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

- - - - - - - - - - - - - - -x
METHANEX CORPORATION, :
Claimant/Investor, :
and :
UNITED STATES OF AMERICA, :
Respondent/Party. :
- - - - - - - - - - - - - - -x

ARBITRATION HEARING, VOLUME 1

Washington, DC
Wednesday, July 11, 2001

REPORTED BY:
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P R O C E E D I N G S

MR. VEEDER: Good morning, ladies and gentlemen. This is the first day of the jurisdiction hearing. I think you know the members of the tribunal. To my extreme left is Mr. Sri Srinivasan, who is one of the two legal secretaries to the tribunal. To my extreme right is Mr. Samuel Wordsworth, who is the other legal secretary to the tribunal.

We received, as I hope you have, a list of all the persons who will be attending these hearings of three days. It's a very long list. I'm not going to ask you to go through it and identify the people on the list, but if we could ask all parties, that is, disputing parties and parties, to be responsible for signing in those who attend for the respective parties at the end of each day and to hand in the signed sheet of paper to Ms. Margrete Stevens, who is here.

What we'd like to do, first of all, is to ask each of the disputing parties and the parties to introduce the advocates who will be speaking over

the next three days. If I can start with Methanex.

MR. DUGAN: My name is Christopher Dugan from Jones, Day, and I'll be the principal speaker on behalf of Methanex. With me is my colleague, Ms. Melissa Stear, and she will be addressing one of the issues that we will be discussing today.

MR. VEEDER: And if I could ask the United States to do the same, please.

MR. BETTAUER: Thank you, Mr. Veeder. I am Ronald Bettauer. I'm a deputy legal adviser for the State Department. Our team consists of, next to me, Barton Legum, the chief of the NAFTA arbitration division in our claims office, Mark Clodfelter, who is the assistant legal adviser in charge of our claims office, and two of the attorneys in our claims office, Andrea Menaker and Alan Birnbaum seated sequentially down the row. Thank you.

MR. VEEDER: If I could now turn to the parties, I think we have a representative from Mexico.

MS. GONZALEZ: Good morning. I'm Adriane Gonzalez Arce. I'm legal counsel, chief of

department from the Secretariat of Economy. During these hearings, I'm as an observer on behalf of the Mexican government.

MR. VEEDER: Thank you. And on the part of Canada?

MR. ULEHLA: My name is Boris Ulehla. I'm with the trade law division of the Department of Justice. I'm here on behalf of the government of Canada. You had asked, Mr. Chairman, whether there would be an advocate for the government of Canada. Canada, as much as Mexico, is here as an observer and does not intend on accepting the tribunal's invitation to address the tribunal on day 3 of the hearing.

MR. VEEDER: That's very helpful. You've jumped ahead in the agenda. I take it both Canada and Mexico, you don't want to address the tribunal orally in respect of the written submissions or other submissions made by the parties?

MS. GONZALEZ: During these hearings, I'm here just as an observer. Mexico will go to rescind its mission later on. It depends -- we're reviewing

this -- after reviewing all the issues on this hearing with legal counsel, Mexico will decide whether or not to present a new submission.

MR. VEEDER: Thank you. We will leave the door open for the time being. We will review it on Wednesday morning. Maybe that's acceptable to both of you. You don't have to make observations if you don't want to, but obviously, the door is open on Wednesday, if you do -- I'm sorry. When I said Wednesday, I should have said Friday.

And let's now turn to more housekeeping matters. The tribunal's letter of the 5th of July responding to the disputing parties' letter of the 27th of June, which followed Mr. Stevens's letter of the 7th of June, the arrangements which I hope is satisfactory, because they are certainly to the tribunal as proposed by the parties, is that today is the Methanex day. So we'll start and we'll run up to 6:00. If you finish before, you certainly won't be penalized. At some stage during the morning, at about 10:30, if you could think of taking a 15-minute break, but again, that's up to

you of when you want to do it. The same in the afternoon, we will have a midafternoon break of 15 minutes, but again, you decide when you want it.

Now, tomorrow is the USA day, and again 9:00 to 6:00 with similar breaks. We'll break 1-1/2 hours for lunch, if that's convenient to you, at about 12:30. But you judge when it's convenient for you to break off. Then on Friday, subject to any observations from Mexico and Canada, again starting at 9:00, we'll have the replies, beginning with Methanex and then followed by the United States. Again, we'll finish no later than 6:00 on Friday.

Is that acceptable to both disputing parties?

MR. DUGAN: Yes, that's acceptable to us.

MR. VEEDER: And on the U.S. side?

MR. LEGUM: Yes, it is.

MR. VEEDER: There are some minor housekeeping issues that we will have to raise during the hearing, but that's all we wanted to raise at this time. Let us proceed.

Methanex, you have the floor.

MR. DUGAN: Good morning, Mr. Veeder, Mr. Rowley, and Mr. Christopher. I thank the tribunal for allowing us the opportunity to present our arguments, especially given the fact that we have put so much into the case that's new. What I'd like to do is just, first of all, tell you how I'm going to approach this and then get started. I will start with some general observations about the nature of the case. Next, I will go to the principal claim to be raised, the 1102 national discrimination claim, and then I will go to the issue of causation, and I will treat at the same time the issues of cognizable harm and legally significant, because I think they have a logical connection.

I will then move on to the claims made under Article 1105. Then I will do expropriation, Article 1110. My colleague, Ms. Stear, will then deal with the issue of the request for amended claim under Article 1117 as opposed to 1116, and then I will finish up by covering the issues of our request for discovery from each of the three signatory

parties, and finally, with the -- our motion -- our request to amend the claim.

Before turning to the specific legal issues, there are three general points that I'd like to make. The first is that despite what has been reported in the media and elsewhere, in the context of international law, this is not an unusual case. International law is littered with cases where international tribunals have determined that reported environmental or health regulations were actually without any legitimate basis and were actually implemented by a government for the primary purpose of protecting the domestic industry, and that is our central contention in this case, and it's neither unprecedented nor novel nor, in its facts, in any way unusual.

Just to give an example, under NAFTA, there have already been two cases that have facts that are very, very similar to what we are alleging here. The first was the S.D. Myers case in which Canada implemented a ban on PCB exports, and it was later found, it was later determined and concluded

by the tribunal there that there was "no legitimate environmental reason for introducing the ban." Similarly, the ethyl case involving another gasoline additive, MMT, eventually resulted in a settlement, and the Canadian government later admitted, as part of the settlement, that there was no evidence that MMT was harmful to human health in low amounts.

And there have similarly been numerous cases under the U.S./Canada Free Trade Agreement, the predecessor to NAFTA. There have been numerous cases in the old GATT, and there have been numerous cases in the WTO. And if Methanex is allowed to proceed to the merits of this case, if the tribunal finds that it does have jurisdiction, we are confident that we can show that the California MTBE ban has no scientific basis. It is not sound science. It is not based on sound science. The MTBE water contamination problem is, in California, despite all the hoopla, relatively small.

In the year 2001, the California Department of Health Services detected MTBE contamination in drinking water sources at a level

that was above California's very low aesthetics threshold, not a health threshold, the level at which it can be smelled in only two-tenths of 1 percent of all the drinking water sources. That is not a significant problem.

The same agency, the California Department of Health Services, also compiled a list, if we could pass this exhibit out, the first exhibit. They compiled a list of the 25 most serious pollutants of California's drinking water in the year during the period October '99 to October 2000. MTBE is not on the list. There are things like nitrate, which I think is fertilizer, manganese, uranium, ethylene chloride, arsenic, benzene, sulfates, but MTBE is not on this list, and when we get to the merits, we are confident we can show that this contamination problem is not serious enough to justify what happened, and the only justification for what happened is extraneous political factors.

Something else was going on in California to justify this ban, and that was the intent of the governor, to protect the United States' ethanol

industry and, indeed, to foster an ethanol industry within California, and that type of protection, if we can show it, combined with the asbestos of any environmental reason for enacting this regulation will constitute a violation of NAFTA.

Now, the second general point I'd like to make, just so that we're clear on the record as to Methanex's position, Methanex fully agrees with every environmental group and with the state of California that no one's drinking water should be contaminated. It shouldn't have MTBE in it. It shouldn't have benzene. It shouldn't have fertilizer. It shouldn't have chloride. It shouldn't have arsenic. It should be as pure as it can be made. But the solution is not to ban one of those components, MTBE. Let me point out benzene wasn't banned, chloride wasn't banned, only MTBE was banned, and that doesn't solve the problem.

What solves the problem of contamination of California's drinking water is to fix the source of the problem, which is the leaking underground gasoline storage tanks. That's by far the most

important cause of the contamination problem, and that can be solved by a much stricter enforcement of laws and regulations that are already on the books, and by completing the upgrade program that was scheduled to have been completed in 1998. Once those are done, we are confident that the MTBE contamination problem, small as it is already, will mostly disappear.

And that type of solution is good environmental policy. Not only will it solve the problem of MTBE contamination, it will solve the problem of contamination by many of the other elements that I just identified, including benzene, which is an acknowledged human carcinogen. And those measures will be consistent with NAFTA, they will be consistent with international trade law.

Now, the third point I'd like to make is that as I go through each of the issues today, I will try to show you that Methanex's claims are, in every instance, squarely rooted in the express language of the treaty, in the text of the treaty. In contrast, most of the U.S. defense is to seek to

rewrite the treaty, seek to insert into the treaty new language that isn't there now. There's no justification for doing that as a general matter. The legal instrument should control the law that's applied here, but even if there were any reason for considering that, I think it's important always to keep in mind the policy and purpose of Chapter 11 of NAFTA, and this was a -- this was a chapter -- this is a chapter that creates a set, a regime of legal protection for investors. That's its purpose, to protect investors, to protect their expectations, and in the words of the treaty itself, to "increase substantially investment opportunities."

Chapter 11 was not created in order to limit the liability of the United States. It was created to expand the liability of the United States, and any interpretation of NAFTA should be guided by the policy of protecting investors and their expectations and their interests and the policy of having an efficient and fair dispute resolution procedure. One tribunal has already concluded that because those are the objectives,

those are the policies of Chapter 11, that its terms should be given a liberal reading, and that's a quote from the jurisdictional holding, a liberal reading in order to effect these policies of increasing investment opportunities and protecting investor rights.

The first specific issue I'd like to talk about is national treatment, Article 1102, which is the central element of the draft amended claim. This, obviously, is one of the most fundamental protections that NAFTA ensures to foreign investors is the right to be free from invidious, unjustifiable discrimination. And what I'd like to do is just start by walking step by step through the language of Article 1102 so that we can make clear the precise elements of our argument. Articles 1102(1) and 1102(2) require the United States to accord to Canadian investors and to Canadian owned U.S. investments treatment no less favorable than it accords, under like circumstances, to its own investors and investments of its own investors.

And Article 1102(3), which is the key

provision underlying our argument, states "the treatment accorded by a party under paragraphs 1 and 2 means, with respect to a state or province," i.e. California, "treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the party of which it forms a part."

And the requirements set forth by 1102 are, thus, fairly simple. Methanex is entitled to the most favorable treatment, to the best treatment that any U.S. investment in like circumstances receives, and NAFTA tribunals have consistently interpreted Article 1102 in that fashion. The S.D. Myers tribunal did and the Pope & Talbot tribunal did.

Analytically, I think the first step in the process is what U.S. investments and investors are in like circumstances with Methanex. Obviously, the nub of the question here is Methanex, in like circumstances with U.S. ethanol, not methanol, with U.S. ethanol producers such as ADM and the rest of

the heavily subsidized, heavily protected U.S. ethanol industry. And the starting point, again, is the treaty language itself. The treaty language is "like circumstances." It's not identical circumstances. It's not in precisely the same circumstances. It's "like circumstances," and "like" obviously connotes a much broader sweep, a much broader form of protection than "identical" or "in precisely the same circumstances."

A second source for interpreting what "like circumstances" means here are the rulings of prior tribunals. The Pope & Talbot tribunal interpreted "like circumstances" to mean investments or investors who operated in the same business or economic sector, and again, that's a fairly broad interpretation. The S.D. Myers tribunal agreed with that, and they said explicitly that the concept of sector has, quote, a wide connotation. And they went on to state that the essence of the test is whether one investment can, quote, take business away, end quote, from another one.

So they incorporated, the S.D. Myers

tribunal incorporated into this notion of like circumstances the concept of competitiveness. If investments are competitive with each other, then they are in like circumstances. Neither one of them suggested that the concept of like circumstances was limited to those investments that are in precisely the same circumstances. They quite clearly created a much wider reach for -- a much wider coverage for entities that are in the "like circumstances" definition.

Now, a third source of interpretation are, again, NAFTA's goals and purposes to protect investors and to increase opportunities, investment opportunities. This, again, should reinforce the notion that "like circumstances" should be given a broad interpretation, not a narrow one.

And a fourth source of international law that's useful for interpreting the phrase "like circumstances" are obviously the GATT and WTO standards. GATT and WTO have been dealing with the concept of likeness for 50 years, and in the most recent pronouncement of principles of applicable

standards, which is the decision of the appellate body with respect to asbestos that came out, I think, in March of this year, they stated "a determination of likeness under Article III:4," which is one of the national treatment provisions of the GATT, "is fundamentally a determination about the nature and extent of a competitive relationship."

So both the NAFTA tribunals and the WTO have focused on this concept of competitiveness as the central element in determining whether products, in the case of the GATT, or investors and investments, in the case of NAFTA, are in like circumstances.

As we set forth in our filing of May 25th, I think we detailed precisely how Methanex and its product, methanol, compete directly with ethanol. The market's divided into two segments, in essence, the captive oxygenate producers, who are typically vertically integrated oil refineries, and for them it's a binary choice. They buy methanol and convert it into MTBE and blend it with their gasoline, or

they buy ethanol and blend it with their gasoline. For them, it's a binary choice. They buy methanol or they buy ethanol.

So any government measure that affects the terms of competition between them, obviously, has an immediate and direct impact on sellers and producers of methanol. The competition in that segment couldn't be any more direct, couldn't be any more immediate.

MR. VEEDER: Just before we move on, you've mentioned the Myers award. We read in the submissions that that award is being challenged in Canada. What is the status of that challenge as of today?

MR. DUGAN: I don't know. All I'm aware of is the basic fact that it was challenged.

MR. VEEDER: There are pending proceedings in court?

MR. DUGAN: There are pending proceedings in court. I don't know the extent of them.

The second segment of the oxygenate market, the oxygenate sector in California is the

merchant MTBE producers. For them, although methanol competes less directly with ethanol than it does with respect to the captive oxygenate producers, the market dynamics are such that a sale of ethanol to a gasoline blender will result in the displacement of a sale of methanol by companies such as Methanex to merchant MTBE producers, and again, it's almost a one-to-one correlation. This is a zero sum gain. The market, the relevant market is the California oxygenate market, and increased sales of ethanol to gasoline blenders will immediately result in decreased sales of methanol to merchant MTBE producers.

So again, although it's not quite as direct as it is for the captive oxygenate producers, it is a very clear and immediate relationship, even in that sector of the market. And the U.S. nowhere disputes these facts, which I think would be inappropriate at this stage of the proceeding anyway. So I think that the competitiveness of Methanex and its methanol products with ethanol at that direct level is undisputed, and that satisfies

the "like circumstances" test. It satisfies the like circumstances test under NAFTA precedence, and it satisfies the like circumstance test under GATT and WTO precedent.

Just to make it clear, one other element of GATT law that I think reinforces the finding that these investments are in like circumstances, there are some cases in -- GATT, in determining likeness, in which they look to the purpose of a particular product in order to determine whether groups of products are like, and in the animal feeds case, animal feed proteins case, the tribunal there concluded that European skim milk powder was competitive with, obviously, nonidentical products such as cottonseed cake and soybean seed cake. The reason they concluded these were directly competitive and were within the scope of the natural treatment protection was that they served the same purpose.

Both of these products, these nonidentical products, their purpose was to increase protein in animal feed, and similarly the purpose of methanol;

methanol is used in the oxygenated market just as ethanol is, and its purpose is to increase the oxygenated content of gasoline in California. So they both share the same ultimate purpose.

So we believe that on the factual allegations that we've made so far, it's undeniable that methanol producers are in like circumstances with ethanol producers. Even though the products are dissimilar -- not dissimilar. Even though the products are not identical, they are nonetheless, the industries, the investments are nonetheless in like circumstances.

MR. ROWLEY: Just tell me where that's pleaded.

MR. DUGAN: I don't know specifically where it's pleaded.

MR. ROWLEY: When it's convenient.

MR. DUGAN: I think it's set forth throughout the papers.

MR. ROWLEY: I've seen it in the submissions, and I'm interested to know where it's pleaded.

MR. DUGAN: Okay. Now, if the two parties -- if the industries are in like circumstances, then the question becomes what does that mean. Well, it means they're entitled to national treatment. What does "national treatment" mean? It means no less favorable than the most favorable treatment received by any U.S. investment.

And again, I think the U.S., in their last pleading, simply ignores this language and instead puts forward an argument that stands the treaty language on its head. The U.S. argues that since the California measures treat U.S. methanol producers just as badly as they treat Methanex, then Methanex has received national treatment. The U.S.'s position is that as long as Methanex U.S. is treated no worse than a U.S. producer in comparable circumstances, there's no violation.

In essence, the U.S. theory seeks to rewrite the national treatment provision so that it reads that treatment no less favorable than the worst treatment accorded to any investment in like circumstances, and Article 1102 is not a worst

treatment concept. It's a best treatment concept. If Methanex is in like circumstances with ADM, Methanex is entitled to the same treatment that ADM receives.

That's the essence of it, and that, I think, is an unchallengeable interpretation of Article 1102.

MR. VEEDER: Is it very important to be looking at Article 1102, paragraph 3 with the words "no less favorable than the most favorable treatment"?

MR. DUGAN: No, I don't think it is, and the issue -- obviously because Article 1102(3) spells out precisely that we are entitled to the most favorable treatment, if it involves a state or a province, that there's no doubt we're entitled to most favorable treatment. Canada, in one of the previous NAFTA cases, raised the issue that since that language does not in appear in 1102, that perhaps the most favorable treatment standard did not apply to treatment that was accorded -- the treatment to measures of the national government as

opposed to measures of the state or province shall govern. That argument was rejected. So the best possible treatment of Article 1102(3), that concept is equally applicable to 102. I think it was the Pope & Talbot tribunal, that's what they withheld.

So the issue has been raised by Canada and has been rejected. I think the rejection of that argument is consistent with the body of national treatment law that has been developed over the last 50 years by the GATT and the WTO. They have, I think, uniformly concluded that most favorable treatment is the -- one of the central elements of national treatment. The other one being that measures can never be adopted if their purpose is to afford protection to a domestic industry. Those are the two key elements of the national treatment standard.

If it's true that under Article 1102 Methanex is entitled to the best possible treatment that any comparable producer, i.e. the U.S. ethanol industry, receives, then it's Methanex's position that standard has been violated in three ways.

First of all, it's been violated in a de jure sense. The measures on their face discriminate in favor of one class of the investors that are in like circumstances, i.e. ethanol producers, and conversely by normal consequence, they discriminate against, on their face, other producers, a different class of producers in the same circumstances, and that type of discrimination, on the face of the measure, between one class and another class is, at least under the rationale of the asbestos panel report, de jure discrimination, because the discrimination is embedded in the language of the measure itself.

Even if it weren't embedded in the language of the measure itself, Methanex's second argument is that it constitutes de facto discrimination. The U.S. ethanol industry is very much a domestic industry. It's heavily subsidized. It's heavily protected. The import penetration of ethanol into the United States is minimal. It's negligible, and any attempt by more competitive ethanol producers, such as sugar producers in the

Caribbean or Brazil, is always beaten off by Congress, because Congress assiduously protects the U.S. ethanol industry, and that's why it is almost exclusively a domestic industry.

The methanol industry in contrast, as the U.S. pointed out, is both foreign and domestic. There is a substantial quantity of imports of MTBE and of methanol, and obviously, at least some of the industry in the United States is owned by foreign producers such as Methanex. So any measure that arbitrarily shifts part of the oxygenated market from the MTBE sector to the ethanol sector, by definition, will have a disparate impact on foreign-owned producers and foreign producers, and that kind of disparate impact is a violation of the national treatment standard. It is de facto discrimination against foreign-owned investments. And again, that standard, that analytical framework, has been explicitly adopted by GATT tribunals repeatedly and by the S.D. Myers' NAFTA tribunal as well.

Finally, the third way in which the

California measure discriminates against NAFTA -- I mean, discriminates against Methanex is intentional. The measure, on its face, is intended to benefit the United States ethanol industry. It has an impermissible protectionist intent built into it, and the evidence of that is within the four corners of the executive order. Paragraph 9 of the executive order starts the process of creating a California ethanol industry. California wanted to not only protect the U.S. ethanol industry but wanted to make sure California got its fair share of the spoils, and that type of protectionism is illegal under NAFTA and international law.

Now, at the same time we have alleged and we believe it to be true that Governor Davis -- one of the reasons why Governor Davis took this step is because methanol and MTBE were identified by ADM to him as foreign products. ADM never loses an opportunity, when it has the ear of a decisionmaker of trying to convince that decisionmaker that it's Midwest versus Mid-East. They relentlessly identify MTBE and ethanol as foreign products. I think it's

certainly inferential that they said the same thing to Governor Davis at their secret meeting in August of 1998, and we have alleged that he accepted that and that one of the reasons why he acted was because he thought that the victims, the entities that would be penalized by this measure, were foreign-owned.

MR. ROWLEY: Just a question. Do you know if any of the domestic methanol or MTBE producers who have been affected by the ban, I presume in the same way as Methanex, have brought any domestic proceedings in relation to the ban using grounds other than Chapter 11, but which have to do with the propriety of the introduction of the ban?

MR. DUGAN: Yes. The trade association, the Oxygenated Fuel Association, OFA, has brought a federal action in court in California under what are known as preemption standards, and that is the concept that the federal government has already enacted a comprehensive oxygenated standard and that where the federal government acts in the U.S. constitutional system, states are preempted from issuing orders or regulations that are contrary to

the federal standard, that the federal regulation preempts any differing state regulation or state legislation in this case.

I know that action has been brought. I don't know whether that action includes other counts, other causes of action. It may, but I'm just not sure. I know there is this preemption claim that has been filed.

Now, the point I was just trying to conclude with is that our allegation is one of the reasons why Governor Davis acted was out of an intent, a recognition that penalizing foreign producers would not necessarily be a bad thing, and that is always the underlying rationale for anti-foreign economic enactments, that we will keep the jobs here, we will keep the investment here, we will keep all the production here, and we will keep the foreigners out. And that rationale has been announced by the EPA two or three times as one of the rationales for protecting the U.S. ethanol industry. It is a position that has been duplicated by the United States EPA. They explicitly stated --

let me back up.

In 1994, there was an attempt to set aside 30 percent of the U.S. oxygenated market for renewable fuels, and renewable fuels in practice meant ethanol. It was an attempt by the U.S. ethanol industry to carve out for itself, through government regulation, by government fiat, a section, a portion of the market that it couldn't possibly obtain on its own terms because ethanol is simply not competitive. As it turned out, the EPA did issue a regulation and it was later thrown out by the United States Court of Appeals for the District of Columbia, the court right down here, on the grounds that the EPA had no authority to issue such a regulation if, in the EPA's own words, it might result in worse air pollution.

But my point is, in the process of promulgating that, the EPA announced as one of the rationales the same type of protectionist sentiment, that this is good for the economy because it shuts off imports and because it keeps domestic employment and domestic investment up. That is impermissible

protectionist intent under trade law and under NAFTA and under GATT law.

MR. VEEDER: Going back to your pleading, the intention which you're describing now is the intention of Governor Davis, isn't it?

MR. DUGAN: That's correct.

MR. VEEDER: So we're looking at material that gives particular attention to him in your draft pleading?

MR. DUGAN: That's correct.

MR. VEEDER: What you get is nothing from Governor Davis himself, but you infer, because he has been in contact with others who have expressed these sentiments and these intentions, those sentiments and intentions have affected his intentions?

MR. DUGAN: That's correct, and we believe that at this stage of the proceedings, where all we are required to do is make credible allegations, that that is a very credible allegation and that he was effective. I think it's credible ADM said it to him. I think it's credible that he would have

gotten it from other sources, and if the EPA is willing to adopt that type of rationale for an action to protect the ethanol industry, it's entirely credible that Governor Davis adopted the same type of rationale. And that's the basis for our allegation, which we think is sufficient to make out a prima facie case of impermissible protectionist intent with regard to the California measure.

As I said, the U.S. response to this is so what. You are treated, you, Methanex, are treated the same as U.S. methanol producers are. If you're treated the same as U.S. methanol producers are, there can't possibly be a violation of the national protection. This is not grounded in the text of the treaty, and it's not grounded in applicable precedence from NAFTA or from the GATT. It's contrary to the language of the treaty. The language of the treaty says Methanex is not entitled to the least favorable treatment that the U.S. methanol industry received. It's entitled to the most favorable treatment.

And this type of defense has been squarely rejected in past GATT cases. It was rejected by the WTO in the Reformulated Gasoline case, and it was rejected by the WTO in the Malt Beverages case. In the Malt Beverages case, which dealt with restrictions, for example, that local U.S. states, such as Mississippi, had on all out-of-state alcoholic beverages, the U.S. proffered that as an indication that there was no violation of national treatment, and the tribunal concluded that the fact that out of state -- U.S. out-of-state producers were receiving the same less favorable treatment as foreign producers was irrelevant. It still violated GATT because the foreign producers were entitled to the most favorable treatment received by any, in that case, product, within the United States, which was a Mississippi product.

So the argument that the U.S. proffers, which it proffers without any support, any legal authority, is simply unsupportable. It can't be squared with the explicit words of the treaty, and it can't be squared with existing GATT precedent.

Accordingly, Methanex believes it has properly alleged, credibly alleged all the elements of a national treatment violation, all the elements of an 1102 violation, and as such, this tribunal has jurisdiction to hear this case.

Now, the next issue I'd like to move to is the three related concepts of causation, legally cognizable damage, and legally significant relationship. As an initial matter, it's Methanex's view that Methanex does not require proximate cause. The NAFTA causation standard, as defined by the explicit words of the treaty, is "by reason of, or arising out of." That is the standard of causation that NAFTA requires, and those are obviously two separate phrases, and we believe that the intent of the drafters of NAFTA was to treat them as two separate concepts, two separate phrases. Two separate concepts, not synonymous. Legal authorities that construe the two terms of causation placed side by side invariably conclude that they mean different things, not the same thing, and they also normally conclude that the phrase "arising out

of" connotes a level -- a degree of causation that is much broader than proximate cause, and we've cited those authorities in our brief.

In response, the U.S. doesn't cite a single authority that interprets two causation standards such as this side by side, using words similar to the words that are used in NAFTA in concluding that they mean the same thing, and I think it's counterintuitive to assume that two separate standards would be the same thing. The U.S. argues that the word "or" in this context doesn't mean separating alternatives. It means "and." It means signifying synonyms, and they contend that this is a common meaning of the word "or." I don't think it is.

Methanex believes that the word "or" normally means alternatives, normally separates alternatives, not synonyms, and just as evidence of that, we examined the first 10 pages of the government's most recent pleading, and they used the word "or" 38 times in that pleading, and every single instance they used the word "or" to separate

alternatives. In no instance did they use the word "or" to mean "and."

And under the principles of the Vienna Convention, the tribunal is required to give a word its ordinary meaning. And even dictionary definitions, dictionary definitions confirm that the first meaning and -- the first meaning of "or" in every dictionary is that it separates alternatives, not that it connects synonyms. For example, the American Heritage Dictionary states that "entries containing more than one sense are arranged with the central and often the most commonly sought meaning first," and that's the case here. "Or" separates alternatives. It doesn't join synonyms. That's not its ordinary and common meaning.

The next U.S. argument in their last paper is that Methanex had made the argument that when a treaty contains two separate phrases such as this, it's the duty of any interpreting authority to give effect, insofar as they can, to the meaning of all the words, and so it's the duty of the tribunal to give effect to both phrases here, "by reason of" and

"arising out of." The United States's response to that was if you give effect to the meaning of the phrase "or arising out of" and you give it a broad meaning, you will have read "by reason of" out of the text. You will have done exactly what we said was impermissible with respect to "or arising out of." I think the proper response to that is that drafters of legal instruments often use two concepts in a phrase, and they use them together, even though one subsumes the other, in order to express the breadth of a particular legal provision.

And I'll give you three examples from NAFTA where that linguistic device is used. The first is from Article 303 where it talks about "substituted by an identical or similar good." Now, similar in most senses, in virtually all senses, subsumes the meaning of "identical," and in that situation, it's quite clear that the operative standard is similar because it's the broader of the two concepts, and the two concepts are placed side by side to indicate the breadth of the coverage.

Similarly, in Article 1108, part of

Chapter 11, it talks about "to sell or otherwise dispose of an investment." And again, "dispose of an investment" fairly obviously includes the concept of sell. The broader expression subsumes the narrower expression. Just because the narrower expression is there doesn't mean that it can qualify the broader one.

Article 1112, a requirement by a party that a service provider or another party "post a bond or other form of financial security," again, "form of financial security" subsumes "bond." This is a common linguistic device, and in order to give the entire -- the two phrases put together operative meaning, the authoritative one, the one that has the legal significance is the broader one, and that's the case here. "Or arising out of" is the operative causation standard. It does not signify proximate cause. It signifies something wider.

Now, in addition, in the amended claim Methanex has alleged, as I just went over, intentional harm by California. It has, in its view, credibly alleged that Governor Davis was

motivated, at least in part, by an intent to penalize foreign producers and foreign-owned producers of methanol, and that type of intentional harm, as the U.S. itself concedes, does not require proximate cause. So if the amended complaint is accepted, the whole issue of what standard of causation is required, at least as a matter of jurisdiction, simply goes away, because Methanex has, in its view, credibly alleged this intentional harm.

Now, the U.S. response to that is simply a conclusory rebuttal. It's no, you haven't alleged intentional harm, but they haven't specified what element of intentional harm has not been alleged, and I think as I've just explained it, which I think is amply set forth in our papers, Methanex has done so.

MR. VEEDER: Again, when you come to my colleague's question about the draft pleading, if you could point specifically to the passage where you plead in the draft an intention by Governor Davis to cause harm.

MR. DUGAN: Okay. We will do that.

Now, the next point is even if the tribunal accepts that, for purposes of this case, proximate cause is the operative causation standard in NAFTA, then in defining the limits of proximate cause for the purposes of this case, the tribunal should be cognizant of the fact that proximate cause is almost always reflective of a particular set of policy norms, depending on the facts and circumstances of the case. It is not a mechanical concept. It's not a concept that lends itself to any type of readily proffered test. In the words of one Iran/U.S. tribunal, "what we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond its certain point."

What Methanex submits the operative policy here is again the central purpose of Chapter 11, which is to protect the rights of investors, to create for them investment opportunities and to create an efficient and fair dispute resolution

procedure, and if that's the policy that animates a delineation of the limits of proximate cause here, it certainly ought to include a definition of proximate cause that includes, you know, damages that are foreseeably inflicted upon a foreign investor. It ought to be cast widely enough so that it effectuates the policies and the objectives and the purposes of Chapter 11.

Again, Chapter 11 wasn't created to limit the liability of the United States. It was created to expand the liability of the United States.

Now, regardless of how the tribunal defines "proximate cause," if that's the standard that it settles on, Methanex is also confident that it can meet any articulated standard of proximate cause. The U.S., in its pleadings, surprisingly doesn't offer a coherent definition. So we'll offer one. This comes from Professor Keeton, who is one of the authorities cited by the United States, although not for this particular proposition, and he states that there are two basic contrasting theories of proximate cause. As he describes them, "one of

these theories is that the scope of liability should ordinarily extend to, but not beyond, the scope of the "foreseeable risks" -- that is, the risks by reason of which the actor's conduct is held to be negligent. The second contrasting theory is that the scope of liability should ordinarily extend to, but not beyond, all 'direct' (or 'directly traceable') consequences, and those indirect consequences that are foreseeable."

Methanex's damages, the alleged damages in this case, meet each of these theories. Our allegations with respect to how the damages were caused meet both of these. The central criterion of Professor Keeton's discussion is foreseeability. If a particular consequence is foreseeable to the actor who causes the harm, then it is proximately caused, and I don't think the U.S. any longer disputes that the damage the California ban inflicted on methanol producers, and specifically foreign methanol producers, was foreseeable.

In fact, not only was it foreseeable, it was actually foreseen by the United States. It was

foreseen by the capital markets, and of course, it was foreseen by Methanex itself. The EPA recognized in the mid-1990s, when it was considering this 30 percent set-aside for ethanol that was later thrown out by the courts, it stated that "the proposed program should have the greatest impact on imported ethers, MTBE, and imported methanol." That's a direct quote from the EPA. They went on to state that "revenues and net incomes of domestic methanol producers and overseas producers of both methanol and MTBE would likely decrease due to reduced demand and prices."

That is not just foreseeability. That is precisely the damage that we have pled here as foreseen by the United States. Similarly, the capital markets foresaw the damages that a California MTBE ban would inflict on Methanex and all other methanol and MTBE producers, and they lumped them together.

What I'd like to show you now is a special comment that was issued by Moody's Investors Service in May of 1998.

MR. VEEDER: Can I just raise a question with you, because I'm sure you're coming to it. We're only looking here at jurisdiction and not the merits. So for those purposes, we're taking the facts from your statement of claim and maybe if we added in the draft statement of claim. When you're putting in new documents like this, for what purposes are you showing us this document?

MR. DUGAN: To meet the U.S. objection that the harms here were not foreseeable, to meet the U.S. objections that the harms here were not proximately caused. This is to -- I think that proximate cause is an odd issue to consider in a jurisdictional hearing, because it is so fact based, and I think it's difficult to consider it without -- I think it's impossible to consider it as a final matter without full consideration of all the evidence that's presented. But the United States has alleged that even though we have alleged that the harms that were inflicted on us were caused by the California measure, that our allegations of causation do not rise to the level of proximate

cause.

And so what this is intended to show -- and it is evidence -- is that the harms that were inflicted on Methanex were, in fact, foreseeable. It's a little fuzzy, because like I said, we are -- the tribunal's entertaining a proximate cause objection at a jurisdictional stage. So we feel we're entitled to put in material that will show that, in fact, we meet the proximate cause standard because it was foreseen.

MR. VEEDER: Your first point is the question of causation, because they're fact-based, should go to the merits phase, not be decided at a jurisdictional phase?

MR. DUGAN: Correct. All of the objections raised by the United States thus far are fact-based objections that cannot properly be considered at a jurisdictional stage. I've talked about national treatment. The authorities are clear that a like circumstances test and a denial of national treatment are heavily fact-dependent. They are dependent on a reasoned analysis of all the

facts and circumstances relevant to the particular situation. It's not the type of thing that I think can easily be made if it can be made at all at a preliminary stage.

Similarly, with respect to causation, with respect to legally cognizable harm, with respect to legally significant connection, all of those things are fact-based. All of our arguments are allegations under fair and equitable treatment. In terms of what's required to make out a prima facie case suitable for a tribunal to assert jurisdiction, I think we've done. But because I think the objections of the United States are themselves so fact-based, we have felt compelled to respond with proffers of evidence of our own, even though I don't believe it's appropriate at this stage of the case to consider those objections, all of them being so intensely fact-bound.

MR. VEEDER: Mr. Clodfelter?

MR. CLODFELTER: It was our recollection that the tribunal eschewed evidence at this hearing. Their entire evidentiary argument depends upon the

legal conclusion that foreseeability is the measure of proximate cause, which we contest. However, we don't think it's appropriate for the Claimant to distribute evidence, at least without our having had a chance to look at it first and assess it and see whether we want to object at this stage or not. So we'd ask you to at least suspend consideration of any new evidence distributed by the Claimant during this session.

MR. DUGAN: If I could, the letter that I think Mr. Clodfelter is talking about said the tribunal did not anticipate taking factual testimony. It didn't say evidence.

MR. VEEDER: There's a broader point, that I think a document like this should be shown to your opponent before it's shown to the tribunal, just to allow your opponent to say whether or not he has an objection. I take it this didn't take place. I'm not criticizing everybody, but it would certainly be helpful if you showed documents to your opponents before they were produced to the tribunal.

MR. DUGAN: Certainly. Point taken. In

the past, we have reached agreements with the Department of State with respect to that. The issue didn't arise here, and so they didn't ask for it, we didn't ask for it. So we felt that we would proceed by just offering exhibits as they came up.

MR. VEEDER: For the time being, we will put this aside. We will give the United States a chance to look at the document, and then please return to it later in your submissions.

MR. DUGAN: We'll give them all the documents that we're going to put in right now.

MR. CHRISTOPHER: Could I ask whether it is your position that under no circumstances can the issue of proximate cause be decided on a motion with respect to jurisdiction?

MR. DUGAN: Obviously, the Hoffman Honey case that's in the record is one case where it was decided. But I think unless the allegations are so bizarre, as they were in the Hoffman Honey case, that it's almost impossible to dismiss them at a jurisdictional stage. And remember, those were truly bizarre allegations. They've been

characterized in the literature as silly, that it was on its face a silly case.

I think the facts were that a Minnesota beekeeper -- Wisconsin beekeeper thought that his bees had been killed by pesticides that had been manufactured using Iranian oil, although he wasn't even sure about that. On its face, that is such a frivolous claim that I can see why that one case would reach that conclusion, but I'm aware of no other case that has ever considered proximate cause to be a jurisdictional issue, and even if it were in any way a jurisdictional issue, I think the allegations that Methanex has made here under 1105, under 1110, and under 1102, even the original allegations are sufficient to support a finding of causation. We have alleged causation, and as a prima facie matter, I think that's all we're required to do.

MR. CHRISTOPHER: Thank you.

MR. DUGAN: The latest U.S. objection in their June paper to our assertion that the proximate cause standard is met here is to raise the issue of

economic loss. The U.S. asserts that the losses that were alleged by Methanex in the original and in the amended complaint were -- constitute economic loss and that economic loss is not something that is proximately caused or is not something that is subject to recovery here. I think the latest alleged limitation is actually more of a damage limitation than a proximate cause objection, but in any case, it has absolutely no applicability here for five or six different reasons.

First of all, it's inconsistent with NAFTA itself. Article 1110 mandates that it should be based on fair market value and going forward value, both of which encompass elements of economic loss, such as lost profits as well as the expectation of future lost profits.

Second, international law itself does not recognize any definition of damages or causation that excludes economic loss. The classic statement of damages in international law is the Chorzow case, which held that a state in breach of its international obligations "must, as far as possible,

wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

And that definition of damages, quite clearly, includes economic loss. And all leading international cases consistently affirm this standard, and in fact, the Court of Justice of the European Communities, in a case five years ago, explicitly excluded that limitation from cases for damages brought under community law, which is a form of international law. "Total exclusion of loss of profits as a head of damage for which reparation may be awarded in the case of a breach of community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible."

So it's been squarely rejected by international authorities, and in fact, the United States cites no international authority for this economic loss limitation. It cites, instead, cases

from four or five common law jurisdictions, and the reason why it cites only -- the reason why it cites no international authority is because there is none, and the reason why it cites no civil law authority is because there is none from civil law countries as well. Civil law countries do not recognize this exclusion for economic loss.

Fourth, the economic loss doctrine, such as it is in common law countries, has greatly eroded in recent years. It doesn't have the vitality that it used to have, and in those pockets of the common law where it does still have some vitality, it's almost always limited to cases involving negligence. This is not a negligence case. This is a case involving a breach of obligations created by an international treaty.

And so for all those reasons -- and any one of those reasons would be more than sufficient to dispense with the latest objection, but for all those reasons, the economic loss limitation simply has no place in this case. In fact, I think it's -- to reach out for something as extraneously and

marginal as this shows, I believe, the weakness of the government position. There's just no grounds for eliminating as a legal matter the type of loss claimed by Methanex here, or the causation basis asserted by Methanex here. We have done all we need to do to meet the requirements of 1116.

Now, closely related to the concept of proximate cause and the issue as it's been raised here is the issue of cognizable harm. The U.S. asserts that Methanex has asserted no loss that's legally cognizable. Much of this issue goes away if the amended complaint is accepted. It's based not only on the executive order but on the implementing regulations which the U.S. concedes is a ban of MTBE, although that still leaves the question about whether Methanex has yet suffered any damages. Methanex, of course, contends that it has.

The first U.S. argument is that the executive order does not really ban MTBE, and therefore, it can't cause any legally cognizable harm. That argument's a red herring. The text of NAFTA states that a state is liable for any measure

that causes damage. The U.S. concedes that the executive order is a measure, and so the only relevant question at this stage is whether Methanex has alleged that the government's order, a conceded measure, has caused any damage, and of course, we have.

We've alleged with great specificity the immediate damage that the executive order caused, including the loss of Methanex's market value. We've alleged it increased Methanex's cost of capital, and if I'm allowed to later on, I will show you the actual decisions by the credit rating agencies to lower Methanex's credit rating within months of the decision by Governor Davis to issue the executive order. And we have articulated that we have begun to lose our customer base, our market share, our market access in California, that that process has started, and all of those are losses that stem directly from the governor's order. They flow from that measure in anticipation of the finality of the ban once it goes fully into place on January 1st, 2003.

And I think it would be useful, if you think it appropriate, for me to walk through the credit ratings by the agencies, because that is -- it's evidence of our allegation that the cost of capital increased immediately.

MR. VEEDER: Again, we're not really concerned with evidence. We're really looking at the moment to your statement of claim and your draft amended statement of claim. If you can take us to passages in that where these matters are raised, that would be more helpful.

MR. DUGAN: We will try to do that, but we've alleged an increase in the cost of capital from the beginning. So I assume that that allegation has taken us there.

Let me step back. One of the things that we wanted to point out is that the damage was immediate. What the United States has raised here is a factual defense, that the damages that we've alleged we've not yet suffered. I mean, how is the tribunal going to respond to what is, in essence, a factual allegation?

MR. VEEDER: Well, we're going to look at your pleading. That's where we're going to start. And so that's where we'd like to be taken.

MR. DUGAN: Okay. If I could return to that later on.

MR. VEEDER: Please do.

