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UNDER THE UNCITRAL ARBITRATION RULES AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant / Investor

-AND-

GOVERNMENT OF CANADA

Respondent / Party

INVESTOR'S RESPONSE TO THE PETITION OF THE CANADIAN UNION OF POSTAL WORKERS AND THE COUNCIL OF CANADIANS

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The Investor makes the following submission on the issues raised by the Petition of the Canadian Union of Postal Workers and the Council of Canadians.

PART ONE: INTRODUCTION

1. The Canadian Union of Postal Workers and the Council of Canadians (the "Petitioners") presented a petition dated November 8, 2000 to this NAFTA Tribunal requesting:

   a) standing as a "party" to this arbitration;

   b) in the alternative, intervenor status, together with:

      i. full disclosure of all submissions made to the Tribunal, as if the Petitioners were disputing parties or a NAFTA Party; and

      ii. the right to make submissions on the place of arbitration and on jurisdictional matters.

2. Further to the directions contained in *Procedural Decision No. 2*,[1] the Petitioners submitted an amended Petition[2] to this Tribunal on May 10, 2001, requesting:

   a) standing as a "party" to this arbitration:

   b) in the alternative, intervenor status as "*amicus curiae*" together with:

      i. full disclosure of all submissions, memorials, witness statements, experts reports and other material submitted to the Tribunal: and

      ii. the right to make submissions on, *inter alia*, the place of arbitration and on jurisdictional matters.

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[1] April 17, 2001.

[2] The Investor notes that in their Petition, the Petitioners have adopted the use the term "party" or "parties" as set out in the UNCITRAL Rules, without distinguishing between "disputing parties" (*i.e.*, Canada and United Parcel Service of America, Inc.) and "NAFTA Parties", (*i.e.*, Canada, the United States of America and the United Mexican States). For clarity, the Investor will use the terms "disputing party" and NAFTA Party, or non-disputing NAFTA Party, throughout this submission. Similarly, the Petitioners have sought both to intervene as a "party" as well as "*amicus curiae*". The Petitioners appear to confuse "party" status with that of "amicus curiae". Since these are terms of art in Canadian and US municipal law, the Investor has been careful to use these terms in a fashion consistent with international law.

3. The issues for this Tribunal, and the Investor's position on each of them, are as follows:

   a) Does this Tribunal have jurisdiction to grant "party" status to strangers to the arbitration? The Investor submits that it does not.

   b) Does this Tribunal have jurisdiction to grant *amicus curiae* status to strangers to the arbitration? The Investor submits that the Tribunal may have such jurisdiction, in appropriate circumstances, on receipt of adequate material warranting the grant of such status.

   c) If the Tribunal has jurisdiction to grant *amicus curiae* status, should such status be granted on the basis of the Petition and Amended Petition, and, if such status is to be granted, what is the proper scope of any *amicus curiae* brief to be received by the Tribunal? The Investor submits that, on the basis of the material filed by the Petitioners, *amicus curiae* status should not be granted at this time, but that the Tribunal might consider granting leave to reapply in the future, on proper material being submitted. If *amicus curiae* status is granted, the *amicus* cannot be entitled to attend hearings or to be provided access to any of the material filed with the Tribunal, but ought instead to be limited to providing a written submission, limited to no greater than ten (10) pages, on the specific issue which the Tribunal might determine to receive such a brief.

4. The Petitioners' submissions advance many novel interpretations of both the applicable law and of the NAFTA. To the extent that the Petitioners rely on Canadian municipal law to advance their position, the Investor's simple response is that such municipal law is irrelevant, given that this arbitration is conducted under the NAFTA, the UNCITRAL Arbitration Rules and international law, and not under Canadian law. Similarly, no response from the Investor is necessary regarding the Petitioners' lengthy submissions containing assertions about what the Investor's case is, or is not about, or speculations about what the Canadian government's potential response to a finding of liability against it might be. Such misinformed speculation does not advance the proceedings, but rather demonstrates clearly that the Petitioners, on the material presented so far, would not materially advance this proceeding.

PART TWO: ARGUMENT

This Tribunal does not have jurisdiction to grant party status to strangers to the arbitration

5. This Arbitration is governed by the NAFTA[3] and the UNCITRAL Arbitration Rules (the "UNCITRAL Rules"). Unless something can be found, in either those Rules or Chapter 11 of the NAFTA, that grants this Tribunal the power to accord status as a "party" or "disputing party" to a stranger to the arbitration then the Tribunal has no jurisdiction to do so. The Investor submits that there is no such power given to this Tribunal by either the NAFTA or the UNCITRAL Rules. Accordingly, the petition for "party" status must be dismissed.

6. NAFTA Chapter 11 deals with "Settlement of Disputes between a Party and an Investor of Another Party". An Investor brings its claim against a NAFTA Party pursuant to requirements set out in NAFTA Articles 1116 or 1117, 1119, 1120, and 1121. The arbitration is conducted on the basis of the consent of the disputing parties. Under NAFTA Article 1121, the Investor confirmed its consent in writing to the arbitration, while NAFTA Article 1122 confirms that each of the NAFTA Parties have consented to claims being submitted by Investors under the procedures set out in the NAFTA Chapter 11.