MR. DUGAN: The next U.S. objection is that the California executive order is not actually a ban on MTBE and, therefore, it couldn't possibly have caused any damage. We think it's apparent from the language of the order itself that it is a mandatory directive, and the whole tone of the language supports that conclusion: "Now therefore I, Gray Davis, governor of the state of California by virtue of the power and authority vested in me by the constitution and statutes," there's no doubt that under the statutes of California Gray Davis was authorized to ban MTBE. I don't think even the U.S. disputes that point. "By virtue of the authority vested by me do hereby issue this order to become effective immediately. The California Energy Commission, in consultation with the California Air

Resources Board, shall develop a timetable by July 1st, 1999 for the removal of MTBE from gasoline at the earliest possible date, but not later than December 31, 2002."

If that's not a ban, it's hard to characterize what it is. It's not a proposal. It's not a request. It's not a recommendation. It's an order banning the use of MTBE no later than December 31st, 2002.

MR. ROWLEY: If one were to disagree with that and say that on a plain reading it is not a ban, but if one were also to accept that it was a measure, does it need to be a ban for your case to succeed? Can it not be simply a measure which has caused damage?

MR. DUGAN: That's precisely our point.

MR. ROWLEY: That is your case, isn't it, if it is not a ban?

MR. DUGAN: And the express language of NAFTA only requires that the measure cause damage, not that the measure be a final in a series of acts that also caused damage. It only requires that a

measure cause damage. I think we've alleged in the complaint as well, and I will try to take you to that point today, we've alleged that the measure itself caused immediate and direct damage to the company and that that was reflected by the immediate loss in market value that Methanex suffered, within days, within four or five days of the issuance of the order.

MR. VEEDER: Just to bring you back to paragraph 4 from which you were reading of the executive order, it's a possible reading, isn't it, that what the order was was the development of a timetable by the CEC rather than an order that MTBE should be removed from gasoline by December 31st, 2002? Do you have the wording in front of you?

MR. DUGAN: Yes, I do, and it does direct a timetable, but it was with a date certain, and the agencies that were directed by this order had no discretion not to obey it, and I don't think even the U.S. contends that they do. They were required to ban it no later than December 31st, 2002. So the timetable merely affected when the final production

of MTBE or final use of MTBE in California would cease. It didn't alter the fact that it would cease no later than December 31st, 2002.

Now, even if the U.S. was right that this wasn't an actual ban on MTBE because it didn't take effect until 2002, under international law, if there are a series of measures that result in damage, the breach dates from the first of the measures, not from the last of the measures. As a quote, the breach extends over the entire period starting with the first of the actions or omissions of the series and acts for as long as those actions or emissions remain not in conformity with the international obligation." That comes from the draft articles and statement of responsibility from the International Law Commission, Article 25.2.

And the NAFTA tribunals that have confronted this issue have reached precisely the same conclusion. When you have legal regimes in place and they are evolving legal regimes with measures that come later in time, a Claimant need not amend his complaint each time one of these

measures are passed, and measures that are implemented even after the start of a legal action can be incorporated into the subject matter of that particular dispute. The Metalclad tribunal reached that conclusion and the Pope & Talbot tribunal also reached that conclusion. So that even if the executive order were not a ban, it was the first of a series of measures that did implement a ban, and as such, it's actionable under international law.

Now, finally, with respect to the waiver issue, California's request for a waiver from the federal oxygenate requirement, it's Methanex's position that the waiver request itself is further evidence of the intent to significantly benefit the U.S. ethanol industry. California made clear, when it requested the waiver from the federal government, that it was concerned with the ability of the United States's ethanol industry to supply enough ethanol for the California oxygenated market, which is the largest in the country, and they also made clear that the ethanol industry, regardless of whether the waiver was granted, would still be a principal,

perhaps the principal beneficiary of the new program.

It stated -- and it didn't just state, it emphasized this literally in italics in its own statement of the basis for the waiver "a significant portion of California gasoline would still contain ethanol." Ethanol would "be expected to be in widespread use in California because of the continuing wintertime" oxygenate requirements. So even if the waiver were granted, ethanol would have occupied a huge share of the California market, much greater than it occupies now, much greater than it occupied two years ago. So even though California was concerned about the ethanol industry's ability, that doesn't in any way undermine its intent to benefit the U.S. ethanol industry.

That was the clear focus of the California regulations, and I think it's also instructive that these regulations named ethanol as the replacement. There are other alcohols out there, TBE, that could serve the same purpose, but they have been excluded from the market. The whole construct of this

measure is to benefit the U.S. ethanol industry, and that's clear from the terms, from the face of the documents themselves.

Now, the next argument, the U.S. argument that a measure must have a legally significant connection to an investor or investment, fails for two reasons, one legal and one factual. The first is that as with so many other provisions, the United States is seeking to insert into the language of NAFTA legally restrictive language that simply doesn't appear there. They have -- they've made this requirement up out of thin air, this idea that it must have a legally significant connection, and it's Methanex's position that this tribunal simply doesn't have the authority to rewrite the language of NAFTA so drastically.

The language, the operative language is in Article 1101. It states that "'measures adopted or maintained by a party relating to investors or investments of another party,'" and the United States seeks to have that interpreted measures adopted or maintained by a party relating in a

legally significant way to investments or investors of another party.

NAFTA doesn't say that. There's no reason for this tribunal to read into the language of Article 1101 such a restriction. Again, under the Vienna Convention, the starting point for any interpretation of a treaty is the ordinary meaning of a word, the ordinary meaning of the word "'relate to'" is to have "'connection, relation or reference' to connect, to establish a relation between." The ordinary meaning, the ordinary dictionary meaning is broad, relating to something that connotes a wide, a wide structure, a wide field in which it can operate.

In fact, the United States has confirmed that the normal meaning of the word "relate to" is wide. In a case that they filed, in a pleading that they filed with the GATT, they stated that "in a normal context, 'relating to' merely suggests any connection or association existing between things." They went on in that pleading to state that that normal definition was not appropriate in the

circumstances of that case, because the phrase "relating to" that they were talking about was a phrase that described an exception to GATT's general obligations, and it is a --

MR. VEEDER: Please identify that pleading on the transcript.

MR. DUGAN: The treaty is Reformulated Gasoline.

MR. VEEDER: Fine.

MR. DUGAN: What the U.S. was saying: "Related to" should be given a narrow obstruction. Again, that's not the case here. What we're talking about in 1101 is a general obligation. It states a basic premise of what is covered here. That is a normal context. By the U.S.'s own words, it should be given a very broad reading. By the U.S.'s own words, there's no reason to read into it this legally significant modification. And again, that's consistent with the policy of NAFTA, and it's consistent with the comments of U.S. negotiators who negotiated Chapter 11.

One of them has said that "Chapter 11 is

the most comprehensive investment accord to date. The breadth of coverage exceed those found in any bilateral or multilateral instrument to which the United States is a party and should substantially improve investor security." That's a quote from Daniel Price, who was one of the lead negotiators of Chapter 11. The intent to create a broadly protective investment regime is evident and apparent in the record, and there's simply no reason to read any restrictions into it.

Now, NAFTA tribunals that have considered the issue have also given the phrase "relate to" a broad meaning. In the Pope & Talbot case, Canada sought to have the tribunal adopt a very restrictive reading of the phrase "relating to." They said that "'relating to' should be interpreted as a relationship that was 'direct and substantial.'"

Let me just step back for a second. At the time that NAFTA was passed, Canada issued a statement of implementation that described the various provisions, and when they did so, they described Article 1101 as -- they described Article

1101 as applying to any measure that affects investments, and the operative verb in their statement of implementation was "affects." It wasn't anything stronger than that. They changed their position concerning that issue, and they moved from a measure that affects investments to a measure that has a direct and substantial effect on investments.

Pope & Talbot rejected that position, and they reached the conclusion similar to Canada's first conclusion, that a measure is within the scope of NAFTA Chapter 11 if it affects an investment. Since then, Canada has changed its mind again, and it now joins with the United States in requesting this legally significant connection gloss, or this legally significant "connection" additional language to be inserted. So Canada has now changed its mind twice with respect to what "relate to" means. But I think the most important point to make here is that the Pope & Talbot tribunal rejected that. That's what this tribunal ought to do as well.

MR. CHRISTOPHER: Pardon me, Mr. Dugan.

Perhaps you're going to cover this point later, and if so, don't bother to respond now, but as I read the submissions both of Mexico and Canada, they are in a position now of agreeing with the United States that it is something more than "affects," and I wonder if you could address either now or later the significance of the fact that all three of the parties to NAFTA have agreed on a particular construction of the treaty, and what do you regard as the significance of that, and how can that, if in any way, be overcome?

MR. DUGAN: I will address it now since it's come up. We think that the significance of that is zero. We think it has no significance under the facts and circumstances of this case. The argument is unpersuasive for a number of reasons.

First, it's a principle of international law that a subsequent practice of the parties -- and that's what this is alleged to be, a subsequent practice of the parties is relevant only when the term of a treaty is ambiguous. We submit that "relate to" is not ambiguous. It has a common,

ordinary meaning, a broad meaning, and that's the meaning that this tribunal ought to give it. If it is unambiguous, then the -- an alleged subsequent practice simply has no bearing. That's the way the ICJ, International Court of Justice, has approached this. They stated that to report to subsequent practices is proper only when the text of a treaty is obscure or ambiguous. That's from the separate opinion of Spender in the Certain Expenses case. "The will of the party is presumed to have been expressed in the text they have framed, and is therefore primarily to be determined by reference to that text."

The first authority was the Certain Expenses case of the ICJ, separate opinion of Spender at 191 to 195. Again, from Fitzmaurice, that last quote I just gave you was from him as well at 213. "If the words used carry natural and ordinary meaning, it would require 'special and clearly established reasons' to justify another interpretation."

That's at 215. So I think the starting

premises are if the words are clear. If the words are clear, an alleged subsequent practice has no impact. Second, the parties' recent litigation posture doesn't constitute a practice. In the fist place, it's simply not long enough. As I'll show you, this practice, this alleged agreement -- well, I will take it back. It is an agreement but it dates only from May of this year. That's two months. In a GATT case, the restrictions of import of cottons and fibers, the appellate body found that two years was not sufficient to establish a practice. If two years is not sufficient to establish a practice, eight weeks is ridiculous. It's simply not long enough to constituted a practice. It is an ad hoc litigating position adopted probably for purposes of political convenience at this time. There's no telling whether or not it will continue to be the practice of the parties in months to come.

Now, the third reason why this alleged practice is of no import here has to do with consistency. One of the quotes that the U.S.

provided to you from Fitzmaurice stands for the proposition that "'a consistent (subsequent state) practice must come very near to being conclusive as to how a treaty should be interpreted.'" the United States left out of that, I assume inadvertently, the emphasis in the original of "consistent." It must be a consistent practice. I think that's the foundation of a subsequent practice in those circumstances where it might be appropriate, and here, I think as I've just shown you with respect to the phrase "relating to," the practice of the parties is not consistent.

Canada has changed its mind twice as to what the meaning of "relating to" is. It's changed its mind twice in seven years. That does not establish consistency. In fact, it establishes inconsistency, and an inconsistent practice -- past inconsistent practice that is rejected in favor of an ad hoc agreement does not constitute a practice. It simply doesn't have the consistency that rises to that level.

And the same is true with respect to the

other elements that are allegedly within the scope of the agreement, and they relate to Article 1105. And I'll take the first of those, which is the relationship between fair and equitable treatment and customary international law. Mexico's latest position is Article 1105 incorporates only customary international law. Conventional law rights on obligation, such as those found in the rest of NAFTA or the WTO agreements, are not incorporated in Article 1105. That's the language that comes from their May 15th submission at paragraph 14.

Mexico's past position was very, very different. Rather than defining Article 1105 in terms of customary international law, Mexico claimed that Article 1105's "drafters intended to incorporate the public international law meaning of 'fair and equitable treatment' and of 'full protection and security.'" That was filed in the Azinian case and in the Metalclad case. Mexico later explained that public international includes both customary international law and treaty or conventional law. So Mexico's position in the past

was that the phrase "international law" in Article 1105 included conventional law. It has now changed its mind. It's changed its position as of May 15th of the year 2001. That's not enough to establish a consistent position.

Similarly, "with respect to how the phrase 'fair and equitable treatment' is to be interpreted, Mexico's latest position is Mexico concurs with the United States that Article 1105 establishes only an international minimum standard of customary international law in which 'fair and equitable treatment' is subsumed." That's from paragraph 9 of their May 15th submission. Again, Mexico's past position was much, much different. "In Azinian and in Metalclad, Mexico stated that 'there is no agreement as to' the 'precise meaning' of the phrase 'fair and equitable treatment.'" Consequently, "'in accordance with Article 31 of the Vienna Convention,' the phrase 'fair and equitable treatment' must be interpreted in good faith and in accordance" within the ordinary meaning. "The ordinary meaning of the word 'fair' is 'just,

unbiased, equitable, in accordance with the rules,' and the ordinary meaning of the word 'equitable' is 'fair and just.'"

Mexico went on to say "the fair and equitable treatment standard requires the party to act without abuse, arbitrariness or discrimination." Thus, Mexico has entirely changed its position on this issue, shifting from a position that was almost in complete agreement with the position that Methanex now adopts and that Methanex now asserts and instead it's changed its mind and now it completely agrees with the United States.

Now, the only conclusion that I think the tribunal can draw from these fairly dramatic shifts in interpretation over the years is that there is no consistent practice. This is an ad hoc litigating position adopted in May of 2001 for whatever political purposes they might serve, but it is not something that rises to the level of a subsequent practice.

And I think the next objection is that I'm not sure that a subsequent practice can be framed in

terms of litigation such as this anyway. Certainly the cases that the United States cited of litigating positions that rose to the level of practice, they involved agreement between the parties to the litigation as to what a particular term meant. Obviously, the parties to this litigation do not agree. Now, it can't be disputed that the signatory states have the power to draft the treaty any way they want, and they have plenary power to phrase it any way they want, but there is growing sentiment for the idea that international law -- that individuals and individual rights have a place in the legal order created by international law, and there is a reference to that in the European Court of Justice case that I just cited to you, the Brasserie case, that individuals have certain rights in this context.

It's quite clear that investors here are third party beneficiaries of Chapter 11. As third party beneficiaries, in at least some equitable sense, they have a right with respect to how these provisions are interpreted. That right is

ordinarily reflected through the political processes. That's where an investor's input is usually made. That's where it's evaluated. And to the extent that what the parties seek to do here is amend NAFTA, to modify NAFTA without going through the constitutional political processes required for amendment, they are evading the purpose of the constitutional limitations, and they are evading the purpose of the prohibition on modifications.

Subsequent practice cannot effect a modification of a treaty. Subsequent practice can only interpret a treaty, and in our view, where the United States has gone with this, they've gone so far with this that this constitutes a proposed amendment of the treaty, and the Department of State, acting alone, does not have the power to amend a treaty. It simply doesn't, as a matter of U.S. constitutional law, because by doing so it deprives the third party beneficiaries of the treaty of their rights to give the types of political input that is an obvious feature of the U.S. political system. Even if this were, even if this had the

attributes of an established, consistent, subsequent practice, our objection would be that it's not an interpretation, it's a modification, it's an amendment, and it's beyond the scope of what states can achieve through a subsequent practice. And it's beyond the scope of what this tribunal should do when it interprets the words of this treaty. So for those reasons, we don't think that this alleged practice should be given any credence by the tribunal whatsoever.

Is this a good time for a break?

MR. VEEDER: If it's good for you, it's good for us.

(Recess.)

MR. VEEDER: Let's resume. Mr. Bettauer, I think you had a point you wanted to raise.

MR. BETTAUER: I wanted to state that Mr. Dugan presented a number of new authorities during the morning and, I assume, will continue to do so throughout the course of the day. I would ask that we get the full citation so we could check it overnight, or if by the end of the day he would hand

it to us in writing so we have exactly what he is citing to.

MR. DUGAN: We will give them to you.

MR. VEEDER: Thank you very much.

MR. DUGAN: We will provide those, I think, by the close of our presentation.

MR. VEEDER: Thank you. If you could identify where they are new materials as opposed to copy of materials you submitted already. Can we raise one question, because you were answering a question from Mr. Christopher, and you gave some very clear answers about practice of states.

We'd like to draw your attention to Article 31.3(a) as opposed to Article 31.3(b) of the Vienna Convention. You've addressed Article 31.3(b) in regarding to any subsequent practice in the application of a treaty, but in Article 31.3(a) there's a different matter that is described, namely, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions as distinct from state practice, and I wondered whether you want to address

that at some stage during your submissions to us. If it's not convenient now, please come back to it later.

MR. DUGAN: I prefer to do that, if I could.

MR. VEEDER: I was reading from the Vienna Convention attached to the second submission of Canada, document number 23 at tab 1.

MR. DUGAN: The final point that I was making with respect to the issue of the legally significant connection, the "relating to" point, was again that I think that if the amendment is accepted by the tribunal, it moots the "relating to" point. Discrimination is an intentional act, and I think to the extent that if that allegation, the discrimination allegation is accepted, an intentional act and the consequences of an intentional act must surely fit within the "legally significant connection" limitation proffered by the United States. So again, this issue, I think, disappears completely if the amendment is accepted.

Next, I'd like to turn to Article 1105.

The parties have spent an awful lot of time arguing about the various relationships between the NAFTA fair and equitable treatment standard and international law, but I think it's important not to lose sight of the point, which for Methanex is the fundamental point, and that is that the text of NAFTA is clear. Parties are obligated to treat NAFTA investors and their investments fairly and equitably. That's what the treaty says, and that's how the treaty must be applied, in Methanex's view, simply because those are the clear words of the treaty, and they allow for no exceptions, regardless of their relationship between that standard and international law.

That is the standard that this tribunal must apply, and in applying it, the Vienna Convention requires the tribunal to apply the ordinary meaning of the words, and I just read to you what Mexico had interpreted the ordinary meaning of the words to encompass, and I think that's as good a starting point as any place. The words do have some elements of vagueness and breadth to them,

but they also have, I think, well understood meanings, especially in established jurisprudence, in international law, and in common law and civil law countries. So I think following the Mexican approach in the Azinian and Metalclad cases is the appropriate way for this tribunal to proceed. That is what other tribunals have done, the Metalclad tribunal chaired by Sir Gerald Fitzmaurice. They looked at the conduct of Mexico and determined whether or not that conduct was fair and equitable.

In that case, they concluded that it was not fair and equitable, and because it was not fair and equitable, it was a violation of Article 1105. Despite the blizzard of paper that has flown back and forth, Methanex's position is that's what this tribunal should do as well. Look at the facts and circumstances of the case, the evidence presented, and during -- where the U.S. and California treatment of Methanex and its investment was fair and equitable.

The only ICSID case that came up under a similar interpretation or a similar treaty provision

is the Maffezini versus Spain case. That's cited in our papers, and that's an ICSID case that was decided last year, I believe. That bilateral treaty that was between Argentina and Spain required fair and equitable treatment. They took the same approach, looked at the facts and circumstances presented there, and in the end, they concluded that Spain's treatment of the foreign investor was not fair and equitable, and for that reason, they awarded him 57 million pesetas.

Again, that common sense, plain word approach is what Methanex submits this tribunal is bound to do, under the clear words of Article 1105.

Now, just to make it clear where Methanex stands, Methanex's position is that the fair and equitable treatment standard is, number 1, part of, obviously, international conventional law. It is found in literally hundreds, more than 1000 bilateral investment treaties, and it's also found in numerous multilateral treaties, not just NAFTA but the America sugar agreement, the Lome IV Convention, and a number of -- the ASEAN treaty, a

number of other multilateral treaties. It is very widely accepted.

Secondly, we believe that it is so widely accepted that it actually rises to the level of customary international law. It is both customary and conventional international law. And third, we believe that it is additive to the protections of the international minimum standard of treatment, which is, to a degree, an antiquated standard that was developed before the second World War. What's taken place since then has been the articulation and development of the fair and equitable treatment standard, which is additive to the old international minimum standard of treatment. We think that interpretation between the various elements is the one that's most rooted in the recent developments of international law in the last 20 or 30 years.

Now, in terms of giving content to the term "fair and equitable treatment," experts in this field have recognized that this will have to be "defined over time through treaty practice, including perhaps arbitration under the dispute

provisions." I think that's an appropriate approach to take. It's a common law like approach where you have a stated principle and the principle is applied and developed through the articulations of various tribunals, and I think the starting point for trying to determine what fair and equitable means are concepts of equity that have been a part of international law and have been explicitly recognized to be a part of international law since the 1920s. One of the first ICJ decisions that accepted it was the Chorzow decision that I quoted from earlier with respect to damages. "That decision, in effect, accepted the principle of clean hands, the well-known equitable concept of clean hands, and since then, many other international cases have adopted and incorporated into international law numerous equitable concepts, estoppel, unjust enrichment, a wide variety of things, and the judges of the International Court have been explicit about the place of equity in international law. This is a quote from Judge Hudson in a separate concurring opinion in the

Diversion of Water from the River Meuse case. "'Principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals.'"

Judge Sir Gerald Fitzmaurice said in Barcelona Traction that "'deciding a case on the rules of equity, that are part of the general system of law applicable is something quite different from giving a decision ex aequo et bono.'" By that he means the concept of equity is so well embedded in international law that a tribunal can look to these concepts of equity in order to decide whether something is fair and equitable.

Similarly, I think NAFTA tribunals have begun the process anticipated by Vandelvelde, the expert I quoted earlier, of defining what fair and equitable means. The S.D. Myers tribunal stated that the fair and equitable standard "imports into NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice."

In addition, the S.D. Myers case explicitly incorporated into fair and equitable treatment standard, incorporated into Article 1105, the concept of antidiscrimination, that this is an equitable concept that is equally a part of 1105 as it is of 1102 and that was the explicit holding of the case. As I noted, that was Mexico's past position about how to interpret and apply this provision. Until its recent agreement with the United States, that was the position that it took.

Now, another source of legal principles that should be relevant for the tribunal as it defines the concept of fair and equitable treatment are GATT and WTO principles. NAFTA is, after all, a trade treaty, and the world trade treaties have, in some cases, identical concepts, in other cases analogous concepts, and the principles and decisions and precedent that has been developed by GATT and WTO may, in many circumstances, be relevant to the definition of fair and equitable treatment. They are certainly a part of international law that is relevant to interpreting this treaty, as Article

31-3-c of the Vienna Convention looks to, "which states that a tribunal should take into account 'any relevant rules of international law applicable in the relations between the parties.'"

Well, each of the three NAFTA signatories are also signatory to numerous GATT and WTO treaties, and for that reason, the principles embodied in those treaties are relevant to any interpretation of NAFTA.

And second, of course, by a tribunal that looks to these established principles of international law has a rooted basis for exercising its jurisdiction to decide what is fair and equitable. Relying upon established principles of law such as that in defining what is fair and equitable is a way of limiting the discretion of a tribunal and rooting it in international law. To the extent that the United States is concerned that a fair and equitable treatment standard is so subjective as to be meaningless, the way to control that threat of subjectivity is to follow established rules of the system. And in fact, one of the

citations that Mexico offered, when it was defining fair and equitable, was treatment in accordance with the rules, and the applicable rules here, the analogous rules here, in many cases, will be GATT and WTO principles.

Now, whether NAFTA creates a private right of action for every violation of GATT is the wrong question. The question is does a particular set of facts and circumstances rise to the level that it's unfair and unequitable. Adherence to a GATT principle may be evidence that adhering to a certain set of circumstances does not rise to the level of unfairness that violates 1105. I don't think that any violation of GATT or any violation of the WTO is, per se, actionable under Chapter 11. I think the test under Chapter 11 is different. It's a combination of violation of international law and fair and equitable treatment, and certainly not all WTO violations will result in a violation of Chapter 11, in our judgment, and I'll give you two examples.

One is that the WTO does not recognize any de minimis limits on injury. If a particular state

measure violates the WTO, it is a violation even if the injury is de minimis, and the most famous example of that principle was the -- I think it was the Reformulated Gas case where there was a differential on imports of 3 or 4 cents a barrel when oil was selling for 30 or $40, so de minimis injury, but the tribunal nonetheless found a WTO violation. None of the parties that were impacted I don't think could credibly assert a violation of 1105 because it doesn't rise to the fairness and equity. That equitable precept, I think, incorporates the notion that de minimis injuries are not fair.

Similarly the WTO finds violations if there is a risk of injury even if there is no actual injury. Obviously, NAFTA requires actual injury. So it's not the case that every violation of WTO or GATT will result in a violation. More needs to be shown, that the Claimant is an investor and needs to meet all the other standing requirements of NAFTA before he could make out such a claim. If an investor does meet all the standing requirements of

NAFTA and, in fact, there has been a violation of an applicable treaty, that should be evidence of unfairness and inequity. A state that refuses to heed its obligations under international law, that act is evidence of unfairness, evidence of inequity. I think the principles that probably will be the most important, if we get to the merits stage, are the principles that environmental measures, health measures that discriminate are nonetheless acceptable if they are necessary, and if they are the least consistent measure.

We set forth in our papers what those concepts cover, but those are well-recognized concepts under GATT principles. They are accepted explicitly by NAFTA itself, not for the investment chapter but for other chapters of NAFTA. They are widely accepted principles, and they're the types of legal principles that can serve to define the concept of fair and equitable treatment. And if we get to the merits, those are the types of principles that we hope to use to show that what California did wasn't fair and it wasn't equitable, because the

MTBE ban was not necessary, and it was certainly not the least inconsistent measure.

I think if you put all of this together, the essence of our claim here is that what happened in California was unfair and inequitable and in some ways breached international law. What we are alleging with respect to California, the facts we're alleging have been accepted by other NAFTA tribunals as being the type of government act that do rise to a level where they violate NAFTA.

For example, in the S.D. Myers case, it found a violation of NAFTA, and it stated -- one of the facts that it was dealing with in S.D. Myers was the access that the American investors, Canadian competitors had with the Minister of the Environment, and the S.D. Myers tribunal stated "in fact, the government of Canada gave S.D. Myers's competitors preferred and privileged access to key decisionmakers, made no effort whatsoever to inform or consult S.D. Myers, and produced a ban that was intended to specifically minimize S.D. Myers's place in the market and effectively did so for some time.

The defects on how S.D. Myers was treated cannot be dismissed on the basis that S.D. Myers was just another" -- "S.D. Myers was the principal cause of the ban and was the interest that was most harmed by it."

That is very analogous to what we're alleging here. We're alleging ADM, in its secret meeting with Governor Davis, had privileged and preferred access to Governor Davis. They used that opportunity, just as S.D. Myers's Canadian competitor did, to influence the policy in a nontransparent way, and they benefited directly as a result of the policy that they influenced. And just as it did in S.D. Myers, here, that rises to the level of unfair and inequitable treatment.

MR. ROWLEY: Can you show us that in the --

MR. DUGAN: Yes. Similarly, the Metalclad case --

MR. CHRISTOPHER: Pardon me, Mr. Dugan. I'd like to talk to you a little further about the S.D. Myers case. As I read that case, it has only

limited relevance here, because it arises in a situation where the court found that the Canadian measure was aimed specifically at SDMI, and I think I asked you whether you could point in your pleadings to an allegation of that effect, but beyond that, it seemed to me that the S.D. Myers case doesn't go quite as far as you indicated. They do talk about the fact that minimum treatment includes good faith and natural justice, but wasn't that just dicta in the case and wasn't the finding really was that there was a violation of 1105 because there was discrimination under 1102?

One of the justices in that case, one of the judges in that case did indeed say that he thought there was a less restrictive standard in connection with that section, but the court, as a whole, did not pick up that less restrictive standard, and they seemed to have decided the case on conventional grounds and not the notion that there is something in this particular section that goes beyond customary international law.

MR. DUGAN: Well, I guess to take your

objections, with respect to their interpretation of what 1105 covers, I don't think that was dictum. I think that was their statement, their interpretation, their beginning of the process in defining fair and equitable treatment. With respect to the least inconsistent principle, I think perhaps I read the case differently. I read that tribunal as explicitly incorporating that standard. This is a quote from paragraph 221 of the decision "where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative which is most consistent with open trade. This corollary is also consistent with the language and case law arising out of the WTO family of agreements."

I think that as concisely as anything summarizes the holding of S.D. Myers. I think they explicitly stated there it is a legitimate object for a government to want to prefer its own industries, but it has to do so in a way that's consistent with international agreements, and this

export ban and this imposition on the operations of the Canadian investment of S.D. Myers was inconsistent with Canada's obligations under NAFTA, and it specifically said there were other measures they could have adopted that would have achieved the same ends. It was Canada's failure to adopt those less consistent measures that was at heart of the violation of S.D. Myers. So perhaps we read that case differently.

What I was going to next is just the analogy, the similarities between the facts of the Metalclad case and the facts here. In Metalclad, the federal government had approved the -- given permission to construct and operate a hazardous waste facility, and that facility was blocked by local Mexican government authorities, and in considering all the facts and circumstances of that case, the tribunal concluded that it was unfair and inequitable.

Some of those same elements are present here. The MTBE standard has been developed by the United States. It applies nationwide, and Canada

has come in and, in essence, blocked Methanex's ability to do business in the oxygenated market in California. It has stepped in where the federal government has already spoken. Methanex's investments were premised on the idea that the federal government had created a unitarian government and would allow it to continue operating. So to that degree, the allegations in our complaint about what California has done resemble the facts in the Metalclad case, and I think most strikingly in Myers. The Myers case is very close to the allegations that we have made, that California discriminated and it discriminated in favor of the domestic industry and against a foreign owned and imports from foreign countries in order to favor a domestic industry, and it did so by disguising the discriminatory intent in an environmental regulation, and that when examined closely, the environmental regulation had no legitimate basis to it.

That's precisely what we're alleging here, and the reason why I raise the similarities is just

to illustrate the fact that under Chapter 11, we have made out a claim. We have alleged enough to sustain this tribunal's jurisdiction in order to determine, on the basis of all the facts and all the evidence as fully developed in a complete proceeding, whether or not California acted unfairly and inequitably.

The last issue I'd like to turn to with respect to 1105 is the concept of full protection and security, which is another phrase that's used in there. Mexico's position is that under the principle for protection and security, California and the United States were obligated to take all reasonable steps to protect Methanex's U.S. investment from discriminatory or arbitrary acts and that this obligation extends to protecting Methanex's intangible property, including its goodwill, its market share, its market access. The United States's response is that that is far too broad a painting of the full protection and security standard. The full protection and security applies only to mobs, to physical seizures, to police

actions, to that type of thing, and the -- we think that's inconsistent, first of all, with the language of NAFTA itself.

Once again, our claim is rooted in the language of NAFTA. NAFTA defines investment to include intangibles. Intangibles include goodwill such as market access, market share, that type of thing. NAFTA requires a state to provide full protection and security to all of an investor's investments. There's no qualification. All investments are protected, including intangible property. So by its terms alone, by its very language, NAFTA has to be interpreted to extending the concept of full protection and security to intangible properties, and it's not just goodwill. That includes things such as copyrights, intellectual property.

Those are intangibles that are protected by NAFTA as to which the obligation of full protection and security fully applies. The tribunals, the two NAFTA tribunals have looked at this issue, one NAFTA tribunal and one ICSID

tribunal, and both agree that the concept of full protection and security extends beyond acts of physical violence. It extends to the protection of private parties when they act through the judicial organs of the state. That was the case where the challenged measure was a jury verdict and a refusal to allow a reasonable bond to be posted. It had nothing to do with acts of physical violence or mob action or crimes. They clearly concluded that the full obligation of protection and security applied there. In the Maffezini versus Spain case, the ICSID case that I mentioned earlier, it held that an improper transfer of funds violated Spain's obligation to "protect the investment."

Now, I looked at the provision in the bilateral treaty today in Spanish, and I don't read Spanish, I don't speak Spanish, but it looked to me like it was an obligation to protect, not an obligation of full protection and security, just an obligation to protect. In other words, on its face by its language, a lower standard of protection than is included in NAFTA. Nonetheless, the tribunal

there found that it applied to an improper bank transfer, in essence a bureaucratic act.

Again, it had nothing to do with mobs, had nothing to do with lynchings or physical violence. It was that this duty extends to all acts of the state. I think that's the fair inference to be drawn from both of those holdings.

Now, the U.S. asserts that Methanex is asking that this standard be converted into one of strict liability, and that's simply not the case. We've never asked that. It is a quintessential straw man. We have asked only that the concept of full protection and security be applied to Methanex's investments, all of its investments, and what we define that to mean is that California and the United States were obligated to take whatever reasonable steps were necessary that they could take to protect that investment.

That's as far as the obligation goes. We've never contended that it's a requirement of strict liability. We think it simply obligates both entities, both the United States and Canada, to act

reasonably when they can in order to protect the investments.

Now, the United States also asserts that the fair and equitable treatment that's included in NAFTA differs in significant ways from the language that appears in many U.S. bilateral investment treaties, and that the language of NAFTA more clearly subsumes fair and equitable treatment into the international standard and customary international law.

Methanex doesn't believe that's the case. Methanex believes NAFTA is quite clear that what is required is fair and equitable treatment, full protection and security. Even if the United States is right, even if there is a material textual difference between NAFTA and bilateral investment treaties, Methanex is quite clearly entitled to the best possible treatment. Under Article 1103, the most favored nation standard, Methanex is entitled to the best treatment that the United States accords under any of its treaties.

So if there is a material distinction

between bilateral investment treaties and the language of NAFTA, Methanex is nonetheless entitled to the best possible treatment. That's the clear import of the most favored nation treatment principle, and it applies here to NAFTA investors and their investments.

Again, this is the same reasoning that the Pope & Talbot tribunal adopted. They found that that was a reason for interpreting NAFTA's 1105 consistent with bilateral investment treaties, but whether it's construed as a reason for identical interpretation or as setting up a different interpretation, Methanex is still entitled to the maximum possible protection that the United States has granted any investor under any of its bilateral investment treaties.

Next I'd like to turn to the issue of expropriation, Article 1110. The U.S.'s position here is that Methanex has not alleged any investment that can be expropriated, and the starting point for our analysis of what investment has been expropriated here is, of course, the language of

NAFTA itself.

First, as I mentioned earlier, investments is defined in Article 1139 to include "other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." Second, investment is defined in Article 1139 to include "interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such territory."

Those definitions cover, without any limitation, intangible property, and a wide variety of contract interests.

This, by intention, is a very broad definition. To cite the language of Daniel Price, again one of the chief negotiators of Chapter 11 for the United States, "if you look at the definition of investment, you will see that it is enormously broad, one would be hard-pressed to think of what we classically think of as an investment, or a commitment of capital to another territory, and not have that brought within the scope of NAFTA Chapter

11."

And again, that's consistent with the intent of Chapter 11, to protect investments and foreign investors. It is a protective chapter, and it's consistent with that, that the definition of investment should be interpreted quite broadly. Intangible property includes, I think without dispute by the United States, goodwill.

One definition from a book called Basic Accounting for Lawyers is 8.04, "Intangibles: Intangibles are assets such as patents, processes, rights, franchises, and goodwill." "Goodwill" has been defined to include "the custom or advantage of patronage of any established trade or business; the benefit or advantage of having established a business and secured its patronage by the public." "Property incident to business sold, and probability that all customers will continue their patronage." That's from Black's Law Dictionary.

Dictionary of Finance and Investment Terms, "goodwill is generally understood to represent the value of a well-respected business

name, good customer relations, high employee morale, and such factors." "Goodwill is a salable asset when a business is sold and is sometimes shown as such on the balance sheet."

And Article 1110 itself recognizes that goodwill can be expropriated. That article states that compensation should be provided for the going concern value of the expropriated entity, which by definition includes goodwill.

One definition of going concern value is the value of a company as an operating business to another company or individual. In acquisition accounting, going concern value in excess of asset value is treated as an intangible asset, termed goodwill.

So goodwill is specifically defined by NAFTA as a type of investment that can be expropriated, and if expropriated, should be compensated for. NAFTA tribunals that have interpreted the scope of NAFTA's investment definitions have uniformly given it a very broad reach.

For example, in S.D. Myers, the tribunal stated in what is probably dictum, but they stated it nonetheless, that market share in Canada constituted an investment.

In Pope & Talbot, the tribunal stated "the tribunal concludes that the investments' access to the U.S. market is a property interest subject to protection under Article 1110." And Methanex contends that its access to the California oxygenated market is equally an investment that can be expropriated, that can be affected by U.S. government actions.

The Pope & Talbot tribunal went on to state that "while Canada suggests that the ability to sell softwood lumber from British Columbia to the United States is a very important part of the business of the investment, interference with that business would have an adverse effect on the property that the investor has acquired in Canada, which, of course, constitutes the investment. The tribunal concludes that the investor properly asserts that Canada has taken measures affecting its

'investment' as that term is defined in Article 1139 and used in Article 1110."

Pope & Talbot went on to state while it "may reflect only the investor's own terminology, that terminology should not mask the fact that the true interests at stake are the investment's asset base, the value of which is largely dependent on its export business. The tribunal concludes that the investor properly asserts that Canada has taken measures affecting its investment as defined in Article 1139 and used in Article 1110."

Those reflect the very same arguments that Methanex is making here, that its access to the California oxygenated market, that its ability to do business in California's oxygenated market are valuable parts of its asset base in the United States, valuable parts of its asset base in California, and that the California measure unduly and unreasonably interferes with Methanex's right to do business in that sector of the market and that that constitutes expropriation.

Now, the authorities that the United

States -- that it relies upon in its submission, none of them interpret NAFTA. They are authorities that go to customary international law standards with respect to expropriation and customary international law concepts of investment, but this tribunal's ruling with respect to what is an investment obviously will be guided, first, by the text of NAFTA, and second, we believe, more persuasive authorities are the NAFTA decisions that are already out there.

So virtually all of the authorities cited by the United States are inapposite because they are not based, they do not interpret the language of NAFTA.

Now, the U.S. also asserts that there has been no expropriation here because Methanex Fortier, which is Methanex's methanol production plant that is in mothballs, has not been physically seized, that Methanex U.S., which is the marketing corporation, has not been physically seized. Physical seizure is not the definition of expropriation. Again, a useful definition is

Chairman Lauterpacht's definition in the Metalclad tribunal, to include a government measure that "has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property."

The oxygenate market, the MTBE market in California is a significant part of Methanex's U.S. business, and the California measure has the effect of depriving Methanex of the reasonably-to-be-expected economic benefit of its access, its share in that market, and as such, the California measure constitutes expropriation. To the extent that California has taken Methanex's market share in the California oxygenated market and given that to the U.S. ethanol industry, which we contend it has done, it has substantially interfered with a form of investment that is cognizable under NAFTA.

All right. At this point, I'd like to turn to my colleague, Ms. Stear, who will address the question of the relationship of Articles 1116

and 1117.

MS. STEAR: Mr. Veeder, Mr. Christopher, Mr. Rowley, as Mr. Dugan stated, my name is Melissa Stear, and I will addressing the issue of Article 1116 standing today on behalf of Methanex.

The legal question presented by this issue is whether Methanex has standing to bring a claim under Article 1116 for damages it suffered as a result of harm done to its enterprises. As I will explain, the text of NAFTA, which is supported by prior NAFTA precedence, proves that Methanex can indeed bring such a claim. In any event, Methanex has alleged injuries to itself that are both direct and nonderivative, and would satisfy even the United States's definition of Article 1116 standing.

Before I turn to the substance of the argument, it seems appropriate to note that should the tribunal decide to accept Methanex's proposed amendment, this issue will become entirely academic. Methanex has invoked, in its draft amended claim, both Article 1116 and Article 1117, and the United States acknowledges that Article 1117 provides

jurisdiction to resolve Methanex's allegations.

Now to return to the substance of the issue. As I will explain in detail later, it is clear that Articles 1116 and 1117 of NAFTA Chapter 11 serve distinct purposes.

By its very terms, Article 1116 eliminates the customary international law prohibition on shareholder standing found in the Barcelona Traction case because it gives the shareholder unrestricted standing to bring claims for their own injuries of whatever type. Article 1117's purpose is to allow shareholders to bring claims for injuries suffered not by themselves but by their enterprises which share the nationality of the respondent state and would, therefore, be barred for claiming in their own right. This article does not in any way alter the operation of Article 1116.

In reaching a decision on this issue, the tribunal need look no further than the text of NAFTA Chapter 11 itself. Methanex's claim falls squarely within the text and scope of Article 1116. Nothing in NAFTA restricts Article 1116 to claims for direct

or independent injury when, and only when, the investor making the claim is a shareholder. Article 1116, in combination with Article 1139, explicitly gives shareholders a clear right to claim for their own injuries and places no restriction whatsoever on the type of injuries they may claim.

It's important to look to the text of NAFTA, as I said, so I'd like to quote for you what Article 1116 says. "An investor of a party may submit to arbitration under this section a claim that another party has breached an obligation under Section A of Chapter 11 and that the investor has incurred loss or damage by reason of or arising out of that breach."

The question arises, then, who is an investor? Article 1139 tells us. It says that an investor of a party means "a national or an enterprise of a party that seeks to make, is making, or has made an investment."

In this respect, NAFTA ties the definition of investor to the definition of investment. Investment, in turn, is defined in Articles 1139(e)

and (f) as follows: It includes an interest in an enterprise that entitles the owner to share an income or profits of the enterprise, and an interest in the enterprise that entitles the owner to share in the assets of that enterprise on dissolution. Thus, by its express terms, NAFTA Article 1116 gives standing to investors who have made an investment in the shares of a company; in other words, shareholders.

Substituting this defined category of investor into the language of Article 1116, it reads as follows: "A shareholder of a party may submit to arbitration under this section a claim that another party has breached an obligation under Section A of Chapter 11 and that the shareholder has incurred loss or damage by reason of or arising out of that breach."

Read in this light, it's clear that Article 1116 specifically gives shareholders a right of action to claim of their own injuries. Moreover, it in no way restricts the type of damages that the shareholder may claim, not to direct damages, not to

independent damages, not to nonderivative damages.

Prior decisions by other NAFTA tribunals support this broad reading and demonstrate that Article 1116's text encompasses claims by shareholders for damages to themselves without limitation on the kinds of damages that may be claimed. In essence, these decisions confirm that NAFTA Article 1116 means what it says.

For example, in Pope & Talbot, the tribunal in its decision on the Harmac motion at paragraph 13 summarized Article 1116. "The requirement of Article 1116 in this respect is that a claim may be made by an investor on its own behalf where it claims breach by a party of a relevant obligation and that it, the investor, has incurred loss or damage by reason of or arising out of that breach." And the only further requirement is that "the claim may not be made after the lapse of three years, which as above stated, did not happen in this case."

It's not surprising that the Pope & Talbot tribunal exercised jurisdiction over claims by a

U.S. investor for damages to itself arising out of injuries to its Canadian enterprises. Pope & Talbot, like Methanex here, had brought its claim only under Article 1116, alleging numerous breaches of NAFTA and seeking damages for injuries arising out of harms inflicted on two of its enterprises, both British Columbia corporations, as a result of the Canadian softwood lumber regulations.

The tribunal not only exercised jurisdiction but it held Canada liable under Article 1105 and stated that Canada's "treatment of the investment during 1999, in relation to the verification review process, is nothing less than a denial of the fair treatment required by NAFTA Article 1105 and the tribunal finds Canada liable to the investor for the resultant damages." That's paragraph 181 of the opinion on the second phase of the merits in Pope & Talbot.

Despite the obviously derivative nature of these claims, Canada never objected to Pope & Talbot's standing under Article 1116. Pope & Talbot's successful claim is in this regard no

different than Methanex's claim here.

S.D. Myers is another example. The claim was allowed under only Article 1116 for the derivative type of injuries that the United States deemed impermissible. The tribunal summarized S.D. Myers's claim as follows: "S.D. Myers's claim is advanced pursuant to Article 1116. It is a claim by SDMI itself as an investor on its own behalf. It is a dispute in relation to SDMI's alleged investment in Canada, and is for damages arising out of the alleged breach by Canada of its obligations under Section A of Chapter 11. SDMI asserts that it has suffered economic harm to its investment through interference with its operations, lost contracts and opportunities in Canada. That is, that it has sustained damages because its investment in Canada suffered harm." That's paragraph 222 of the S.D. Myers opinion.

The S.D. Myers tribunal held Canada liable on this derivative Article 1116 claim for violations of Article 1102 and 1105. For the same reasons that S.D. Myers had standing to bring its claim, Methanex

has standing to bring this claim under Article 1116. Thus, multiple NAFTA Chapter 11 decisions have allowed a foreign investor to recover under Article 1116 for injuries it suffers as a result of harm to a local enterprise.

The United States argues that these cases are irrelevant because Canada did not raise the issue and the tribunal, therefore, did not decide the issue. Methanex submits that Canada's silence can only support its position in this case. It should be inferred from the fact that Canada did not object to either Pope & Talbot's standing nor S.D. Myers's standing that it does not share the United States's restricted interpretation of Article 1116 as it pertains to shareholders.

Moreover, in its 1128 submission to this tribunal, with the United States having raised the issue, Canada has not joined this interpretation of Article 1116 standing. In fact, neither has Mexico. Thus under both the text of Article 1116 and the text of Article 1139, as well as in prior NAFTA decisions, shareholders have been given standing to

bring claims for their own injuries that were derivative of harms to their investments.

Nothing in NAFTA anywhere restricts a shareholder's right to bring a claim for its own damages under Article 1116. Indeed, other provisions of Chapter 11 confirm that Article 1116 may well be used to bring this type of derivative claim. Article 1121, which is NAFTA's waiver provision, as I'm sure you're all well aware, states that both the investor and the enterprise must waive their rights to local remedies "where the claim is for loss or damage to an interest in the enterprise."

NAFTA clearly contemplates derivative claims by shareholders. Nothing in Article 1117 in any way alters this conclusion. The text of Article 1117 reads "an investor of a party on behalf of an enterprise of another party that is a juridical person that the investor owns or controls may submit to arbitration under this section a claim that the other party has breached an obligation under Section A of Chapter 11, and that the enterprise has

incurred loss or damage by reason of, or arising out of, that breach."

Article 1117.4 further states "an investment may not make a claim under this section." It thus invokes the customary international law prohibition on making a claim against one's own state. This demonstrates that Article 1117 is intended to allow a foreign-owned domestically incorporated subsidiary corporation to recover its damages arising out of a respondent state's NAFTA breaches.

This supports Article 1135.2(b) which provides that all awards rendered under an Article 1117 claim must be paid directly to the enterprise. This is so despite the fact that a named claimant in such a case will be the foreign investor. The foreign investor may not recover any damages under an Article 1117 claim.

As I noted at the beginning, each article then serves a distinct purpose. Article 1116 gives investors, specifically defined to include shareholders, unlimited and unrestricted right to

recover their own damages arising out of a breach of NAFTA Chapter 11. In this way, it overrides Barcelona Traction's general prohibition on shareholder standing. Article 1117 allows subsidiary corporations that share the nationality of the respondent state to recover directly for damages that the enterprise has suffered. This overrides the prohibition on claiming against one's own state.

Two such causes of action -- one to recover for damages to investigator, one to recover for damages to the enterprise -- is only logical, given, as the United States has recently noted in its pleadings, that both an investor and an enterprise could sustain damage as a result of a single measure.

Despite the explicit text of NAFTA, the United States asserts that Methanex's interpretation can't possibly be right because NAFTA is silent on the issue. The U.S. construes Methanex's interpretation of Article 1116 as based "on the mere fact that the article provides investors a right to

submit claims to arbitration and is silent about the type of claims that may be submitted."

NAFTA is not silent about giving shareholders a right to make a claim under Article 1116. It is explicit. Rather, the silence is as to the United States's proposed restriction on shareholder standing. Article 1116, in combination with Article 1139, specifically provides that a shareholder is included in the type of investor that may bring a claim under that article. It's silent as to any restriction on a shareholder's right to make a claim or the type of damages that a shareholder may, in fact, claim.

Similarly, Article 1121 recognizes that a shareholder's claim under Article 1116 may well be derivative but says nothing about any limitations on the type of claim a shareholder can make. Indeed, the court in Barcelona Traction, the International Court of Justice recognized that its holding might well not be applicable in the case of a treaty that explicitly protected shareholders. It's found at paragraph 90 of the 1970 opinion. So I will shorten

it considerably.

The highlights include as follows: In the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations. Indeed, whether in the form of multilateral or bilateral treaties between states or in that of agreements between states and companies, there has, since the second World War, been considerable development in the protection of foreign investments. Sometimes companies themselves are vested with a direct right to defend their interest against states through prescribed procedures.

No such instrument is in force to the parties in the present case. And Judge Eduardo Jimenez de Arechaga, former president of the International Court of Justice, in his 1965 article, "Diplomatic protection of shareholders in international law," which has already been cited by the United States in these proceedings, notes one reason that this tribunal should distinguish between a claim brought under customary international law

using diplomatic protection and a claim brought under an investment treaty specifically designed to protect investors. The judge stated "a perfect protection of foreigners or foreign investments is not the aim nor the ratio legis of those rules of international law. The interest taken into account and protected by such rules are not those of individuals but of states."

As Mr. Dugan has already discussed, NAFTA Chapter 11 was not intended to protect states. It was intended to protect investors, and investor is specifically defined to include shareholders. As suggested by the Barcelona Traction court itself, NAFTA Article 1116 has retracted the prohibition on shareholder standing.

Finally, if this tribunal determines that the United States's interpretation of Article 1116 is the correct one, Methanex has alleged injuries independent of harm to its enterprises. It has consistently alleged these nonderivative injuries, and while it, in fact, has been harmed by the injuries to its investments, it also has been harmed

directly and independently in its capacity as an investor. Methanex has consistently alleged loss to itself, for example, of customer base, goodwill, and market for methanol in California and elsewhere.

It is in the notice of arbitration at page 8, the statements of claim at 12; this is the original statement of claim of December 3rd, 1999, the draft amended claim at pages 35 to 36. Goodwill, especially, is an asset owned by the corporate group and is not an asset limited to Methanex U.S. Methanex itself is directly losing a portion of its goodwill and market access as a result of the California MTBE ban as has been detailed in our pleadings.

Goodwill and market access, as Mr. Dugan just discussed, are nonjuridical intangible investments under NAFTA. The United States itself notes that this type of nonjuridical investment which is injured must be remedied under Article 1116.

Methanex has also consistently alleged loss to itself due to the increased cost of capital.

As Mr. Dugan noted earlier, Methanex's credit rating was lowered as a result of the California MTBE ban, which led to an increased cost of capital to Methanex. This constitutes direct and independent harm.

MR. VEEDER: Where is that last statement?

MS. STEAR: Methanex has consistently pleaded the increased cost of capital, and I believe, while I unfortunately don't have that specifically written down, that it is in the same location as those I noted earlier, notice of arbitration at 8, statement of claim at 1, and draft amended claim at 35 to 36.

Would the tribunal like to hear with regard to the flushing out of the point of the increased cost of capital? I believe the pleadings reference the increased cost of the capital and were not more specific as to what that meant. The decrease in the credit rating, the downgrade of the credit rating is what resulted in the increased cost of capital.

MR. VEEDER: Is that pleaded anywhere?

MS. STEAR: With specific reference to the downgrade in the credit rating, no. It's stated as loss due to increased cost of capital.

Methanex has also further alleged that the California measures have reduced and will continue to reduce the demand for methanol from historical levels. As noted in our pleadings and our recent papers, MTBE represents approximately 30 percent of the global demand for methanol, and California MTBE use alone represents approximately 6 percent of that global demand. Because methanol is a commodity with a substantially uniform global price, the California measures will continue to cause downward pressure on the global price of methanol and the price will be reduced below what it would otherwise be.

While Methanex and its U.S. enterprises have suffered and will continue to suffer as a result, this particular injury has global effect. To the extent it is without the United States, Methanex itself has obviously suffered injuries independent of those suffered by its U.S. enterprises.

The last point I'd like to make on this issue is a practical one, and it is that if the tribunal decides to accept Methanex's proposed amendment, there is no need to presently decide which claim governs which damages. That would appropriately be an issue joined to the merits. And in fact, this type of situation has recently arisen in the Loewen case, and the tribunal decided to do just that.

The United States had objected to one of the Claimants' standing under Article 1117. The tribunal noted that because the Claimant also had standing -- or also had alleged claim under Article 1116, that the issue was not a dispositive one, and therefore, determined that it was not appropriate for ruling at the jurisdictional stage.

As in Loewen, there is no reason for this tribunal to render a decision on this issue at the preliminary stage if the amendment is accepted and Article 1117 is invoked.

Unless the tribunal has any further questions on this particular issue, I'd like to turn

the floor back to Mr. Dugan.

MR. VEEDER: Thank you very much.

MR. DUGAN: What I'd like to do at this point is go over the discovery question, and even though it's rather early, I would like to break for lunch and we can come back to address your questions of where our allegations occur in the draft amended complaint. We can formulate our response to your question with respect to the provision of the Vienna Convention that you asked a question about.

MR. ROWLEY: Mr. Dugan, when you come back after lunch, on that point, I think we would find it particularly helpful if you can go through your -- the notice of arbitration, the original claim and the draft amended claim, and just identify each one of the allegations which you say is an allegation of fact which gives rise to a cause of action; that is to say, is an allegation of breach of a duty owed to your client under Chapter 11.

MR. DUGAN: Okay. We will attempt to do that.

MR. ROWLEY: And if it's difficult to do

after lunch, speaking for myself, I'd be happy to have it at any time in these proceedings, but I do think it's very important for us to have a clear understanding of what your allegations of fact are, which, if accepted to be true, constitute a breach of a provision giving rise to a duty owed to your client.

MR. DUGAN: Okay. Hopefully, we can do that after lunch. I think it will be doable at that point; we will certainly try.

MR. ROWLEY: Thank you.

MR. DUGAN: With respect to the discovery requests, when the U.S. put into issue the practice of the signatory parties with respect to NAFTA, they characterized it as a practice, and as I think we've shown, one of the fundamental requirements of a practice is that it be consistent.

This is an alleged practice that the U.S. has proffered, and having put the issue on the table, we think that as a matter of basic fairness and due process, we are entitled to all of the pleadings of all of the signatory parties in all of

the respective cases, to the extent that the tribunals in those cases are willing to allow the release of those pleadings.

As we've already pointed out, the record that we have -- and right now, it's only a very partial record -- but the record that we have indicates that there are very serious inconsistencies in the practice of the parties in the seven years that NAFTA has been in existence, and I think that if we have access to a full set of all the pleadings filed by all the parties, which I believe are in the United States's possession, by the way, I think as part of the treaty process, they are obligated -- or the other parties are obligated to provide to the United States copies of all pleadings filed.

I think that once we have access to a full set of the signatory parties' pleadings in these cases, we will be able to show even more persuasively than I hope I showed this morning that the parties' practice over the last seven years has been characterized not by consistency but by

inconsistency. To the extent that that can be shown, it obviously undermines, in our view fatally, the allegation that there is a consistent practice.

The other element of practice is that it takes a substantial period of time to develop a practice, and eight weeks is not sufficient. We are entitled to see, as a matter of due process, what the practice of each of the signatory parties has been in the last seven years.

The United States has not produced them, and it has not asked the respective tribunals for permission to produce the pleadings that it has in its possession. And we think that as a matter of fairness, they should be requested to do so, and the signatory parties, having joined in those requests, having joined in the argument that this is a subsequent practice, should also be asked to approach the various tribunals and to state the purpose for which they seek to have these pleadings released, and if the tribunals agree, release all such pleadings to Methanex so we can determine whether this is an even, consistent practice as the

record seems to indicate.

MR. VEEDER: With respect to Article 31 of the Vienna Convention, I think you have a copy before you --

MR. DUGAN: I don't have a copy before me, but my understandings is the United States has not characterized this, that provision of Article 31. What they characterized it as is an agreement that comes under -- evidence of subsequent practice, under subsection 3(b), that's how they themselves characterized it.

MR. VEEDER: It's "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." So we wouldn't be concerned about the individual practice of any party to the NAFTA treaty. We have to be looking to a practice that established the agreement of all three parties; would that be right?

MR. DUGAN: Well, our interpretation of the word "practice" is that it would have to be something that extends over time and something that

is consistent, and I think that's consistent with the ordinary meaning of the word "practice."

MR. VEEDER: I have those points, but looking at the practice under 31-3(b) establishes the agreement of all three parties. So a practice, say, of one party to NAFTA wouldn't be enough.

MR. DUGAN: I'm sorry. I think I misunderstood your question. I agree. I think under subsection (b), it has to be a long-standing, consistent practice of all the parties to the agreement, and it must also be an interpretation and not a modification of the agreement. And in those circumstances, it would constitute an authoritative interpretation of an ambiguous term in the treaty, but only in those very narrow circumstances; virtually none of which, in our opinion, are met here.

MR. VEEDER: The second part I wanted to raise with you is, what is our power or jurisdiction in regard to parties who are not disputing parties? Do we have any power, which you seem to refer to, over either Mexico or Canada, or did I mishear you?

MR. DUGAN: I think you perhaps misheard me. What I was getting at is the idea that the signatory parties, the nations obviously have plenary power to interpret a treaty, when a treaty provision is such that it creates rights for third-party beneficiaries as it does for investors here, those individual rights have a place in the legal order, in the international legal order.

Where that place is is not defined, but it seems to me that to the extent the tribunal is concerned about the extent of its power to interpret NAFTA in a way that may stretch the limits of what's an interpretation and cross into the area of what's a modification, that it should defer to the constitutional processes of a country, so that the rights of individuals who are not nations can be taken into account.

MR. VEEDER: Forgive me. I thought you just asked Canada and Mexico to produce documentation to us.

MR. DUGAN: I misunderstood again. I apologize. I don't know that you have any explicit

authority to order such discovery. I think it's inherent in the power of a tribunal to request such discovery from parties that have put an agreement on the table, such as Mexico and Canada have done.

And I think it's further within your power that if Mexico and Canada and the United States refuse to produce a complete set of pleadings that have been made or refuse to approach the respective tribunals, that you can draw an adverse evidentiary inference from that refusal; that is, if they refuse to provide a full set of their pleadings, you can conclude, and perhaps should conclude, that their practice in the past has been even more inconsistent than it now appears to be.

MR. VEEDER: You're suggesting we have power over Mexico and Canada for them to produce documents under the NAFTA treaty and the tribunal rules?

MR. DUGAN: I don't know if you have the power to do so. I think you have a power to request it.

MR. VEEDER: If it's simply a request

that's not met, it could be met for a variety of reasons.

MR. DUGAN: Right. The U.S. certainly has the right -- you certainly have the right to order the United States to ask the various tribunals. In other words, these pleadings are in the possession of the United States pursuant to one of the sections of NAFTA. If the United States has these pleadings in its possession and the only barrier to its giving them to us, producing them to us is the confidentiality agreements or the confidentiality orders that other NAFTA tribunals have entered into, I think you have the power to order the United States, as a party to this proceeding, to request that those other tribunals waive the confidentiality provision with respect to those pleadings so that they can be used, if necessary in conference, in this proceeding.

MR. ROWLEY: Am I correct in my understanding that the United States has produced every one of those pleadings in its possession which it feels able to produce but for some inability

which arises as a result of a specific confidentiality order which would be breached if it did so produce?

MR. DUGAN: Yes, I believe that that is their position, but you might ask them. That's our understanding of it.

MR. LEGUM: Yes, that is correct.

MR. DUGAN: Is this a good time to break for lunch?

MR. VEEDER: Yes, it is. Can I ask you about your overall program, how you're doing for the day?

MR. DUGAN: I would be surprised if I go past an hour.

MR. VEEDER: Ms. Stear, have you exhausted your function, or are you going to come back on any point?

MS. STEAR: I believe unless the tribunal has any questions on my Article 1116 standing, that I have exhausted my utility before you today.

MR. VEEDER: Do you want a shorter lunch or longer lunch?

MR. DUGAN: Hour and a half is fine.

MR. VEEDER: On that basis, we will break now and come back at 1:30. And you have about an hour, you say? We won't tie you down, but it looks as though we will be finished by 3:00.

And again, I'm asking but not insisting, what would the position be for the United States to start this afternoon as opposed to tomorrow morning? It's a matter entirely for you. It's your convenience and whether you want to or not, but if you wanted to, we're certainly ready to hear you starting this afternoon.

MR. CLODFELTER: Mr. Chairman, it would not be helpful to have a disjointed presentation, so we will reserve to present tomorrow.

MR. VEEDER: That's acceptable to the tribunal. We will break when you finish and resume at 9:00 tomorrow morning with the United States's argument. Thank you very much, until 1:30.

(Whereupon, at 11:55 a.m., the hearing was recessed, to be reconvened at 1:30 p.m. this same day.)

AFTERNOON SESSION (1:30 p.m.)

MR. VEEDER: We will continue.

MR. DUGAN: We will try to go through the portions of the complaint in response to your questions, Mr. Rowley, to the extent we can, but we'd also like to reserve the right to supplement that, if necessary, in response to your question.

MR. ROWLEY: It's entirely all right with me. If you were to do something like this, obviously, your friends would need to have a copy, but it might be helpful to do what you can but just to put on a piece of paper the allegations, the obligations and just hand it over the table. So in the end, without having to look at 50 pages, one could look in two pages exactly what, at the end of the day, one has to see what the hurdle is and whether it's been surmounted.

MR. DUGAN: Okay. We will try to do that. With respect to the question of waiver, I think that is now officially a nonissue. In our draft amended claim, we did not include an allegation that the Senate bill, the bill that created the University of

California Davis Commission, that study on MTBE was, in fact, one of the measures that we were formally complaining of, and I think the United States, in light of the waivers that we have now put in, that conform to what the United States insists should be part of the record, we have now conformed to what the United States has requested. I think at -- as they put it in their last pleading, as long as we agree not to assert that the bill and only the bill is a measure that we are formally complaining of, the waivers are not an issue.

That obviously means that the other measures that we assert caused the damages, specifically the government's executive order, and if the amended claim is accepted, the California regulations are measures that we are complaining about, but we will no longer assert that the Senate bill setting up the commission is, itself, a measure that we're complaining of. By "complaining of," I'm speaking in terms of a measure that causes damage, and the measure that we assert causes the damage is the governor's executive order, and to the extent

that it is necessary, the regulations issued thereafter. But I think this is consistent with the United States position. So I think it's no longer an issue.

MR. VEEDER: It is worth inviting the United States to comment on that, whether that is now a nonissue on that basis or will it remain an issue.

MR. LEGUM: I believe that we requested that the arbitration be deemed submitted on the date that the waivers were provided, and if that's what Methanex is offering to do, then that's acceptable to us. It's not an issue. We find that the waivers that they have more recently submitted do comply with the requirements of the NAFTA, and if the arbitration is deemed submitted on the date that they submitted those waivers, then we're in agreement.

MR. VEEDER: That leads to a different difficulty or not?

MR. LEGUM: I'm not sure.

MR. DUGAN: I think "deemed submitted" is

much different and raises possibly a Pandora's box of difficulties. As I had understood the U.S.'s position, if the waivers were submitted in a form acceptable to them, so long as we no longer asserted that the Senate bill was a measure that caused damages, that would be sufficient. It goes to the practical effect, I think, rather than the characterization.

MR. VEEDER: I think it might be helpful if you were to talk about this privately. If there is no issue and you came to a form of words, it certainly would be helpful to the tribunal to have a form of words agreed between you, because we don't want any ambiguity as to whether there is or isn't an issue between you, or if there's an acceptance on certain conditions that have or have not been agreed by Methanex.

MR. DUGAN: That's acceptable to us.

MR. LEGUM: We're always happy to talk.

MR. ROWLEY: Could I just ask one question so I understand? Are you talking about the waivers, the second wave of waivers, or are there other

waivers that we don't know about?

MR. DUGAN: There are no waivers that you don't know about, and the waivers that I'm referring to are the waivers that were submitted with our May 25th submission. That's the waivers required by Article 1121 of NAFTA. Now, turning to the question of amendability, we have submitted a detailed draft amended complaint that we have asked the tribunal to accept in order to amend the claim; and it includes a new theory of recovery, discrimination under Article 1102, as well as discrimination under Article 1105. It includes some new allegations and specifically the meeting between Governor Davis and ADM and the campaign contributions, and it includes a new cause of action, 1117, to go along with 1116.

We think that under the standards that the UNCITRAL rules contain, and as they've been elaborated on by various tribunals, that there's no possible reason why the amendment shouldn't be accepted by the tribunal. Article 20 creates a liberal standard of amendability. I think that's clear from the traveaux preparatoires, that it's

meant to allow a tribunal to accept amendments in most circumstances in order to enable a party to pursue his case as fully as possible, which I think is precisely the situation that Methanex is in here. It has been interpreted by, for example, the ethyl tribunal as creating a presumption of amendability, and I think that's a good operative characterization of the legal effect of the standard, and I think that's how this tribunal should approach it, that the amendment is presumptively acceptable, unless some prompt reason can be proffered that serves as the basis for an objection.

I might add that every NAFTA tribunal that we're aware of has accepted the amendments or the changes that have been submitted by the claimants in order to evolve the nature of a complaint. Article 20 itself says amendments should be allowed unless they're frivolous or vexatious. I don't think the U.S. has contended that these are frivolous. These are obviously very serious, very substantial obligations, and in fact, it was the, and in fact, it was the serious nature of the allegations,

especially with respect to the secret meeting and the political contributions, that caused the very small delay in the time that the -- that we learned of the secret meeting and the time that the corporation decided to actually amend the claim.

We learned of the secret meeting in September of the year 2000, and the new information was presented to the corporation. It went all the way up to the board of directors, as you would expect a prudent corporation with duties to its shareholders would do, before it made serious allegations like this. It considered them very carefully, and once it made the decision to assert these new allegations, it required a change in counsel. Baker & McKenzie had an ethical conflict. They represented ADM. They were not in a position where they could prosecute a case that says about ADM what our amended complaint says about ADM.

So at that point the corporation had to retain new counsel to represent it. And that consideration, that decision, and the retention of our firm took place within three months, which we

contend under the circumstances is not undue delay. In addition, it took place still at the very beginning of the proceeding. It would be much more problematic had it taken place in the midst of a hearing on the merits or in the midst of briefings on the substance of the case, but since the notice was put in before Methanex had filed a responsive pleading on the jurisdictional issues, that is close enough to the beginning of the case where it should be less problematic than a later addition.

It's not a vexatious type of amendment. It's an amendment that raises serious claims, substantial claims. It's an amendment that we think increases the likelihood of Methanex's recovery, and I think that not even the United States would characterize it as frivolous or vexatious. The United States has had ample opportunity to respond to all the allegations in the complaint. They have now had two rounds of pleadings to respond to these allegations, as well as their initial pleading, their initial memorial, which contains many of the same objections to the original complaint as it has

to this one.

So they've had ample opportunity to respond. They have now the opportunity of the three-day hearing to further respond, and they've actually had one more pleading than Methanex has on these issues. So I don't think there's been any lack of opportunity for the United States to respond to the new allegations and the new assertions. The United States has claimed that it will be prejudiced by the amendment, and we've invited them on a number of occasions to detail exactly how they would be prejudiced, and we have yet to see any detail as to precisely how they are prejudiced, and perhaps they can articulate it more clearly. But we can't see any prejudice. They've had a full opportunity to respond. We're entitled to put in a substantial amount -- an amendment that's nonfrivolous and nonvexatious, and the fact that it may widen the scope of the claim and allege new facts in support of the claim doesn't create the type of prejudice that would block an amendment.

Finally, we don't think that these

proposed amendments, the new 1102 and new 1117, claim -- and the allegations of discrimination in any way create a new claim in the sense that it would prevent an amendment. The essentials of our cause of action are the same, Methanex complains that the MTBE ban enacted by California has severely damaged it. That was the essence of the original claim, and that remains the essence of the claim now. We have articulated a new legal theory. We've articulated some new legal reasons as to why we think we're entitled to recover, and we have articulated new facts, but the new facts are clearly supplemental facts. They're not facts that change the fundamental character of the claim. The claim is still based on the California ban, and it still seeks precisely the same damages.

So we don't think that this can properly be characterized as the type of new complaint, new claim that takes it outside the scope of presumptability. It is presumed to be acceptable to file an amendment, which by definition is going to include material that is new. An amendment must

include something new in the way of legal theories or legal facts. Otherwise, it wouldn't be an amendment, and I think that Methanex's amended claim is well within the scope of what is actually new. There's a lot more detail in the claim that explains some of the prior claims, but in terms of raising new operative facts, we don't believe that it does; but, as I said, for the meeting and for the contributions. So Methanex believes it is well within the range of what is a permissible amendment here and that in the interest of justice and in the interest of due process, in the interest of allowing Methanex to fulfill -- to pursue its claim as fully as possible, it ought to be granted. Now, in terms of trying to answer your questions with respect to the amended -- where's the amended -- in terms of the claim, in terms of damages, what we have asked for in damages, I think, has changed very little, if at all, between the amended and the original complaint.

In the original complaint, at -- the notice of arbitration at page 8, we asked for loss

to Methanex, Methanex U.S., and Methanex Fortier of a substantial portion of their customer base, goodwill, and market for methanol in California and elsewhere. Losses to Methanex, Methanex U.S., and Fortier as a result of the decline in the global price of methanol, loss of return to Methanex, Methanex U.S., and Fortier on capital investments they have made in developing and serving the MTBE market, loss to Methanex due to increased cost of capital, loss to Methanex of the substantial amount of its investment in Methanex U.S. and Fortier.

And we also referenced in the original claim the decline in the price, and the material that I had proffered today was really material that provided more detailed evidence of the increase in the cost of capital. It was simply the ratings decreases by the created agencies that were tied to the MTBE announcement by Governor Davis. But it doesn't in anyway raise a head of damage that's not encompassed by the claim in the original complaint that we were seeking compensation due to the increased cost of capital. It was simply evidence

of that.

Now, in the amended claim, the damages that we asked for, in section 5 at page 35, we state "the California ban on MTBE has substantially damaged Methanex, its U.S. investments and its shareholders. The California measures have deprived and will continue to deprive Methanex and Methanex U.S. of a substantial portion of their customer base, goodwill, and market for methanol in California. In essence, California has taken part of the U.S. methanol business of Methanex and Methanex U.S. and handed it directly to its competitor, the U.S. domestic ethanol industry. The California measures also contribute to the extended closure of the Methanex Fortier plant. The measures have reduced the return to Methanex, Methanex U.S., and Methanex Fortier on capital investments they have made in developing and serving the U.S. MTBE market, increased their cost of capital, and reduced the value of their investments." It goes on to say that "the California measures have reduced and will continue to reduce the demand for methanol."

It asserts as another head of damage that "the state of California is extremely influential when it comes to environmental matters in the United States. Thus, its decision to ban MTBE on environmental grounds established a flawed precedence that has triggered a 'ripple effect' that is now being felt across the United States." "To the extent that the MTBE bans and restrictions in other U.S. states can be traced to the California measures at issue here, they constitute additional harms."

The next paragraph references that "the executive order caused immediate damage to Methanex, its investments and its shareholders, and excellent evidence of that damage was the direct and immediate drop in Methanex's market share." And it goes on to describe how the price plummeted almost 20 percent in the 10 days after the order was issued. "That loss" -- "that represented a loss in Methanex's market value of approximately 180 million Canadian dollars." This loss was suffered by Methanex's investments and its shareholders.

Now, with respect to -- I think the second question you asked was the degree of competition, the like circumstances between Methanex and the U.S. ethanol industry. On page 66, for example, in this case, "the United States has allowed California to take unreasonable, unfair actions that severely harmed Methanex and its investments. Moreover, these measures were intended to discriminate against Methanex and its investments as foreign competitors of the highly protected domestic ethanol industry."

We also stated at page 57, "these measures were intended to favor the domestic U.S. ethanol industry and protect it from foreign competition, including Methanex" -- I'm sorry. Page 57. "These measures were intended to favor the U.S. methanol industry and protect it from foreign competition, including Methanex and its U.S. investments. In effect, California took part of the market share of Methanex and its U.S. investments and handed it directly to ethanol, one of its principle competitors. Accordingly, because the California measures are discriminatory, they violate NAFTA

Article 1105's requirement 105 of fair and equitable treatment."

Similarly, on page 36 -- and I think I just read this in the context of damages -- "California has taken part of the U.S. methanol business of Methanex and Methanex U.S. and handed it directly to its direct competitor, the U.S. ethanol industry."

Page 46 and page 47, "similar to S.D. Myers, California's decision to ban MTBE improperly discriminated in favor of the U.S. ethanol industry and against non-U.S. products and investments, and therefore, violated NAFTA Article 1102 and international law. The decision was motivated primarily by a desire to protect the domestic ethanol industry by eliminating one of ethanol's chief competitors, the foreign methanol product, MTBE, from the California oxygenate market. The effect was to severely damage Methanex and its U.S. investments by handing their market share directly to the U.S. ethanol industry."

And finally, with respect to the type of

intent that would be required to -- if alleged properly not to require proximate cause, starting on page 1, we allege that "Methanex seeks to amend its NAFTA claim in order to allege intentional discrimination by the state of California to favor and protect the U.S. ethanol industry and to ban a product, methanol-based MTBE, that has been repeatedly and stridently identified in the United States as foreign."

Page 15 focuses on ADM's allegations about methanol. "For numerous officials at all levels of the U.S. government have characterized methanol as a predominantly non-U.S. substance and believe that the use of MTBE will increase reliance on imports. In contrast, ethanol is regularly described as a domestic U.S. product, whose increased use will protect national security." And that's the belief that we allege, that ADM instilled in Governor Davis and motivated him to implement this measure, that belief that by taking steps to bolster the U.S. ethanol industry, he would be acting patriotically.

On page 20, "these statements, by

organizations and public officials supported by ADM, reflect the great success of ADM's efforts to paint methanol and MTBE as undesirable foreign products. It would be extraordinary if ADM, during its secret meeting with Governor Davis did not emphasize to him what it has stated publicly on numerous occasions, that methanol and MTBE are foreign products and would be a patriotic step to reduce U.S. independence on foreign fuels.

"The California actions replacing MTBE," on page 47, "with ethanol reflect a protectionist attitude found across the United States that dependence on the foreign methanol product would harm the American economy, whereas reliance on the domestic ethanol product would not only aid American farmers but would boost the U.S. economy generally."

MR. CHRISTOPHER: I missed the page number.

MR. DUGAN: Page 47, bottom of page 47. Such discrimination violates 1102 and international law.

Page 53, "the California MTBE ban is in

truth a disguised trade and investment restriction intended to achieve the improper goal of protecting and advantaging a domestic industry through sham environmental regulations. It is fair to conclude that ADM promoted the ban on MTBE at its secret meeting with Governor Davis. It is fair to conclude that the meeting led to ADM's massive campaign contributions immediately thereafter. And it is fair to conclude that the MTBE measures were, at least in part, the result of the government's political debt to ADM, and of his desire to favor and protect ADM, establish a California based ethanol industry, and penalize producers of MTBE and methanol, the dangerous and foreign MTBE feedstock. As such, the ban violates international law and NAFTA article 1105."

Finally, on page 57 -- I think I just read that before with respect to --

MR. ROWLEY: Can I stop you there?

MR. DUGAN: Sure. That was my last citation anyway.

MR. ROWLEY: It seems to me on this last

point that it's an assertion of a possible conclusion, but it does stop short, does it not, of an assertion that ADM did, in fact, discussed what might be assumed to have been discussed and that, in fact, Governor Davis acted on what might have been discussed?

MR. DUGAN: I think what we have asserted is that -- what we've alleged, I think, that that's what ADM told Governor Davis, and we've alleged that Governor Davis acted on what ADM told him. It's clear that ADM promoted the ban on MTBE during their discreet meeting with Governor Davis. It's fair to conclude that the measures were, at least in part, the result of the governor's political debt and of his desire to favor and protect ADM, establish a California-based ethanol industry, and penalize producers of MTBE and methanol, the dangerous and foreign MTBE feedstock. That's on page 53.

What we haven't alleged is that we have any actual evidence that that's what he did, because we don't, but at this stage of a proceeding, at a preliminary stage of the proceeding where we need

only allege the facts that support the claim, I think we have gone more than far enough.

We hope that if we have the opportunity to develop the facts of the case, that we will obtain the evidence from which, if it's not direct evidence, we hope that it is evidence sufficient to support an inference that the governor did act with improper protectionist intent, but I think that that process is a process that more properly belongs to the merit stage of the case rather than to a preliminary stage of the case.

Now, the final thing I'd like to read is just the UNCITRAL rule on the statement of claim. It merely requires that "the statement of claim shall include the following particulars," names and addresses, a statement of the facts supporting the claim, the points at issue, and the relief or remedy sought. It is not an extensive or detailed pleading requirement. That's Article 18, and I think that the amended claim under any proper characterization meets the requirements of Article 18.

MR. VEEDER: Could you read that again.

MR. DUGAN: Names and addresses, statement of the facts supporting the claim, the points at issue, the relief or remedy sought.

So the point is, I think, that Methanex has articulated an amended claim that complies in every respect with the UNCITRAL requirement, that obviously gives notice to the United States of the types of claims that we're going to seek to bring, and that vest this tribunal with merits to hear our claim, to determine whether or not there was actual discrimination, to determine whether or not there was actual unfair and inequitable treatment, and to determine whether an investment of Methanex and its U.S. investments was, in fact, expropriated by California.

Methanex submits that those are all intensely factual questions and that they can't really be decided at this stage. They can't be decided at all at this stage. Each one of those allegations deserves an opportunity to have the full evidence supporting them brought before the tribunal so that it can reach a reasoned conclusion with

respect to these allegations.

Thank you very much, and we will get back to you with the Vienna Convention Article 31.

MR. VEEDER: Does that conclude your submissions for the day?

MR. DUGAN: It concludes our submissions for this stage.

MR. VEEDER: We may have questions for you. We will indeed have questions for the United States, too, but we won't put them now. We will hear the United States tomorrow morning.

Is there any application from anybody that we need to deal with at this stage? I will ask the United States.

MR. LEGUM: No, there is not. Thank you.

MR. VEEDER: And I take it there's no application from Methanex that we need to deal with?

MR. DUGAN: One other thing. The evidence that we submitted, does the tribunal have any interest in going over that? Like I said --

MR. VEEDER: We received one page. We were going to come back to the second document,

which was the Moody's Investors Services document, after the United States has had a chance to look at it.

Has that happened, or do you want more time?

MR. CLODFELTER: We've not completed our review of it, Mr. Chairman, and we would like more time.

MR. VEEDER: We will come back to it later, and certainly if we need to look at it, we will give you a chance to develop it.

MR. DUGAN: Have you been given copies of all of the exhibits? You don't want to see them? You want us to give them to them first --

MR. VEEDER: I don't know which documents you're describing.

MR. DUGAN: A small stack of documents. The government has the entire stack, I believe. Yes.

MR. VEEDER: I think as long as there's no objection from the United States, we'd like to have the documents delivered to us as soon as possible.

MR. CLODFELTER: We've been given a stack of documents. We have no idea what they relate to. We have not studied them yet. I have no objection if you all take possession of copies of these documents, but we would like an opportunity to review them.

MR. VEEDER: We will leave it, I think. You look at them first, and we will come back to it. If we need to look at them, we will deal with it in due course.

How long does the United States estimate for their submissions tomorrow?

MR. LEGUM: I strongly suspect that we'll be done probably either shortly after lunch tomorrow, if not before lunch. It may take longer, but that's my estimate.

MR. VEEDER: In those circumstances, would you still want to stop tomorrow and then resume Friday morning, or would you prefer to have the --

MR. DUGAN: We would very much prefer to stop for the same reason that I think the United States has proffered. If there are new factual

materials, new legal materials, we'd like the opportunity to study those overnight before having to respond to them.

MR. VEEDER: Were there going to be new factual materials or new legal materials? Can you say at this stage? Obviously, the sooner you share them with your opponents, the more easy it is to introduce them, if they consent.

MR. LEGUM: We're not intending to introduce any new factual materials. I don't think that we have any new legal citations, but it's -- it would be presumptuous of me to rule that out at this stage.

MR. VEEDER: Okay. Let's close the hearing now. We will resume together at 9:00 tomorrow morning. Thank you very much.

(Whereupon, at 2:10 p.m., the hearing was adjourned, to be reconvened at 9:00 a.m., on Thursday, July 12, 2001.)

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

- - - - - - - - - - - - - - -x
METHANEX CORPORATION, :
Claimant/Investor, :
and :
UNITED STATES OF AMERICA, :
Respondent/Party. :
- - - - - - - - - - - - - - -x

ARBITRATION HEARING, VOLUME 2

Washington, DC
Thursday, July 12, 2001

REPORTED BY:
SARA EDGINGTON

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P R O C E E D I N G S

MR. VEEDER: Good morning, ladies and gentlemen. It's day 2 of our jurisdictional hearing. Today is the day for the United States. Before we start, is there any application to be made by either disputing party? Now, the Claimants first?

MR. DUGAN: No, none by us.

MR. LEGUM: No, none for the United States. Thank you.

MR. VEEDER: You have the floor.

MR. BETTAUER: Mr. President, members of the tribunal, it is my pleasure to open the United States' presentation on jurisdiction and admissibility. I speak on behalf of the entire United States team in saying that we are honored to appear before you.

This is a case of immense importance to the United States government, as you can see from the attendance at yesterday and today's hearing by representatives of many government agencies and the state of California. This is only the third NAFTA

Chapter 11 case against the United States. The decisions on matters at issue in this hearing, while they will not be binding on future tribunals, will clearly have wide future ramifications. It is critical, therefore, to us that this case be decided correctly.

This morning I shall make some general remarks, give a brief overview of the United States' presentation, and review for you how we intend to split up the presentation among the members of our team. We, obviously, do not intend to repeat all the arguments and authorities that we set forth in our written submission -- in our various written submissions, but we will ask the tribunal to keep in mind that we continue to rely on those arguments and authorities.

Let me start by drawing your attention to the breathtaking sweep of Methanex's claim. Under Methanex's reading of NAFTA, an announcement of a potential governmental action by any level of government in a NAFTA country may readily be argued to be a violation of NAFTA, even though it is not

yet in effect, even though the responsible governmental unit does not yet have legal authority to take the action contemplated. All the person or company needs to do is own a share in a company that may arguably be affected, no matter how indirectly, if and when the contemplated governmental action is actually taken. Under Methanex's view, a violation can be argued in the announcement may be seen by someone as being unfair or inequitable under an unknown subjective standard not based on international law. And even if the announcement is not argued to be fair or inequitable, if the result is a decrease in stock value or loss of sales, well, Methanex would argue that there has been a failure to provide full protection to the investor and there's liability anyway. An announcement that merely changes the general business climate would be enough to support a claim, in its view.

Mr. President, members of the tribunal, I submit that this is just not credible. It is unimaginable that the three NAFTA parties agreed to such a scheme. This would be a prescription for

total paralysis of governmental action. In fact, many governmental acts have some negative effect on a person or company. That is the nature of policy choices by governments in a democracy -- or in democracies. NAFTA was not drafted to allow each such negative effect to be the source of a potential claim.

Methanex argued yesterday: why not? Mr. Dugan asserted that the function of NAFTA was to increase the liability of the three state parties. But there's no basis for this incredible assertion. The NAFTA parties, wishing to promote investment, entered into specific commitments in Chapter 11 concerning the treatment to be accorded to investors and investments of the other parties.

The NAFTA parties agreed that their Chapter 11 commitments must be interpreted in accordance with applicable international law, and agreed that investors could bring cases to international tribunals in these -- in cases where those specific commitments were breached. They did not agree to abandon the requirements that claimants

prove their claims, claims founded in the specific terms agreed to. They never agreed to enter into NAFTA merely as an engine for increased liability to investors.

Methanex tries to get around this problem by focusing on specific words in the NAFTA, without respect to their context, and arguing that the ordinary meaning of these words may be found in the dictionary, without the need to go further. This, we submit, is not how the meaning of a treaty is found. Article 31 and 32 of the Vienna Convention on the law of treaties are accepted as codifying customary international law on treaty interpretation. Paragraph 1 of Article 31 requires that a treaty be interpreted, and I quote, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

One cannot just take a term out of context. The context, as defined in paragraph 2 of Article 31, includes the other terms of the treaty. One cannot, for example, ignore the word "including"

in Article 1105 of the NAFTA and focus only on the word "fair." And in interpreting NAFTA, one must take into account the factors defined in paragraph 3 of Article 31, any subsequent agreement regarding interpretation, subsequent practice, and relevant rules of international law.