7. The Investor does not consent to the participation of the Petitioners, or either of them, or of any other third party, as a disputing party or with any analogous status. Nor does the Investor consent to the disclosure to the Petitioners of all submissions, evidence, pleadings or any other material provided to the Tribunal, or to their making submissions on the place of arbitration, jurisdiction, or any other matters. Thus, unless the Tribunal has a specific power to allow such participation absent the consent of the disputing parties, the Petition must be denied.

8. The Petitioners have been unable to point to any provision in the NAFTA which grants the Tribunal the jurisdiction to make the requested order. Indeed, the Tribunal in *Methanex and the United States of America*, discussed by the Petitioners in their submission, considered that proposition to be self evident. In that case, the Tribunal was asked to consider petitions seeking leave to submit *amicus* briefs, rather than, as here, where the Petitioners seek status as disputing parties. The Tribunal, however, in considering that question, made important observations relevant to the existence of a jurisdiction to add "disputing parties".

9. In determining whether it had the power to allow *amicus* submissions (which the Investor discusses more fully below), the Tribunal noted that the only possible source of

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[3] NAFTA Article 1135.

jurisdiction was Article 15 of the UNCITRAL Rules.[4] [5] Implicit in that conclusion is that there was nothing in Section B of Chapter 11 of NAFTA which would grant that power, or, correspondingly, the power to add strangers to the proceeding as disputing parties. Thus, the Tribunal concluded:

> The Petitioners' requests must be considered against Article 15(1) of the UNCITRAL Arbitration Rules; *and it is not possible or appropriate to look elsewhere for any broader power or jurisdiction.*[6]

10. The implications of the Petitioners' submission are significant. To permit party status for what are in substance intermeddlers seeking to advance their own political agendas would be inconsistent with the rights of limited participation which the NAFTA has expressly provided, in Articles 1127, 1128 and 1129, for the non-disputing NAFTA Parties, in this case the governments of Mexico and the United States of America. While these NAFTA Parties are entitled, under Article 1129, to receive the evidence and written argument of the disputing parties, their ability to make submissions is strictly confined to questions of interpretation of the NAFTA. It is thus apparent that the drafters contemplated third party participation in NAFTA arbitrations and chose to limit those rights to those granted to the non-disputing NAFTA Parties.

11. Moreover, the Petitioners would have this Tribunal accord them a greater status than is given to subnational governments of the NAFTA Parties. Indeed, an issue has arisen in two previous NAFTA Investor-State claims over the rights of NAFTA Parties to share information received in the course of an Investor-State arbitration with others, including their subnational governments. The Tribunals have been clear that the NAFTA does not accord rights of access to information relating to such proceedings to the subnational governments. Not only, therefore, are the Petitioners seeking greater rights than the non-disputing NAFTA Parties possess, but they are seeking greater rights than the subnational

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[4] Article 15(1) of the UNCITRAL Rules states as follows:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.

[5] There is no provision under the UNCITRAL Rules expressly permitting this Tribunal to allow persons not party to the arbitration agreement to participate in the arbitration as disputing parties. The Investor notes that the Petitioners have not referred to any other provision of the UNCITRAL Arbitration Rules beyond Article 15 which would provide the jurisdiction they assert this Tribunal possesses.

[6] *Methanex Corporation and the United States of America, Decision of the Tribunal on Petitions from Third Persons To Intervene as "Amici Curiae"*, January 15, 2001, at para. 25 ("*Methanex–Amicus Decision*").

governments of any NAFTA Party, irrespective of whether the NAFTA Party is a disputing party or not.[7]

12. Thus, the Investor adopts the analysis of the Tribunal in the NAFTA Chapter 11/UNCITRAL arbitration *Methanex Corporation and the United States of America, Decision of the Tribunal on Petitions from Third Persons To Intervene as "Amici Curiae"* which clearly found that Article 15(1) of the UNCITRAL Rules does not grant the Tribunal the power to add further disputing parties.

> Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. *As a procedural provision, however, it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA.*
>
> *...It is thus self evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules.*[8]

13. Accordingly, the Investor submits that the Tribunal must reject the Petitioners' request for standing as disputing parties.

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[7] In *Pope & Talbot and the Government of Canada*, the Tribunal sustained the Investor's objection to Canada's practice of making protected documents available to Canada's provincial and territorial governments. The Tribunal stated that such documents could only be disclosed to "the limited class" of persons referred to in a prior procedural order (namely, the Investor and Canada), and that this class "does not include the ten provinces and three territories": *Pope & Talbot and the Government of Canada*, Decision of February 14, 2000, at para. 6. Similarly, in *S.D. Myers and the Government of Canada* the Tribunal, considering the same issue, found that: "On the plain terms of the Treaty, CANADA is the 'Party' to the NAFTA, not any of the provinces or territories." *S.D. Myers and the Government of Canada, Procedural Order No. 16*, May 13, 2000, at para. 14.

[8] *Methanex–Amicus Decision* at para. 27, 29. (Emphasis added).

This Tribunal may have jurisdiction to receive *amicus curiae* briefs, but on the material before it, it ought not to receive them from these Petitioners

14. The Investor does not dispute that this Tribunal may have the procedural power to receive an *amicus* submission from a third party under Article 15 of the UNCITRAL Rules.

15. That power, however, is not unconstrained. For instance, Article 25(4) of the UNCITRAL Rules states that: "Hearings shall be held *in camera* unless the parties agree otherwise." The Investor's position is that this arbitration should be held *in camera* and it has not agreed otherwise. Accordingly, the Investor submits that this Tribunal lacks jurisdiction to permit the Petitioners to attend hearings, and, because the exchange of evidence and memorials in writing is but an incident of the hearing process, nor can the Petitioners be entitled to receive copies of any documents filed in this arbitration, unless the disputing parties agree that they can be made public.[9] [10]

16. The Tribunal ought not to receive *amicus* submissions unless it is confident they will provide a particular insight into the issues before the Tribunal.[11] An application to make an *amicus* submission raises numerous complex legal and technical issues, including whether and how a NAFTA Chapter 11 Tribunal should receive submissions from persons other than the disputing parties or the non-disputing NAFTA Parties, and who should be given standing to participate as an *amicus curiae* and the nature of such participation.

17. The Investor adopts the reasoning of the Tribunal in *Methanex* that it must be assumed that "the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute."[12] Accordingly, *amicus* briefs should only be submitted in the event that the Tribunal determines the disputing parties are unable to provide the necessary assistance and materials needed to decide the dispute.

18. Further, any determination to accept *amicus* briefs ought not to permit strangers to the arbitration greater rights than those accorded to the NAFTA Parties. NAFTA Article 1128 permits a non-disputing NAFTA Party to have the opportunity to provide their

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[9] The *Methanex–Amicus Decision* Tribunal also states, at para. 47, that "...it has no power to accept the Petitioner's requests to receive materials generated within the arbitration or attend oral hearings of the arbitration."

[10] The Investor will make submissions on the appropriate scope of a confidentiality order in accordance with whatever procedure the Tribunal establishes to address that issue.

[11] *Methanex Corporation and United States of America, Statement of the Respondent United States of America in Response To Canada's and Mexico's Submissions Concerning Petitions for* Amicus Curiae *Status*, November 22, 2000 at p. 14. ("*Methanex Statement of Respondent*").

[12] *Methanex–Amicus Decision*, at para. 48.

views on interpretations of the NAFTA. Non-disputing Parties are not permitted the right to comment on evidence, to cross-examine witnesses or to raise new legal issues. In the absence of the specific permissions included in NAFTA Article 1128, even this limited form of participation would not have been possible under the UNCITRAL Rules. If any *amicus* submission is to be received, it must be strictly limited in scope and not be permitted to raise issues outside of those articulated by the disputing parties – and even then, such submissions must be strictly limited to providing an interpretation of the particular NAFTA provisions as issue.

19. In light of the fact that non-disputing NAFTA Parties have been restricted to only making submissions on questions of interpretation of the NAFTA, if this Tribunal were to allow *amici* to make submissions on matters of different scope than the interpretation of the NAFTA, it could be argued that the Tribunal would also be obliged to similarly permit non-disputing NAFTA Parties to make *amici* submissions. This appears contradictory to the express provisions of NAFTA Chapter 11.[13] Had the NAFTA Parties intended non-disputing NAFTA Parties to have the right to make submissions on matters other than the interpretation of the NAFTA, this would have been expressly provided for in NAFTA Chapter 11. Accordingly, the Investor submits that *amici* submissions should be restricted to matters relating to the interpretation of the NAFTA.

20. Care must also be taken to ensure that *amicus* submissions are not received without sound reason to believe that they will usefully assist the Tribunal. If a Tribunal were to permit *amicus* briefs liberally, then the proceedings would quickly become unmanageable, as no doubt the various sub-national governments, special interest groups advocating specific views such as the Petitioners, and other non-governmental organizations, would equally seek to participate. That would be unfair and costly to the disputing parties, who would be called upon to respond to potentially voluminous material none of which is received on the basis of their consent.

21. In any event, the Investor submits that the Tribunal must limit the timing, form and content of any *amicus* submissions it determines to receive. The scope of the *amicus* submissions should be predicated on the objective that the Tribunal "would be assisted by these submissions on the Disputing Parties' substantive dispute."[14] In other words, a potential *amicus* must demonstrate to the Tribunal that its submission would be not only relevant, but helpful.

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[13] Mexico raised similar concerns with respect to non-Party submissions and *amicus* briefs in the *Methanex* arbitration. See *Methanex Corporation and United States of America, Submission of Mexico*, November 10, 2000, at para. 7.

[14] *Methanex–Amicus Decision*, at para. 48.

22. Applying these tests, it is clear that it is premature for the Tribunal to determine whether to receive *amicus* briefs from either of these Petitioners, and if so, on what terms and conditions.

23. The Investor submits that the following factors should be considered in the exercise of the Tribunal's discretion prior to allowing *amicus curiae* briefs being accepted in this arbitration. Before any *amicus* brief is received, the proposed *amici* must establish in a meaningful way that they have a real interest in the outcome of the proceeding *and* that they have something important to add, of which the Tribunal would otherwise be unaware (having full regard to the principle that it ought to be for the parties to determine what evidence the Tribunal needs to receive to fully appreciate the claim and the defence). Merely finding the issues in the arbitration to be matters that prospective *amici* find to be interesting is an insufficient basis upon which a Tribunal ought to exercise its discretion to receive any material from a non-party.