We will comment further on the interpretation of specific provisions later, but my general point is that all elements in Article 31 and 32 of the Vienna Convention need to be considered. Indeed, the International Law Commission made exactly this point in paragraph 8 of its 1966 report when it adopted the proposed text of the Vienna Convention.

Yesterday, Mr. Dugan suggested that by applying the Vienna Convention principles to the interpretation of NAFTA, the parties might change the terms of the treaty and subvert their constitutional processes. That view flies in the face of accepted principles of treaty interpretation and precedent. International courts and international tribunals, arbitration panels

interpret treaties in accordance with applicable rules of international law all the time. Indeed, the NAFTA specifically calls for that in Articles 102(2) and 1131(1).

On the other hand, if one applies the principles suggested by Methanex, discretionary interpretation of words such as "fair," such as "equitable," by Chapter 11 arbitration panels without guidance established by customary international law, this would be a license for the panels themselves to revise the treaty framework agreed to by the parties. That is something the NAFTA panels are not allowed to do.

It is, of course, true, as Mr. Dugan maintained, that we all want uncontaminated drinking water. Methanex filed its claim because the state of California chose to announce a schedule for potential MTBE ban instead, according to Mr. Dugan, of upgrading underground storage tanks and more strictly enforcing the laws relating to them. The fact, of course, is that California chose to do both. Mr. Dugan did not mention that the executive

order at issue calls for increased storage tank enforcement and that Senate Bill 989 has some 20 pages of increased enforcement provisions. I also note that California has restricted some of the other chemicals on the list Mr. Dugan distributed yesterday, although he asserted the state has not. But now is not the time to debate facts.

Instead, the panel needs to understand the implications here. After much study and an open process, California decided on a multi-pronged approach to dealing with the problem of groundwater pollution. Part of that was an instruction from the governor to an agency to set a schedule for potential MTBE ban. Methanex would have this panel substitute its judgment for that of the state.

Mr. Dugan yesterday said that Methanex's claim is a routine claim. In our view, nothing could be further from the truth. In an unsuccessful attempt to support its claim, Methanex has put before the tribunal myriad authorities, but not one of those authorities accepts a claim that bears any resemblance to Methanex's claim here. There's a

reason for this. The text of NAFTA makes clear that it only covers claims where loss or damage has been incurred by reason of or arising out of a breach. As I have already noted, the NAFTA tells us to interpret such provisions in accordance with the applicable rules of international law. This includes both the law applicable to the interpretation of treaties, which I have just briefly addressed, and the law state responsibility, the backdrop of secondary rules that underpin the obligations contained in Chapter 11 of NAFTA.

A reading of the NAFTA's provisions, in light of these rules, makes clear that there must have been a direct and proximate causal link between the alleged breach of an obligation by a state and the damage complained of. That link does not exist here. There's no basis for state responsibility for government acts that merely change the general business environment in which a company operates.

Application of the specific terms set out in Chapter 11 of the NAFTA confirms that Methanex's claims here are far beyond the pale of accepted

international claims. Indeed, this is evident with respect to each claim, since Methanex argues for novel interpretations of Chapter 11's terms. Let me turn to Methanex's particular claims for breach. My colleagues on the U.S. team will address each of these in more detail, but I would like to give you a very brief summary of our argument now.

Methanex's first claim of breach is under Chapter 1102 -- excuse me, Article 1102, Chapter 11's national treatment provision. We will show that that claim has no legal basis. Here, in summary, is the reason. Methanex does not dispute that the measure in question provides it with precisely the same treatment that the measure provides to U.S. investors and U.S.-owned investments in the methanol industry. Instead, Methanex contends that the national treatment obligation entitles it to better treatment than other participants in the methanol industry. Methanex claims that it, unlike other participants in the methanol industry, is entitled to be treated as if it produced and marketed ethanol, a different

product. That is not, however, what national treatment means.

Methanex does not produce or market ethanol. Like the other participants in the domestic United States -- excuse me, Methanex does not produce or market ethanol. I hope I said it correctly. Like the other participants in the domestic United States methanol industry, Methanex produces and markets methanol. The tribunal, we submit, does not need an evidentiary hearing to figure out whether Methanex is in like circumstances with methanol producers and not with ethanol producers, and thus defined, that Methanex's national treatment claim is baseless on its face.

Methanex's next claim for breach is based on the requirement in paragraph 1 of Article 1105 of "treatment in accordance with international law." Because Methanex cannot anchor its claim to any existing rule of international law, it urges the tribunal to change the rules so its claim can fit.

Methanex's argument is that treatment in accordance with international law does not, in fact,

require the tribunal to identify and apply rules of international law, but instead permits it to decide the case on whatever basis the tribunal thinks is fair or equitable in an intuitive and subjective sense.

Methanex also argues that this tribunal should import certain provisions from the GATT or WTO trade agreements, not investment provisions like Chapter 11, to give contents to these words, but there is no legal basis for doing so. Neither of these two approaches is supportable. In effect, Methanex attempts to transform the Article 1105 requirement of treatment in accordance with international -- with law into its exact opposite, a license to decide without regard to law.

The tribunal does not need an evidentiary hearing to decide that that is not what 1105(1) contemplates. For it is clear in paragraph 2 of Article 33 of the UNCITRAL rules that the tribunal can only decide ex aequo et bono if the parties have expressly authorized it, clearly not the case here. Methanex has made a number of arguments under the

heading of Article 1105. In our presentation, we will explain in some detail why none has merit. I will limit myself to the observation that none of Methanex's arguments fit any basis in international law. Each would require the tribunal to break new ground in order to permit Methanex's claim to proceed.

While obviously the issues in this case arise under the specific provisions of the NAFTA and have to date been only a limited number of cases decided by Chapter 11 tribunals, the text of 1105 deals with treatment in accordance with international law rules. Thus, one looks to previous international decisions to see if any tribunal has ever found that there are violation of the type that Methanex asserts, but one finds nothing. No tribunal has ever found, for example, that international law precludes elected officials from deciding matters that might affect contributors to their campaigns for offices. There's good reason why there are no such holdings, no such rules exist.

Methanex's final claim of breach is under

Article 1110, NAFTA's provision on expropriation. Here, again, we will demonstrate that Methanex alleges nothing remotely resembling an expropriation as known in international claims practice. Methanex has not been dispossessed of any property in the United States. It remains in control of its investments. Here, indeed, the U.S. segment of Methanex's business has been generating increasing income for Methanex in the months and years since the executive order was announced.

Instead, Methanex claims that its investments in the United States may not generate as much income for it in the future as a result of the MTBE ban that is due to come into effect. This, they argue, amounts to an expropriation of goodwill and market share. Those factors, standing alone. But no international tribunal has ever accepted a claim of expropriation of goodwill or market share by itself. While impacts on goodwill may result from the expropriation of a going concern and in appropriate cases, goodwill, lost profits, and other factors need to be taken into account in determining

damages. We will show that neither goodwill nor market share is something capable of expropriation.

Those are the specific claims, but there are also more general bases for dismissal at this point. There are several fundamental defects that pervade all of Methanex's claim. We will show that Methanex's claims fail because the measure of which it complains is far too remote from any purported injuries suffered by Methanex for Methanex to have standing to assert a claim. Methanex admits that it manufactures and markets methanol, not MTBE. It does not produce or market MTBE, and the derivatives of methanol are much more diversified than MTBE's single use in gasoline. Methanol is not banned by the California measures. Methanol can still be legally manufactured and marketed for use anywhere in the United States, and this will continue to be true after December 2002.

Methanex will feel any effect of the California measure only if, as anticipated, gasoline suppliers of the California market purchase less MTBE and the MTBE producers, potential contractors

with methanol, then purchase less methanol to use to make MTBE. A claim based on such a remote and contingent impact must fail. It must fail as a matter of law. We will show that it is well-established that a Claimant cannot recover for losses suffered merely as a result of a measure's effect on persons with which it has a contractual relationship. There's no dispute here as to the chain of causation. The measures complained of are anticipated to have primary effect on gasoline suppliers. They are anticipated to have a once-removed effect, a secondary effect on MTBE producers. They could only have a twice-removed effect, a tertiary effect on methanol producers.

This is clearly true, and there's no need for an evidentiary hearing to determine this. And it is beyond dispute that the international authorities collected in the United States' memorial, which we will summarize in our presentation, compel dismissal of a claim such as this one as too remote.

Methanex argues that the phrase in

Articles 1116 and 1117 referring to "loss or damage by reason of, or arising out of" a breach indicates an intent by the NAFTA parties to adopt a new broad standard of causation hitherto unknown in international law. Methanex asserts this from its reading of the text alone, without any authority to support that proposition. We will show that there's no basis for this assertion and that these provisions -- there's no basis for the assertion that these provisions change the substantive standards applicable to breach, and that international law authorities are, in fact, to the contrary.

Our team will review other reasons as well that compel dismissal of Methanex's claim.

Let me point to one more. Methanex's claim is startling in its assertion that it is entitled to approximately $1 billion in damages for a ban that has not yet gone into effect. This assertion is simply not credible. We will show that no damage Methanex claims is legally cognizable at this stage.

Finally, everything before this tribunal can be resolved as a preliminary matter, without the need for a hearing. We will show that on the basis of the facts alleged by Methanex and the facts we allege that Methanex does not contest, Methanex does not assert a claim that, on analysis, falls under the NAFTA as a matter of law.

This is so looking either at the original claim submitted by Methanex or at Methanex's proposed amendment. If the proposed amendment does not fall under Chapter 11 as a matter of law, it should not be allowed. In that event, the amendment would be impermissible under Article 20 of the UNCITRAL arbitration rules because it would fall outside the scope of the arbitration agreement.

Whether a claim is within the tribunal's jurisdiction or is admissible under the NAFTA Chapter 11 provisions is thus a legal question. The tribunal can decide these matters based on the facts, as I've just said, that have been alleged by Methanex and are undisputed. These questions should be addressed at this stage, since that would be the

most efficient way to handle the proceedings.

As I noted at the outset, each of my colleagues will address these points in greater detail. They will make clear the multiple separate reasons why Methanex's claims should be dismissed. We will distribute a list of how we will address the issues so that you can follow along. Let me summarize. Mark Clodfelter will address Methanex's claims of breach under Article 1102, the national treatment provision. Then Bart Legum will examine Methanex's multiple claims under Article 1105(1), the general treatment provision.

Next, Andrea Menaker will review Methanex's claim of breach under Article 1110, the expropriation provision. We will then address the United States' cross-cutting objections that apply to all of Methanex's claims of breach. Alan Birnbaum will explain why Methanex's claims are too remote to be cognizable under Articles 1116 and 1117. Next, Andrea Menaker will explain why, at this point, the ban has not yet -- with the ban not yet in effect, there has been no legally cognizable

damage.

Finally, Ms. Menaker will briefly address why Methanex cannot assert a claim under Article 1116 for alleged injuries to the enterprise.

I now invite the tribunal to turn the floor over to Mark Clodfelter, who will address Methanex's claim under Article 1102. Thank you very much.

MR. CHRISTOPHER: Mr. Bettauer, you were careful to say you weren't trying to cover the entire waterfront in your statement, but I wondered if you are going to rely on the fact that -- on the argument that the Methanex claim is not a measure relating to an investor under 1101.

MR. BETTAUER: We will address the "relating to" point in our presentation. We think there is an issue there, and we maintain the position that we've set forth in our memorials, and we will briefly summarize that in our presentation.

MR. CHRISTOPHER: So that point has not been abandoned or dropped?

MR. BETTAUER: That point has not been

abandoned or dropped.

MR. CHRISTOPHER: Thank you.

MR. VEEDER: That was the same point, in fact, we were going to raise, if you could just make sure you do cover 1101. Although it's been very well-covered in both parties' written submissions, we'd like help from both parties, in particular the United States, on 1101, the "relating to" point.

MR. BETTAUER: It shall be done.

MR. CLODFELTER: Mr. President, then I will proceed to make the United States' comments on Methanex's 1102 claim. Under 1102, Methanex has two fundamental burdens: first, it must show that it or its investments is, in like circumstances with the ethanol producers, alleged to be treated differently; and second, it most show that the California measures impermissibly accord it and its investments treatment that is less favorable than that accorded to ethanol producers on the basis of the nationality of their ownership.

For the rest of my presentation, when I refer to "Methanex," I will be referring to their

investments as well. When I refer to "producers," I mean to include marketers as well.

Methanex spent a lot of time yesterday talking about the factors that it contends put it in like circumstances with ethanol producers, and about their various theories of how it has been discriminated against, but these issues cannot be resolved at this stage of the proceedings. We obviously take issue with Methanex's factual contentions with respect to both the question of like circumstances and less favorable treatment.

The evidence, however, is not sufficiently developed to permit a decision on many of these contentions. For example, Methanex has not even begun to meet its burden of proving that the California measures accord Methanex impermissibly less favorable treatment than they do to ethanol producers, and we believe that the evidence would show quite the opposite. Nor is there enough evidence to permit a finding that Methanex is even in like circumstances with ethanol producers.

However, we don't believe that the

tribunal needs to consider further evidence on these issues, and this is because the claim should be disposed of at this preliminary stage on legal grounds as inadmissible. Based on the uncontested facts and taking Claimant's allegations to be true for purposes of argument, you can and you should determine that as a matter of law, Methanex and its investments are not in like circumstances with ethanol producers.

And this is so because, again, as a matter of law, the only proper comparison for determining national treatment in this case is between Methanex on one hand and U.S.-owned methanol producers on the other. And because the California measures admittedly treat Methanex exactly the same way that they treat U.S.-owned methanol producers, there can be no Article 1102 violation. This is the issue I will be discussing primarily today, although I will have a few comments about the other points made by Methanex yesterday.

There are four uncontested facts that underlie the conclusion that Methanex cannot be

considered in like circumstances with ethanol producers. First is the obvious observation already made by Mr. Bettauer that Methanex and its American investments produce and/or market methanol.

Second, there happens to be a huge United States-owned methanol industry. One would think, from reading Methanex's written submissions, that the methanol industry and the MTBE industry, for that matter, are nondomestic industries, but in fact, as is uncontested, the U.S.-owned -- U.S. methanol industry supplies three quarters of the U.S. methanol consumption, and fully one quarter of the entire world's demand for methanol.

The third uncontested fact is that the U.S. investors and the U.S.-owned investments that make up this domestic methanol industry are in like circumstances with Methanex. Indeed, they are in identical circumstances.

And finally, it is undisputed that the California measures accord Methanex and its U.S. affiliates precisely the same treatment that they accord to these U.S. investors and U.S.-owned

investments. Given these four facts, the only proper comparison of investors and investments in like circumstances is between Methanex and U.S.-owned methanol producers.

Thus, it would not be proper to also consider Methanex to be in like circumstances with U.S. ethanol producers, and there are three reasons for this conclusion. First, it would be extremely incongruous to apply the like circumstances requirement this way, under these facts.

It cannot be disputed that the circumstances in which U.S. ethanol producers find themselves are less like those of Methanex than are the circumstances of U.S.-owned methanol producers; that is, the U.S. investors who do precisely what Methanex and its affiliates do. Among other differences, compared to methanol producers, ethanol producers use very different processes to produce a different product, at least most of whose uses, and we would contend all of whose uses, but for purposes of arguments, at least most of whose uses are different.

On the other hand, U.S. methanol producers perform the very same activities as does Methanex and its subsidiaries. Just to put it another way, U.S. methanol producers are in circumstances more similar, indeed, much more similar to Methanex than are U.S. ethanol producers.

Now, there may be cases in which there has to be a comparison made between foreign and domestic investors who do not produce exactly the same product or provide the same service, or who do not operate in exactly the same way. This could be the case, for example, where there simply are no domestic investors exactly like the Claimant, and the facts otherwise indicate that other investors are similar enough to justify considering their circumstances to be alike.

But it just does not make sense to opt for a comparison of investors in less similar circumstances, when there is a substantial body of domestic investors in identical circumstances with the Claimant. The proper group for comparison in this case is obvious, those domestic investors and

investments who do exactly the same thing as the Claimant investor and its investments. Methanex, on one hand, U.S. methanol producers on the other. No other comparison would be appropriate.

The second reason why Methanex should not be compared with U.S.-owned ethanol producers is that those authorities who have considered this issue -- and they happen to be Methanex's own authorities -- have rejected such comparisons, where there is a substantial domestic industry that is both identical to and treated the same way as the Claimant. And I'd like to discuss two of these authorities, the Pope & Talbot case and Professor John Jackson's treatise. And because the Pope & Talbot case is complicated, I'm going to take time to go through it very carefully.

Methanex cites the Pope & Talbot tribunal for the proposition that "as a first step, the treatment accorded a foreign-owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector." This is at pages 17

and 18 of Methanex's May 25th rejoinder.

I should note that the rejoinder miscites this quotation as coming from paragraph 78 of the Pope & Talbot's tribunal's June 26th, 2001 interim award, when it actually comes from paragraph 78 of the April 10th award on the merits in the second phase. This was part of the award that Mr. Dugan made reference to yesterday.

I will have more to say in a few minutes about what that tribunal and the tribunal in the S.D. Myers case meant when they spoke of "business" or "economic sector," but for now, I would like to focus on what the Pope & Talbot tribunal had to say about the like circumstances requirement, in a factual situation exactly analogous to the one in this case.

As you will recall, Pope & Talbot involved a challenge to Canada's implementation of the softwood lumber agreement between it and the United States. That agreement required Canada to impose export fees on softwood lumber exports to the United States from certain Canadian provinces called

covered provinces under the agreement. One of Pope & Talbot's claims was that the regime adopted by Canada for allocating the burden of these export fees violated the national treatment guarantee of Article 1102.

Pope & Talbot, of course, had to show that it was in like circumstances with favored domestic investments, and it tried to do this with respect to three different groups of Canadian lumber producers. It ended up losing on all three attempts, and its Article 1102 claims were dismissed. But one of its attempts is very instructive, because it was based upon the same kind of relationships as you have before you in this case.

Pope & Talbot operated in British Columbia, one of the covered provinces, and it argued that it was in like circumstances with Canadian lumber producers in the noncovered provinces; that is, the provinces where no export fees were charged. Pope & Talbot argued that because it was in like circumstances with those noncovered producers, it, too, was entitled under

Article 1102 to export lumber to the United States without paying export fees. The tribunal rejected this argument for two reasons, as explained in paragraphs 86 through 88 of its award.

First, it held that the decision of Canada to exclude noncovered provinces, the decision to exclude noncovered provinces from the fee requirement, was reasonably related to a rational policy of removing the threat of countervailing duty claims by the United States, which was realistically only aimed at the covered provinces. But the second reason is the reason that's pertinent for this case. The tribunal stated as follows in paragraph 87. "Since the decision"; that is, the decision to exclude noncovered provinces from the fee requirement, "affects over 500 Canadian-owned producers, precisely as it affects the investor, it cannot reasonably be said to be motivated by discrimination outlawed by Article 1102."

The tribunal concluded as follows in the very next sentence, paragraph 88, "based on that analysis, the producers in the noncovered provinces

were not in like circumstances with those in the covered provinces."

In other words, Pope & Talbot could not possibly be in like circumstances with lumber producers in the noncovered provinces, because there was a substantial number of Canadian lumber producers in the covered provinces just like Pope & Talbot. Or to put it another way, because the Canadian producers in the covered provinces were in exactly the same circumstances as Pope & Talbot and were subject to the same export fees as was Pope & Talbot, Pope & Talbot could not, as a matter of law, properly be compared to Canadian lumber producers in the noncovered provinces. This, of course, is exactly analogous to the situation here. Just as the Canadian lumber producers in the noncovered provinces were not subject to the export fees, U.S. ethanol producers would not be subject to negative effects of a ban on gasoline containing MTBE. And just as the Canadian-owned lumber producers in the covered provinces were subject to the export fee, U.S.-owned methanol producers would be subject to

any negative effects from such a ban on MTBE use.

And finally, just as -- because of these facts, covered province producers like Pope & Talbot cannot be considered in like circumstances with producers in noncovered provinces, for the same reasons, methanol producers cannot be considered in like circumstances with ethanol producers. Therefore, under Methanex's own authority, it is not in like circumstances with ethanol producers, and because the domestic investments with which it is in like circumstances, namely U.S.-owned methanol producers, are treated exactly the same way as Methanex by the measures, there can be no Article 1102 violation.

The second of Methanex's authorities I wanted to discuss was --

MR. ROWLEY: Can I ask you a question at this stage?

MR. CLODFELTER: Yes, sir.

MR. ROWLEY: Would it follow from what you say that if the California government intended to discriminate in favor of ethanol and against

methanol producers by an intention to introduce an ethanol industry, that a company such as Methanex would not have a claim under 1102?

MR. CLODFELTER: I will have some comments on the claim of intentional discrimination, but I think the whole point of the Pope & Talbot analysis was that that possibly is not credible. It's not credible that there be intent to harm, for example, foreign methanol producers, when there's such a huge U.S. methanol industry that would be equally harmed. That was the conclusion reached by the Pope & Talbot tribunal, and that is what makes the allegation incredible and the comparison unacceptable.

Should I go ahead?

MR. ROWLEY: Yes.

MR. CLODFELTER: Methanex cites Professor Jackson's highly regarded treatise on GATT law, that under GATT jurisprudence, different products, like methanol and ethanol, can be considered "like products" for purposes of GATT Article 3.2. Professor Jackson was, of course, not addressing NAFTA Article 1102. Article 3 of the GATT is

significantly different from Article 1102 of the NAFTA, and there's a real danger in using GATT and WTO decisions on likeness in the NAFTA Chapter 11 context. None of the likeness tests in the GATT or WTO agreements involve a like circumstances test, and none are applicable to investors, or investments, as opposed to products.

In addition, there are different tests for like products, even within the context of the GATT and WTO, depending on the provision at issue. So it is very difficult to use this concept, even by analogy, as numerous GATT and WTO panels have warned.

Nevertheless, even putting aside these limitations, Professor Jackson's treatise undercuts the main thrust of Methanex's argument. At page 5 of its rejoinder, Methanex points to a hypothetical example cited by Professor Jackson taken from the GATT preparatory meetings. The example attempts to show how apples and oranges, the quintessential metaphors for things that are different, can still be like products for purposes of GATT Article 3.2,

dealing with internal taxes.

In that example, a favorable tariff is negotiated for imported oranges, but new internal duties imposed on oranges actually have the effect of increasing the total cost of oranges to the point where consumers stop buying them, thereby protecting a domestic apple industry. Methanex argues that even very different products can, thus, be like enough so that unfavorable treatment of one constitutes a national treatment violation. However, Methanex neglects to point out that the premise of this hypothetical is that there is no domestic orange production with which to compare treatment. The import company did so because "it grows no oranges itself."

Professor Jackson's analysis makes clear that this conception of likeness would not apply, and a comparison of the treatment of oranges and apples would not be valid, if there was a domestic orange industry that was treated the same way as the imported orange industry. Indeed, this is the case whenever there is a substantial domestic industry

identical to the foreign industry and they are treated alike, just as we have in this case with U.S.-owned methanol producers.

Thus, Methanex's own authorities show that foreign-owned investments are in like circumstances with substantial and identical domestic investments who are treated the same, and that they cannot be compared to other nonidentical domestic investments for purposes of establishing a national treatment violation.

The third reason for rejecting Methanex's attempt to lump itself with ethanol producers is that it has been unable to cite a single case that has held that different products, services, investors, or investments should be compared as if they were alike where there was an identical domestic industry that received the same treatment as the Claimant. None of the cases cited by Methanex supports its contention that this tribunal should ignore those investments that are in precisely the same circumstances with it, and instead compare it to investments that produce and

market a different product.

In S.D. Myers, the service provided by the U.S.-owned company found to be in like circumstances with the favored Canadian companies was exactly the same, namely the reprocessing of PCB wastes. In the Cross-Border Trucking case, all of the investments at issue were trucking companies, identical. In the Alcoholic and Malt Beverages case, the advantaged product that benefited from a lower Mississippi excise tax and the Canadian product involved were identical products, namely "still wine."

Similarly, in the Reformulated Gasoline case, both the allegedly favored product and the injured product was gasoline. Thus, all four of these cases are different from this case, because the favored and injured products or services involved were identical. Methanol and ethanol are admittedly not identical.

The taxes on petroleum case similarly is different because the identical domestic industry involved was not treated the same as the foreign industry because it was subsidized. Of course,

here, it is conceded that the U.S. methanol industry receives treatment under the California measures no different from that received by Methanex.

And in the EEC Animal Feed Proteins case, the panel actually held that while the favored domestic product involved was substitutable for import products, it was not a "like product" in relation to the imported products involved. This is at paragraph 4.2 of the panel report. That is, the panel rejected the designation of "likeness" that Methanex seeks in relation to ethanol producers in this case. Methanex can point to no case in which the comparison it seeks here was adopted by a tribunal in a situation present in this case.

Methanex has no solution to this fundamental problem with its 1102 claim. It is simply not valid to claim a violation of national treatment in relation to domestic investors who make a different product when you are treated exactly the same as a substantial domestic industry that makes exactly the same product as you do. In this case, the only proper comparison or treatment accorded to

investors and investments is between Methanex and U.S.-owned methanol producers.

We believe that this disposes of the question of like circumstances, based on uncontested facts and without the need for further evidence. Of course, if the tribunal were to disagree, it would still have to determine whether Methanex was or was not in like circumstances with ethanol producers, and as I suggested earlier, this question would require more evidence. While Methanex spent some time yesterday on its analysis of when investments are in like circumstances as opposed to when they are not, it really isn't ripe for decision.

So I will limit myself to a few comments on the points that they made. Based on dicta in the Pope & Talbot and S.D. Myers awards, Methanex argues that investments in the same business or economic sector are automatically in like circumstances. Unfortunately, neither tribunal explained what a "sector" was or how you determine when two industries are in the same sector. The S.D. Myers tribunal didn't have to do so, since the three

companies involved all performed the identical service and were thus obviously in the same sector. So that case is of no help where you have investments producing different products. And as we have seen, the Pope & Talbot award actually repudiates the relevance of the business sector concept in its actual application of the like circumstances test.

You will recall that the tribunal rejected the claims of like circumstances with lumber producers in noncovered provinces, in other covered provinces, and in British Columbia itself, even though all the companies involved did exactly the same thing, produced lumber, and obviously were in the same sector. So even companies that are obviously in the same sector in Pope & Talbot are not considered to be in like circumstances. Moreover, Methanex's argument that competitiveness is the key factor is not very helpful either.

The S.D. Myers award does mention the ability to take away customers through price competition, but only after it mentions, and clearly

as an adjunct to the fact, that the companies involved were all in the exact same business, something not present here in this case.

And while the asbestos case does, as Mr. Dugan read yesterday, say that competitiveness is important in trade cases, it then tempered its view in the same paragraph read yesterday, 99, the appellate body continues by saying "we are not saying that all products which are in some competitive relationship are "like products" under Article 3.4."

What is more interesting about the asbestos case, however, is even though the appellate body found the requisite competitiveness, it still declined to find that the products involved were "like products."

And that was because of the inherently higher risk posed to the public by asbestos as compared to other competitive fibers. Obviously, if this case -- this claim were to continue, this would be a key issue with regard to methanol and MTBE.

Yesterday, Methanex also addressed the

issue of unfavorable treatment. This, too, is a question for a later stage of the claim, if there is a later stage, so I won't say too much about it, either.

Methanex contends that the discrimination it alleges is demonstrated in three ways, on the face of the executive order; de facto; and because the measures were intended to discriminate against foreign methanol producers. Just briefly in response, clearly, no discrimination is apparent from the terms of the executive order, and we do not believe that Methanex will be able to prove any de facto discrimination. But Methanex's allegations with respect to intentional discrimination should be rejected out of hand by this tribunal, as we requested at page 16 of our reply memorial.

These allegations are a mere tissue of innuendo, and Methanex's case is based upon inference built upon inference. I have to say that we were shocked yesterday by Mr. Dugan's candid admission that Methanex does not have a shred of evidence to back up these wild charges. And in

response to Mr. Rowley's question yesterday, it's significant that these measures have not been challenged on this ground, on grounds of arbitrariness and capriciousness, in any U.S. court.

Methanex --

MR. VEEDER: Can I interrupt you there, because it's not alleged that the governor of California did anything unlawful, but if a governor of a state, say California, intended harm to Methanex in the way that was suggested yesterday, would that be lawful conduct, or would that be unlawful?

MR. CLODFELTER: Let me say, Mr. Chairman, and not wanting to be evasive, first of all, that that is not what we have here, and the very fact that there's no evidence of that really suggests that you or we should not have to deal with that question. But more directly, let me say that intention might in certain circumstances be relevant, but it depends on the other circumstances, and I am not prepared to go into what role it would play when at this point. Fortunately, it's not

something that we believe you're going to have to struggle with.

MR. VEEDER: What I'm struggling with is, certainly, by reference to the jurisdiction with which I'm familiar, which, if it's accepted that the governor of California did nothing wrong, both in the civil or criminal law, and yet it's suggested that he intended harm to Methanex, not simply as a benefit to the ethanol producers but intended harm to Methanex itself, I'm having some difficulty with the legal principles with which I'm familiar as to whether that could be lawful.

MR. CLODFELTER: I think we can safely say that without more, that would not be sufficient to establish a national treatment violation. First of all, understand the measures that we're dealing with here. The governor issued an executive order. The governor didn't have authority to order a ban on gasoline with MTBE. His regulatory agencies did not have that authority. He ordered a timetable. Subsequently, the California legislature passed authority to prohibit gasoline with MTBE, but the

legislature is not the governor, of course. That legislation was implemented by way of regulations, by administrative agencies who also are not the governor.

Without specific facts, it's impossible to determine the affect of the governor's intention to harm somebody on a claim for a national treatment violation. It would not, by itself, be sufficient, even if true.

MR. VEEDER: My question is not related to Article 1102. It's a broad question. It may be that you need to be a Californian lawyer. If it's accepted -- if it isn't, we will hear more from Methanex -- that the governor of California did nothing unlawful, can it be suggested that he intended -- I will add the word "maliciously," to make it even clearer -- to harm Methanex, but certainly in the jurisdiction from which I come, targeted malice by public officials is unlawful.

MR. CLODFELTER: To harm Methanex in particular as opposed to, say, the Canadian methanol industry?

MR. VEEDER: Let's take it at the extreme. I'm not saying that's the allegation you're facing. I'm trying to clarify where lawfulness/nonlawfulness goes in terms of the governor of California.

MR. CLODFELTER: I don't know that we're going to need a California lawyer or not, but I think we will need some time. We want to carefully consider this.

MR. CHRISTOPHER: When you consider that, Mr. Clodfelter, would you consider whether or not, if there was a malicious intent to injure Methanex, whether that would not constitute a bill of attainder and must be unlawful in those terms?

MR. CLODFELTER: We will, and some other possible implications of law of such an intent.

MR. CHRISTOPHER: Did you understand Methanex to argue yesterday that there was an intent on behalf of the state, through the governor, to injure Methanex directly as a company, or did you understand it was an intent to injure the methanol industry?

MR. CLODFELTER: We take it as an

allegation of intent to penalize the methanol industry, the foreign methanol industry.

MR. CHRISTOPHER: And Methanex is a part of that.

MR. CLODFELTER: But not targeted to Methanex in particular.

MR. CHRISTOPHER: If there was such an intent, would you think that would bring the case within 1102?

MR. CLODFELTER: As I said, the subjective intent of one particular official, we do not believe would be sufficient to establish, without more, that there's a violation of the national treatment requirement. It's hard to deal with concepts about intent and measures which have such wide participation in their enactment. Exactly what factors such a subjective intent on the part of one official would have, it would have to be carefully considered.

MR. CHRISTOPHER: Mr. Clodfelter, in your discussion this morning, your comments were laced with the need to have additional evidence, or the

need to analyze or compare the evidence involved. Could you give us a succinct statement as to why, under 1102, there is a jurisdictional defect in the pleadings?

MR. CLODFELTER: Well, our 1102 objection is an admissibility objection. In other words, that taking all of the allegations of fact made to be true, including uncontested facts, that as a matter of law, there can be no claim, and that the claim is ripe for dismissal at this stage for that reason.

MR. CHRISTOPHER: And because?

MR. CLODFELTER: Because, as a matter of law, there can be no national treatment violation when the Claimant -- when there is a substantial domestic industry that is exactly like the industry of which the claimant is a part and is treated exactly the same way by those measures. It cannot be said that Methanex has suffered a national treatment violation when they've suffered the same treatment that every U.S. methanol producer has made. That's a legal question. That's why, for example, the Pope & Talbot tribunal reached its

conclusion.

Now, the facts it needed to reach that conclusion were on the basis of evidentiary submissions. Here, they are supplied by taking the allegations made to be true and looking at uncontested facts. So you have all the evidence you need to apply the law on this point.

MR. CHRISTOPHER: Looked at in its most favorable light to Methanex, you say that the allegations do not meet the test of 1102 because they're treated no different than other methanol producers?

MR. CLODFELTER: Treated no different than the substantial U.S. methanol industry is treated, exactly.

MR. ROWLEY: May I just go back to the point that I raised earlier? You said, if my note is correct a few minutes ago, that you took Methanex's allegations yesterday to be that there was an intention by the governor to harm not Methanex itself, but the foreign methanol industry. Now, you may have taken that to be what they said

yesterday. Whether or not that is the allegation in the claim or the draft amended claim is another matter.

But on the basis of what you took them to be saying yesterday, should that be the allegation, and if we must accept that as factually accurate for our purposes today, are you telling us that as a matter of law, 1102 cannot be used to give relief against those foreign producers of methanol who are intentionally discriminated against, whether it's Methanex or some other foreign producer? The domestic producers may or may not have their own domestic cause of action. I know nothing about that.

MR. CLODFELTER: We accept the reasoning of the Pope & Talbot tribunal that the very existence of a substantial domestic industry identical to the Claimant's industry and treated the same way excludes the possibility of intentional discrimination as a matter of law. That's what their conclusion was. We believe that's the right conclusion, and the intention or otherwise, there is

no discrimination in that situation.

Is that responsive?

MR. ROWLEY: That's an answer.

MR. VEEDER: Do please continue.

MR. CLODFELTER: I was talking about the allegations of intentional discrimination and the thinness of those allegations, and what we think the implications of that thinness are.

Methanex has frequently repeated its view that all it has to do to survive this stage is make credible allegations. The allegations made on this point are not credible allegations. They're scandalous allegations, and the very fact that they were made without the barest evidence is really a comment on the weakness of Methanex's entire case.

We renew our request that you summarily reject Methanex's allegation of intentional discrimination. With that, I am finished with my presentation, Mr. President. I would be happy to take additional questions; also happy to turn the floor over to my colleague.

MR. VEEDER: We will continue with your

colleagues.

MR. LEGUM: Mr. President, members of the tribunal, I will address Methanex's claims under Article 1105(1) this morning. That article requires treatment in accordance with international law, including fair and equitable treatment and full protection and security. As the tribunal is aware, Methanex has made a large number of assertions under the heading of this article. For purposes of this presentation, I will divide Methanex's assertions into two camps. The first is its assertion that the article's phrase "fair and equitable treatment" empowers the tribunal to decide the case not according to rules of law but rather according to whatever the tribunal deems to be fair or equitable.

The second is its assertion that assuming the case is to -- excuse me, assuming the tribunal is to decide the case according to rules of law, various principles have become rules of customary international law that apply to the measures at issue here.

And my proposal is to break for coffee at

the midpoint of my remarks, although if the tribunal would find it more convenient at any point to break earlier, I'd be happy.

MR. VEEDER: We're in your hands. At some convenient point to you, you decide.

MR. LEGUM: Very good. I'd like to begin with four points on the subject of fair and equitable treatment. First that the text of Article 1105(1) does not support Methanex's position. Second, that the accord among the three NAFTA parties rejecting Methanex's interpretation is authoritative. Third, that state practice does not support Methanex's position. And finally, that Methanex's position makes no sense from a historical or a policy perspective.

I'll start with the text of article Article 1105, which Methanex claims must be amended if it is to conform to the interpretation given it by all three NAFTA parties. As a preliminary matter, I note that the text does not provide for a state to accord fair and equitable treatment, full stop, as Methanex argued yesterday. Instead, it

requires treatment in accordance with international law, including fair and equitable treatment. The text sends a clear signal that the phrase "fair and equitable treatment" is not to be read in the abstract, but rather is to be read as a part of existing international law. In other words, as the Supreme Court of British Columbia found in setting aside part of the Metalclad award earlier this year on similar grounds, fair and equitable treatment is not additive to the requirement of treatment in accordance with international law, as Methanex argues.

Instead, it is to be read as required, to the extent that fair and equitable treatment is recognized in international law. That, as the British Columbia court found, is the plain import of the word "including" in Article 1105(1). Now, I will turn in a moment to the content of the phrase "fair and equitable treatment in international law."

Before doing so, however, I would like to address Methanex's assertion that the three NAFTA parties misinterpreted the treaty they drafted

because the word "customary" does not appear in the text. Methanex is correct that the word "customary" does not appear in the text, but it doesn't need to. Article 31(1) of the Vienna Convention requires the terms of the treaty to be construed in their context and in light of its object and purpose. The text of Article 1105(1), in its context and in light of its object and purpose, clearly signals that the parties had a specific body of law in mind in referring to international law in Article 1105(1).

The first signal is the title of the article, which is "minimum standard of treatment." The title accords with the obligation imposed by the article, which is that parties accord to investments of investors of another party treatment in accordance with international law. It is plain, from these signals, that the NAFTA parties had in mind not the entirety of international law, but that part of international law that deals with standards of treatment.

The next signal is the object of the obligation, investments of investors of another

party. We know from the definition of this phrase in Article 1139 that it refers to various forms of property that are directly or indirectly owned by aliens who are nationals or residents of another NAFTA party. We know from Article 1101(1), chapter 11's scope provision, that the property at issue must be within the territory of the party to be covered by the chapter.

These signposts make it clear that the NAFTA parties, in Article 1105(1), were referring specifically to that part of international law that provides standards of treatment for the property of aliens in the territory of the host state. The context makes it clear that the parties were not referring to the entirety of international law, as Methanex contends. Articles 1116 and 1117(1) provide further context for the use of the term "international law" in Article 1105(1). Those articles provide a fairly narrow list of provisions in the NAFTA that may be made the subject of investor state arbitration. The list includes Section A of Chapter 11 and a couple of provisions

from the NAFTA's competition law chapter.

Clearly, there are many other provisions in the NAFTA that constitute international law for the NAFTA parties, and the NAFTA parties were well aware that there were other provisions in other agreements that constituted international law for them. NAFTA Article 103, entitled "relation to other agreements," for example, notes and reaffirms the parties' existing obligations under the GATT and other agreements to which the NAFTA parties are party. But the NAFTA parties decided not to allow any of those provisions to be the subject of investor state arbitration. Reading Article 1105(1)'s reference to international law to incorporate these conventional obligations would be unreasonable because it would defeat the intent of the parties, clearly expressed in Articles 1116(1) and 1117(1). The context of 1105(1), therefore, makes it clear that the reference to international law cannot reasonably be read to sweep in all of international law.

Instead, the text of the context make

clear that the international law in question is that dealing with treatment of investments of aliens in the territory of another state. There is a body of law that addresses this subject. It is known as the international minimum standard of treatment for aliens. It happens to be a body of customary law, efforts of codification in the 1960s having concluded without approved text.

Thus, the text and the context of Article 1105(1) confirm the view expressed to this tribunal by all three NAFTA parties as to the meaning of the provision in the treaty. The reference is to the customary international law, minimum standard of treatment. Far from being an after-the-fact amendment of the treaty, as Methanex contends, the NAFTA parties' interpretation of the provision fully accords with the language and the context of the article.

MR. CHRISTOPHER: Mr. Legum, before you leave your first point on the text, what do you say of Mr. Dugan's argument that conventional international law becomes so widespread in this area

by bilateral treaties that it has risen to the level of international law, customary international law -- I may not be doing justice to his point, but I understood that to be generally his point, that conventional international law on this subject is so widespread that it has really become customary international law and that those conventions frequently refer to fair and equitable treatment.

Would you either now or later address that point, as I think it's crucial to the understanding of your textual argument.

MR. LEGUM: I will addresses that point later, if that's all right. If at the end of my presentation, you don't feel I've fully addressed it, I will entertain questions then, if that's satisfactory. If there are no further questions, I'd like to turn to the agreement of the parties expressed to this tribunal and its significance.

The importance of state practice reflecting an agreement on interpretation is amply addressed in the parties' written submissions. What I'd like to do here is respond to three points

asserted by Methanex yesterday. The first is that a subsequent practice may be considered only if the tribunal first finds the treaty text to be ambiguous. That is not what the Vienna Convention says.

Article 31, paragraph B of the convention, provides that "there shall be taken into context, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The article unconditionally requires such subsequent practice to be taken into account. By contrast, Article 32 of the Vienna Convention permits recourse to supplementary means of interpretation only upon certain findings, such as that an initial interpretation of the text leaves the meaning ambiguous or obscure. Subsequent practice under Article 31, however, is not a supplementary means of interpretation. It is one that must be referred to unconditionally, as we have already seen. The Vienna Convention's terms are contrary to Methanex's position on this point.

Now, yesterday, Methanex relied for this proposition on two separate opinions by two judges of the International Court of Justice in the Certain Expenses of the United Nations case. Its reliance is misplaced. First of all, those judges disagreed with the court's advisory opinion on the subject. Their views represent, therefore, their own views and not those of the court. Most important, however, those views were expressed several years before the Vienna Convention was negotiated and signed. To the extent that those views are inconsistent with the Vienna Convention, they do not reflect customary international law.

Second, Methanex said that subsequent practice must be extended in time in order to be considered under Article 31. Again, the text of Article 31 reflects no such requirement. The decisions of the International Court of Justice similarly reflect no such requirement. For example, in the arbitral award made by the King of Spain on the 23rd of December, 1906, case -- sorry about the long case title -- the court found that positions

taken by treaty parties at one point, during the course of an arbitration procedure provided for under the treaty, constituted an authoritative subsequent practice.

MR. VEEDER: Can I stop you? Are you still dealing with the accord of the three parties?

MR. LEGUM: Yes, I am.