24. The Tribunal should consider the demonstrated expertise as well as the objectivity, helpfulness and reliability of the material the proposed *amici* seek to submit. Here, on the material before the Tribunal, insufficient foundation has been laid to believe that either of these Petitioners, if granted *amicus* status, would assist the Tribunal. Each Petitioner ought to be considered on their own, rather than, as here, in one joint petition where the relative interests and potentially useful contributions are not clearly articulated. Participation as *amicus* ought not to be granted merely to provide a platform to advance a particular political viewpoint.

25. Specific references were made in the submissions to the *Methanex* Tribunal, and in the *Methanex-Amicus Decision*, regarding the *amicus* procedures outlined in the WTO case *European Communities–Measures Affecting Asbestos and Asbestos Containing Products*.[15] These procedures included the conditions for those third parties who wished to apply for leave to file a written *amicus* brief. Using the example of the *Asbestos* case, an *amicus* leave application should include the following elements:

(i) a description of the relevant expertise and experience of the applicant and the nature of the applicant's interest in the arbitration;

(ii) an outline of the specific issues in the arbitration that the applicant wishes to address;

(iii) a description of what way the applicant will make a contribution that is not likely to be repetitive of what has been already submitted (by the disputing parties or other *amici*); and

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[15] WT/DS135/9 ("*Asbestos*"). *Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review*. AB-2000-11. November 8, 2000.

(iv) the disclosure of the nature of the third party's relationship with either of the disputing parties or the NAFTA Parties.

26. Any *amicus* brief which the Tribunal receives ought to be strictly limited in length, (such as no greater than ten pages) and confined to the specific issue or issues on which the Tribunal permits the brief to be filed. The Tribunal should not receive oral submissions from a proposed *amicus*, nor should the *amicus* be permitted to either attend at any hearing or to receive or review any material related to the proceeding except that which the parties consent to being made publicly available.

27. Article 15(1) of the UNCITRAL Rules provides that the parties be "treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case." The *Methanex* Tribunal raised this issue in response to the concerns of the Claimants that a burden would be added to the arbitration if *amicus* submissions were presented and the disputing parties were obliged to make submissions in response. As the *Methanex* Tribunal stated in its *Amicus Decision*:

> The burden is indeed a potential risk. It is inherent in any adversarial process which admits representations by a non-party third person.[16]

28. The Investor agrees with the *Methanex* Tribunal that *amici* should not adduce the evidence of any factual or expert witness as this would be too great a burden on the disputing parties.[17] In addition, any *amicus* submission must be strictly limited in scope and not be permitted to raise issues outside of those articulated by the disputing parties. The Investor also concurs with the *Methanex* Tribunal that there is a possible risk of unequal or unfair treatment with an *amicus* process and that such matters should be addressed as and when such immediate risk arises. As the US noted in its submissions to the *Methanex* Tribunal, granting permission to submit an *amicus* brief should "not prejudice the rights of the parties or interfere with the efficient advancement of the proceedings."[18]

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[16] *Methanex–Amicus Decision*, at para. 35.

[17] *Methanex–Amicus Decision*, at para. 36.

[18] *Methanex- Statement of Respondent*, at p. 15.

PART THREE: RELIEF SOUGHT

The Investor respectfully submits that the Petition to this Tribunal by the Petitioners be dismissed with respect to the requests that the Petitioners be given standing as a disputing party.

The Investor submits that the application to provide an *amicus* brief should be dismissed at this time, but that the Tribunal might determine that the Petitioners could be granted leave to make an application to submit an *amicus curiae* submission, in the manner and at the time determined by this Tribunal in its discretion pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.

All of which is respectfully submitted.

Submitted this 28th day of May, 2001

Barry Appleton
for Appleton & Associates International Lawyers
Counsel for the Investor, United Parcel Service of America, Inc.

UNDER THE UNCITRAL ARBITRATION RULES AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

UNITED PARCEL SERVICE OF AMERICA, INC. ("UPS")

Claimant / Investor

- AND -

GOVERNMENT OF CANADA

Respondent / Party

INDEX

(to the Investor's Response to the
Petition of the Canadian Union of Postal Workers and the Council of Canadians)

Tab 1

IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER 11 OF THE NORTH AMERICAN
FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

B E T W E E N :

METHANEX CORPORATION

Claimant/Investor

and

UNITED STATES OF AMERICA

Respondent/Party

**DECISION OF THE TRIBUNAL ON
PETITIONS FROM THIRD PERSONS
TO INTERVENE AS "AMICI CURIAE"**

THE TRIBUNAL:

William Rowley QC;

Warren Christopher Esq;

V.V. Veeder QC (Chairman).

23. As to the Petitioners' requests that they be allowed to attend hearings and receive copies of all documents filed in the arbitration, the Respondent's position was that the Tribunal's jurisdiction was effectively restricted by Article 25(4) of the UNCITRAL Arbitration Rules and the Consent Order regarding Disclosure and Confidentiality. It nonetheless was in favour of giving public access to the greatest extent possible, and therefore gave its consent to the open and public hearing of all hearings before the Tribunal, supporting disclosure consistent with the Consent Order.