MR. VEEDER: If we're looking at Article 31(3)(a), we don't need to look for any practice, would that be right?

MR. LEGUM: That is true.

MR. VEEDER: It's only if we look in B, which you're coming to next, when we look at state practice?

MR. LEGUM: Actually, I have been dealing with state practice so far. I will turn to paragraph A of Article 31 in a second.

MR. VEEDER: If you could. I had written down dealing with the accord of the three parties.

MR. LEGUM: Yes, the accord of the parties expressed through state practice is the point I've been addressing.

MR. VEEDER: I want you to bear in mind the difference between A and B. Are you relying on Article 31(3)(a)? That's all.

MR. LEGUM: Well, in our papers, we address state practice under Article 31(3)(b) of the Vienna Convention, which we invoked because we considered the evidence of state practice to be conclusive. We listened with interest to the president's question to Methanex on this point yesterday concerning the potential applicability of Article 31(3)(a) and have overnight studied the question and consulted with our treaty experts at the State Department, and we now believe that the tribunal was correct to raise the question of the applicability of paragraph A and have a couple of observations to offer on that point.

I might as well do them now.

MR. VEEDER: Please.

MR. LEGUM: First, an agreement under Article 31 need not be a formal document meeting the requirements of the Vienna Convention for a treaty. The convention notably did not use the defined term

"treaty" to describe subsequent agreement in Article 31(3)(a). Statements to the -- statements by the delegates to the conference at which the convention was adopted similarly support the notion that a broader range of agreements was intended to be encompassed. For example -- and I'll ask my colleagues to distribute this excerpt.

MR. VEEDER: Have you shown that to Mr. Dugan?

MR. LEGUM: They're getting it right now, yes.

MR. DUGAN: Just for the record, it was not shown to us in advance.

MR. VEEDER: If you could distribute documents in advance. If you could look at it briefly, if you have a comment to make, please reserve your position.

MR. LEGUM: Obviously, this is not evidence. This is merely a subsequent authority, and I note that Methanex did not share their subsequent authorities that they referred to during their presentations with us.

MR. VEEDER: And we made a ruling about that. Anyway, please continue.

MR. LEGUM: Yes. The representative of the Federal Republic of Germany stated -- and I'm referring to what's really paragraph 65, although it appears on this page as a second paragraph 63. He stated that his delegation was of the opinion that subsequent agreements between the parties regarding the interpretation of a treaty, as mentioned in paragraph 3, did not have to be in written form. It was confirmed in that opinion, that is, the opinion of the German delegation, not only by constant state practice but also by the fact that paragraph 3 treated subsequent agreements and subsequent practice on an equal footing.

The second point that I'd like to make is that the NAFTA parties, in their submissions to this tribunal, have couched their views in terms of explicit agreement. The United States' reply at 23 to 24 -- pages 23 to 24 noted the agreement among the NAFTA parties on this point. Canada's 1128 submission at paragraph 26 stated that "Canada

agrees with the disputing parties that NAFTA Article 1105 incorporates the international minimum standard of treatment recognized by customary international law. More significantly, it is a matter of public record that the three NAFTA parties are in agreement on this interpretation."

Mexico's 1128 submission at paragraph 9 states that "Mexico concurs with the United States that Article 1105 establishes only an international minimum standard of customary international law in which 'fair and equitable treatment' is subsumed." That's the end of the quote from the Mexican submission.

Statements such as these clearly indicate an agreement among the parties on the interpretation of the provision, which is the essential element under either paragraph A or paragraph B of Article 31(3). There is an agreement, and that is all that is required.

I'd just like to make one final point on subsequent state practice. Methanex said yesterday that the subsequent practice had to be consistent.

Again, the Vienna Convention doesn't contain any such requirement, and again, the ICJ's decisions are to the contrary. And I would simply refer the tribunal to the United States' rejoinder at page 24, note 31, where we describe a decision by the International Court of Justice in which the court found an authoritative subsequent practice to exist, even where a number of treaty parties expressed uncertainties and conflicting views at the outset of an interstate dialogue on the subject.

And finally, Methanex attempted to make much yesterday of some isolated statements in Mexico's counter-memorials in two early NAFTA cases. I think the tribunal will find, on reviewing those statements in context, that they merely represent the effort that any good litigant would make to meet the case against it under any conceivable interpretation of a provision at a merits hearing.

Unless the tribunal has any further questions on the issue of the agreement among the parties, I'll turn to my next point.

MR. VEEDER: Please do. One question.

MR. CHRISTOPHER: Just so I understand -- this is a very important point, Mr. Legum -- you keep sliding back and forth, it seems to me, perhaps inaccurately between practice and agreement, and I'd like to get it clear from you. You contend, the United States contends that the comments in the briefs of the United States, Mexico, and Canada constitute an agreement within the meaning of 31(3)(a)?

MR. LEGUM: Yes.

MR. CHRISTOPHER: Thanks.

MR. LEGUM: Since it's 10:30, why don't we break at this point.

MR. VEEDER: Whatever you like. Why don't we break for 15 minutes and resume at quarter to 11:00.

MR. LEGUM: Thank you.

(Recess.)

MR. VEEDER: We will continue.

MR. LEGUM: There was one minor matter I wanted to address. Methanex yesterday addressed the tribunal to order the United States to write to

tribunals in arbitrations against Canada and Mexico and request that those tribunals release the United States from its obligations of confidentiality under Article 1129(2). This point is addressed in the United States rejoinder at 53 to 54. I won't rehash those arguments here, but I would note that the United States is not a party to the arbitrations against Canada or Mexico. It has no more standing before those tribunals to make such a request than Methanex does. We told Methanex months ago that we had no objection to Methanex's approaching those tribunals directly to request the documents that it was interested in, but it never did. It is in no position, we suggest, to request the procedural relief that it does on this topic.

Unless the tribunal has any questions, I would now like to turn to the subject of the meaning of the phrase "fair and equitable treatment in accepted state practice."

MR. VEEDER: Just before you move on from the application made by Methanex, the position is, as we understand it, that everything that you could

disclose, subject to confidentiality, to Methanex has been disclosed?

MR. LEGUM: That is correct.

MR. VEEDER: It's simply that you don't have these documents or that you do have documents but in order to disclose them, you would need to have the confidentiality restriction removed from the U.S.?

MR. LEGUM: I believe it's the latter. Under Article 1129(1) of the NAFTA, the parties -- the state parties have the right to review pleadings in other cases in order to be able to make, for example, the 1128 submissions that the tribunal's received here. Article 1129(2) requires the parties receiving those documents to treat them as if they were a party in the arbitrations that originate the documents. In some of these arbitrations, there are confidentiality orders or confidentiality agreements, and the United States is bound under Article 1129(2) to respect those confidentiality orders and agreements.

MR. VEEDER: Thank you.

MR. LEGUM: But we have produced everything except for those documents.

Because Methanex's discussion of fair and equitable treatment in international law is, in our view, fundamentally misconceived, I'd like to preface my remarks with a few very brief observations on what international law is and what it is not. International law is the law that governs the relationship between states. Modern international law is premised on the notion that rules of international law are binding on states, only because states have consented to be bound by such rules, whether through formal agreement or through state practice indicating action or inaction, based on a sense of legal obligation.

Only states can make international law. Only the practice of states is relevant to determining whether a rule has become a part of international law and what its content is. Methanex completely ignores state practice in its contentions as to fair and equitable treatment. A brief review of the state practice reflected in the record before

this tribunal conclusively refutes Methanex's position.

As we noted in our memorial, the most direct antecedent to the use of fair and equitable treatment in international investment agreements is the 1967 OECD draft convention on the protection of foreign property. The commentary to that convention stated that "the fair and equitable treatment standard conforms, in effect, to the minimum standard which forms part of customary international law."

In 1980, the Swiss government published a memorandum stating its views on the content of the phrase "fair and equitable treatment." It concluded that -- and I'll be quoting the translation from the French -- the phrase "references the classic principle of international law according to which states must provide foreigners in their territory the benefit of the international minimum standard."

In 1984, the OECD committee on international investment and multinational enterprises surveyed the OECD membership. The

OECD's membership includes the great majority of the industrialized world. The committee found that "according to all member countries which have commented on this point, fair and equitable treatment introduced a substantive standard referring to general, that is customary, principles of international law."

In 1994, Canada's statement of implementation accompanying the NAFTA recited that "Article 1105 provides for a minimum absolute standard of treatment based on long-standing principles of customary international law." The United States' statements, in letters submitting bilateral investment treaties to the Senate, the U.S. Senate, for advice and consent, contemporaneously with the adoption of the NAFTA and continuing to the present similarly state that articles referring to fair and equitable treatment in those BITs "set out a minimum standard of treatment based on customary international law."

And, of course, there are the submissions of Canada and Mexico pursuant to Article 1128 that

I've already referred to. Thus, the evidence of state practice before this tribunal clearly and consistently evidences the belief of states that the phrase "fair and equitable treatment" is a shorthand reference to principles of customary international law governing the treatment of aliens in a territory of a state, which is generally known as the customary international law minimum standard of treatment.

And this, I believe, is the first answer to the question that Mr. Christopher asked, what is the significance of the use of fair and equitable treatment in a number of bilateral investment treaties around the world. The significance, in our view, is that it does reflect a customary standard, and the standard that it reflects is the customary international law minimum standard of treatment. That's what state practice shows the content of the phrase "fair and equitable treatment" to be.

In the face of this consistent evidence of state practice, Methanex offers no state practice at all to support its position. Instead, it offers the

opinions of a handful of academics of how, in their view, fair and equitable treatment might be construed. As Methanex itself recognizes, however, the works of commentators may be referred to -- and I'm quoting Methanex's rejoinder at page 38, note 14. They may be referred to "not for the speculation of their author concerning what the law ought to be, but for trustworthy evidence of what the law really is."

The works that Methanex refers to merely relate each author's view as to how the phrase might be or should be construed. None is based on state practice. None is suited for determination of the rules of law as required for such writings to be given weight. The Maffezini award, the award in the ICSID arbitration, Maffezini versus the Kingdom of Spain does not support its position on fair and equitable treatment. Although the tribunal's finding of a violation of the fair and equitable treatment standard contained in an Argentina-Spain bilateral investment treaty was not accompanied by a statement of legal reasoning, the facts that the

tribunal recited in support of its finding easily support a violation of the customary international law minimum standard of treatment. The tribunal in that case found that a government representative, without authorization, transferred 30 million pesetas of the Claimant's funds to a corporation that was partly owned by a government entity, and that was at the time in difficult straits.

Although the governmental entity characterized the unauthorized transfer as a loan, the loan was never repaid. Such an unauthorized taking of private funds, without compensation, would, on its face, violate the customary international law standard for expropriation. Thus, the text of Article 1105(1), its context, the explicit views of the three NAFTA parties and the evidence of general state practice before this tribunal all support the NAFTA parties' interpretation of Article 1105(1) as incorporating the international minimum standard.

The final point I'd like to make with respect to fair and equitable treatment is that

Methanex's position makes no sense from a broader historical and political perspective. As Professor Michael Reisman observes in his article in the most recent issue of the ICSID, "a basic postulate of public international law is that every territorial community may organize itself as a state and, within certain basic limits prescribed by international law, organize its social and economic affairs in ways consistent with its own national values." This postulate, that of self-governance, that a state has a right to decide for itself how persons and property within its territory should be regulated. This postulate is at the heart of the notion of sovereignty on which modern international law is based. As Professor Reisman observes, "the legislative expression of variations in the law of different states is internationally lawful and entitled to respect."

Against this background, it makes no sense to suggest, as Methanex does here, that the NAFTA parties intended that three private individuals, convened to an ad hoc basis for purposes of a single

case, generally hailing from three different countries, would have the power to review a state's governmental decisions with no guide other than their conscience. Allowing three individuals to make such decisions based only on their subjective and intuitive sense of what is fair or equitable would, we submit, be an extraordinary relinquishment of state sovereignty. It is one that cannot lightly be presumed and cannot be inferred from the text of 1105(1).

I want to dispel any suggestion that my remarks indicate any ambivalence by the United States towards either members of this tribunal, for which it has the most utmost respect, or to the international tribunal arbitration in general. The United States strongly supports international arbitration, and NAFTA investor state arbitration in particular, as a means of resolving international disputes under law. But what Methanex proposes through its reading of Article 1105(1) is not arbitration under law, but decision ex aequo et bono, a form of dispute resolution where the

decisionmaker sits not as an arbitrator but as an amiable compositeur. The distinction between these two forms of dispute resolution is a fundamental and a traditional one. By requiring treatment in accordance with international law in Article 1105(1), the NAFTA parties made their choice clear: arbitration under law is this tribunal's task.

I'd like to now move on to the second part of my presentation, which will address each of the supposed principles of international law that Methanex asserts is encompassed by Article 1105(1). I will demonstrate that Methanex's principles either are not recognized in customary international law or have no application here. Before I begin, however, I would like to note that the proponent of a rule of customary international law bears the burden of establishing its existence and its exact content. The United States collected authorities on this point in its reply at page 31, and specifically note 42 of the reply. Methanex, therefore, bears the burden of demonstrating that its supposed principles exist and that their content extends to the matters

at issue here. It has not come close to carrying that burden.

I'd like to begin with the subject of good faith. Little, in the United States' view, remains to be said on Methanex's claim that customary international law imposes a general obligation of good faith in all things. As we demonstrated in our rejoinder, the International Court of Justice has twice rejected a similar argument, and Sir Robert Jennings has now confirmed in his recent letter to the tribunal that Methanex may not "purport to bring a case in international law merely and solely by alleging a failure of good faith."

MR. VEEDER: Can I stop you there. You're referring to the letter that we received last week?

MR. LEGUM: Yes.

MR. VEEDER: We were going to raise it at some stage to the parties, but I take it from your reference there's no objection that it comes into the file?

MR. LEGUM: No, we have no objection.

MR. VEEDER: Thank you.

MR. LEGUM: Sir Robert's point is precisely the United States' point. There is no obligation of good faith that applies to the treatment of property of aliens in international law that could serve as a foundation for a claim under Article 1105(1). Unless the tribunal has any questions on this point, I will move on to the next one.

The second principle that Methanex relies upon is that of the customary international law prohibition of unreasonable discrimination based on alienage. The United States demonstrated, in its reply and its rejoinder, that it does not make sense to read such a prohibition in Article 1105(1), given the comprehensive regulation of discrimination based on nationality and other articles of Chapter 11. Whether Article 1105(1) does or does not incorporate such a prohibition is a rather arid debate in any event, given that Methanex does not suggest that its customary international law principle could be breached in circumstances where there has been no violation of Article 1102, the national treatment

provision in the NAFTA. Again, unless the tribunal has a question, I will turn on to the next principle.

MR. ROWLEY: Do I understand you to say, though, that the unreasonable discrimination against a person based on alienage is a component of customary international law, whether or not it can be relied on here is another question, because you say 1102 governs, if at all.

MR. LEGUM: There are certainly a number of authorities that stand for the proposition that unreasonable discrimination, based on alienage, is a violation of the customary international law minimum standard of treatment. By "unreasonable," what they mean is unreasonable in view of state practice on the subject. For example, as Professor Brownley notes in his book, it's reasonable under international law to prevent aliens from voting or participating in the political process. That's something that's common to all legal systems. So by "reasonable," it's not meant in some kind of abstract sense, but it's to be determined by state

practice.

MR. ROWLEY: Well, eventually, we're going to come to "relating to," but let me just put out a proposition to be thought about by everybody. What sort of -- or let me put it this way. Let me ask a question. If there is an allegation of intention to discriminate against foreign producers of a product to benefit domestic producers of another product, for those two products, read methanol and ethanol, if there is such an allegation, do we get over the "relating to" hurdle? And you need not answer that question now, but I'm just getting it out on the table.

MR. LEGUM: I will let my colleague answer that question with respect to "relating to." Mr. Birnbaum will be addressing that later on today. But with respect to Article 1105, the issue would be what does state practice say. There are a number of areas where it's perfectly lawful under customary international law to discriminate against aliens.

MR. ROWLEY: Thank you. I took your points. I just wanted to get my issue out onto the

table so people could start thinking about it.

MR. LEGUM: We appreciate that. Thank you.

The third principle that Methanex relies upon is what it describes as the principle of neutral decisionmaking. Methanex has had a bit of trouble deciding exactly what this supposed principle is. In its draft amended claim, it described the principle as implicated whenever a state official acts "in favor of a protected domestic industry that has given the official substantial political contributions." The reference there is to page 50 of the draft amended claim.

The United States pointed out in its reply that there is no support in state practice for the existence of such an obligation, and that, in fact, such an obligation would be inconsistent with established campaign finance practices in each of the NAFTA countries. In Methanex's rejoinder, this so-called principle morphed into a very different creature, a prohibition of when "a public official receives private financial remuneration for a

governmental act disadvantaging a competitor." The reference there is to Methanex's rejoinder at page 51.

There is a term in municipal law for this type of principle. It's called bribery, and it is a crime throughout the United States and in California. Such a principle is irrelevant to the issues here, because Methanex has expressly disavowed any allegation that Governor Davis or any other officer is guilty of bribery or other violation of law. Yesterday, Methanex asserted that its allegations were like the findings in S.D. Myers, because it, too, averred "preferred and privileged access to key decisionmakers."

Now, aside from the fact that the referenced discussion in S.D. Myers was in its national treatment analysis and not in its discussion of Article 1105, that is not what Methanex is alleging here. The supposed secret meeting with ADM took place not with Governor Davis, but with Mr. Davis at a time when he was a candidate for office in a hotly contested election that he

might or might not win. At the time of that meeting, he was not a decisionmaker with respect to the measures that are at issue here.

If there are no questions on that principle, I will turn to the next one.

MR. VEEDER: Was he not lieutenant governor at the time rather than plain Mr. Davis?

MR. LEGUM: He was, but my understanding is that -- and I believe this is confirmed by the text of the bill -- that decision was to be made by the governor of California, not by the lieutenant governor.

MR. VEEDER: Thank you.

MR. LEGUM: The next principle, introduced for the first time in Methanex's rejoinder, is one of transparency. This supposed principle is based exclusively on provisions elsewhere in the NAFTA and in the general agreement on tariffs and trade. For the reasons I've already explored, provisions other than those specifically identified in Articles 1116(1) and 1117(1) may not be the subject of investor-state arbitrations under the NAFTA and are

not incorporated into Article 1105(1). Unless the tribunal has any questions on this principle, I will move on to the next one.

The next principle is what Methanex calls the rule of the "least restrictive measure." Methanex contends that this principle, supposedly originally reflected in the GATT and in certain WTO agreements, has become a rule of customary international law. This is the position that it took in its rejoinder. As we demonstrated in our rejoinder, however, there were specific criteria that must be satisfied before a principle stated in a multilateral agreement can be deemed to have become binding on nonparty states as a rule of customary international law.

Methanex's supposed principle meets none of the criteria. I don't propose to rehash here the U.S. rejoinder's analysis of each of these criteria, but I'd be happy to answer any questions the tribunal has about that analysis, if there are any.

MR. VEEDER: We may have questions later, but please proceed for now.

MR. LEGUM: I would like to make two observations regarding Methanex's presentation yesterday. First, Methanex suggested that the S.D. Myers award supported its view that "fair and equitable treatment" encompassed its "least restrictive measure" principle, relying in response to a question by Mr. Christopher on paragraph 221 of the award, as explicitly incorporating Methanex's standard. That is a distortion of the S.D. Myers award. Paragraph 221 is found nowhere near the tribunal's discussion of Article 1105, which begins at paragraph 258. In fact, paragraph 221 is in a short section of the award that summarizes the North American agreement on environmental cooperation and attempts to reconcile in broad terms the purposes of that agreement with the NAFTA, the Canada-U.S. Transboundary Agreement on Hazardous Waste, and the Basel Convention on Control of Transboundary Movements of Hazardous Waste. Those agreements are not at issue here. S.D. Myers does not support Methanex's position on this point.

Second, yesterday, we heard Methanex

suggest that even if Chapter 11 did not, by its terms, incorporate WTO and GATT provisions, the tribunal could nonetheless pick and choose from different WTO and GATT provisions, not because the provisions are rules of decision to be applied in the case, but as a guide for the tribunal to use in its exercise of broad discretion that Methanex feels is permitted under its view of fair and equitable treatment.

Perhaps the best statement of Methanex's proposed mix-and-match approach occurred when Mr. Dugan stated at page 88 of the draft transcript that the tribunal should apply certain GATT principles that "are accepted explicitly by NAFTA itself, not for the investment chapter but for other chapters of the NAFTA." Now, referring to principles as guides in this way, not as rules of decision but as principles to guide a decisionmaker towards a proper decision is not what arbitrators do. It is not what judges do. It is what legislators and policymakers do. That is not what the function of this tribunal is.

As Article 1131(1) indicates, the NAFTA parties asked this tribunal to decide the issues in dispute in accordance with this agreement and applicable rules of international law. The NAFTA is a large and complex document. What is called for, what is required is for tribunals to apply the provisions of the NAFTA as they are written and with precision. Methanex's mix-and-match approach cannot be squared with the language of the treaty or the requirements of international law.

If the tribunal has any questions on this point, I'd be happy to answer them. Otherwise, I will move on.

MR. VEEDER: We may ask some later. You may move on.

MR. LEGUM: Thank you. I now come to the last of Methanex's principles, that of full protection and security. This, as Article 1105(1) clearly recognizes, is a long-standing principle of customary international law. In the United States' reply, we showed that state practice had recognized responsibility for violation of this principle only

where a state had failed to provide reasonable police protection against physical invasions of an alien's person or property.

Yesterday, Methanex purported to identify two cases to the contrary. It did not. The first is the Maffezini case. Now, Mr. Dugan admitted, in discussing this case, that his Spanish was not that good and that his conclusion that Maffezini was relevant was based on his reading of the Argentina-Spain BIT. He was right about one thing. His Spanish is not that good. Article 3.1 of the Argentina-Spain BIT does not resemble Article 1105 of the NAFTA. It reads, in pertinent part -- and I hope the tribunal will forgive me for my attempt to read Spanish.

MR. VEEDER: You have to prove you qualify first.

MR. LEGUM: "Cada Parte protegera en su territorio las inversiones efectuedas, conforme a su legislacion."

Now, the best translation we've been able to come up with on this text in the time available

is "each party will protect the investments effected in its territory, in conformity with its legislation." This is obviously a different kettle of fish than Article 1105(1), which sets forth a standard based on international law and not on domestic legislation. Maffezini does not help Methanex.

The second reference is terse dicta in the Loewen interim decision that was made without the benefit of any briefing on the subject by the parties in that case. That dicta does not help Methanex either. Finally, Methanex says that the inclusion of intangible forms of property as "investments" under NAFTA somehow expands the scope of state practice concerning full protection and security. It does not, for several reasons. The first, customary international law authorities do permit claims for harm to intangible property that results from a physical invasion of an alien's property that could have been prevented by reasonable police measures. For example, in the Ziat case cited in the U.S. reply at page 37, note

51, the tribunal recognized that the owner of a store could have recovered for accounts receivable lost because of the destruction of books of account by a mob if he had not -- if he had made out the rest of his case.

Do you have a question? I'm sorry. I just noticed your light was on.

MR. VEEDER: I will turn it off.

MR. LEGUM: My apologies.

Secondly, not every article in Chapter 11 sets forth standards that are necessarily relevant to all forms of investment. For example, it is difficult to see how the performance requirement provisions of Article 1106 could apply to investments in real estate. In Article 1107, it is limited on its face to investments in enterprises.

For these reasons and the reasons stated in the United States' rejoinder, Methanex's contention on full protection and security are misplaced.

I'd be happy to answer any questions on this principle, but I'm also happy to move on.

MR. CHRISTOPHER: Why don't you finish your presentation, Mr. Legum, and then I will go back. I have a sweeping question or two for you.

MR. LEGUM: Oh, I like those. Thank you.

MR. CHRISTOPHER: We'll see.

(Laughter.)

MR. LEGUM: Finally, I'd like to respond to Methanex's assertion yesterday, based on the Pope & Talbot award, that the most favored nation provision of the NAFTA permits Methanex to pick and choose among various formulations of U.S. BITs those formulations that most suit Methanex. Now, as a preliminary matter, Methanex's assertion is misplaced, because as I've already demonstrated, fair and equitable treatment, as used in the BITs, means the same thing that it means in the NAFTA.

It's a reference to the customary international law minimum standard of treatment. More fundamentally, however, this assertion is wrong on the law and irreconcilable with the reality of how states like the United States negotiate bilateral investment treaties. The MFN clause in

the NAFTA requires a comparison of the treatment actually provided to investors or investments of other nations and that provided to NAFTA investors or investments. It is limited to specific subject areas, "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." This is not a choice of law clause, and it cannot fairly be read to permit a deviation from Article 1131(1)'s requirement that the tribunal decide the case "in accordance with this agreement and applicable rules of international law."

Moreover, the United States goes to considerable lengths to tailor its BITs to the particular conditions that apply to its bilateral relations with the BIT partner in question. We have a model BIT, but it is just that, a model. The United States works with its BIT partners to ensure that the model's provisions are suitable to the relationship, and it varies from the model in appropriate cases. BIT negotiations are based on the premise that the substantive provisions of that

particular BIT are what will govern the relationship between the parties. Teams of negotiators will not spend days poring over proposed BIT text if the Pope & Talbot decision were correct, but they do, and they do so because they are under the impression that they are actually negotiating operative language.

That concludes my prepared remarks. I'd be happy to answer Mr. Christopher's question or any other questions.

MR. CHRISTOPHER: Mr. Legum, assuming that, just for the purpose of this question, you're right about fair and equitable being within the context of customary international law, taking the word "including" in the terms that you have identified it, and the same thing with respect to "full protection and security." Nevertheless, those terms clearly have some content, there's something there, and the question I have for you, one I think you need to address at this jurisdictional level, is to whether there are evidentiary issues as to whether California's action is fair and equitable

and whether it accords full protection and security under customary international law, and whether that's a conclusion that can be reached as a jurisdictional matter.

MR. LEGUM: And the answer to the question is -- it's a question of admissibility. Our position is that Methanex has not identified any principles of international law incorporated into Article 1105(1) that are implicated by the facts that it has alleged. So assuming the facts that it has alleged are true, there is no standard of international law incorporated into Article 1105 that could provide it relief. And our view is that there are no evidentiary issues there, because they have not identified any principles of international law that are at issue here.

MR. CHRISTOPHER: Based upon your interpretation of 1105?

MR. LEGUM: That's correct, based on our reading of "fair and equitable treatment" as incorporating the international minimum standard of treatment and customary international law.

MR. CHRISTOPHER: That answer is fair, because I built that into my assumption.

MR. VEEDER: Thank you very much.

MR. LEGUM: Thank you.

MR. VEEDER: Is Ms. Menaker next?

MR. LEGUM: Yes.

MS. MENAKER: Yes. Mr. President, members of the tribunal, I will now address Methanex's claim under Article 1110.

Article 1110 serves an important role in the NAFTA. It prohibits a NAFTA party from expropriating an investor's investment, except under certain circumstances provided for in that article. Although providing an important protection, Article 1110 was never envisioned by any NAFTA party or, I venture to say, by any BIT provider, as an insurance policy for foreign investors that business conditions, via economy or indeed an investor's profitability, would remain unchanged. These things are subject to change, and an expropriation provision doesn't provide any insurance against such change. Rather, it provides protections against the

unlawful expropriation of investments.

When a Claimant files an Article 1110 claim, it must first identify the investment that has been allegedly expropriated by the state. Methanex has failed to do this. At various times, Methanex describes the investments it claims to have been expropriated using different terms, but none of those items constitutes an "investment," as that term is defined by Article 1139 of the NAFTA. This isn't surprising, since article 1131 instructs tribunals to apply international law in Chapter 11 cases, and Article 102(2) provides that the provisions in the NAFTA shall be interpreted in accordance with rules of international law. And courts and tribunals applying international law have repeatedly held that the items that Methanex identifies as its "investment" do not constitute property that is capable of being expropriated.

Methanex's counsel yesterday suggested that the authorities cited by the United States in its written submissions supporting this context were inapposite because those authorities all interpret

customary international law. But as I just noted, both Article 1131 and Article 102(2) provide that the rule of decisions in these cases ought to be international law, and also that the terms of the NAFTA ought to be interpreted in accordance with rules of international law.

And as detailed in our memorial at page 34, it is a principle of customary international law that in order for there to be an expropriation, a property right or interest must have been taken. The authorities relied on by the United States all address the issue of whether the item alleged to have been expropriated by the Claimant was a property right that was capable of being expropriated under customary international law. Thus, these authorities are instructive.

I will discuss, in turn, each of the items that Methanex claims to have constituted an investment, namely goodwill, customer base, market share, and market access. And I will explain why each of those items is neither an investment nor a property right that, by itself, is capable of being

expropriated.

I will begin by discussing Methanex's allegation that its and its affiliates' goodwill has been expropriated. Goodwill is not listed among the investments identified in Article 1139, and international courts have denied claims for expropriation that were premised on the allegation that a company's goodwill, by itself, was a property right that was capable of being expropriated.

As the Permanent Court of International Justice in the Oscar Chinn case noted, "favorable business conditions and goodwill are transient circumstances subject to inevitable changes." The court there denied Claimant's expropriation claim for failure to identify an investment that was capable of being expropriated.

Of course, the term "goodwill" is often used when valuing a business. For example, when a company is sold, the price often can be broken down to include its physical assets, such as the building, equipment, and inventory; the intangible assets, such as copyrights, patents, and trademarks;

and then there is often an additional charge that is characterized as goodwill. This is the extra that one pays for having purchased a company that has an established reputation.

The United States agrees that, under appropriate circumstances, an investor may be compensated for goodwill when it has had its investment expropriated. For example, if an enterprise was expropriated, the investor would be entitled to the fair market value of that enterprise. That's the amount that the enterprise would have sold for in a free market. That price may include goodwill, just as it may take into consideration the company's future profitability, taking into account the company's market share and customer base. However, goodwill is not an asset that may be bought or sold by itself, apart from another investment.

As counsel for Methanex noted yesterday, and I quote from the draft transcript, "goodwill is a salable asset when a business is sold, and is sometimes shown as such on the balance sheet."

Goodwill can't be transferred by itself. Goodwill is not accounted for, apart from the other assets of a company. Goodwill is simply not an investment that, by itself, can be expropriated. This distinction between an attribute of a company which may be taken into account when valuing an enterprise that has been expropriated and a property right that by itself is capable of being expropriated has been recognized and commented upon by several international legal scholars. And I refer the tribunal to pages 34 through 38 of our memorial, and page 43, and note 51 of our rejoinder, where those authorities are collected.

Methanex also contends that its customer base has been expropriated. Methanex nowhere defines or explains what it means when it says that its customer base has been expropriated. The only thing it could possibly mean is that as a result of the California ban, Methanex anticipates that certain of its and its affiliate's customers either will decrease their purchases of methanol from them in the future or will stop buying methanol from them

altogether.

This concept is no different from what I just discussed with respect to goodwill. And in fact, in its reply to the statement of defense, Methanex refers to "goodwill" as "customers cultivated by Methanex U.S." The United States submits that customer base, like goodwill, is not an investment that is capable of being expropriated, nor does one have a property right in one's customers. Customers is nowhere listed among the investments defined in Article 1139. That's because customers are not an investment. What is an investment is what the enterprise uses to make sales to the customers, and international courts and tribunals have held that one's customers is not a property right that is capable of being expropriated.

Again, the Oscar Chinn case is a good example. There, the PCIJ rejected Claimant's position that the loss of customers deprived the Claimant of any vested right. Similarly, Rudolf Bindschedler, a noted legal scholar, also concludes

in his article, cited in our memorial, that "clientele is no more capable of expropriation than liberty of commerce and industry."

In essence, Methanex's claim boils down to its fear that it will sell less methanol after the ban. Even assuming that were true, selling less of its product does not mean that Methanex has lost a property right of any kind. If it did, every case of decreased demand or increased supply would be turned into an expropriation. But as detailed in our memorial at pages 36 through 38, the maintenance of a certain rate of property -- excuse me, of profit, is neither an "investment," as that term is defined by the NAFTA, nor a property right that is capable of being expropriated.

Methanex also alleges that its and its affiliate's market share has been expropriated, but certainly no investor is entitled to a specific share of the market. Once a company has a share of the market, it is not entitled to keep it. Market share, we submit, is neither an investment nor a property right.

Methanex also contends that it has been denied market access, and relying on language in the Pope & Talbot award, it argues that this market access is a property right that has been expropriated. But here, it is beyond dispute that the measures at issue do not impact or interfere with Methanex's or its U.S. affiliate's access to any market in the United States. Methanex, and its U.S. affiliates, are continuing and can continue to produce and market methanol for sale anywhere in the United States. Methanex and its U.S. affiliates will be free to continue operating their businesses in the same manner that they currently operate them after the ban goes into effect. Methanex is simply not being denied market access.

In any event, market access is not a property right that is capable of being expropriated. Market access is not property that one owns and which can be expropriated. Denying market access may be the means by which one expropriates an investment, but what a tribunal would determine was whether the company had been

expropriated by denying it market access, but not whether there had been an expropriation of market access. This is how the Pope & Talbot tribunal analyzed the issue before it.

As is clear from the passages quoted by Methanex's counsel yesterday, the Pope & Talbot tribunal determined that the purported interference was not substantial enough to constitute an expropriation of the enterprise at issue.

I refer the tribunal to paragraph 98 of that award, where the tribunal writes "interference with that business would necessarily have an adverse effect on the property that the investor has acquired in Canada, which, of course, constitutes the "investment," with a capital I. In paragraph 4 of that award, the investment is defined as "the enterprise"; that is, the company that manufactures and sells softwood lumber.

The tribunal later concluded that "the degree of interference with the investment's operations to the export control regime does not rise to an expropriation, creeping or otherwise,

within the meaning of Article 1110." That was at paragraph 102.

It's clear that the Pope & Talbot tribunal approached the issue by looking at whether the enterprise had been expropriated by means of purportedly denying that enterprise market access, but it did not determine that market access was a property right that, by itself, was capable of being expropriated.

Finally, I'll briefly address Methanex's somewhat vague allegation that it has met the condition of identifying an investment that has been expropriated by asserting that its U.S. enterprises themselves have been expropriated.

Yesterday, Methanex's counsel stated that the United States contends that there has been no expropriation, because neither Methanex Fortier nor Methanex U.S. has been physically seized. Methanex's counsel then argued that that was not the standard for expropriation, and that it had alleged an expropriation of its enterprises because -- and I will quote, recognizing that this is a rough

transcript -- "the measure has the effect of depriving Methanex of the reasonably to be expected economic benefit of its access, its share in that, meaning the California market."

Based on its written submissions and the argument yesterday that I just quoted, it appears to the United States that Methanex is actually arguing that its and its affiliate's market access and market share has been expropriated. If that's the case, I've already addressed those points. But to the extent that Methanex argues that it has alleged that its affiliates themselves have been expropriated, the United States disagrees. The United States does agree with Methanex that an enterprise need not be physically seized for it to have been expropriated, but inherent in the concept of an expropriation is that the property at issue has been taken by the state. The authorities Methanex cites on page 68 of its draft amended claim support this view.

For example, the passage from Whiteman's Digest, cited by Methanex, states "the rule in this

section is intended to cover only those situations in which conduct attributable to a state is substantially equivalent to the taking of an alien's legal interest in the property." And even the S.D. Myers and Pope & Talbot decisions on which Methanex relies support this view.

For example, the Pope & Talbot tribunal stated "while it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner." That is at paragraph 102.

Similarly, the S.D. Myers tribunal stated "the term 'expropriation' carries with it the connotation of a taking by a governmental type authority of a person's property." That is at paragraph 280 of that award.

Methanex has not alleged that either of its U.S. affiliates have been constructively taken away from it as a result of the California measures, and it could not make a credible allegation to that

effect. The uncontested facts simply cannot support a claim that either of Methanex's U.S. affiliates has been expropriated.

First, I will address Methanex U.S. And by "Methanex U.S.," that's the term that will we've all been using throughout our written submissions. That's Methanex Methanol Company. Methanex's reported properties for its U.S. segment have increased every year since the executive order was issued. If Methanex is still profitably running Methanex U.S., and indeed, if Methanex is keeping and reporting the profits that Methanex U.S. is earning, it simply cannot allege that Methanex U.S. has been taken from it.

Then there's Methanex Fortier. It is uncontested that eight months after the executive order was issued, Methanex bought out its joint venture partner with which it owned Methanex Fortier. If Methanex believed that Methanex Fortier had been expropriated by the United States, would it have purchased the remaining 30 percent interest in that expropriated enterprise? It simply makes no

sense that an investor would make an investment in an enterprise after it claims that that enterprise has already been expropriated.

This tribunal does not need to hear any evidence to determine that Methanex has simply not credibly alleged that the United States expropriated by either Methanex Fortier or Methanex U.S.

I'd be pleased to answer any questions, if the tribunal has any.

MR. VEEDER: Thank you. Not at this stage.

MS. MENAKER: Thank you. I will turn the floor over to my colleague, Alan Birnbaum.

MR. BIRNBAUM: Hi. Thank you for this opportunity, Mr. Veeder, Mr. Christopher, Mr. Rowley. I'm addressing the issues of proximate cause and "relating to." And Mr. Rowley, I'd be pleased to answer your question and any other questions regarding "relating to" when I reach that section of my presentation, if that's okay.

I'm beginning with proximate cause. With respect to proximate cause, I will explain two

things. I will explain why the NAFTA parties did not subject themselves to claims for remote damages, and I will explain why it is apparent, based solely on Methanex's statement of claim and draft amended claim, that Methanex's claims are for remote damages.

First, I want to note that there are a number of issues that Methanex doesn't dispute. Methanex doesn't dispute that proximate cause is a well-settled principle of customary international law. Methanex doesn't dispute that the phrase "by reason of" embodies the proximate cause requirement. Methanex doesn't dispute that international tribunals have interpreted the phrase "arising out of" as embodying the proximate cause requirement. And Methanex does not dispute that the alleged injuries are solely economic and an indirect result of the subject measures' impacts on prospective contractual counterparties of Methanex and its investments.

Instead, Methanex argues that rather than the well settled principle of proximate cause,

Chapter 11 incorporates an undefined standard of causation, a standard anchored entirely in inapposite municipal insurance law, not international law, a standard that is substantially more expansive than proximate cause.

Methanex argues in the alternative that its claims satisfy the proximate cause requirement solely because the alleged damages were, according to Methanex, reasonably foreseeable. Methanex also argues that its claims are actionable because the measures were intended to benefit the U.S. domestic ethanol industry, and therefore, were intended to injure Methanex and its investments. We demonstrated in the memorials that each of these contentions is without merit as a matter of law.

In this case, the central question is, does Chapter 11 support claims where the alleged damages were indirect, economic consequences of a regulatory measure of general application? More specifically, did the NAFTA parties subject themselves to claims where, as here, the alleged damages are not the result of a measure's direct

effects on the Claimant or its investments, but because, in response to measures of general application, third parties change their behavior, thereby setting off an economic ripple or chain reaction effect that eventually impacts the Claimant or its investments?

To answer this question affirmatively would mean finding that the NAFTA parties make themselves blanket insurers of foreign-owned investors and investments for all indirect, as well as direct, economic consequences of measures of general application that violate Chapter 11 obligations, or as Methanex would have it, any NAFTA or other treaty obligation.

For several compelling reasons, the NAFTA parties did not do so. The text of the NAFTA compels the conclusion that proximate cause is a prerequisite to a NAFTA Chapter 11 claim. By providing that losses or damages must be "by reason of, or arising out of," the breach of a Chapter 11 obligation, Articles 1116 and 1117 expressly incorporate the principle of proximate cause.

As we noted in our memorials, if the NAFTA parties intended to depart from such a well-settled, general principle of customary international law, then they would have done so expressly. Any such intention would not have been left to doubtful interpretation.

Customary international law also compels the conclusion that proximate cause is a prerequisite to a Chapter 11 claim. In the context of international agreements containing liability provisions such as Articles 1116 and 1117, the phrases "by reason of" and "arising out of" consistently have been interpreted to mean "proximate cause."

In fact, we are aware of no international tribunal holding -- and Methanex cites none -- that in a dispute of the type involved here, where a state allegedly violated a duty owed an alien, the principle of proximate cause was rejected.

We've cited a great many of other international law cases and international authorities -- on pages 23 to 29 of our memorial,

and pages 8 to 13 of our reply memorial -- applying the principle of proximate cause in cases such as this one, where the alleged damages are an indirect economic effect of the measures at issue. As noted on page 19 of our memorial, those international law cases are in keeping with municipal law.

The rule of treaty interpretation, reflected in Article 31 of the Vienna Convention, that text must be read to avoid unreasonable results, further compels the conclusion that proximate cause is a prerequisite to a Chapter 11 claim. As this case itself shows, unreasonable results would follow if proximate cause were not required. This is so, given the intensely regulated nature of the NAFTA parties' economies, and given that businesses are extensively interconnected.

Regulating the NAFTA parties' economies are an enormous number of measures that, by directly affecting one line of business, indirectly impact many other contractually related lines of businesses. The ripple or chain reaction effects of regulations are extraordinarily far-reaching.

Therefore, if, in fact, the principle of proximate cause were not embodied in Chapter 11, then the NAFTA parties would be exposed to monetary damage awards potentially totalling astronomical sums. As well, such awards would almost certainly lead to substantial chilling effects on the adoption of regulatory measures of general application.

Moreover, contrary to Methanex's argument, recognizing that Articles 1116 and 1117 incorporate the principle of proximate cause is not at all inconsistent with the NAFTA's objectives, including the NAFTA's objectives of increasing opportunities for cross-border investments, creating effective procedures for the resolution of disputes and protecting foreign-owned investors and investments. The unlimited liability that Methanex urges is not necessary to obtain these objectives in full.

Despite all this, Methanex claims that Articles 1116 and 1117 incorporate some substantially lower standard of causation than proximate cause, a standard unknown in the context of international law, a standard that would

exponentially expand the number of Chapter 11 claims. Methanex bases this contention on two things: how the language "arising out of" is interpreted by municipal courts in the context of insurance contracts; and that one of the uses of the word "or" is to introduce alternatives.