V - THE TRIBUNAL'S REASONS AND DECISION

24. Pursuant to Articles 1120(1)(c) and 1120(2) of NAFTA and the agreement of the Disputing Parties, this arbitration is governed by the UNCITRAL Arbitration Rules save insofar as such Rules are modified by Chapter 11, Section B, of NAFTA. In the Tribunal's view, there is nothing in either the UNCITRAL Arbitration Rules or Chapter 11, Section B, that either expressly confers upon the Tribunal the power to accept *amicus* submissions or expressly provides that the Tribunal shall have no such power.

25. It follows that the Tribunal's powers in this respect must be inferred, if at all, from its more general procedural powers. In the Tribunal's view, the Petitioners' requests must be considered against Article 15(1) of the UNCITRAL Arbitration Rules; and it is not possible or appropriate to look elsewhere for any broader power or jurisdiction.

26. Article 15(1) of the UNCITRAL Arbitration Rules grants to the Tribunal a broad discretion as to the conduct of this arbitration, subject always to the requirements of procedural equality and fairness towards the Disputing Parties. It provides, broken down into numbered sub-paragraphs for ease of reference below, as follows:

> *"[1] Subject to these Rules, [2] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, [3] provided that the parties are*

treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting its case."

This provision constitutes one of the essential "hallmarks" of an international arbitration under the UNCITRAL Arbitration Rules, according to the *travaux préparatoires*. Article 15 has also been described as the "heart" of the UNCITRAL Arbitration Rules, and its terms have since been adopted in Articles 18 and 19(2)of the UNCITRAL Model Law on International Commercial Arbitration, where these provisions were considered as the procedural *"Magna Carta"* of international commercial arbitration. Article 15(1) is plainly a very important provision.

27. Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. As a procedural provision, however, it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA. The issue is whether Article 15(1) grants the Tribunal any lesser procedural power in regard to non-party third persons, such as the Petitioners here.

28. In addressing this issue, there are four principal matters to be considered:

(i) whether the Tribunal's acceptance of *amicus* submissions falls within the general scope of the sub-paragraph numbered [2] of Article 15(1);

(ii) if so, whether the acceptance of *amicus* submissions could affect the equal treatment of the Disputing Parties and the opportunity of each fully to present its case, under the sub-paragraph numbered [3] of Article 15(1);

(iii) whether there are any provisions in Chapter 11, Section B, of NAFTA that modify the application of Article 15(1) for present purposes; and

(iv) whether other provisions of the UNCITRAL Arbitration Rules likewise modify the application of Article 15(1) in regard to this particular case, given the introductory words of the sub-paragraph numbered [1] of Article 15(1).

It is convenient to consider each matter in turn.

(i) The General Scope of Article 15(1) of the UNCITRAL Arbitration Rules

29. The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules.

30. However, in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 of NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged.

31. The Tribunal considers that allowing a third person to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules. The wording of the sub-

(ii) Safeguarding Equal Treatment

35. The Tribunal notes the argument raised by the Claimant to the effect that a burden will be added if *amicus* submissions are presented to the Tribunal and the Disputing Parties seek to make submissions in response. That burden is indeed a potential risk. It is inherent in any adversarial procedure which admits representations by a non-party third person.

36. However, at least initially, the burden in meeting the Petitioners' written submissions would be shared by both Disputing Parties; and moreover, that burden cannot be regarded as inevitably excessive for either Disputing Party. As envisaged by the Tribunal, the Petitioners would make their submissions in writing, in a form and subject to limitations decided by the Tribunal. The Petitioners could not adduce the evidence of any factual or expert witness; and it would not therefore be necessary for either Disputing Party to cross-examine a witness proffered by the Petitioners: there could be no such witness. As to the contents of the Petitioners' written submissions; it would always be for the Tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of those submissions were arguably to constitute written "evidence", the Tribunal would still retain a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight. Of course, if either Disputing Party adopted a Petitioner's written submissions, the other Disputing Party could not then complain at that burden: it was always required to meet its opponent's case; and that case, however supplemented, can form no extra unfair burden or unequal treatment.

37. It would always be the Tribunal's task, assisted by the Disputing Parties, to adopt procedures whereby any burden in meeting written submissions from a Petitioner was mitigated or extinguished. In theory, a difficulty could remain if a point was advanced by a Petitioner to which both Disputing Parties were opposed; but in practice, that risk appears small in this arbitration. In any case, it is not a risk the size or nature of which should swallow the general principle permitting written submissions from third persons.

46. This is however a difficult area; and for present purposes, the Tribunal does not have to decide the point. Confidentiality is determined by the agreement of the Disputing Parties as recorded in the Consent Order regarding Disclosure and Confidentiality, forming part of the Minutes of Order of the Second Procedural meeting of 7th September 2000. As *amici* have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any rights at all), they are to be treated by the Tribunal as any other members of the public. Accordingly materials may be disclosed only as allowed in the Consent Order. Of course, pursuant to paragraph 3 of that Order, either party is at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain (subject to redaction of Trade Secret Information). That is however a matter for the Disputing Parties and not the Tribunal.

(v) The Tribunal's Conclusion

47. *Power:* The Tribunal concludes that by Article 15(1) of the UNCITRAL Arbitration Rules it has the power to accept *amicus* submissions (in writing) from each of the Petitioners, to be copied simultaneously to the legal representatives of the Disputing Parties, Canada and Mexico. In coming to this conclusion, the Tribunal has not relied on the fact that *amicus* submissions feature in the domestic procedures of the courts in two, but not three, NAFTA Parties. The Tribunal also concludes that it has no power to accept the Petitioners' requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration. Such materials may however be derived from the public domain or disclosed into the public domain within the terms of the Consent Order regarding Disclosure and Confidentiality, or otherwise lawfully; but that is a quite separate matter outwith the scope of this decision.

48. *Discretion:* The next issue is whether, in the particular circumstances of this arbitration, the Tribunal should decide that it is "appropriate" to accept *amicus* submissions from the Petitioners in the exercise of the discretion under Article 15(1) of the UNCITRAL Arbitration Rules. At this early stage, the Tribunal cannot decide definitively that it *would*

be assisted by these submissions on the Disputing Parties' substantive dispute. The Petitions set out the credentials of the Petitioners, which are impressive; but for now, the Tribunal must assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute. At the least, however, the Tribunal must also assume that the Petitioners' submissions *could* assist the Tribunal. The Tribunal must look to other factors for the exercise of its discretion.

49. There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.

50. There are other competing factors to consider: the acceptance of *amicus* submissions might add significantly to the overall cost of the arbitration and, as considered above, there is a possible risk of imposing an extra burden on one or both the Disputing Parties. In this regard, as appears from the Petitions, any *amicus* submissions from these Petitioners are more likely to run counter to the Claimant's position and eventually to support the Respondent's case. This factor has weighed heavily with the Tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary.

51. These are all relevant circumstances under Article 15(1) of the UNCITRAL Arbitration Rules. Less important is the factor raised by the Claimant as to the danger of setting a precedent. This Tribunal can set no legal precedent, in general or at all. It has no power

Tab 2

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Government of Canada
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14 February 2000

Dear Sirs

NAFTA UNCITRAL Investor-State Claim
Pope & Talbot Inc and the Government of Canada

I refer to the recent exchange of faxes in relation to the question of confidentiality. The Tribunal has carefully considered these, in particular the Government of Canada's fax dated 10th February 2000.

1. It is clear that the provinces and territories of Canada are different persons in law from Canada. The governments of each of these (the "sub-national" governments) have been provided with copies of certain documents in this arbitration, including the unredacted Statements of Claim and Defence.

2. In terms of the Confidentiality Order (Procedural Order No. 5) Clause 3 certain documents could be released into the public domain "subject to redaction of confidential business information as agreed to by the parties".

3. It follows that the Government of Canada was at liberty to make available the redacted Statement of Claim and Defence to any person, but not unredacted material.

4. In terms of Clause 4 no document for which business confidentiality has been claimed in these proceedings, i.e. "Protected Documents", or information recorded

therein ... "shall be disclosed except in accordance with the terms of this Order ..."..

5. It appears to the Tribunal to follow definitionally that any of the material excluded from the redacted Statement of Claimant and Defence was material constituting a Protected Document or Documents within the meaning of Clause 4.

6. It further follows that under Clause 9 of the Order such Protected Documents could only be disclosed to the limited class referred to therein, which does not include the ten provinces and three territories to the representatives of which disclosure has in fact been made.

7. In these circumstances, the Tribunal is bound to conclude that the Government of Canada has been in this respect in breach of the Confidentiality Order made by the Tribunal on 14th December 1999.

8. The Tribunal notes that according to the fax from the Government of Canada dated 10th February 2000, the Memorial submitted for the Claimants has not been made available by Canada to any other person. The Tribunal wishes to stress that under no circumstances without the consent of the Claimant or the Tribunal should that document be made available to any other party.

9. The Tribunal notes that Canada, in the event that it has breached Procedural Order No. 5 (as is the case) desires that the Tribunal should modify that Order so as to permit material to be shared on a confidential basis with provinces and territories. The Tribunal is prepared to consider such an application but considers that it should proceed by way of an application from the Government of Canada specifying the extent and limits of the modification sought by them to Procedural Order No. 5.

Yours faithfully

Lord Dervaird
Presiding Arbitrator

Copy:

Mr Murray Belman
Hon. Benjamin J Greenberg Q.C.

Tab 3

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

S.D. MYERS, Inc.
('MYERS') (Claimant)

- and -

GOVERNMENT OF CANADA
('CANADA') (Respondent)

PROCEDURAL ORDER No. 16
(concerning confidentiality in materials produced in the arbitration)

Introduction

1. At an early stage in the arbitration the parties attempted to agree on a confidentiality regime, but were unable to do so. The Tribunal was therefore required to make an order. Initially the Tribunal made a temporary order in the form of Procedural Order No.3. In November 1999, after considering the parties' proposals and submissions, the Tribunal made a permanent confidentiality order in the form of Procedural Order No. 11.