Turning to Methanex's first argument, as we explained in our memorials, there is no reason to conclude that the NAFTA parties abandoned the well-settled principle of proximate cause in using the phrase "by reason of, or arising out of." Certainly, a contrary conclusion is not reasonable simply because some municipal courts interpret the phrase "arising out of" in the context of insurance contracts to incorporate some lower standard of causation than proximate cause.

Under Articles 1131(1) and 102(2), the NAFTA is not interpreted in accordance with municipal law, but in accordance with applicable rules of international law. Moreover, although Methanex prefers to analogize Chapter 11 to an insurance provision, this analogy is incorrect.

Insurance contracts are contractual cost-shifting mechanisms, and as a matter of public policy, provisions such as "arising out of" are read broadly in favor of insureds.

Chapter 11 and similar treaty provisions, such as those involved in the Lusitania case, are not akin to insurance-type cost-shifting mechanisms. Rather, they are akin to mechanisms that provide for compensation by a wrong-doer that breaches a common law or statutory obligation. So a NAFTA party's liability under Chapter 11 is analogous to that of a wrong-doer who violates a tort or a statutory requirement rather than to the contractual liability of an insurer. As reflected in the cases cited on page 5 and 6 of our rejoinder, even under municipal law, liability is limited by the principle of proximate cause where there is a tort or a statutory violation.

Turning to Methanex's second argument, its reliance on the use of the word "or" is not availing. As we noted in our memorial at page 14 and our rejoinder at page 12, an ordinary use of the

word "or" -- and the use of the word "or" in the context of "by reason of or arising out of" in Articles 1116 and 1117 -- is to introduce interchangeable terms. Methanex incorrectly equates a term's most frequent use with its ordinary meaning and, again, completely ignores the relevance of context. Methanex does not dispute that the terms "loss" and "damage" are interchangeable in the phrase "loss or damage," as that phrase is used in the context of Articles 1116 and 1117.

Likewise, "by reason of" and "arising out of" are interchangeable, as those phrases are used in the context of Articles 1116 and 1117. While Methanex relies on the general principle that a treaty should be read to avoid superfluous text, Methanex's interpretation of the phrase "by reason of, or arising out of" violates the principle that text should not be read to be ineffective. If "arising out of" incorporates a substantially more expansive standard of causation than "proximate cause" -- than the phrase "by reason of," which Methanex agrees embodies the customary international

law principle of proximate cause, would be rendered wholly ineffective.

Rather, several reasons compel the conclusion that, like "loss" and "damage," "by reason of" and "arising out of" are interchangeable phrases that reinforce or clarify each other, a technique not uncommonly employed in drafting treaty and statutory provisions.

First, the principle of proximate cause is, as I've noted, a well-settled principle in customary international law. Second, as noted in our reply memorial at page 7 to 13, international tribunals and other authorities consistently have interpreted the phrases "by reason of" and "arising out of" and broader treaty language to embody the principle of proximate cause. Third, Methanex cites no international authority, and the United States is aware of none, where the phrases "by reason of," "arising out of," or "by reason of, or arising out of" have been interpreted to embody a principle of causation other than proximate cause.

Fourth, there is no evidence that the

NAFTA parties intended to depart from the well-settled principle of proximate cause, and had they done so, they would have done so expressly. Fifth, Chapter 11 is not analogous to insurance contracts; and sixth, an ordinary meaning of the word "or" is to introduce interchangeable terms.

Consequently, the only reasonable conclusions are that "by reason of" and "arising out of" are interchangeable, and the phrase "by reason of, or arising out of" incorporates the customary international law principle of proximate cause, not some undefined, substantially lower standard of causation unknown to customary international law, a standard that Methanex fails even to identify and apply to the alleged facts.

In addition, we note that yesterday Mr. Dugan referred to legal authorities which "invariably" interpreted the phrases "by reason of" and "arising out of," when combined by the word "or" to reflect a lower standard of causation than proximate cause. However, Mr. Dugan failed to note that the legal authorities on which his statement is

based come from only four municipal courts in two non-NAFTA countries, interpreting the phrases "caused by or arising out of" or "directly caused by or directly arising out of."

Now, not only is proximate cause a prerequisite to a Chapter 11 claim, but Methanex's claims are too remote. This is apparent, again, based only on Methanex's statement of claim and draft amended claim. With respect to this issue, the central question is, is the proximate cause requirement satisfied here? Specifically, is it satisfied here, where the Claimant alleges only indirect damages as a result of the loss of prospective contracts and an anticipated decline in the sales price of its product? The answer to this question also is no.

Methanex does not dispute the indirect nature of the alleged damages. Specifically, Methanex does not dispute that the alleged damages will result only from the anticipated loss of prospective contracts. The MTBE ban will affect gasoline distributors and, in turn, affect MTBE

producers and, in turn, affect suppliers of products or services to MTBE producers, including, but certainly by no means limited to, suppliers of products such as Methanex and its investments.

As shown in our memorial at pages 23 to 29, numerous international tribunals have held that claims such as Methanex's claims are too remote. Those tribunals have consistently rejected claims where, as here, the alleged injuries flowed solely from the effects of a measure on parties with whom the Claimant had only prospective contractual relations. As shown in our memorial, these cases include, for example, insurers' claims for losses arising from unlawful military actions, and creditors' claims for losses arising from the effects of measures on debtors.

Methanex's only response to these international decisions and other international authorities identified in our memorials is its contention on page 13 of its rejoinder that the proximate cause requirement is satisfied because the purely economic, indirect effects of the California

measures on it and its investments were, according to Methanex, reasonably foreseeable. This contention fails, because reasonable foreseeability alone is not the test of proximate cause in customary international law and applied by international tribunals.

Reasonable foreseeability may be a necessary element of proximate cause, but in and of itself, it is not a sufficient element. In international law cases, such as those cited in our memorial at pages 23 to 29, where a claimant alleges purely economic injuries stemming from the indirect effects of a state's actions on contractual relations between the claimant and third parties, tribunals consistently have applied a standard of proximate cause based on concepts of immediate or direct consequences. And I mean those terms interchangeably. That reasonable foreseeability alone is not a sufficient test of proximate cause is also reflected by municipal law.

As shown by the numerous cases from several jurisdictions cited in our rejoinder at

pages 5 and 6, under municipal law, a claimant cannot recover for indirect and purely economic losses where the class of persons similarly situated to the claimant is indeterminate, even if the claimant's losses were reasonably foreseeable. For example, in the English case of Weller & Company versus Foot and Mouth Disease Research Institute, the court held that the plaintiff cattle auctioneers' loss of sales commissions were not recoverable from the defendants whose acts resulted in the outbreak of foot and mouth disease.

And for example, in the United States case of Nautilus Marine, Inc., versus Niemela, the court denied recovery of economic losses where the plaintiff was prevented from using a chartered vessel because the defendant's ship collided with it.

In addition, the same unreasonable results that would flow if proximate cause were not embodied in Chapter 11 would flow if reasonable foreseeability, as defined by Methanex, were the sole test of proximate cause. For example, if

Methanex's anticipated damages were actionable, only because they were reasonably foreseeable, as Methanex would define "reasonable foreseeability," then anticipated lost profits of all foreign-owned investors and investments resulting from increased gasoline costs would also be actionable.

Moreover, anticipated lost profits of all other foreign-owned suppliers of products or services to MTBE producers and to suppliers of such suppliers and so on would be actionable. For example, in addition to foreign-owned methanol producers and marketers, Chapter 11 claims could be brought by foreign-owned investors that transport MTBE, construct MTBE production facilities, supply MTBE production equipment, dispose of MTBE production wastes, supply utilities to MTBE producers, and supply any other feedstocks to MTBE producers. Again, not only would such a result be unreasonable, but also the resulting chilling effect on government regulations of general application would far exceed any contemplated by the NAFTA parties.

We note that yesterday Mr. Dugan criticized the argument that "economic damages" are not recoverable. The United States, however, never made this argument. Rather, as I've just explained, our argument focuses on indirect, purely economic damages, and we have cited myriad international law cases supporting this argument. None of the authorities Mr. Dugan cited yesterday in any way refutes this argument. Article 1110 of the NAFTA and the Chorzow Factory case do not support the proposition that a claimant can recover for indirect, purely economic damages. In Brasserie du Pecheur, which involved a French beer manufacturer's alleged economic damages as a direct result, not an indirect result, of a German import restriction, does not support that proposition.

Finally, we note that yesterday, Mr. Dugan cited Professor Keeton as supporting foreseeability as a general test of proximate cause. As a preliminary manner, we note that while we cite Professor Keeton in footnote 33 on page 18 of our memorial, we do so only to support the proposition

that remoteness is a legal issue. Unlike Methanex, we did not cite Professor Keeton to define a standard of proximate cause. To do so would, as noted earlier, be inappropriate, given that the NAFTA must be interpreted in accordance with applicable rules of international, not municipal, law. While the use of municipal law may be appropriate to illustrate a principle that is in accordance with international legal authorities, municipal law cannot be used, as Methanex does, to supplant international law.

Putting this aside, we note that the cited reference to Professor Keeton is taken from a discussion of proximate cause and the law of torts generally. However, in the specific context of interference with prospective contractual relations, the only context relevant here, Professor Keeton on pages 997 and 1002 of his treatise on torts, in fact, supports the United States' argument that indirect economic damages are not recoverable absent a specific intent to injure the Claimant, even if the juries were reasonably foreseeable.

As Professor Keeton states on page 997, "interference with contract, which had its modern inception in 'malice,' has remained almost entirely an intentional tort; and in general, liability has not been extended to the various forms of negligence by which performance of a contract may be prevented or rendered more burdensome."

Professor Keeton further states on page 1001 that the policy against recovery of nonintentional economic damages is based, in part, on a pragmatic objection and that "while physical harm generally has limited effects, a chain reaction occurs when economic harm is done and may produce an unending sequence of financial effects best dealt with by insurance or by contract or by other business planning devices. The courts have generally followed this policy, and the rather limited and narrow exceptions have had virtually no impact on the law."

Finally, Methanex has not pleaded the intent necessary to demonstrate proximate cause. This is so because Methanex alleges only intentional

discrimination, but its claim of discrimination fails as a matter of law. This is also so because the foundation of Methanex's allegations regarding intent is that the California measures were intended to benefit the U.S. domestic ethanol industry. Even assuming an intent to injure foreign-owned MTBE producers could be inferred based on an intent to benefit the U.S. domestic ethanol industry, an intent to injure suppliers of products or services to MTBE producers could not reasonably be inferred.

Any such inference would be purely a leap of logic. This is so because, as Methanex concedes on page 2 of its rejoinder, ethanol and MTBE, not methanol, are used as oxygenates. Specifically, because California completely obtains its alleged objective of benefiting the domestic ethanol industry simply by banning MTBE, there would have been no need for and, therefore, there is no basis to infer, that California adopted the subject measures with any intent to injure suppliers of products or services to MTBE producers.

MR. ROWLEY: May I ask you a question on

that point, Mr. Birnbaum? When I read the draft amendment at page 1, I see that Methanex seeks to amend its claim in order to allege international discrimination. I won't read on, but you can come to it. It then defines "international discrimination."

In the second sentence of its definition in the footnote, it says "in this context, international discrimination means an intent to discriminate against imports of methanol and MTBE to the benefit of the domestic ethanol industry." So if your point was that there's only an allegation to benefit ethanol and not an allegation to discriminate against methanol, does this footnote and the allegation of intentional discrimination affect the position you just took with us?

MR. BIRNBAUM: I would venture to say that the exclusive foundation of their allegation of intentional discrimination is an intent to benefit the U.S. domestic ethanol industry, and it makes sense, because why would California have any interest in injuring foreign-owned producers --

foreign-owned suppliers of products or services, if not to benefit the U.S. domestic ethanol industry. After all, they've amended their claim, because of allegations of ADM's involvement with the governor. If it's not to benefit domestic ethanol producers, then why would there be any intent to discriminate against anybody else?

I think that's the foundation of their allegation regarding intentional discrimination, and I'm willing, for the purposes of argument, to assume that you can infer an intent to injure MTBE producers, because ethanol and MTBE are used as oxygenates, but I think it is this leap of logic to infer an intent to injure foreign-owned suppliers of products or services to MTBE producers or foreign-owned suppliers of products or services to such suppliers, and so on, or to infer an intent to harm foreign-owned investors or investments that are going to incur increased costs of gasoline in California, or anybody else from the allegation that this is an intent to benefit the domestic gas and ethanol industry.

Now, I've also had some trouble, in their draft amended claim, with the point that you identify in the footnote, and I would note that to the extent that Methanex, in fact, alleges that the subject measures were intended directly to harm foreign-owned methanol producers and marketers, in other words independent of any intent to benefit the U.S. domestic ethanol industry -- and again, I don't see a basis for this in their allegations -- but to the extent it's there, this intent is based solely on the merest of inferences.

If we take all of the facts pled as true in the statement of claim and the draft amended claim -- for example, the fact alleged that Governor Davis, before he was governor, as a candidate met privately on one occasion with ADM executives, and if we assume that the fact as pled, that at that meeting ADM executives disparaged methanol as well as MTBE, because, in their view, methanol is a foreign product, and we assume that ADM has been doing this from time immemorial and has done it since that meeting, and we assume that the U.S.

Environmental Protection Agency made the statements that Methanex refers to, and if we assume all of the facts that they've pled, it still would be a leap of logic to infer that there was an intent on the part of the governor to discriminate on the basis of nationality against suppliers of products or services.

MR. ROWLEY: I don't mean to interrupt you there, but just one further question. If you go as far as you do and one accepts, for argument, that there is not that -- the intent is to benefit ethanol and there is not a specific intent involving malice to harm methanol producers, but if the intent is to benefit methanol and, you said, for argument go as far as an intent to harm MTBE, in those circumstances, just dealing with damages and causation, can one not say that it is obviously foreseeable that those two intents in those two ways with those two products will have a direct consequence, a directly foreseeable consequence on the producers of methanol, some of whom may or may not be foreign?

MR. BIRNBAUM: You're combining direct and foreseeability. Do you mean a directly foreseeable impact on foreign suppliers of products or services to MTBE producers?

MR. ROWLEY: By "foreseeably," I mean a reasonably foreseeable effect.

MR. BIRNBAUM: There may be. But let's assume for the sake of argument there is a reasonably foreseeable impact on foreign suppliers of methanol to MTBE producers, but under the international law and the myriad of cases we've cited, it isn't sufficient in the context of a purely economic damage to have reasonably foreseeability as a test of proximate cause. It has to be a direct effect. It's like -- for example, the Lusitania case where there are insurers who have contracted with the travelers on the ship, life insurance policies. And Germany sinks the Lusitania, and the insureds perish in the disaster, and the beneficiaries of the life insurance policies claim against the insurance companies. The insurance companies pay out under the policies.

And then the insurers want to recover from Germany because, under the Treaty of Berlin and the Treaty of Versailles after World War I, Germany has to compensate for all direct and indirect damages as a result of its actions, and they say that "indirect" sweeps them in because their damages are indirect, and I would say their damages were reasonably foreseeable, that Germany would have reasonably foreseen that by sinking the Lusitania, there would be travelers on the ship who would have life insurance policies and insurers would have to pay out sums as a result of the premature deaths.

So I think the damages are reasonably foreseeable there, and the tribunal, for example, you know, rejected the claims on proximate cause grounds because it wasn't a direct or immediate consequence. And there are -- the great many cases that we cite in our memorial cover this. That's Provident Mutual Life Insurance. There's the Estate of Thornhill, Trail Smelter, Leach versus Iran, MA Quina Export, and Dix, and these involve multiple international tribunals, not only the U.S.-German

mixed claims tribunal that dealt with Lusitania, but several other, three or four other, or five, international tribunals.

Now, there's another issue, though. There's a number of Canadian cases -- and we've cited them in our memorials -- that look not at reasonable foreseeability, per se, but whether or not it was within the -- was reasonably contemplated, not necessarily reasonably foreseeable. And one of those cases that we cited had to do with the captain of a ship who's approaching a bridge, and he knows that there is rail traffic on the bridge, trains that use the bridge. And he collides with the bridge, and the court looked at the issue of well, was this -- there's an action brought by the railroads that have to redirect the train traffic around the bridge, and they incur losses.

So the question arises, was it reasonably foreseeable to the ship captain that by damaging the bridge, he was going to put out -- that he was going to cause costs to be incurred by the railroad

companies. And the court there said that the issue was whether or not it was in the reasonable contemplation of the captain at the time that, by colliding with the bridge, there would be these damages incurred by the -- by the rail companies, and the conclusion was that it was not in the reasonable contemplation of the ship owner, and the requests for damages, the claim for damages of the railroad companies were dismissed.

If reasonable foreseeability alone is to be applied in the context here, where you're dealing with government regulations of general application, then it certainly makes much more sense to apply a standard of reasonable foreseeability that is like these Canadian cases.

And there are others as well, at least another one that we found in our research dealing with the concept of reasonable contemplation. And then you would ask yourself, was it in the reasonable contemplation of California in enacting the MTBE ban, a measure of general application, that it was going to subject itself to suits for damages

by all suppliers of products or services to MTBE producers.

I mean, all of the companies that construct the facilities, that supply the equipment, that provide other feedstocks, and the companies of those companies, I mean, was it in their reasonable contemplation? They might very well have reasonably foreseen those injuries, but was it within their reasonable contemplation?

I think the answer has to be no, that it wouldn't have been in their reasonable contemplation, like the ship captain who knew about the rail traffic on the bridge. So even if it's reasonable foreseeability alone, then it should be reasonable contemplation, and I think that these damages should still be dismissed based on the facts alleged in the statement of claim and the draft amended claim.

But again to go back, the standard isn't reasonable foreseeability alone. It is direct or immediate consequences. Like the myriad of cases we cite, there is no direct or immediate consequence

here. Methanex's damages are removed. It is only because of their contractual relations with MTBE producers that they're going to be impacted by this ban on the use of MTBE in gasoline sold in California.

MR. ROWLEY: Thank you.

MR. BIRNBAUM: To conclude, then, with respect to remoteness, the NAFTA parties did not subject themselves to claims for remote damages and Methanex's claims for purely economic damages, damages anticipated as a result of changes in the behavior of gasoline distributors and MTBE producers are too remote. Consequently, because, under Articles 1116 and 1117, a claim may not be submitted to arbitration in the absence of proximate cause, this tribunal lacks jurisdiction to hear Methanex's claims.

Moreover, these claims should be dismissed at this pre-merits phase, because as reflected in the International Court of Justice cases, cited in footnote 36 on page 21 of our memorial, no purpose would be served by adjudicating the case on the

merits.

Contrary to Mr. Dugan's statement yesterday, the Hoffland Honey tribunal dismissed that case at the pre-merits phase, not because the facts were silly, but rather because in that case, as here, the facts alleged, even if true, clearly demonstrated the absence of proximate cause.

Before turning to "relating to," if you have any more questions on proximate cause or remoteness, I can address them now.

MR. VEEDER: Please continue.

MR. BIRNBAUM: Actually, I had a request, since it's almost 12:30 now, if we could break now.

MR. VEEDER: How long will it take you to conclude your submissions?

MR. BIRNBAUM: That may depend on how many questions you have.

MR. VEEDER: If you'd like to break now, we can break now. I think if you don't mind, we'd prefer it if you could finish your submissions. But just tell us how long, left alone by the tribunal, you estimate that would take?

MR. BIRNBAUM: My submission on "relating to"?

MR. VEEDER: Yes.

MR. BIRNBAUM: It's fairly brief. If you've got short questions, then we should be through with it fairly expeditiously.

MR. VEEDER: Please finish.

MR. CLODFELTER: Mr. President, perhaps -- I suggest that he finish his presentation, and then if you have questions to put, then we can come back and answer them.

MR. VEEDER: We do have something we'd like to raise with you, which may affect some of the presentation that will follow. So we'll certainly be flexible. I think it's only fair that Mr. Birnbaum finish.

MR. BIRNBAUM: As I said, I only have a few comments relating to "relating to." First, though, I want to clarify the relationship between "relating to" and the United States' other defenses. "Relating to" relates to whether Methanex's claims fall inside Chapter 11, and the United States'

obligations at all. Even if Methanex can make out a "relating to" claim, it still must state a claim under some substantive obligation within Chapter 11. Therefore, if the tribunal decides that we are right on "relating to" and Methanex's claims are outside the scope and coverage of Chapter 11, then the entire dispute will be decided and dismissed.

However, if the tribunal agrees with Methanex and we surmount the other general objections, then Methanex still must demonstrate that it has succeeded in stating an admissible claim of a violation of one of the three substantive provisions on which it relies, Articles 1102, 1105, and 1110.

Now, again, as I've mentioned, Article 1101 concerns the scope and coverage of Chapter 11. In this context, the language "relating to" means more than "effecting." On this, all three NAFTA parties agree. This is so, because Chapter 11 not only identifies obligations owed by the NAFTA parties to foreign-owned investors and investments, but also embodies a waiver of sovereign immunity.

It would not be reasonable to infer, as Methanex argues, that the NAFTA parties subjected themselves to claims for substantial monetary damages simply where foreign-owned investors allege the particular measures happen to affect them or their investments, but not in a legally significant way.

On their face, the California measures at issue here do not relate to Methanex or its investments in a legally significant way. This is so because the measures concern only the content of gasoline sold in California. The measures do not, for example, in any way regulate Methanex or its investments or their sole product, methanol.

The measures merely, and inadvertently and indirectly, affect the interests of Methanex and its investments by allegedly eliminating a submarket for and lowering the price of methanol. Therefore, the measures do not relate to Methanex or its investments, just as they do not relate to foreign-owned investors and investments that may incur economic losses because of any increased costs

of California gasoline. The measures do not relate to Methanex or its investments, just as they do not relate to any other foreign-owned suppliers of products or services to MTBE producers or to suppliers of such suppliers or to suppliers of suppliers of such suppliers, and so on.

Finally, with respect to Mr. Dugan's statements yesterday regarding "relating to," we note that rather than inserting new language into Article 1101, we are merely interpreting the text. We are interpreting what is meant by "relating to" in the context of Article 1101, just as Methanex itself attempts to interpret Article 1101 by asserting that "relating to" means directly or indirectly relating to.

In addition, Mr. Dugan incorrectly stated yesterday that because Methanex has alleged intentional discrimination, the "relating to" requirement is automatically satisfied. This assertion fails for the same reasons explained in our memorials and today that Methanex's intentional discrimination claim itself fails.

We've already responded to the other statements regarding "relating to" made by Mr. Dugan yesterday in our reply memorial at pages 43 to 46 and our rejoinder at pages 45 to 47, and therefore, I'm not repeating our responses now. Thus, because the measures do not relate to Methanex and its investments, this tribunal lacks jurisdiction to hear Methanex's claims for this reason as well.

MR. VEEDER: We won't ask you any questions about Article 1101 now. We may want to come back to it, and if you want to come back to it after the break, please do. We just want to take stock of where we are, because once you finish, Mr. Birnbaum, we have Ms. Menaker on no cognizable loss or damage; is that right?

MS. MENAKER: Yes, that's right.

MR. VEEDER: Then we have you also addressing us on whether there can be any claim under 1106 for alleged injury to an enterprise. With regard to that matter, that would depend on whether or not we allow in the draft amended statement of claim. You're addressing that, I

think, on the basis of the original statement of claim only?

MS. MENAKER: And also, I believe, the draft amended claim seeks to add a claim under Article 1117, but it does not withdraw its claim under Article 1116. So even if you permitted the Methanex to amend its claim, we would still have the same objection as with respect to its draft amended claim.

MR. VEEDER: You'd have the same objection, but would it get you anywhere if they can bring that same claim under Article 1117?

MS. MENAKER: Yes, it would, and we can address that either now or in my presentation this afternoon.

MR. VEEDER: At some stage, we would like somebody to address us on the discretion that we would have under Article 20, leaving aside jurisdiction admissibility, but dealing with the allegations of lateness and prejudice to the United States in making the claims and the draft amended statement of claim.

Now, is that going to be on you, or is that going to be somebody else, or do you want to add to anything you've already said in your written submissions?

MR. LEGUM: We'll address the tribunal on that subject either during the closing or --

MR. VEEDER: We'd like it before we hear Ms. Menaker on Article 1116.

MR. LEGUM: It shall be done, then.

MR. VEEDER: Thank you.

MR. VEEDER: Can you give us some rough estimate as to how much longer -- we have the time. It's just a question of knowing how far you're going.

MR. LEGUM: I suspect that we'll be done within an hour after we start after lunch, although it might be less, it might be a little bit more.

MR. VEEDER: Thank you. That's a very helpful guidance. Let's break now, and we will resume at -- would it be possible to start a little earlier? Could we resume at 1:45 instead of 2:00? Will that cause any difficulty to anybody?

MR. LEGUM: That's fine.

MR. CHRISTOPHER: We might indicate that the reason we're pressing here is that the tribunal desires to meet and ponder itself this afternoon, and we're trying to estimate how long we'll have for that. That's the only reason. It isn't that we're going out to watch the Baltimore Orioles.

(Whereupon, at 12:30 p.m., the hearing was recessed, to be reconvened at 1:45 p.m. this same day.)

AFTERNOON SESSION (1:45 p.m.)

MR. VEEDER: Let's resume. Mr. Birnbaum, did you have anything you wanted to add to what you said this morning?

MR. BIRNBAUM: I'm happy to respond to any questions, but I haven't got anything to add.

MR. VEEDER: We don't have any questions for you for the time being.

MR. BIRNBAUM: Very good. Thank you.

MR. VEEDER: Ms. Menaker?

MS. MENAKER: Mr. President, members of the tribunal, I will now address the United States' objection that Methanex has not alleged any legally cognizable loss or damage. Methanex's claim is, at best, premature. All of Methanex's and its affiliates' purported losses, amounting to approximately $1 billion in U.S. dollars, are claimed to arise out of the ban of MTBE in California's gasoline. That ban, however, is not yet in effect. As of today, there is absolutely no prohibition on the sale of gasoline containing MTBE in California. There are two separate and

independent reasons why this fact should dispose of Methanex's claim.

First, Methanex's Article 1110 and 1102 claims are not ripe, because at this time there can be no breach of those provisions. Second, Methanex has not alleged that it or its U.S. affiliates have suffered any legally cognizable loss or damage by reason of or arising out of the ban -- excuse me, arising out of the measures of challenges, as is required by Articles 1116 and 1117. I will address these points in turn. First, I will address our objection that Methanex's Article 1110 and 1102 claims are not ripe. Methanex contends that the ban of MTBE in California's gasoline constitutes an expropriation of its investments, but no ban is currently in effect. Even assuming that Methanex is correct and that the ban will constitute an expropriation, its expropriation claim is not ripe, because there can be no expropriation before property is actually taken. This rule of international law has been applied in several cases and is recognized by commentators interpreting

national law.

For example, in Malek versus Iran, a case decided by the Iran-U.S. claims tribunal, that tribunal determined that the date of the expropriation was the date that the property was seized and not the date that the law was issued pursuant to which the property was seized. Similarly, in International Technical Products, another case before the Iran-U.S. claims tribunal, the tribunal there determined that the date of expropriation was, at the earliest, the date when the owner in that case lost his right to require that his property be sold at auction and not the date when the writ was served on the property owner pursuant to which the property was ultimately for closed on.

And in the Mariposa claim, a claim before the U.S. Panamanian commission, that tribunal held that the date of the alleged expropriation was the date that the court determined that the state was entitled to claimant's property and not the date on which the law was passed that enabled private

persons to initiate suits on behalf of the state to claim certain properties. I will refer the tribunal to pages 57 through 60 of our memorial where these and other supporting authorities are discussed.

In this case, to the extent that the ban is alleged to constitute an expropriation of Methanex's investments, Methanex's claim is not ripe, because that expropriation would occur -- would only occur when the ban actually went into effect and not on the date that the law pursuant to which the ban will go into effect was adopted. Methanex also claims that the ban denies it and its investments national treatment. Its claim is premised on the allegation that because the ban has different effects on methanol producers than it has on ethanol producers, the ban discriminates on the basis of national origin, in violation of Article 1102.

Aside from the objections already noted, Methanex's claim fails again because there is no ban in effect. We submit that there can be no national treatment violation unless and until there is less

favorable treatment accorded. Methanex has pointed this tribunal to no authority that supports its conclusion that there can be a national treatment violation found before the measure that purportedly discriminates against it is actually in effect and before the claimant is actually discriminated against as a result of that measure.

In addition to Methanex's Article 1110 and 1102 claims not being ripe, Methanex has not alleged that it has suffered any cognizable loss or damage by reason of, or arising out of the challenged measures, as is required by Articles 1116 and 1117. First, Methanex challenges the executive order as a measure that violates the NAFTA. All of Methanex's claimed damages, however, are alleged to arise out of the ban of MTBE in California's gasoline. I will refer the tribunal to page 8 of Methanex's notice of arbitration which Methanex cited yesterday. On page 8, Methanex states "the ban on MTBE has caused and will cause losses, including inter alia," and then it goes on to list the various losses that Methanex and its affiliates purportedly have sustained.

Similarly, on page 35 of its draft amended claim, under the heading of "damages," Methanex states "the California ban on MTBE has substantially damaged Methanex, its U.S. investments, and its shareholders." It then continues to elaborate on its purported damages.

The executive order, however, did not ban MTBE in California's gasoline. It merely directed certain California agencies to prepare a timetable and to promulgate regulations. This was not a self-executing measure. The executive order had no legal effect on members of the public, including Methanex and its U.S. affiliates. December 2002 would have come and went, and if there had been no regulations promulgated, there would be no ban on the use of MTBE in California's gasoline. As we stated in our reply, the United States' objection is simple. Methanex alleges that the ban of MTBE violates Chapter 11 and has caused it damage. It must challenge the measure that bans MTBE.

The California Reformulated Gasoline 3 regulations do this, the executive order does not.

Even if Methanex is permitted to amend its claim to challenge the California reformulated 3 regulations, its claim fails because it has failed to allege that it has suffered any legally cognizable loss or damage by reason of, or arising out of those regulations. As an initial matter, to the extent that Methanex claims that the future ban on MTBE in California's gasoline will cause it loss or damage, those claims are not legally cognizable. The NAFTA makes clear that a claimant must have already sustained loss or damage to have standing to file a Chapter 11 claim. I note that this position was endorsed by Canada in its Article 1128 submission.

Moreover, none of Methanex's claim damages are legally cognizable, because they are not alleged to have been sustained by Methanex in its capacity as an investor in the United States. Methanex has the status of an investor as defined by the NAFTA, because it owns and controls Methanex Fortier and Methanex U.S., two companies organized under the laws of the United States. Suppose, for example, that the United States expropriated all stock

certificates held by foreign investors. If the U.S. were to do this, Methanex's stock certificates that it holds in Methanex Fortier, for example, would be confiscated, and that would constitute a loss to Methanex that was sustained by Methanex in its capacity as an investor in the United States.

Methanex, however, has not claimed that it has suffered any injuries of this nature by reason of, or arising out of the measures of challenges. Rather, it alleges that its cost of capital will increase, its share price declined, and its customer base, goodwill, and market share have been adversely affected. But in this respect, Methanex is no different from any other foreign producer of methanol that does not have an investment in the United States. All of those producers will be equally affected if the global price of methanol declines as a result of the California measures. The cost of capital for all of those companies may indeed increase as a result of the California measures, but those companies have no standing to bring a claim under the NAFTA, because they are not

investors as defined by the NAFTA, and if one of those hypothetical companies were an investor, because it had purchased stock in a U.S. company, for example, its status as an investor in that regard would not give it standing to bring a NAFTA claim for injuries it allegedly suffered that were not sustained by it in its capacity as an investor in the United States. Methanex is no different from that hypothetical investor. It is an investor for the injuries it alleges to have suffered are not related in any way to its role as an investor in the United States. Thus, none of the damages alleged by Methanex to have been sustained by it are legally cognizable.

Furthermore, a number of damages claimed by Methanex are not legally cognizable for additional reasons. For example, Methanex claims that its share value declined in the hours following the issuance of the executive order and that it is entitled to damages in the amount of this decline because this decline is lost market capitalization. But this decline is not a loss at all, and in any

event, is not legally cognizable. Any purported decline in its share value is not a legally cognizable loss or damage to Methanex. A corporation can recover for injury directly caused to it, but it cannot recover for a decline in the value of shares that it issued. The injuries suffered by the corporation is the underlying injury and not the decline in share value. Moreover, share value may decline without the company having sustained any injury.

Even in the most generous of economic theories, share value just reflects the market's speculation as to what the company's future prospects are. In short, a decline in share value is neither an injury to the corporation that issued the shares, nor is it necessarily an indicator that the corporation has actually sustained an injury.

Finally, Methanex claims that it has alleged that its U.S. affiliates have sustained legally cognizable loss or damage so its claim should move forward. We submit that Methanex has not done this.

First, it is uncontested that Methanex Fortier, a plant that produced methanol in Louisiana, was idled by Methanex before the executive order was issued. Methanex claims that as a result of the future ban of MTBE in California's gasoline, Methanex Fortier will remain idle for a longer period of time than it otherwise would. As I mentioned earlier, however, it is a jurisdictional prerequisite that an investor allege that it or its investment has sustained loss or damage by reason of, or arising out of a measure at the time it submits its statement of claim. Methanex has not alleged that Methanex Fortier has already sustained any loss or damage by reason of, or arising out of the California measures, nor could it credibly so allege, given these undisputed facts.

The only remaining point is whether Methanex has credibly alleged that Methanex U.S. has suffered legally cognizable loss or damage by reason of, or arising out of the measures of challenges. We submit that it has not. Methanex alleges that Methanex U.S. has sustained damages in the loss of

its customer base, goodwill, and market share. Those allegations, we submit, are simply not credible allegations. Methanex's reported profits for its U.S. segment have increased every year since the executive order was issued. This flies in the face of Methanex's allegations that Methanex U.S. has already suffered loss or damage by reason of, as a result of the future ban of MTBE in California's gasoline. Similarly, statements made by Methanex in its annual report for the year 2000, released this past April, compel the conclusion that under the undisputed facts here, Methanex has not credibly alleged that it or its U.S. affiliates have already sustained loss or damage by reason of, or arising out of the future ban of MTBE in California's gasoline.

In that annual report, Methanex states "during the summer of 2000, MTBE use in California was at record levels." It goes on to state "the methanol supply and demand fundamentals point to a balanced market for the next two years, and any impact on the methanol market of a reduction in MTBE

use in the United States is unlikely to be felt until 2003. Some industry commentators are now suggesting that it will take longer than expected to see a reduction in MTBE use in the United States."

These flatly contradict Methanex's allegations that it makes here, that it and its affiliates have already sustained damages as a result of California's future ban. Consequently, Methanex has not credibly alleged that it has suffered loss or damage as is required by Articles 1116 and 1117. For all of these reasons, Methanex has failed to satisfy the jurisdictional prerequisite contained in Articles 1116 and 1117 that an investor allege that it or its affiliates has sustained loss or damage by reason of, or arising out of the challenged measure or measures.

If the tribunal has no questions on that presentation, I will --

MR. VEEDER: Nothing at this stage. Thank you very much.

MS. MENAKER: Thank you.

MR. LEGUM: I will now, as the tribunal

suggested, briefly address the issue of amendment under Article 20. I would like to take an opportunity to take care of a couple housekeeping matters left over from yesterday.

Article 20, as the tribunal, all here are no doubt aware, contains discretionary grounds and nondiscretionary grounds. Most of the United States' objections presented here are in the nondiscretionary category. They go to whether the tribunal would have jurisdiction over the claims pleaded in the draft amended claim. In terms of discretionary grounds for amendment, there are two categories of assertions that the United States has made. One is that, even assuming that the tribunal has jurisdiction or even if the tribunal finds it has jurisdiction over some of the claims, many of those claims lack merit on their face, and as a result, even if the tribunal would have jurisdiction, other circumstances within the meaning of Article 20 are present, that counsel against allowing those claims into the case, and the parties are essentially in agreement on this. Our reply

memorial addresses this question at pages 5 to 6. The parties essentially agree that if the claims are baseless on their face, other circumstances are present, and this --

MR. VEEDER: You said page 9?

MR. LEGUM: Excuse me, 5 to 6. So, in addition to those legal grounds, the other discretionary grounds specified in Article 20 are delay and prejudice.

MR. VEEDER: When you say "baseless on their face," I think the language used by Methanex is "frivolous" or "vexatious." You're using those as synonyms, are you?

MR. LEGUM: I am, yes, and not as alternatives.

MR. VEEDER: I got the point.

MR. LEGUM: The other discretionary grounds are delay and prejudice. Those grounds are addressed in the United States' reply at pages 55 to 58 and in its rejoinder at pages 54 to 55. The United States will rest on those pleadings, unless the tribunal has any questions addressed to those

two points.

MR. VEEDER: When we talk about prejudice, there's always a prejudice if a claim comes in late to a defendant. It's really a question of whether it's a remediable prejudice. I mean, the prejudice you can incur is that you've got to plead to it twice. You've got to amend your defense. You've got to cover the same ground again, but that can be remedied with an order of costs which we have jurisdiction to make.

So when you allege prejudice, is there any unremediable prejudice that the United States would suffer?

MR. LEGUM: I strongly suggest that my wife would disagree with me on this subject, but no, I don't believe there is any unremediable prejudice that we've been able to identify.

MR. VEEDER: That's a very fair answer.

MR. LEGUM: If the tribunal has no further questions on that, I would like to address a few housekeeping matters. The question of the waiver issue came up yesterday. We have been in touch with

counsel for Methanex, and the parties have agreed that we'll continue to talk with an effort towards, if at all possible, presenting the tribunal with some agreed resolution of that particular issue.

MR. VEEDER: Just one moment.

(Pause.)

What the tribunal would like to do now is take a five-minute break and just see if we can make an appropriate ruling in relation to Article 20 on the discretionary grounds. In the meantime, if you could keep talking about waiver. So if we could take a five-minute break, we will resume in five minutes.

(Recess.)

MR. VEEDER: Let's resume. We don't need to hear from you on this point, Mr. Dugan. The tribunal makes the following order in regard to the Claimant's application to amend its statement of claim. We shall give reasons for this order later, but we thought it appropriate to make the order at this stage, because it will affect the presentation that follows from the Respondent. The order is that

subject to all jurisdiction admissibility issues and subject to any order as to costs, the tribunal will allow the Claimant to amend its statement of claim in the form of the draft amended statement of claim.

I hope that order is clear. It is subject to the first two items that I have listed.

Now, it will affect, I think, Ms. Menaker's presentation in regard to Article 1116, but as we understood this morning, it won't entirely preclude it, which we're interested to see how it works. If you need more time just to recast your submissions, please don't hesitate to ask for it.

MR. LEGUM: May I just -- a couple of other housekeeping issues before turning the floor over to Ms. Menaker.

MR. VEEDER: Yes. I take it the waiver produced no clear agreement between the parties.

MR. LEGUM: I think there is certainly a will there, although we're a little bit weary at this point. What we've agreed is that we will talk, probably next week, and if we cannot reach agreement

within a week, we will let the tribunal know and submit that particular issue on the papers, unless the tribunal has any questions on it.

MR. VEEDER: I think we may pursue on this, then. Let's leave this aside for the time being. We can come back to it. We want to get a clear idea of where the differences lie at this stage. They seem to be there, but maybe not as large as was anticipated. Why don't we come back to it later.

Next point, please.

MR. LEGUM: The final point is the question of the documents that Methanex offered yesterday. The tribunal will recall that Methanex offered documents. We requested an opportunity to look at them and then undertook to provide our views to the tribunal. I'd like to do that now. Having reviewed the documents, we believe that they are evidence and, therefore, not relevant to the task that is before the tribunal on these objections to jurisdiction and admissibility.

MR. VEEDER: We were given a list, I

thought by Methanex, of the additional materials cited yesterday. They can't all be evidence on this list.

MR. LEGUM: I'm sorry. The list that you have, I believe, are, in fact, authorities rather than evidentiary documents.

MR. VEEDER: I think you need to look at it, because there are some things that simply can't be authorities, like the world map.

MR. LEGUM: Let me show you what we're referring to. There's a map.

MR. VEEDER: We didn't get the map. We have a list. Do you have the list?

MR. LEGUM: Yes. No objection to the list.

MR. VEEDER: Do you want to go through the list and tell us where the objection lies?

MR. LEGUM: What I'm about to tell you is that we don't have an objection, which might be more helpful.

MR. ROWLEY: They're evidence, they're of no use to us, but you're going to let it in.

MR. LEGUM: They're misleading in many respects, as evidence can often be. Mr. Bettauer spoke to a chart they offered this morning. That said, we have no objection to the tribunal reviewing them, although we believe that the weight the tribunal should give them is zero.

MR. VEEDER: I'm being very slow. How can the Brasserie case be evidence?

MR. LEGUM: It's not. We don't suggest that it is. The documents we have in mind are a Moody's report from May 1988; an excerpt from a Natural Resources Defense Council document from April 2001; a press release from Fitch IBCA; an excerpt from a Web page of the California Environmental Protection Agency; a -- it looks like some kind of credit report or announcement of a credit report from Bloomberg. I believe that's it.

MR. ROWLEY: The map?

MR. LEGUM: And the map and the stock chart.

MR. VEEDER: Thank you.

MR. LEGUM: I apologize for the confusion.

MR. VEEDER: No, no, it's my fault. The problem is we haven't got most of these.

MR. DUGAN: And we will provide them to you as soon as you want. We will get them to you this afternoon.

MR. VEEDER: Thank you.

MR. LEGUM: One final point, the tribunal asked a question concerning United States' domestic law as to if there were a malicious intent to harm aliens, would that violate domestic law. I'm grossly simplifying the question. I'm simply reporting at this point that it will be likely tomorrow that we can answer that question.

MR. VEEDER: To be a little more specific, in circumstances where moneys are paid to a public official -- let's add in the secret meeting as well -- and that public official succeeds to a request that -- it doesn't have to be an alien, it can be a U.S. citizen, is harmed and to be harmed by an official act of that public official, is that lawful?

It would be the tort of misfeasance in my

land and it would not be lawful. It would be an abuse of power.

MR. LEGUM: The notion here is that there is a quid pro quo, that the official is taking official action --

MR. VEEDER: The official is taking official action in his position as a public official, targeting maliciously in order to harm that target.

MR. LEGUM: And there was a reference in your question, I believe, to compensation or remuneration of some kind?

MR. VEEDER: That is not some whim of the public official, but as a result of a request made by another person, not a public officer, and not a bribe, but a money consideration takes place, such as a campaign contribution.

MR. LEGUM: We will give some thought to that and respond tomorrow morning.

MR. VEEDER: I will find the reference in one of the memorials, but there was a Californian statute cited, in I think either your rejoinder or

your reply. I was wondering how far it went in this particular factual context.

MR. LEGUM: We will take a look.

MR. VEEDER: Thank you.

MR. LEGUM: And that's all I have.

MR. VEEDER: Thank you.

MS. MENAKER: Members of the tribunal, taking into consideration the order you just issued, I will cater my remarks to that order to the extent I can.

In its draft amended complaint, Methanex makes claims under Articles 1116 and 1117. The United States submits that Methanex lacks standing under Article 1116. The United States, therefore, asks that this tribunal dismiss Methanex's Article 1116 claim for lack of jurisdiction.

As I hope will be clear at the end of my presentation, this issue is not merely academic, as Methanex's counsel suggested yesterday, and it will have consequences in this case should this case proceed beyond the jurisdictional phase.

Yesterday, counsel for Methanex spent a

lot of time advocating in favor of two positions; namely, that a shareholder is an investor as defined by the NAFTA, and that a shareholder has standing under Article 1116 of the NAFTA. The United States agrees that a shareholder may, in appropriate circumstances, be an investor as defined by the NAFTA. The United States also agrees that a shareholder may, under certain circumstances, have standing under Article 1116.

In this respect, the NAFTA differs from customary international law. Under customary international law, only states have standing to bring international claims, and a private party who is injured has to petition the state of which it is a national to espouse its claim.

The NAFTA, by including an investor-state dispute resolution mechanism, deviates from this rule of customary international law by granting investor standing to bring claims. That is not where our disagreement with Methanex lies. The only point of disagreement between the parties is what types of injuries are recoverable under Articles

1116 and 1117, respectively.

As detailed in our submissions, Articles 1116 and 1117 serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment. The two articles are not interchangeable. This result is compelled by the language of the NAFTA itself, the United States' statement of administrative action, and in an examination of the background principles of international law against which the NAFTA and these articles in particular were drafted.

The first of these principles is that a corporation has a legal personality distinct from that of its shareholders. This is a principle recognized by the vast majority, if not all, of developed legal systems around the world and was specifically addressed by the International Court of Justice in the Barcelona Traction case.

A corollary of this principle is that a

shareholder ordinarily cannot act on behalf of the corporation. As the ICJ in the Barcelona Traction case noted, in certain circumstances, the municipal law of many states provides an exception to this general rule with what is known in common law countries as a shareholder derivative suit, and in civil law countries as an action sociale, or equivalent term.

However, as the Barcelona Traction court concluded, customary international law provides no equivalent exception to the general rule that shareholders do not have standing to assert derivative claims on behalf of a corporation.

The second principle is that a Claimant does not have standing to bring an international claim against the state of which it is a national. The problem that the drafters of Chapter 11 faced was that applying these background principles of customary international law, a large class of potential investors would be left without a remedy under the NAFTA.

This is because, not infrequently,

investors choose to make investments through a corporation incorporated in the country in which they are investing. Although Article 1116 would provide a right of action for investors to bring claims for injuries to that investor, the investor would be without a remedy where the investor owned or controlled a corporation incorporated under the laws of the respondent state and that corporation suffered an injury.

For example, suppose a Canadian investor that manufactures widgets decides to invest in the United States. For tax and other reasons, the investor decides to establish a U.S. subsidiary to hold the factory where the widgets are produced. If the United States later decided to build an airport on the land where the factory was located and a dispute emerged over the amount of compensation due, under the international law principles I just discussed, the investor would be left without a remedy. Under the Barcelona Traction rule, the Canadian parent would lack standing to bring an international claim because the injury would be to

the subsidiary and impacts the parent only derivatively.

The Canadian parent, as a shareholder, would not have standing to act on behalf of that subsidiary. The U.S. subsidiary would also lack standing to bring a claim because a Claimant may not assert an international claim against the state of which it is a national.

The subsidiary's incapacity to act was of significant concern to the drafters of Chapter 11. The device of a locally incorporated subsidiary to hold a substantial investment abroad is widely used.

It is for this reason that the drafters included Article 1117. Article 1117 addresses the situation where the alleged violation of Chapter 11 directly impacts a locally incorporated subsidiary. It does this by creating a new derivative right of action that is not found in customary international law. The right of action is in favor of an investor of another party, thus ensuring that the claimant will be of a nationality different from that of the respondent state. Under customary international law

principles, a shareholder could not take action on behalf of a corporation. Under Article 1117, it may. The right of action created by Article 1117 is clearly a derivative one, however.

Article 1117 provides that the right can only be exercised where the investment has incurred loss or damage by reason of, or arising out of, the breach. The addition of Article 1117 in no way alters the principle that a corporation has a legal personality distinct from that of its shareholders and that a shareholder cannot recover for an injury suffered by a corporation in which it owns shares. It is for this very reason that Article 1135(2) provides that any award on a claim made under Article 1117 must be paid to the enterprise and not to the investor.

Whether an injury is direct or derivative depends in large part on what form the investment takes. Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor. Where the investment is not a separate

legal entity, however, any damage to the investment will be a direct loss to the investor.

Let me provide an example. Suppose a Canadian investor purchases a piece of real estate in the United States. Now suppose another Canadian investor incorporates a subsidiary in the United States and that subsidiary purchases a piece of land. The United States then expropriates both pieces of land.

In the first scenario where the Canadian investor purchased the piece of land, that investor would have suffered a direct injury and it would have standing to file a claim under Article 1116.

In the second scenario where the investor incorporated a local subsidiary to hold the land, the investor would have suffered a derivative injury. There, it's the U.S. subsidiary that has suffered the direct injury, and that investor would have standing to file a claim under Article 1117 on behalf of its investment. Any award would be made to the enterprise.

Here, Methanex has filed a claim under

Articles 1116 and 1117, including its draft amended claim, but Methanex has no standing to bring any claim under Article 1116. Its claims are for damages allegedly suffered by its U.S. enterprises, Methanex Fortier and Methanex U.S. For example, Methanex claims that its U.S. affiliates' goodwill, market share, and customer base have been expropriated.

Methanex also claims that its U.S. affiliates have sustained losses as a result of the decline in the global price of methanol and in investments they've made in serving the U.S. market. Both of those affiliates are separate juridical entities. Any injury to either affiliate constitutes a direct injury to that affiliate and an indirect derivative injury to Methanex.

Methanex, therefore, only has standing to file a claim under Article 1117 on behalf of its U.S. enterprises. Nor do Methanex's claims of direct losses give it standing under Article 1116.

These purported losses fall into two categories. The first are losses that have been

allegedly sustained by its U.S. affiliates, and therefore, only affect Methanex indirectly as a shareholder of that affiliate. These are classic derivative losses for which a shareholder has no standing. Losses of this nature include any purported decline in Methanex's share value as a result of the losses allegedly sustained by Methanex U.S. and Methanex Fortier, for example.

The second category are losses that are not cognizable because they are not losses that Methanex has allegedly sustained in its capacity as an investor. I discussed this issue at length in my previous argument. Here, I'll simply repeat that Methanex's claims that it has suffered a direct loss because its share price has declined, its cost of capital has increased, or its goodwill, market share, or customer base has been injured are not injuries that have allegedly been sustained by Methanex in its capacity as an investor.

Injuries to Methanex that would be direct injuries suffered by it that could give it rise -- could give it standing under Article 1116 would be

injuries that it might sustain if, for example, the United States expropriated stock certificates that it held in a U.S. corporation, or if the United States denied Methanex its right to vote its shares that it held in a U.S. corporation.

Those are examples of direct injuries suffered by an investor in its capacity as an investor. The losses alleged by Methanex, as explained earlier, are not of this nature and do not constitute direct losses to Methanex sustained by it in its capacity as an investor in the United States. Consequently, those allegations of direct loss do not give Methanex standing under Article 1116.

The fact that there have been other NAFTA Chapter 11 cases where tribunals made awards under Article 1116, although the claim was for damage to an enterprise, is of no import here. As the United States noted in its rejoinder, this issue was neither raised by the parties in those cases nor addressed by the tribunals in those awards. Those awards offer no guidance on this point.

In addition, I note that in at least one

Chapter 11 case, Metalclad, the claim was for damage to an investment in Mexico and that investor filed a claim under Article 1117. That accords with the United States' interpretation of the correct application of these articles.

Now, yesterday, Methanex's counsel suggested that this tribunal could draw an inference from the fact that neither Canada nor Mexico, in their Article 1128 submissions, indicated agreement with the United States' position on this point. As I'm sure this tribunal recognizes, there is absolutely no basis for any such inference to be drawn, either in favor of the United States' position or in favor of Methanex's position on this issue.

I refer the tribunal to the second sentence of Methanex's submission which provides "no inference should be drawn in respect of those issues not addressed by this submission," and the third paragraph of Canada's submission which provides "this submission is not intended to address all interpretive issues that may arise in this

proceeding. To the extent that it does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties."

Permitting an investor to have standing to file a claim under Article 1116, when its alleged injuries are all derivative of those purportedly suffered by an enterprise, would be unjust. As I already mentioned, any award rendered under Article 1116 is made to an investor, while an award rendered under Article 1117 is made to an enterprise. In a situation where an enterprise, for example, was in bankruptcy, in that kind of a situation, any award made to the enterprise would benefit the enterprise's creditors, and the investor and equity holder may not receive any benefit.

Yet, permitting the investor to file an Article 1116 claim for injuries sustained by that enterprise would allow the investor to unjustly benefit at the expense of the enterprise's creditors, because the investor would receive the full amount of the award. That is not what the

NAFTA parties intended. Adopting Methanex's interpretation would also permit the inappropriate possibility of double recovery.

Under Methanex's interpretation, if an enterprise has suffered damage, the investor may file under either or both Articles 1116 and 1117. In that case, if an enterprise sustained an injury, the investor could file an Article 1117 claim on behalf of that enterprise. The award, pursuant to Article 1135(2) would be paid to that enterprise and would presumably make the enterprise whole.

But according to Methanex, the investor would also be entitled to file an Article 1116 claim to recover for so-called injuries suffered by it as a result of any damage sustained by the enterprise, such as a decline in the value of that shareholder's shares, for example. Such a result would unjustly enrich claimants, unfairly penalize NAFTA party respondents, and could not have been intended by the NAFTA parties.

Yesterday, Methanex's counsel submitted that if its amendment were permitted, this issue

would become purely academic. We submit that it is not, and we seek dismissal of Methanex's claim under Article 1116.

In addition to being important to the United States and indeed to all of the NAFTA parties that the NAFTA be interpreted correctly, this issue has particular ramifications for this case. In the event that this tribunal does not deny Methanex's claim in full, a decision on this issue could substantially narrow the issues in dispute in any later phases of these proceedings.

If the tribunal finds, as we believe it should, that Methanex lacks standing under Article 1116, it will be clear that Methanex, at best, has only a claim on behalf of its U.S. affiliates for loss or damage allegedly sustained by those affiliates. This will simplify the hearings, because it will be unnecessary, for example, to receive any evidence regarding the effect of the measures on Methanex's businesses separate from its investments in the United States, such as issues dealing with shipments of methanol from Methanex's

facilities in Canada and Chile, for example.

Unless the tribunal has any questions on that --

MR. VEEDER: None at this time. Thank you.

MS. MENAKER: You're welcome.

MR. VEEDER: Who's next?

MR. BETTAUER: I am, and it's just to briefly close out our presentation. We have now reviewed the specifics of each of Methanex's claims. I think we have shown, both in our written submissions, which we, as I earlier said, continue to rely on, and in our presentation today why, as a matter of law, based on the facts alleged -- "credibly alleged" was Methanex's term -- by Methanex that its claims under Articles 1102, 1105, and 1110 should be dismissed. We've also reviewed a series of general grounds warranting dismissal. I don't need to repeat them here. We've just gone through them today.

There's been one theme that seems to have pervaded, I think, somewhat in both of our

presentations, and that is that from different perspectives, does one see NAFTA as a cost shifting or insurance device. The Claimant here has suggested that NAFTA is a cost shifting or insurance regime. We have seen their argument as a way to provide investors in each of the three parties compensation for any change in economic circumstances caused by governmental action that may cause them loss.

Well, we are firm in our view that NAFTA is no such device. That is not what the parties agreed to, and to find otherwise would put NAFTA-party investors in a much better position than nationals, which was not intended. It was meant to level the playing field. It would give NAFTA-party investors far greater remedies than nationals.

We intend to give investors special remedies, but not of that magnitude. It would risk undermining government at every level in each of the NAFTA parties, because there could be no certainty that a governmental action would not cause loss to someone in one of the other NAFTA parties, and no

doubt would create extreme domestic political outcries in each of the NAFTA parties. This is really not what NAFTA is about.

I'm not making a solely policy argument to you. We have demonstrated to you, reviewing each of the claims based on the facts alleged and based on the law that's applicable to the specific provisions of NAFTA, we've demonstrated that none of them is legally sustainable and that there is a legal basis for resolving the case now, for dismissing the claims at this point. We urge the tribunal to do so.

Thank you.

MR. VEEDER: Thank you very much. We come to the end of the oral submissions made by the United States. The program calls now for replies, and in view of what was discussed yesterday, the parties, I think, would prefer that we break now and start with the reply from Methanex at 9:00 tomorrow morning.

Is that still the position, Mr. Dugan?

MR. DUGAN: That is still our position,

yes.

MR. VEEDER: We will do that. Do you have any estimate as to how long you wish to take?

MR. DUGAN: I suspect about an hour and a half, something in that neighborhood, one to two hours.

MR. VEEDER: And on the United States' side, is there any estimate?

MR. BETTAUER: I think we will have to hear what the Claimant says before we --

MR. VEEDER: We'll finish by 6:00 tomorrow?

MR. BETTAUER: There's no doubt.

MR. VEEDER: Is there any application that either side wants to make at this stage? The tribunal may have questions tomorrow. We are working, as you heard, this afternoon, to formulate possibly certain questions for both parties we'll ask as and when the matters arise tomorrow morning, and I hope you will be in a position to answer them.

There were two matters we would like to come back to for sure, and that is, if you could

simply tell us on the waiver discussions what divides you, because we're slightly concerned that if we left it over to further written submissions, we wouldn't be in a position to clarify with you orally the scope of your differences or disagreements. But we want to know tomorrow what are the differences, even if you're not in a position to agree to something for us.

The other thing we have to look at is the form of our award. Inevitably, our award may be subject to challenge. Is there any particular form of the award that you need? I don't say to make a challenge more successful, but we don't want to state -- if there's anything you need to tell us about the form of the award, we can tell you already it will be a very long document, but you can tell us that tomorrow.

On the government side, if there is a total victory or partial victory, there's a claim for costs. Again, we'd like to hear from the parties how they anticipate we should deal with the question of any application for costs under the

rules, depending, of course, on the result of our award.

It's now quarter to 3:00. Unless there's some other matter to be raised, let's stop now and resume at 9:00 tomorrow morning.

MR. DUGAN: The only point is we will pass out to the tribunal copies of the exhibits we gave to the government yesterday.

MR. VEEDER: Yes. And thank you for the new Methanex CD-ROM which we received this morning.

(Whereupon, at 2:40 p.m., the hearing was adjourned, to be reconvened at 9:00 a.m., on Friday, July 13, 2001.)

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

- - - - - - - - - - - - - - -x
METHANEX CORPORATION, :
Claimant/Investor, :
and :
UNITED STATES OF AMERICA, :
Respondent/Party. :
- - - - - - - - - - - - - - -x

ARBITRATION HEARING, VOLUME 3

Washington, DC
Friday, July 13, 2001

REPORTED BY:
SARA EDGINGTON

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P R O C E E D I N G S

MR. VEEDER: Good morning, ladies and gentlemen. We'll start day 3 of the jurisdictional hearing. This is the day for replies from Methanex and the United States. But before that, we have a further observation from Mexico, if I could call upon the representative of Mexico to make those observations.

MS. GONZALEZ: Good morning, Mr. President, members of the tribunal, and counsel for Claimant and Respondent. I have been instructed by my government to make the following submission regarding the effort of the agreement amongst NAFTA parties on a point of interpretation.

I would like to refer the tribunal to the 1128 submission the government of Mexico filed on May 15, 2001, where the government of Mexico has stated its position in more detail. The point I want to add is simple. The three NAFTA parties have an institutional and long-term interest in the proper functioning of the agreement. Its correct interpretation by arbitral tribunals is fundamental

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for such proposal. That is precisely the reason for the Article 1128. Where the three NAFTA parties hold the same view on a particular point of interpretation of the agreement, that position should be considered authoritative. The general rule of interpretation for Article 31(3)(a) and (b) of the Vienna Convention states that a treaty such as NAFTA shall be taken into account, together with the context, and any subsequent agreement of the parties regarding its interpretation, as well as any subsequent practice in the application of the treaty.

In the respectful submission of Mexico, Article 1128 submissions are such an agreement of the parties, and they reflect the practice that the three NAFTA parties agree shall be considered as an extension for the interpretation of the treaty. It is Mexico's opinion that NAFTA Chapter 11 tribunals should not diverge from such sharp interpretations. As the drafters and signatories to the NAFTA, the parties stand in opposition to both articulate their intent and to convey the position that will ensure

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its proper application, bearing in mind their shared interests in its long-term success and acceptance by the citizens of their respected nations.

NAFTA Chapter 11 seeks to ensure that its investors receive the appropriate level of protection in each of the other parties. Therefore, when formulating its position on interpretive issues in NAFTA Article 1128, each party seeks to balance its interests in order to protect its investors and to protect themselves against any undue exposure to claims.

Also, the treaty has been negotiated and administered by the NAFTA parties, and their shared views as all of the sovereign state parties to the agreement should be considered authoritative on a point of interpretation. For these reasons stated, in the respectful submission of the government of Mexico, where all three NAFTA parties have clearly agreed on a particular point, their views should be considered highly authoritative by Chapter 11 tribunals.

While I have nothing else to add except to

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thank the tribunal for the opportunity granted to my government in order to present its views during this hearing.

MR. VEEDER: We thank you for those observations. We will now move on to the next stage of the proceedings, but before we call upon Mr. Dugan to put the reply for Methanex, are there any other matters that ought to be raised by any of the parties with the tribunal at this stage?

In that case, Mr. Dugan, the floor is yours.

MR. DUGAN: The only thing I was going to put on the record is I believe we have reached an agreement with respect to the waiver; is that correct? I wanted to make that a part of the record.

MR. VEEDER: That's good news to the tribunal. In due course you will tell the tribunal what that is.

MR. DUGAN: I think we will be able to provide you with a copy later on this morning.

Mr. Christopher, Mr. Veeder, Mr. Rowley,

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yesterday in Mr. Bettauer's opening and closing, the United States painted a picture of dire consequences if the tribunal accepts jurisdiction and renders a decision in this case. They stated things, for example, "under Methanex's reading of NAFTA, an announcement of a potential government action by any level of government in a NAFTA country may readily be argued to be a violation of NAFTA, even though it is not yet in effect."

That was Mr. Bettauer at pages 172, 173. "All the person or company needs to do is own a share in a company that may arguably be affected, no matter how indirectly, if and when the contemplated government action is taken." That is again Mr. Bettauer at page 173. "This would be a prescription for total paralysis of governmental action." Mr. Bettauer again at page 173. And Mr. Legum emphasized some of those later on.

Methanex submits that such statements grossly overstate the likely impact of any ruling by this tribunal, except in jurisdiction. NAFTA cases are extremely rare. NAFTA has been in effect for

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seven years, and I think, counting generously, no more than 25 cases have been filed. In that time, tens of thousands, perhaps hundreds of thousands of standard litigation cases have been filed in municipal courts, and thousands of them involve foreign investors. Foreign investors always have and always will turn far more often to the forums -- the fora provided by municipal authorities than they will turn to NAFTA -- I mean they will turn to a NAFTA tribunal. And the reason for that, the reason why I think NAFTA cases have been and will continue to be very rare is that the circumstances in which a claim actually arises will themselves be quite rare. It's very -- it's a very uncommon factual situation for a NAFTA government to inflict on a NAFTA investor harm, and for that harm to have been inflicted in a way that violates a provision of NAFTA.

It is a peculiar and unique remedy, and as a real-world matter, it simply does not arise very often. So I think the allegations of some type of systemic, structural, catastrophic, sky-is-falling

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change, if this tribunal accepts jurisdiction, are factually unfounded. There's no basis for supposing that that will happen.

Now, a second point that the United States made was -- I had said on Wednesday that Chapter 11's purpose was to increase the liability of the United States, not to restrict it, and they asserted that "there's no basis for this incredible assertion." That's Mr. Bettauer at page 174. "They never agreed to enter into NAFTA merely as an engine for increased liability to investors." That's Mr. Bettauer at page 175. They've offered no alternative explanation of what Chapter 11 is intended to do other than provide a remedy and increase the liability of the NAFTA parties for wrongful acts to foreign investors.

That's its stated purpose. That's its intended purpose, and having offered no alternative reading of the entire chapter, it's difficult how this tribunal could conclude that it was enacted for any other purpose, and that purpose, again, should be one of the guiding lights, guiding signposts when

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this tribunal interprets the various provisions of the treaty.

Next, throughout the hearing, the United States has made numerous assertions about how Methanex believes this tribunal should proceed in deciding this case. The U.S. asserts that Methanex's position at this tribunal is that this tribunal can decide this case "without guidance established by customary international law." "Under an unknown subjective standard not based on international law." That's Mr. Bettauer at page 173.

At page 181, he states "Methanex's argument is that treatment in accordance with international law does not, in fact, require the tribunal to identify and apply rules of international law, but instead permits it to decide the case on whatever basis the tribunal thinks is fair or equitable in an intuitive and subjective sense."

Mr. Legum says at page 247 "against this background, it makes no sense to suggest, as

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Methanex does here, that the NAFTA parties intended that three private individuals, convened on an ad hoc basis for the purpose of a single case, generally hailing from three different countries, would have the power to review a state's governmental decisions with no guide other than their conscience. Allowing three individuals to make such decisions based only on their subjective and intuitive sense of what is fair or equitable would, we submit, be an extraordinary relinquishment of state sovereignty."

Now, I don't know what briefs Mr. Bettauer and Mr. Legum have been reading, but they're not Methanex's briefs. Methanex has never made any assertion even remotely close to that. In fact, what Methanex has attempted to show to the tribunal is that the fair and equitable standard is a legal standard. There's no doubt that it is the law. It is the rule of decision in this case, because it is the express treaty language included in the case, and it is not some type of amorphous, unanchored, standard floating out in space. It references

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implicitly and explicitly a number of sources of law, rules of law that the tribunal can draw upon in deciding this case.

As we noted, it incorporates, we think, explicitly the principles of equity that have been a part of international law for at least 80 years. It can turn to the decisions of other NAFTA tribunals in determining what the standard consists of. It can turn, for example, to the submissions of Mexico in the Azinian and Metalclad decisions where Mexico defined what fair and equitable treatment consists of. And it can turn to principles of law adopted by the parties, amongst themselves, in other contexts such as GATT and WTO principles. All of these are rules of law. All of these are the types of rules of law that should govern a tribunal when it determines whether or not a claim presented to it, whether all the facts and circumstances of that claim rise to the level of violation of Article 1105.

What Methanex is arguing for is a very principled, a very substantive, and a reasonably

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well-defined standard under Article 1105 that will guide the tribunal in making these determinations, and I don't know how much clearer we can possibly make that. Methanex has never argued for anything approaching its ex aequo et bono standard that is not allowed to this tribunal.

Now, the government also asserts that government acts that affect the general business environment should never be actionable under NAFTA. Well, merely because a government act affects the general business environment does not exempt it from scrutiny under NAFTA, nor does it exempt it from scrutiny under any aspects of international law. Trade cases are filled with examples of government measures of general application that are nonetheless scrutinized by international tribunals, and in many cases, determined to be consistent with standards of international law.

The Meat Hormones case in Europe, which was a very controversial decision, is a very good example. That was a measure of general application that the WTO found to be inconsistent with the

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international standard, scientific standard with respect to use of hormones in beef.

So measures of general application are not exempt from scrutiny. There's nothing in NAFTA upon which that type of restriction can be based, and there's nothing in international law that would serve as a foundation for that type of restriction.

Mr. Bettauer also asserted that Methanex asserted that Chapter 11 is a cost-shifting insurance regime. Again, Methanex has never asserted that this is any type of insurance regime. It's not. It is a regime that provides a remedy when a NAFTA government breaks international law and causes damages. That's not an insurance regime. That is a standard regime attributing liability, financial liability to a party that has committed a wrongful act. That concept obviously is deeply embedded in anyone's concept of jurisprudence.

Now, one of the questions that was raised yesterday -- I just wanted to make it clear -- was there was a question as to whether anyone in the industry has pursued an action in California, and I

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referenced the fact that there was this preemption proceeding, which also includes some other claims. It includes a commerce clause proceeding. But under NAFTA, Methanex has the right to choose between pursuing a claim under municipal law, for example, a claim that what happened in California amounted to a taking under the Fifth Amendment, or that perhaps it violated some California procedural standard with respect to arbitrariness and capriciousness, but NAFTA explicitly gives foreign investors a right to elect remedies, the right to choose between a municipal remedy and international remedy, before an impartial, independent tribunal to decide an issue.

And Methanex opted here to choose the international remedy, because it wanted a tribunal that was independent, that was impartial, and that was free from the political influences that it thinks have been responsible for the decision in California.

That is Methanex's right under NAFTA, and it was a right that was created by the three parties. So the fact that this thing could have

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been challenged in California is utterly irrelevant, and I don't think the United States will even argue that Methanex did not have a right to elect this particular remedy as opposed to a municipal remedy.

Now, turning to the more specific issues, like treatment, the U.S. sticks resolutely to its argument that the only proper comparison here are those domestic investments that are in precisely identical circumstances with Methanex. Yesterday, the U.S. simply did not address the textual argument. NAFTA says "like circumstances." It doesn't provide any other exception, and what the U.S. wants to do is insert new language in Article 1102 so that it reads as follows, "in like circumstances, except as like circumstances shall be defined as identical circumstances if there exists a domestic industry that is identical." NAFTA doesn't say that, and there's no reason for this tribunal to interpret NAFTA in a way that constricts the meaning of "like" to a point where it means "identical." There's no policy basis for doing so and certainly no textual basis for doing so.

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In addition, the United States said "the third reason for rejecting Methanex's attempt to lump itself with ethanol producers is that it has been unable to cite a single case that has held that different products, services, investors, or investments should be compared as if they were like where there was an identical domestic industry that received the same treatment as Claimant." Well, that's simply not true. We have identified a number of cases where that precise situation presented itself.

MR. ROWLEY: I will just interrupt you for a moment, Mr. Dugan. I can't remember which one of us asked on day 1 -- and I don't have the transcript in front of me, but my note indicates to me that one of us, possibly I, asked whether it was pleaded in your original or draft amended claim, now the amended claim, whether ethanol and methanol were in like circumstances.

MR. DUGAN: It's pleaded that there was a violation of Article 1102 and we plead the facts that constitute like circumstances. We plead the

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fact -- we repeatedly plead the fact that Methanex is a competitor to the U.S. ethanol industry, and under the definitions of "like circumstances" proffered by the NAFTA tribunals and by WTO tribunals, competitiveness is the essential criterion in determining likeness. And we have clearly, clearly alleged that Methanex is competitive with the U.S. ethanol industry, and when we provide you with our compilation of the various allegations in the complaint and how they relate to various components, we will summarize those for you.

Now, getting back to what I was saying, there are, and we cited many of these cases in our brief, there are numerous cases in which the conditions described by the United States are met, where there is a domestic industry that is identical to an industry that produces an imported product. One example is the animal feeds case. In that case, the protected product in Europe was skimmed milk powder. The competitive import were vegetable proteins for Europe, soybean cakes, cottonseed cakes, all of which were used to make animal feed.

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There was also a vegetable protein industry in Europe. Europe has, as everyone knows, a very extensive agricultural industry, and they produce their own competitive, not just competitive, they produce their own like products, their own that were like to the imports. There was a -- the domestic farming industry in Europe produced 90 percent of domestic consumption in Europe. It was a very large producer of -- it was an identical producer to stuff that was being imported, and it was a large domestic producer. Nonetheless, the WTO tribunal had no hesitation in finding that, despite the fact that there was a domestic industry that was identical to the industry that was producing products identical to those being imported, that did not stand in the way of finding that national treatment had been violated and that the imports were entitled to the protections of national treatment. That was the clear finding in that case.

And similarly, in the Japan Alcoholic Beverages case, one of the products that were being -- the products that were being compared there

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were Japanese shochu and imported vodka. There was also a domestic vodka industry in Japan, and the fact that there was a domestic vodka industry in Japan did not stop the tribunal from finding that Japanese shochu was like imported vodka.

And the same is true in other cases. The United States' taxes on automobiles, the luxury tax, the U.S. luxury -- producers of luxury automobiles and luxury boats, that did not derail a finding of like products. So the existence of a domestic industry that is in identical circumstances with the foreign industry is irrelevant. It's irrelevant as a matter of precedent, and it is clearly irrelevant as a matter of the text of NAFTA, which requires the most favorable treatment to any industry in like circumstances.

Now, with respect to the Pope & Talbot argument, the Pope & Talbot decision that the U.S. spent so much time on yesterday, Methanex submits that contrary to the government's position, Pope & Talbot actually supports Methanex's position. First, the Pope & Talbot factual holding was

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inapplicable there on its own terms because the distinction between the covered and the noncovered lumber producers was, in the words of the tribunal, reasonably related to a rational policy objective.

Here, Methanex has asserted that the MTBE ban was not necessary and it was not reasonably related to environmental protection. And in order to -- if the tribunal were to adopt the Pope & Talbot analysis, they would have to make that finding first, and they can't make that finding here, Methanex submits.

Second, Pope & Talbot made it clear that its conclusion -- and it was a factual conclusion -- its factual conclusion was based on a finding that there was no evidence of discriminatory motivation.

This is a quote from page 36. "A formulation focusing on like circumstances will require addressing any difference in treatment, demanding that it be justified by a showing that it bears a reasonable relationship to rational policies, not motivated by preference of domestic over foreign-owned investments." And that, of

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course, is precisely, precisely what Methanex asserts here.

The Pope & Talbot tribunal also asserted, as support for its approach, a quote from an OECD document which also specifically references the fact that -- this is the quote. "The key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes an exception to national treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprise is under foreign control."

So again, a central element of the Pope & Talbot test was a finding that there was no intent to discriminate, either in favor of the domestic industry or against the foreign-owned or imported product. It references both tests in its determination of whether or not there was impermissible discriminatory intent. And Methanex here has alleged both forms of intentional discrimination.

Finally, the Pope & Talbot decision was a

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factual decision. It wasn't a legal finding. It was based on all the evidence that was submitted to the tribunal over the course of the entire proceeding, and that is consistent with the approaches of almost every other -- virtually every other tribunal, that a finding of like circumstances is an intensely factual finding that can only be made after all the evidence has been presented during the merits phase of the hearing.

Now, with respect to the evidence of Governor Davis's discriminatory intent, the United States asserted yesterday that we had admitted that we didn't have a shred of evidence, but that's simply not true. We never admitted we didn't have a shred of evidence and we think the circumstantial case here is very, very strong. What we said was that we didn't have any actual direct evidence. We didn't have a smoking gun such as exists in the S.D. Myers case or such as exists, in the words of the EPA, when it adopted the 30 percent set-aside for ethanol in 1994, when it explicitly referenced it, the desire to reduce imports as one of the reasons

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why it enacted that particular regulation. That type of smoking gun does not appear in the record, but remember, with respect to discriminatory intent, it's often the case that people attempt to cover up evidence of discriminatory intent because they view it as improper. A good example was in the S.D. Myers case where the Canadian official who promised the Canadian industry that he was going to protect them deleted that promise, penciled it out from a particular document and said we shouldn't have this, or words to that effect.

Now, we don't know whether the records exist that will show, that will provide that type of smoking gun, but given the circumstantial evidence here, it's entirely possible that during the merits phase that type of evidence will come out. But the circumstantial evidence that we rely upon for our allegation, I think, is very, very strong. ADM, as we have said, universally, so far as we know, portrays methanol and MTBE as foreign products, and it universally argues that the United States should reduce its reliance on foreign energy sources.

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Government officials in the United States who support the ethanol industry invariably -- that's too strong, almost always cast their support in terms of improper protectionist intent. The idea that the United States should reduce its energy dependence on foreign sources and it should reduce imports so that can become more independent. That may be an appropriate energy policy, but in terms of trade law, in terms of NAFTA law, in terms of national treatment, that is evidence of a violation. And the fact that ADM always proffers this, the fact that government officials always recite this as one of the reasons for protecting the ethanol industry, we think, is a reasonable basis for our allegation.

But again, the allegation at this stage must be accepted as true, regardless of our basis for the allegation. We have made the allegation very clearly in our complaint, that the intention here was an intention to discriminate against imports of methanol and MTBE, and having made that allegation in the context of a jurisdictional hearing, Methanex submits that it must be accepted

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as true, and if it is accepted as true, it raises an issue of intentional discrimination that cuts across almost every one of the government defenses, and having been properly asserted, in Methanex's view, it means that this tribunal should go, and must go, to the merits hearing in order to develop all the evidence of intentional discrimination to see whether it does, in fact, exist.

MR. ROWLEY: Mr. Dugan, would you turn with me, please, to page 1 of the amended claim, and we read on page 1 at the top that Methanex seeks to amend its NAFTA claim, and it has now done so to allege intentional discrimination by the state of California to favor and protect U.S. ethanol industry and to ban a product that has been repeatedly and stridently identified in the United States as foreign. And then you define "intentional discrimination" in the footnote, the second sentence of which reads "in this context, intentional discrimination means an intent to discriminate against imports of methanol and MTBE to the benefit of the domestic ethanol industry."

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Now, it's probably fair to say that that is a conclusory statement, and what we would like you to do, if you've not already done it, is to point us to the pleaded facts in the draft -- or the amended claim which allow you to make that statement.

MR. DUGAN: Well, it's a very long series of facts, but let me say first of all, I think that that type of conclusory allegation is all that's required under Article 20 of UNCITRAL.

MR. ROWLEY: Well, in the event that we don't agree with that --

MR. VEEDER: We're beyond Article 20.

MR. DUGAN: I'm sorry, not Article 20, Article 18, the one that provides the precise requirements of what's to be included within the claim. We view that as a -- what in the United States we term as notice-type pleading, rather than one where we have to plead all the specific facts. We're not aware of any UNCITRAL complaint that has been dismissed for failing to plead specific facts, as long as the allegation is pleaded.

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With that said, I will go into the precise facts that we think support the allegation, and as we said, this is a -- it is an inference that we draw from the facts and circumstances of the meeting, the fact that it was a secret meeting, the fact that there were obviously huge political contributions made at the same time, the fact that the United States said yesterday that Governor Davis was in a hotly contested race. It wasn't a hotly contested race. Governor Davis was ahead by 5 to 15 percentage points in the raise. He was clearly going to be the winner in the campaign.

MR. ROWLEY: Was that fact in the pleading?

MR. DUGAN: No. That was a response to the fact that the United States offered yesterday. I guess one of the problem I have here is that facts are coming in through the United States, and there's a real question whether this is a factual hearing or whether it's a jurisdictional hearing.

MR. VEEDER: Let me make it quite plain. It's not a factual hearing, it's a jurisdictional

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hearing. If I can bring you back to Article 18, because the context of my colleague's question is really Article 18, Rule 2B, that is, that the pleading does require a statement of the facts supporting the claim.

MR. DUGAN: Right.

MR. VEEDER: Certainly you can read the footnote at page 1 as the claim, that is the basic conclusory allegation, but the question we have -- and please don't take trouble to do it now, you can do it later, at your leisure, later than this morning. We really want to be taken through the facts that you rely on in this amended statement of claim. And obviously, an inference can be a fact. We don't exclude that. We just want to make quite sure that we've gotten the material from you that you say supports this conclusion at page 1.

MR. DUGAN: I'd like to quickly go through it, and we will submit something in more detail afterwards, but the essence of the facts that we allege are, first of all, as I said, ADM has made it part of its propaganda to ban methanol and MTBE as

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foreign imports. Similarly, the political supporters of ethanol in the United States make the same allegations. In the context of the secret meeting, which was intended to discuss ethanol, we think it is a -- not just a fair inference, but a virtually certain inference that ADM made these same statements to Governor Davis.

The fact that so many decisionmakers in the United States, so many governors, senators, representatives, even presidents of the United States articulate a protectionist intent as a reason for supporting the domestic ethanol industry, indicates to us that it's a fair inference again that Governor Davis had the same protectionist intent in mind, and the fact that he intended to protect the ethanol industry, we think, is made abundantly clear by the creation -- or not the creation, by the paragraph in the executive order that seeks to start the process of creating a California ethanol industry.

And from that, we infer an intent to protect the domestic industry, to prop up and to

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create a market for the domestic ethanol industry, and those are the types of factual circumstances that we believe support an inference -- well, that support our allegation, our clear allegation that Governor Davis discriminated against imports of MTBE and methanol. It may be a conclusory allegation, but it is nonetheless a factual allegation. But we will provide that in more detail. We will walk you through that in more detail.

MR. CHRISTOPHER: Mr. Dugan, in discussions that we've had on this point, we have noticed the allegations at page 53 of the amended complaint. Is that paragraph there, the first complete paragraph at the top of the page, a fair summary of what you've just been telling us here? It sounds to me as if it is.

MR. DUGAN: It is; that's a fair summary of what we've been telling you. That's a succinct summary of the factual basis.

MR. CHRISTOPHER: That had been my assumption.

MR. DUGAN: One other point I want to make

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here with respect to discriminatory intent is that concerning Article 1102, national treatment, we have alleged both forms of discriminatory intent, an intent to afford protection to the domestic industry and an intent to penalize imports of methanol and MTBE because they're foreign. Either of those intents, we believe, is sufficient to make out a violation of Article 1102, the national treatment standard, and we think also, to a degree, those two intents are logically very closely related, and the reason for that is that the essence of our complaint is that Governor Davis affected the conditions of competition in the California oxygenate market.

As we have repeatedly alleged, he took Methanex's market share in that market, and he gave it to the U.S. ethanol industry, and an intent to favor one competitor in a particular market, by definition, will adversely affect and will harm any other competitor in that market, and that's especially clear here, where it is, in essence, a two-supplier market. Any intent to favor ethanol will directly harm its competitors, and we have

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alleged that ethanol is a competitor of methanol in that market. So --

MR. ROWLEY: Dealing with that, the United States has argued that the methanol industry is not only a Canadian industry, but it is also an American industry, and the alleged discrimination in favor of ethanol and as pleaded against methanol is a discrimination by the California governor and the state of California, not only against foreigners but against its own industry. What do we infer from that possibility? Do we infer a likelihood that he is inclined to disfavor his own industry?

MR. DUGAN: Well, first of all, I'm not sure they've even alleged there is a methanol industry in California, and my understanding is that there is not. And from the viewpoint of a state governor, an industry in Texas is little different than an industry in Canada. Neither one has employees who vote in California. But again, that's precisely the type of factual issue that, I think, is obviously not appropriate for disposition here.

But even accepting that, simply because

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there is a domestic industry as well as a foreign industry that is discriminated against by a particular measure is, by no means, irrational or unprecedented. Nations often do that for any number of reasons. The centerpiece of Methanex's allegations here is that because the U.S. ethanol lobby is so enormously powerful politically, the combination of the farm lobby and ADM and the lobby's political contributions give it legendary clout in Washington, and that clout allows it to obtain decisions from government decisionmakers that favor its interests over all its competitors, whether domestic or whether foreign. And that happens all the time in national processes, that one interest is favored over another interest, one competitor is favored over another competitor. While that may be perfectly legitimate in terms of U.S. municipal law, it may well violate international law if it has a disparate impact on foreign producers, as we allege it did here and also as it was intended to have that type of disparate impact.

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Secondly, in addition, remember, Davis intended to create a California ethanol industry, and he has started the process of creating a California ethanol industry, and it is ongoing. He intended to create a protected domestic industry within his own state. You could as easily interpret this as an intentional shift of jobs from Canadian producers of methanol and MTBE to California producers of ethanol. And in fact, I think it's hard, given the wording of the executive order, not to infer that intent. It's not even an inference. That's direct evidence of intent to create a protected California industry. An intent to create a protected California industry is a violation of Article 1102. That's precisely what -- that's precisely the type of the -- that's a regulation that is designed to afford protection to a domestic industry, and that is what is impermissible under Article 1102.

MR. VEEDER: Can you just help me on this? Are you distinguishing between California methanol producers, which you say don't exist, and U.S.

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methanol producers where you acknowledge they exist? I thought you acknowledged in your rejoinder that they were equally damaged by the MTBE ban.

MR. DUGAN: U.S. methanol producers were equally damaged by the ban. I referenced the fact that there's no California methanol industry only to provide a reason of why Governor Davis would take an action that, on its face, might seem to hurt part of his own constituency. To show there was, with respect to the methanol production, no constituency there.

In terms of the effect of the ban, we don't disagree that the effect of the ban disadvantaged U.S. methanol producers as badly as it disadvantaged Canadian or other foreign methanol producers. But again, the point is not the impact on the domestic producers under international law. The question at issue is the impact on the foreign producers or the foreign-owned producers.

Now, with respect to fair and equitable -- unless you have any further questions with respect to Article 1102, national treatment?

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MR. VEEDER: Not at this stage.

MR. DUGAN: Okay. With respect to fair and equitable, the first point I'd like to make is that even if the U.S. interpretation is accepted, that the phrase "international law" in Article 1105 is limited to customary international law, the text of the treaty itself expresses the formal agreement of the parties that customary international law includes the fair and equitable treatment standard. That's what it says. So again, whether fair and equitable treatment is or is not a part of customary international law, whether it is additive or not, it is still a clear treaty requirement. Those are the words of the statute, and those words of the statute simply cannot be ignored.

Now, Mr. Legum spent a lot of time yesterday describing state practice with respect to the fair and equitable treatment, which he characterized as consistent and widespread. We would dispute that characterization. We think that it was fragmentary and sporadic and that there is, in state practice, a very well-developed body of

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exactly what states do with respect to foreign investments. And what they do is they sign hundreds, perhaps more than a thousand bilateral investment treaties and many multilateral treaties that incorporate the express standard of fair and equitable treatment. That's what state practice is with respect to fair and equitable treatment, is the adoption of treaties that require that level of protection.

Now, Mr. Legum has not offered a single treaty -- a treaty, the best evidence of state practice -- and we are certainly aware of none, that states that fair and equitable treatment doesn't really require fair and equitable treatment and only requires treatment in accordance with the international minimum standard. In essence, Mr. Legum is reading that qualification into every bilateral investment treaty, the hundreds of bilateral investment treaties that have been concluded, despite the fact that the United States obviously can't speak for the intent of other states who are parties to their own bilateral investment

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treaties that include this language.

And again, this is a very, very wide-spread practice. 130 countries -- approximately 130 countries have adopted the standard, and multilateral treaties in virtually every context -- NAFTA, the MERCOSUR Agreement in South America, the ASEAN Treaty, the European Energy Charter Treaty -- have adopted the fair and equitable treatment standard for foreign investment.

And the map that I handed up to you yesterday, the exhibit, what that shows is the extent of world acceptance of this standard. It is accepted as the operative standard for the protection of foreign investment by virtually every trading nation, every significant trading nation on the face of the earth.

We think that from the extent of that coverage, it must be interpreted, not only as a separate standard because it is so clearly expressed in state practice as a stand-alone standard, but that this widely comprehensively adopted standard is now a part of customary international law. The

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treaty system around the world that incorporates this standard is so extensive that it has all the attributes of customary international law. States now expect their investments to be treated fairly and equitably by foreign countries, and they expect this as a matter of obligation of foreign countries, and as such, it is customary international law.

Now, with respect to subsequent practice, Mr. Legum made the point yesterday that the Vienna Convention does not use the word "consistent" and doesn't use the word "long-standing." That's true enough, it doesn't, but I think the concept of practice is such that it inherently requires a period of time, a practice is different from an ad hoc litigating position. It's something that by its nature, by the word itself, the definition and connotations of the words itself requires a practice that extends over a certain period of time. How long that period is, the authority that we quoted for you yesterday said two years was not enough, but however long that period is, eight weeks is surely not enough.

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Secondly, I think the concept of a practice itself connotes consistency. An inconsistent practice, we would argue, is not a practice at all. Again, the level of inconsistency here is so great that it fatally undercuts any assertion that this constituted a practice. And the U.S. assertions, the litigating positions taken by Mexico are not to be given any credence because they're merely litigating positions. That's the United States' position here with respect to the alleged agreement. What they denigrate what Mexico did they now say rise to the level of an agreement. They can't have it both ways. Either it was an inconsistent practice or what they proffered to this forum today or this forum in the course of these proceedings is nothing more than a litigating position that don't really amount to anything, it can be disregarded by the tribunal. It's an inconsistency that I think they have to deal with.

Now, with respect to the new claim that was formally adopted by the United States yesterday morning, the idea that these concurrent 1128

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submissions constitute an agreement under the Vienna Convention, we have four objections to that. First of all, we think that the negotiating history of the Vienna Convention tends to make it clear that the agreements referenced in the provision of the Vienna Convention require a formal agreement. It's the type of agreement that is formal enough that it rises to the level of -- that goes through the ordinary procedures that nations go through when they reach formal agreements with respect to anything. And in fact, one of the early comments with respect to one of the predecessors of this provision said "subparagraph B deals with the effect of later treaties, a topic which has already come under prolonged examination by the commission in connection with Articles 41 and 65." That's page 62 of the 1964 yearbook of the International Law Commission, volume 2, at 53.

MR. VEEDER: Do we have that?

MR. DUGAN: You do not have that now, but we will provide you with a copy of that. Seeing as how this argument arose two days ago for the first

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time, we will try to get you all citations.

MR. VEEDER: When we look at the wording of Article 31(3)(a) which talks about agreement and not treaty, the word in Article 31, paragraph 1, how is that helpful?

MR. DUGAN: It's not as helpful as it might be. But again, I think it illustrates that throughout the negotiating history -- not throughout, but at least at one point during the negotiating history, what the parties were considering were very formal agreements and not simply a concurrent, vague melding of views, an agreement rises to something that's higher than that.

MR. VEEDER: I take your point that if you put them side by side, you can see there is some vague concurrence. I can see your point, that is too informal, where the Article 1128 written submission says I agree with the position taken by the two other member states?

MR. DUGAN: They say they agree and then phrase things in different ways, and that's what I'm

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coming to. One of the reasons why, when an agreement is required, it requires the parties to sit down and work through the precise wording in an agreement. It's very easy for parties to put into place a litigation proceeding and say we agree, and then put into place an interpretation that is different from what the other party has put in. So it agrees with the United States.

And I think the "relating to" is a good example where each party uses different terms. They say they agree with the United States and then proffer their own definition. It's internally inconsistent, and because they are three separate submissions instead of a common agreement, those types of inconsistencies cannot be reconciled, and that's why the proper interpretation of the word "agreement" is a formal agreement, a single document in which the parties work through all the various linguistic differences that always arise in this type of situation.

Negotiation of treaties is a long and arduous process because differences over particular

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words can be severe, and until that process is sorted out and worked through, I think it's premature for anyone to claim that there is the type of agreement here that evidences the parties' intent with respect to the interpretation of the treaties.

Secondly, there is also evidence during the negotiations at the ILC that makes it clear that the word "agreement" is meant -- means something with prospective effect only, not retroactive effect, which this has. Again, this is from the 1966 yearbook of the International Law Commission, volume 1, part 2, page 122, paragraph 91. "Where subparagraph C was concerned, there might be some doubt concerning the value of subsequent treaties of interpretation and the possibility of their having retroactive effect and," referring to a particular delegate, "he was accustomed to drafting protocols of interpretation which came into force on the day of the entry into force of the treaty of interpretation itself."

So I think there's a second question here. If this is an agreement, when is it effective? Is

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it effective as of now, going forward, or can it be cast back and be given retroactive effect? And we think obviously that it cannot, even if it is an agreement. It has prospective effect only, which means that it would not affect any of the issues in dispute here.

Third, we believe that this purported agreement is inconsistent with NAFTA procedures. Article 2001(2)(c) expressly vests the power of interpreting NAFTA in the Free Trade Commission, which is an institutional body associated with NAFTA, and that provision, Article 2001, says that whenever there is a dispute concerning the interpretation, the Free Trade Commission shall determine the appropriate interpretation. It doesn't limit the disputes to disputes between signatory parties.

There's no reason to believe that disputes between a signatory party and an investor that is expressly protected by Chapter 11 is not the type of dispute that wouldn't be within the jurisdiction of the Free Trade Commission. And decisions of the

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Free Trade Commission interpreting the treaty are binding on this tribunal. That's an established NAFTA procedure for resolving interpretation disputes of this sort, and that's the procedure that the parties ought to follow if they intend to submit to the tribunal any type of agreement on what interpretation of NAFTA is.

MR. VEEDER: Just help us on the role of the commission. The commission is not limited to making interpretations where the three NAFTA parties are in agreement as to that interpretation. They decide disputed interpretations between the member states; is that right?

MR. DUGAN: They decide disputes concerning interpretations. It doesn't say between the member states. It simply says disputes. Does anyone have the treaty language? We'll supply you with a copy. It doesn't limit it to disputes between the states.

MR. VEEDER: Have there been any such rulings from the commission thus far?

MR. DUGAN: I frankly don't know. We will

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check on that as well for you.

MR. CHRISTOPHER: Also, Mr. Dugan, I wonder if there's any indication that that route is exclusive and prevents other agreements with respect to interpretation.

MR. DUGAN: No, it doesn't indicate that route is exclusive. I think that's a fair implication from the creation of the route, but it doesn't indicate on its face that that's exclusive.

And finally, even if the parties can amend a treaty through this process, it's quite clear that they cannot -- even if the parties can agree to a specific interpretation, it's quite clear on the face of NAFTA itself that they cannot amend or modify the treaty through this type of agreement.

Article 2202 provides as follows: "1, the parties may agree on any modifications of or addition to this agreement. 2, when so agreed and approved in accordance with the applicable legal procedures of each party, a modification or addition shall constitute an integral part of this agreement."

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And that's the point that we were getting at yesterday, is that in amending a treaty, that invokes the political processes of a country, and that's the process by which entities such as investors can make their voice known in a democratic society. And what the parties are trying to do here rises to the level of an amendment in Methanex's submission, and as such, it must be subjected to the scrutiny of the political process to ensure that all appropriate interests are protected. It's clear as a matter of U.S. law that an agreement that has been adopted by Congress as a statute and signed by the president must go through those same procedures again if it's going to be amended.

I don't know in detail anything about Canadian law, but it's my understanding in talking with my client that similar procedures apply in Canada. Any amendment or modification of a treaty cannot be done by an agreement by one department of the government, that there is a more formal process that must be adhered to. I don't know what the procedure is in Mexico, but it wouldn't be

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surprising, again, if a modification of NAFTA didn't require far more formal procedures than what have been followed here.

So for all those reasons, we do not believe that this is an agreement under the Vienna Convention. Since this issue has arisen only two days ago, we would like the opportunity with respect to this one issue to submit something within a week or so in which we set forth our reasons in more detail describing why we do not believe this constitutes the type of agreement contemplated by the Vienna Convention.

Now, turning to Maffezini, the U.S. asserts that in the Maffezini case, which was the Spanish -- the Argentinian investor in Spain, that that judgment was consistent with customary international law, and because it was consistent with customary international law, it shows that fair and equitable treatment means nothing other than customary international law. Now, that's contradicted by the language of Maffezini itself, and let me read it to you.

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"In particular, these acts" -- and the judgment there is referring to the acts of the Spanish officials -- "amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3.1 of the Argentina-Spain bilateral investment treaty. Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4.1 of the same treaty. Accordingly, the tribunal finds that with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation in the manner spelled out below."

Now, that says nothing about customary international law. It talks about fair and equitable treatment. It applies the standard, and it applies it on the grounds of a lack of transparency, precisely what Methanex has asserted here as one of the elements of its fair and equitable claim, a lack of transparency because of the secret meeting between Governor Davis and ADM.

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Now, with respect to good faith, Methanex's claim here is based not just on breaches of good faith, it's based on an assertion that California and the United States breached their obligations of good faith, their obligation to act reasonably, and their obligation not to act arbitrarily and capriciously. And it's Methanex's position that these arise out of Article 1105, and the amended claim makes that clear.

Now, the whole disagreement between Sir Robert Jennings and Professor Vagts rose out of the fact that Professor Vagts asserted that Sir Robert Jennings claimed that there was a general obligation of good faith, but that doesn't appear in Sir Robert's opinion, which is one reason why I think you can see he was a little bit annoyed.

We have always rooted our good faith claims in the idea -- and again, the statement of claim makes this clear. This is part of our 1105 claim. The good faith and, I think the U.S. now accepts this, that the obligation of good faith does attach to the performance of treaty obligations, and

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that is precisely our assertion. Article 1105 imposes a duty to treat foreign investments and investors fairly and equitably, and that requires the United States and its constituent states to act in good faith reasonably and to not act capriciously or arbitrarily.

It is an obligation with respect to the performance of a treaty obligation, and Methanex's claim here is that Governor Davis did not act in good faith. He did not act reasonably. Instead, he acted arbitrarily and capriciously. And again, having made out that claim under elements which I think even the U.S. will concede is a part of customary international law, we have made out a claim under Article 1105 that we believe must go to the merit stage.

Now, with respect to MFN, most favored nation treatment, the Article 1103 of NAFTA, what we think that's important for here is, as the Pope & Talbot tribunal found, it provides the context for interpreting Article 1105. The most favored nation treatment, by definition, grants to anyone who is a

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beneficiary of that clause treatment in accordance with the best treatment given to any other national of any other nation, if there's a legal instrument that provides that other national with better treatment.

That's the essence of the principle, and the Pope & Talbot tribunal looked to that as part of the context in interpreting 1105 and said that we must interpret -- because of that context, we must interpret 1105 as granting a NAFTA investor the same broad protections as found in the best bilateral investment treaties, because in essence, the United States or Canada is obligated to provide those best protections in other bilateral investment treaties under the MFN clause.

So therefore, it makes sense to give it a wide and a protective reading, and that's how they interpreted 1105, was to conform to these other bilateral investment treaties that may give broader treatment than Article 1105 does, broader protection than Article 1105 does.

Now, it's also worth noting, they made

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that determination -- there was no Article 1103 claim in Pope & Talbot. They just used that as part of the context in interpreting Article 1105.

Now, I think in conclusion what I'd like to try to do is summarize exactly what Methanex's position is with respect to 1105 and characterize what I think is the U.S.'s position.

Methanex believes that 1105 requires, in essence, four -- has embedded into it four components of protection: first of all, the requirement for fair and equitable treatment; second, the requirement for full protection and security; third, the requirement that the treatment accord with international law; and that in turn has two components, all customary international law including the international minimum standard is embedded in that, as well as relevant principles of treaty law of the treaties that the parties have agreed to, such as GATT and WTO. That's what we think is the fair way of interpreting the scope of Article 1105.

I think the U.S.'s position, although it's

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not entirely clear to me, is that 1105 is limited to the principles of the international minimum standard as it was developed in the 1920s and the 1930s, and that it goes no farther than that. And I think that's an impossible reading of Article 1105, if only because, I might point out, that Mexico never accepted the international minimum standard. Mexico, until the time that the NAFTA was signed, was always adhering to the Calvo Doctrine which rejected the use of the international minimum standard.

So I think there's simply no textual historical basis for adopting so narrowly, and so textually unsupported an interpretation of Article 1105. In fact, it wouldn't be an interpretation. It would be an amendment.

Now, turning to expropriation, the U.S. asserted yesterday that Methanex has not been denied access to any market in the United States. In fact, our allegation is that we've been denied access to the California oxygenated market. That's precisely the market that we think our market share has been

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stripped away and given to the ethanol industry and where we have been denied access.

Secondly, with respect to expropriation, the United States focused yesterday on the concept of whether Methanex U.S. and Methanex Fortier had been expropriated, whether the enterprises had been expropriated. That's not the NAFTA test. The NAFTA test is whether an investment has been expropriated, not an enterprise, and again, that's the explicit language of Article 1110. And our argument is that Methanex's intangible property -- its goodwill, its market share, its market access -- were expropriated by California and given to the U.S. ethanol industry.

The U.S. response is that goodwill can never be independently transferred or sold and that it can never be independently expropriated. But that's simply not true. Goodwill can certainly be independently sold, and a good example of that is when a doctor sells his practice. What he is selling there is almost entirely, with the exception possibly of miscellaneous equipment, he is selling

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his goodwill. He is selling his market share. He's selling the expectation that his patients will continue to come to the new doctor. That is a sale of almost pure goodwill.

Now, whether states can expropriate goodwill or market share, I mean, you can hypothesize any number of situations where they would do exactly that. Assume, for example, that a state creates a monopoly in, for example, insurance. It decides that henceforth only it will issue automobile insurance, doesn't deny anyone a license to do business or doesn't confiscate any physical assets, it simply says that from now on all consumers will have to come to the state to get automobile insurance. In doing so, it would take away existing insurance companies's business. It would take away their ability to do business in that particular market. It would strip them of their goodwill, of the expectation that they would continue to do business in that market and continue to make profits in that market, and that would be an expropriation. And in fact, if we get to the merits

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stage, I believe we can show that one Canadian province backed off a plan like that for that very reason. It was concerned about expropriating the goodwill of insurance companies.

Take again another example. Suppose that California, which is very sensitive about its film industry and it's sensitive about competition from the Canadian film industry, passed an executive order decreeing that henceforth no films made in Canada could be shown in California. Again, that would be taking from the Canadian film industry goodwill, their expectation that they can continue to do business in California and show their films in California, and that would be their market share in California, their market access in California, the expectation of profits from showing films in California that California would be expropriating and, in essence, giving to its own California film industry.

That effect would be a seizure, quite clearly, of an asset of the Canadian film industry and a transfer of that asset to the California film

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industry. That's a seizure of an intangible, and that seizure of an intangible would, of course, give rise to a NAFTA claim, because it's a violation of NAFTA, and it's a violation of international law, even though it is almost purely, purely goodwill. It is an intangible that has been seized in that circumstance.

So the idea that expropriation can never be seized, which by the way is proffered by the United States without a shred of legal support, has no logical support either. Situations can be in conditions where goodwill can be seized, and what we have presented to you is a situation where goodwill has been seized and where in our lights goodwill has been seized from one competitor, Methanex, and given to another competitor, the U.S. ethanol industry, the market share and market access to the California oxygenated market.

Now, with respect to proximate cause, the U.S. knows that proximate cause under international law focuses on immediate and direct damage, and again, all they have produced are fragmentary

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authorities with respect to that. They haven't produced a comprehensive definition that focuses the international test on immediacy and directness as opposed to foreseeability, for example, and I don't think there is any comprehensive statement of proximate cause under international law that, in our view, distorts the definition of proximate cause that way. Foreseeability has always been one of the central elements of proximate cause, and I think that the quote that we gave you from Keeton yesterday shows that foreseeability has been, at least in U.S. law, one of the central elements.

I think that -- and I'm not sure about this. You obviously will know better than I -- that the concept of foreseeability is closely associated with the concept of in contemplation of, to use the English practice, that those are very analogous, if not identical, concepts. The concept of contemplation and foreseeability. And obviously, if that's the central concept of proximate cause, the U.S. doesn't dispute that the damages inflicted on Methanex were foreseeable and it could hardly do so

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given that they were foreseen.

And one of the exhibits that we handed out to you yesterday, the Moody's report from 1998, I think, was meant to provide additional evidence of the foreseeability of the harm that was inflicted on Methanex. This is a report that was prepared in 1998 before Governor Davis acted, and this report specifically identifies that Methanex, alone of all the MTBE and methanol producers that it surveyed -- and by the way, it's important to note that Moody's surveyed methanol and MTBE producers together. It viewed them as part of the same economic sector that was going to be damaged by any regulation with respect to the use of MTBE -- and it concluded that Methanex, of all these companies, was at the highest risk, of these methanol and MTBE producers, Methanex was at the highest risk.

And in our view, this is persuasive, if not conclusive evidence, of the fact that not only did the United States government itself foresee the harms that would be inflicted on Methanex, but the capital markets as well foresaw the harm that would

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be inflicted on Methanex as a result of MTBE ban, and thus, foreseeability cannot be disputed. It was foreseeable that Methanex would be directly harmed by any MTBE ban.

Now, if the tribunal accepts that the appropriate test is one of immediate and direct damage as opposed to foreseeability, Methanex meets that test as well. Again, one of the things I'd like to emphasize is that the U.S., their entire remoteness case is now built on their factual assertion, that Methanex's damages are indirect. That's their factual assertion.

Methanex, in its complaint, alleged that it was harmed by these measures and was harmed in various ways by these measures, and the United States comes back with a counterassertion, factual assertion that said those are all indirect damages and, therefore, they're not recoverable. That type of factual assertion is precisely what the tribunal cannot rely upon at this stage of the hearing. Whether or not the damages that Methanex suffered were direct and immediate is a factual question.

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We've alleged it, and for purposes of sustaining the tribunal's jurisdiction, that's all that need be done.

In terms of directness, we have alleged that the ban, the ban itself led, for example, not only to the precipitous decline in the stock market value -- and the chart that I gave you showing the stock market value, I think, shows quite graphically the extent of the damage. The chart shows that -- it shows a correlation between Methanex's share price and the price of methanol up until March 1999, and then there is a significant divergence between those two prices. And our argument is that that diversion, that dates from March of 1999 and still exists, was a direct and immediate consequence of Governor Davis's order. It started on March 25th when he issued the order, and within five days, methanol had lost a substantial share of its market value, and it continued until it had affected a structural change in the correlation between the price of methanol and Methanex's share price, and that this is evidence of direct and immediate

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damage.

Additional evidence of direct and immediate damage --

MR. VEEDER: Before you move away from the chart, what is the explanation for the gap in the red line, looking at September 1994?

MR. DUGAN: Ah, I don't know. If I can consult with my client.

MR. VEEDER: It may just be the printer and it may be something more.

(Pause.)

MR. DUGAN: All right. The ceiling to this particular chart is 450, the right-hand scale, and apparently it peaked above that particular ceiling.

MR. VEEDER: Thank you.

MR. DUGAN: Actually, if I could explain the gap in May of 1998, the reason why it diverts slightly there is that there was a -- the prospect of a takeover of Methanex that caused its share to temporarily pop up.

Now, the second set of exhibits that we

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gave you yesterday deal with Methanex's increased cost of capital, which was alleged in the original complaint and was alleged in the amended complaint, and those exhibits show that as soon as literally the day, March 25th, 1999, as soon as Governor Davis issued his executive order, Moody's put Methanex on a credit review in order to assess whether it was appropriate to downgrade its credit rating, and four months later, in July, that's precisely what happened. Methanex's credit rating was downgraded by Moody's, by Standard & Poor, and by, I believe it's Fitch. And all of them reference the executive order as one of the reasons, not the only reason, but as one of the reasons why the downgrade was taking place.

Now, a downgrade in any company's credit rating is, in Methanex's view, per se damage. It not only damages its reputation, it limits its abilities and its business opportunities. It obviously increased the cost of capital, and in this case, it led to -- it was one of the reasons, not the only reason, it was one of the reasons why

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Methanex abandoned a debt offering in the summer of 1999.

So this type of damage inflicted by the executive order and clearly referenced -- the executive order is clearly referenced in these downgrades -- is direct and immediate damage. So even if Methanex's definition of proximate cause is accepted, the allegations in the complaint meet that test. There was direct and immediate damage.

And again, the question of directness versus indirectness is a classic factual question. It's not something that can be decided by the tribunal at this stage, Methanex submits.

Now, moving to the "relating to" issue. The United States said yesterday that the damages inflicted on Methanex happened to affect them and that they were inadvertent and indirect. And again, to the extent that those are factual assertions, they cannot be resolved here, but Methanex's allegation is that they were not something that happened to them.

Methanex asserts that Governor Davis, in

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effect, took Methanex's market share in the oxygenated market in California, and gave it to the U.S. ethanol industry, that the primarily focus of what he did was to affect and alter the conditions of competition in the California oxygenated market. He was faced with two competitors, and he advantaged one and he disadvantaged the other intentionally.

MR. VEEDER: Can I stop you, because again -- just take it very slowly. This is an important part. When you say that Governor Davis in effect gave, that's not a description of his intention. Now you've just referred to his intention.

Can you make it very careful -- carefully say where you say he intended and whatever he did, the effect of it was, because it may be an important distinction between the two.

MR. DUGAN: Right. Governor Davis quite clearly intended to benefit the U.S. domestic ethanol industry, and he quite clearly intended to set up a protected California ethanol industry. He also intended to discriminate against foreign

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methanol and MTBE, and he did so because they were competitors of U.S. ethanol.

The effect of that was to begin the process of shifting Methanex's goodwill, its market share, its market access from Methanex to the U.S. ethanol industry, and that process is ongoing as we speak, as the U.S. ethanol industry starts to gear up and figure out how it can supply the California market with ethanol to replace at refiners like TOSCO, for example, methanol that Methanex has sold in the past. That's the effect of it.

And it relates to the -- to Methanex in three ways, because it was an intent to -- it was an intent to restrict imports from companies such as Methanex. It was an intent to directly benefit Methanex's competitor, i.e. the U.S. ethanol industry, and it relates to because it has so large and significant an effect on Methanex, and any government measure that has so large and significant effect must be deemed to be "relating to," which again is a factual issue.

The extent of the impact on Methanex,

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because it was foreseeable, must be deemed to be a legally significant connection, because it was direct, because it was immediate, because it was foreseeable, and at least as far as Moody's goes, Methanex was the entity that was most harmed by this particular ban, by this particular measure. It should be deemed to have a legally significant connection.

In any case, that must be a factual question. That must be a question that can only be determined after all the facts and circumstances are presented to the tribunal, assuming that intentional harm does not, per se, meet the requirement of legally significant. Obviously, it's Methanex's position that benefit to its competitor meets the requirement of a legally significant connection. Any intent to affect competition that will have the impact, even if its not directed against Methanex, per se, if it's directed against -- if it's directed in favor of its competitor, that should meet the definition of a legally relevant connection. It certainly would meet the definition under antitrust

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laws, for example, if that's the test. Again, as we say, that should not be the test. "Relate" here in its ordinary meaning as the Vienna Convention requires in the United States' own words has a broad definition.

Now, since the amendment has been granted, with respect to cognizable harm, the only issue that's left with respect to that issue is whether Methanex had suffered any damages at the time that it filed its claim, and I think that the timing issue is quite clearly disposed of by the increase in the cost of capital, which happened well before then, and as the material I just presented to you, I think, confirms that, and also by the drop in the market valuation, which I think the United States concedes is reflective of the loss suffered by Methanex -- of a loss suffered by Methanex. The U.S. asserts that just because the stock drops doesn't necessarily mean that a corporation has suffered an injury, and as an abstract principle that's true, but it doesn't mean that it can't also be the case.

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There are many instances where the corporation is injured and its stock does drop, and that's precisely what Methanex has alleged here and precisely what I think it's providing convincing evidence of. It was injured by -- it was immediately injured by the California measure, and because it was immediately injured, the market recognized that, and the stock plummeted.

An injury to a corporation can have an effect. An injury to a corporation can cause a decline in the value of its stock. And that's precisely what happened here. It's certainly what Methanex has alleged, and given that Methanex has alleged that's what happened and when it happened as a factual allegation, it must satisfy the allegation of immediate harm, which again is the only remaining issue with respect to cognizable harm.

Now, I'd like to, if I could, turn the discussion over to my colleague, Ms. Stear, to deal with the issue of 1116 and 1117.

MS. STEAR: Mr. President, members of the tribunal, I will attempt to briefly address, once

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again, the issue of Article 1116 standing. Given the tribunal's recent order accepting Methanex's amended claim, subject to jurisdiction and admissibility, I will limit my comments to direct responses to the United States' argument made by Ms. Menaker yesterday. As counsel for the United States noted, the only point of disagreement between the parties is what types of injuries are recoverable under Articles 1116 and 1117 respectively. That's from the transcript at page 341.

As Methanex submitted on Wednesday and in its written submissions, the text of NAFTA and prior NAFTA decisions made clear that there are no restrictions on the type of injuries recoverable under Article 1116, as long as they are proven to have damaged the investor and to have arisen out of a violation of NAFTA Chapter 11. With respect to specific points made yesterday, I would first take issue with the United States' suggestion that the drafters of NAFTA created Article 1117 to give investors an additional measure of damage beyond the

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reach of Article 1116. Despite NAFTA Article 1116's broad and clear language that provides a right of action for investors to bring claims for injuries to that investor, the United States argues that the investor would be without a remedy where the investor owned or controlled a corporation incorporated under the laws of the respondent state, and the corporation suffered an injury. This is page 343 of the transcript.

This assertion is contrary to the plain text of NAFTA. Article 1117, by its express terms, provides a remedy to the enterprise, not the investing shareholder. Article 1117 provides that an investor may bring a claim on behalf of the enterprise, because international law generally prohibits a claim by a national against his own state. But under Article 1117, the damage alleged and the remedy received is the enterprise's. Thus, it is only the United States' restricted interpretation of Article 1116 that denies a shareholder as an investor a remedy.

This would be particularly true in the

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case of a minority shareholder, particularly one whose enterprise is majority-owned by domestic investors. Both Daniel Price, in his article, "an overview of the investment" chapter at page 172 to 173, which is cited by the United States, not those pages but this source is cited by the United States on this point, and NAFTA Article 1117(3) recognizes that both -- that minority or noncontrolling shareholders are protected under NAFTA and have standing to bring an Article 1116 claim.

Moreover, nothing in NAFTA Chapter 11 limits its protections to majority shareholders. Just as it places no restrictions on the type of injury a shareholder may claim, it places no restriction on the type of shareholder, i.e., majority or minority, that may make a claim.

Under the United States' interpretation of Article 1116, however, the minority shareholder would be virtually unprotected under NAFTA Chapter 11 because the United States would undoubtedly argue, as it did in the Loewen case, that the claiming investor under Article 1117 must have at

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least a controlling share. Next, I would like to briefly address the United States' assertion that Methanex's interpretation of Article 1116 would allow for an inappropriate possibility of double recovery. NAFTA's text provides safeguards against double recovery, both in instances where only an 1116 claim is brought and in situations where both Article 1116 and Article 1117 are invoked.

Where there is only an Article 1116 claim, Article 1121(1)(b) requires the enterprise to waive all of its rights to recover damages resulting from the measures at issue and any other forum if the investor's claim is derivative of the injury to the enterprise. For example, long before Methanex's amended claim was accepted and an Article 1117 claim was added, the United States insisted that Methanex's enterprises waived their rights to bring municipal claims for their own damages arising out of the claimed NAFTA breaches, despite its argument that Article 1116 allowed Methanex to recover only for its own damages that were entirely independent of the enterprise's damages.

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Under the U.S. version of Article 1116, Article 1121 would have quite inequitably required Methanex U.S. and Methanex Fortier, the enterprises in question, to waive all rights for anyone to ever recover for their damages. Given the proper and unrestricted interpretation of Article 1116, however, Article 1121(1)(b) simply prevents double recovery because Methanex alone would then have been able to recover for losses arising out of injuries to the enterprises.

Now that the claim has been amended to invoke both articles, 1116 and 1117, however, it is Article 1117(3) that will prevent double recovery. That article provides that where an investor makes an 1117 claim on behalf of an enterprise and the investor, or a noncontrolling investor, also claims under Article 1116 all such claims must generally be heard before the same tribunal. This allows the tribunal to ensure that any recovery awarded is rendered in an equitable and nonduplicative fashion.

Finally, even if the tribunal does decide that the United States' legal interpretation of

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Article 1116 is the correct one, as it need not do at this stage of the proceedings under the rationale laid down by the Loewen decision, as I referenced on Wednesday, Methanex has credibly alleged numerous and immediate damages to itself that are independent of harms to its enterprises, many of which were just discussed by Mr. Dugan and which I referenced specifically on Wednesday.

In response, the United States alleges that as a factual matter these injuries are derivative and not direct, as Mr. Dugan also previously noted. Whether or not those damages were, in fact, direct and independent or whether they affected Methanex "in its capacity as an investor," despite the fact that they fell outside the U.S. territory, is strictly a factual question for the merits as the ethyl tribunal previously held at paragraphs 70 to 73.

Now that the amendment has been granted and Article 1117 invoked, there is no reason for the tribunal to rule on Methanex's Article 1116 standing at this preliminary stage.

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Unless the tribunal has any further questions on this issue, I think I will turn the floor back over to Mr. Dugan.

MR. DUGAN: I have about five more minutes. I can do it before break or after a break.

MR. VEEDER: If you could finish it now, that'd be good.

MR. DUGAN: I'd like to make two general summary points. The first is that having worked our way through now the allegations of each of the defenses and the bases of each of the defenses, it's Methanex's position that every U.S. defense has a substantial factual component to it. It's based on a substantial factual allegation of the United States. The proximate cause defense rests on the U.S.'s factual assertion that the damages here were indirect and not direct. The damages here were not immediate, but delayed.

The U.S. defense with respect to "relating to" rests on a factual assertion that there was no intentional discrimination here, and it rests on a factual allegation that the level of effect was not

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significant enough to be -- to rise to the level of legally significant. The U.S.'s assertion that there was no cognizable harm is an assertion that the damages here were not immediate, a factual assertion. The U.S. defenses with respect to fair and equitable, leaving aside the legal ones, with respect to the concept of good faith and the performance of treaty obligations, the U.S. defense must be a factual defense that Governor Davis acted in good faith, again, not appropriate for resolution here.

The Article 1110 defense rests on the assumption that goodwill was not expropriated here, a factual defense. The 1102 case, "like circumstances" is, in international law, always deemed to be a very fact-intensive determination, that it should not be made until all the evidence is in, and even under the U.S. description of the test under Pope & Talbot, that presupposes no intentional discrimination, again a factual finding.

And last, the Articles 1116 and 1117 analysis rests on the U.S.'s characterization of all

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the damages to Methanex, the parent, as derivative and not direct, again a factual characterization of the United States. At a preliminary stage, it's not appropriate, we believe, for the tribunal to accept any of these factual circumstances, facts that were placed so heavily in all of the defenses of the United States. The appropriate thing to do is to defer all of these defenses until the merits and resolve them with the merits after the facts have been fully developed and presented to the tribunal.

Now, the last point I'd like to make, the United States said that it would not be appropriate for this tribunal to substitute its judgment for that of California, and it said that "against this background, it makes no sense to suggest, as Methanex does here, that the NAFTA parties intended that three private individuals, convened on an ad hoc basis for the purpose of a single case, generally hailing from three different countries, would have the power to review a state's governmental decisions with no guide, other than their conscience. Allowing three individuals to

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make such decisions based only on their subjective and intuitive sense of what is fair or equitable would, we submit, be an extraordinary relinquishment of state sovereignty."

Now, disregarding the question of the standard, whether it's ex aequo et bono, Methanex submits that that's precisely what Chapter 11 was designed to create. It was designed to create an independent, impartial tribunal that would have the power to review state's acts to determine if a state's acts conform with international law and specifically whether they conform with the broad requirements of NAFTA. That's why Chapter 11 was designed. That's why it was put into place, and there's no reason to doubt this tribunal's competence or its authority to render a decision, to render a fair decision, an impartial and independent decision. That's why Methanex filed the claim, and it submits that this tribunal is fully empowered to review California's decisions to see whether they complied with international law.

Thank you very much.

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MR. VEEDER: Mr. Dugan, are you going to come back to us with passages in the amended statement of claim?

MR. DUGAN: Yes. We will come back to you with passages in the amended statement of claim that we believe support our assertion that Governor Davis acted with impermissible intent to harm a foreign import. Would you like us to do that with respect to the intent to protect the domestic industry as well?

MR. VEEDER: I think we'd like to be taken through all the relevant passages that you would like to have attention drawn to. I think it would be helpful to do that before the United States reply. Can we do that during the break? We can take a longer break because we seem to be doing well on time, but we would like to have that help from you.

MR. DUGAN: We will try to do that during the break.

MR. VEEDER: Do you want a 20-minute break? Would that give you long enough?

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MR. DUGAN: How about a half-hour break?

MR. VEEDER: Let's have a half-hour break, which would take us on my watch to 10 past 11:00. So we will resume at 10 past 11:00.

MR. LEGUM: Before we do, could we talk about scheduling for the day a little more broadly.

MR. VEEDER: Yes, please.

MR. LEGUM: What we were going to propose is a bit of time to allow us to collect our thoughts in response to what we've just heard and come back and give our presentation. Our current estimate is that our presentation will be less than an hour in response. So this kind of pushes up against the lunch break, if we take a half an hour now, which we have, of course, no objection to. It's just a question of figuring out how to do this.

We would like, if at all possible, an hour, hour and a half to collect our thoughts before coming back and responding, which would mean we'd finish up, I believe, by 1:30, if that is acceptable to the tribunal.

MR. VEEDER: Again, we'd like to help the

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parties, and it's your convenience that comes first. Would it make more sense, then, to have a longer break now, to have an hour's break now, and we will then resume with Mr. Dugan taking us through the amended statement of claim, and then we'll simply continue until we finish. We can have a late lunch, but we'd finish obviously before lunch. Does that work?

MR. LEGUM: That would be fine. It's just -- it might be useful for us to have a bit of time to confer after hearing Mr. Dugan take the tribunal through the allegations of the draft amended claim.

MR. VEEDER: It shouldn't take you too much by surprise.

MR. LEGUM: I think we've read it before once or twice.

MR. VEEDER: I think we all have, but if you need more time because of what he says in regard to the amended statement of claim, we can give you further time. We suspect you want more time to respond to what you've already had this morning, but

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is an hour enough?

MR. DUGAN: While they're conferring, could I ask for just a little guidance from the tribunal, precisely what it is that you want to do here, what allegations support the allegation of intentional discrimination against foreign imports, you'd like to know what allegations support the -- or what factual allegations support the allegation of intentional discrimination in favor of the domestic industry?

MR. VEEDER: Do both, but particularly the former, intention to discriminate and an intention to harm foreign methanol producers, including Methanex, and if you go further, intention to harm Methanex.

MR. DUGAN: Okay. Anything else?

MR. ROWLEY: I'd do both intentions.

MR. DUGAN: Both intentions, I understand that, and that's the extent of what you want us to present after the break?

MR. ROWLEY: You have alleged discrimination?

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MR. DUGAN: Yes.

MR. ROWLEY: That is the basis of the amendment. We had a claim. The essential distinction is, apart from argument, discrimination. It is very important that every fact that is pleaded on which you say we can infer discrimination, if you do not have direct evidence, is brought to our attention so we can understand your best case on discrimination.

MR. VEEDER: The other area we'd like some help on -- I think we raised this on Wednesday and yesterday -- this coexistence of where you say that Governor Davis committed no unlawful act under the laws of the United States or California, which I understood no unlawful act both in criminal law and in civil law or public law, put that on one side, and then how far you go in saying that he had an intent to harm Methanex or foreign methanol producers. We'd just like some help as to exactly the quality of that intention.

MR. DUGAN: Sure. I can address that now.

MR. VEEDER: No, no, take your time.

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MR. DUGAN: I'm willing to address it now, if you'd like.

MR. VEEDER: Wait a minute. I think we're all concerned to see where we're going on the timetable.

MR. LEGUM: What we would prefer is to have an hour and a half to collect our thoughts, and the possibilities are we could break, come back in half an hour and listen to what Mr. Dugan says, then break for an early lunch, or we could simply break for an hour and a half and come back and then go until we either die of starvation or we're all --

MR. VEEDER: It depends upon how many weeks you have of submission, but we had hoped you'd finish today.

MR. LEGUM: We will.

MR. VEEDER: What I suggest we do is we break now until 12:15. We will then hear Mr. Dugan. I suspect what he says may not come as a total surprise to the State Department, but if it does, we will be sympathetic to a further application to give you time to respond to what he says, but you will

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have an hour and a half uninterrupted time to respond to what you've heard already this morning. So Mr. Dugan, if you're prepared to wait until 12:15, we will return to you on the matters we've raised with you.

MR. DUGAN: That's fine.

MR. LEGUM: Could we just ask one thing, which is could we hear the answer that Mr. Dugan was prepared to give, which hopefully won't take that long before we break.

MR. VEEDER: We don't insist you give it now, but if you want to, you can.

MR. DUGAN: I think I would rather take some time on that.

MR. VEEDER: I think so. Why don't we leave it until 12:15. One moment, Mr. Dugan.

MR. CHRISTOPHER: We want him to point to paragraphs in the amended claims that refer to that issue.

MR. DUGAN: Yes, I think I understand now what you want.

MR. VEEDER: Thank you very much. Until

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12:15.

(Recess.)

MR. VEEDER: Let's resume. Before we call upon you, Mr. Dugan, the tribunal has read the letter of the 13th of July signed by the parties dealing with the question of waivers under Article 1121. From the tribunal's perspective, this seems to answer the question satisfactorily, and unless the parties have anything to add, we wouldn't propose returning to this question of these waivers.

MR. DUGAN: That's fine with Methanex.

MR. LEGUM: And with the United States as well.

MR. VEEDER: Thank you both for taking the trouble to produce this in writing for us.

Mr. Dugan?

MR. DUGAN: All right. First, just to begin with, I'd like to correct the record with respect to something I said previously. I cited the automobile case for the proposition that in that case there existed a domestic industry in the United States, and there was still a finding of like

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products. Apparently, that's incorrect. Apparently, the finding there was -- that case should have been cited for the proposition that the United States argued in that case that competitiveness was one of the critical tests for determining whether or not there are like products, as we have alleged here. I just wanted to correct the record with respect to that.

We have gone through here, and here's what I've attempted to do, and I hope this meets with what the tribunal was expecting. I have identified the portions of the complaint that deal specifically with the allegations of discrimination on behalf of or to benefit a domestic industry. I've also gone through and I have identified those portions of the complaint that deal with allegations that Governor Davis discriminated against methanol and MTBE because it was a foreign product. And then lastly, I have identified other portions that, in our view, support both of those allegations because they set forth the background and they explain how ADM operates, how the ethanol industry operates, and

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they explain that, given the circumstances of this case where MTBE was singled out for a punitive action, the only explanation is discriminatory intent. And so what I'd like to do is just walk you through each of those three segments.

First, with respect to evidence of the intent to discriminate against a domestic industry, the best starting point -- in favor of domestic industry, the starting point are pages 32 and 33, and starting with the top of the paragraph there where it says "finally, the governor's executive order on its face discriminates in favor of the U.S. ethanol industry. In addition to banning MTBE, the order simultaneously began the process of developing an ethanol industry based in California," and it quotes from the order itself: "'The California Energy Commission shall evaluate by December 31, 1999 and report to the governor and the secretary for environmental protection the potential for development of a California waste-based or other biomass ethanol industry. CEC shall evaluate what steps, if any, would be appropriate to foster

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waste-based or other biomass ethanol development in California should ethanol be found to be an acceptable substitute for MTBE.'"

The next paragraph, "on December 16, 1999, regulations implementing the governor's labeling requirement went into effect. These regulations require that gasoline pumps containing MTBE be labeled as follows: 'Contains MTBE. The state of California has determined that the use of this chemical presents a significant risk to the environment.'

"Likewise, regulations adopted by the California Air Resources Board went into effect. These regulations implement the executive order by prohibiting the use of MTBE in California gasoline and facilitating the removal of MTBE prior to December 31, 2002. These regulations also 'prohibit, as of December 31, 2002, the use of any gasoline oxygenate other than ethanol unless the California Environmental Policy Council determined, based on an environmental assessment, that the use of that oxygenate would not present a significant

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risk to public health or the environment.'"

The final paragraph, "once the California ban on MTBE was in place, ADM announced that it would distribute ethanol and build an ethanol facility in California. Thus, ADM's effort to eliminate its foreign competition