2. Procedural Order No. 11 contained *inter alia* the following provisions:

   - *In accordance with Article 24.4 of the UNCITRAL Rules, all hearings shall be held in camera unless the parties agree otherwise*

   - *All transcripts and other records taken of hearings (except those documents mentioned in Procedural Order No.3, paragraph 1, namely the Notice of Intention, Notice of Arbitration, Statement of Claim and Statement of Defense)*

the opening and closing submissions and witness testimony must logically be applied to equivalent written materials. It would 'drive a coach and horses' through Article 25.4 of the Rules if any other conclusion were to be reached.

13. Furthermore, Article 25.4 is written in mandatory terms ('Hearings *shall* be held ... *unless* ...). A close examination of the manner in which Section III of the Rules was crafted reveals that the drafters had the distinction between mandatory and permissive terminology well in mind. Accordingly, the Tribunal takes the view that it has no authority to derogate from the provision contained in Article 25.4 in the absence of agreement between the parties.

14. On the plain terms of the Treaty, CANADA is the 'Party' to the NAFTA, not any of the provinces or territories. CANADA speaks on behalf of the Party in defending Chapter 11 cases. This is consistent with CANADA's international and domestic law, under which the federal government has authority to enter into treaty obligations with other states.

15. There are a number of areas of economic regulation in which, under CANADA's constitution, the provinces and territories ordinarily have the exclusive authority to legislate, or have authority that is concurrent with that of the federal government but subject to federal paramountcy. The NAFTA touches on some of these areas. In the interests of promoting compliance with NAFTA, and in light of that the fact that federal-provincial consultation is an important part of the Canadian constitutional culture, it is understandable that the federal government is eager to share information with the provinces and territories about current developments.

16. Nonetheless, the provinces and territories are not generally exempt from the rules applicable to the sharing of information with those who are not disputing parties in a Chapter 11 arbitration. It is true that Article 105 of NAFTA requires parties to take necessary steps to promote compliance with NAFTA. However, the Tribunal does not accept that the interest of promoting compliance reasonably requires more than the disclosure of the following: the pleadings provided for in Articles 18 and 19 of the Rules (which identify the claims and defences and the material facts alleged to support them); procedural orders (which provide important guidance in a number of different respects); and the eventual award(s) (which provide interpretations of the NAFTA and identify conduct that complies with or violates its requirements).

17. A special situation would exist in a case where an investor is bringing a Chapter 11 claim against the federal government on the basis that a provincial measure has caused loss to the investor. While the federal government be the respondent in such a case, not the province, the sharing of information with that particular province may be necessary to give CANADA a fair opportunity to defend the claim.

Tab 4

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

STATEMENT OF RESPONDENT UNITED STATES OF AMERICA REGARDING PETITIONS FOR *AMICUS CURIAE* STATUS

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Barton Legum
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
Alan J. Birnbaum
Andrea J. Menaker
Laura A. Svat
Attorney-Advisers, Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

October 27, 2000

ACCEPTANCE OF *AMICUS* SUBMISSIONS IS APPROPRIATE WHEN LIKELY TO ASSIST THE TRIBUNAL

In cases involving the responsibility of a NAFTA Party for the alleged injury of an investor of another Party, a non-disputing party may have knowledge or expertise that could be of value to a Chapter Eleven tribunal. In these circumstances, the appropriateness of such input is evident, though not unlimited. Article 15(1) qualifies the Tribunal's discretion with the following proscription: "that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." There is nothing inherent in the allowance of *amicus* submissions that conflicts with either of these admonitions.

Furthermore, failure to accept such submissions will reinforce the growing perception that Chapter Eleven dispute resolution is an exclusionary and secretive process. NAFTA's Chapter Eleven plays an important role in settling investment disputes in the NAFTA territories, and in developing generally applicable principles of state responsibility under international law. Thus, a Chapter Eleven arbitral tribunal should be free to accept *amicus* submissions – "in such manner as it considers appropriate" – where they provide insight into, and experience with, the issues before the tribunal. UNCITRAL Rules art. 15(1).

To facilitate making such a determination, the Tribunal could, in its discretion, impose procedural requirements upon Petitioners. For instance, before deciding whether to grant leave to file a full submission, the Tribunal could require a prospective *amicus* to submit a summary or précis that describes the issues the petitioner wishes to address and provides information necessary to judge the petitioner's expertise to address those issues. This case in particular raises important issues regarding the application of NAFTA disciplines to public health and

environmental measures. Thus, the Tribunal may determine that Petitioners have demonstrated their particular expertise in these areas and that their participation will assist the Tribunal in deciding this matter. In addition, the Tribunal may, once it decides to receive an *amicus* submission, impose upon the submitter appropriate page limits and deadlines to ensure order in the proceedings.[5]

Finally, the Tribunal need not fear a deluge of petitions for *amicus* status. If the instant case is any indication, groups with shared interests are unlikely to file duplicative submissions. Here, the Tribunal received only two *amicus* petitions on behalf of four Petitioners, when it appears that approximately 90 non-governmental organizations in the NAFTA territories alone have expressed some interest in the case. *See* Letter from NGOs attached to October 13, 2000, amended petition for *amicus curiae* status. Likewise, the record before both WTO dispute settlement bodies and the WTO Appellate Body demonstrates that a Chapter Eleven tribunal will not be overburdened with requests. Even if duplicative or frivolous petitions are received, it remains within the Tribunal's discretion not to consider them.

Therefore, upon a showing by a non-disputing party of knowledge or expertise, and upon a determination by the Tribunal that the submission would be both relevant and helpful to the Tribunal – yet would not prejudice the rights of the parties or interfere with the efficient advancement of the proceedings – the Tribunal should permit such non-disputing party to make a submission as *amicus curiae*.

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[5] The United States notes that the long-standing tradition in U.S. courts and, more recently, in WTO dispute resolution bodies has been to accept *amicus* submissions, yet employ procedural devices that, like those suggested here, help the decision-makers maintain control over the proceedings.

Tab 5

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RE: Methanex Corporation v. The United States of America

The Government of Mexico makes this submission pursuant to Article 1128 of the NAFTA, in relation to the petitions of the International Institute for Sustainable Development, Communities for a Better Environment, The Bluewater Network of Earth Island Institute, and the Center for International Environmental Law (the Petitioners) to file *amicus curiæ* briefs in the above referenced proceeding.

A. The parties in a NAFTA Chapter Eleven dispute settlement proceeding

1. The NAFTA establishes a mechanism that allows an investor of a Party and another Party to resolve investment disputes involving claims to money damages arising from the alleged breach by such other Party of certain obligations set forth in Chapters Eleven and Fifteen. By its express terms, Chapter Eleven only allows an investor of a Party[1] to submit a claim to arbitration under Section B, and such claims can only be directed against one NAFTA Party, i.e. the host State of the investment of the disputing investor. Thus, Article 1139 defines disputing parties as the disputing investor and the disputing Party[2].

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1. Article 1139 defines investor of a Party as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".

2. Under Article 1139, "disputing investor means an investor that makes a claim under Section B" and "disputing Party means a Party against which a claim is made under Section B".

2. Except as provided under Article 1128, no other person has a legal interest in the dispute, and therefore, Chapter Eleven does not provide for the intervention of other persons.

3. Indeed, even an enterprise of a Party that is a juridical person owned or controlled, directly or indirectly, by an investor of another Party —and that by definition is an entity that has a separate and distinct legal personality from that of the investor— may not submit a claim to arbitration on its own against the Party under whose law it is established or organized, and it is also not afforded a right of intervention, even though it would have a direct legal interest in the dispute. This is also the case for enterprises of a Party on whose behalf no investor of another Party could submit a claim to arbitration (although the investors could bring a claim on their own pursuant to Article 1116).

B. Participation by a NAFTA Party

4. Because the NAFTA Parties have a fundamental interest in the proper interpretation of the Agreement, they agreed to allow for NAFTA Parties other than the disputing Party to make submissions. However, Article 1128 confers only a limited right upon the other NAFTA Parties to make submissions to a Tribunal on questions of interpretation of the NAFTA.

5. Moreover, under Articles 1127 and 1129, the NAFTA Parties are entitled to obtain all the documents and other information exchanged in the course of a proceeding under Section B of Chapter 11 of the Agreement, including the evidence tendered to the Tribunal, but that right is not extended to other persons.

6. NAFTA Parties have availed themselves of the opportunity to make submissions in writing to tribunals hearing claims against another Party. However, non-disputing Parties have not taken an active role in such proceedings beyond the filing of the submission and attendance at the hearing to observe it.

7. If *amicus curiae* submissions were allowed, *amici* would have greater rights than the NAFTA Parties themselves, because of the limited scope of Article 1128 submissions. Given that nowhere in Chapter Eleven are non-NAFTA third parties even contemplated, such a result was clearly never intended by the NAFTA Parties. Alternatively, allowing *amicus curiae* submissions would render Article 1128 meaningless, contrary to the principle of effectiveness in international treaty interpretation, because the NAFTA Parties would then be able to make submissions on questions on interpretation of the Agreement under Article 1128, and file *amicus* briefs for other purposes. In either case the result would be inconsistent with the clear terms of the chapter.

Tab 6

WORLD TRADE ORGANIZATION

WT/DS135/9
8 November 2000

(00-4729)

Original: English

EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

Communication from the Appellate Body

The following communication, dated 8 November 2000, was addressed by the Chairman of the Appellate Body to the Chairman of the Dispute Settlement Body, informing him of the additional procedure adopted by the Division hearing the appeal in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*.

I am writing to inform you that the Division hearing the above appeal has decided, in the interests of fairness and orderly procedure in the conduct of this appeal, to adopt an additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or a third party to this dispute. This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

Attached, for your information, is a copy of this additional procedure.

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products

AB-2000-11

Additional Procedure Adopted Under Rule 16(1) of the *Working Procedures for Appellate Review*

To All Participants and Third Participants:

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon* on *Thursday, 16 November 2000.*

3. An application for leave to file such a written brief shall:

(a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;

(b) be in no case longer than three typed pages;

(c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;

(d) specify the nature of the interest the applicant has in this appeal;

(e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;

(f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and

(g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon* on *Monday, 27 November 2000.*

7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the brief;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and

(c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon* on *Monday, 27 November 2000.*

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure.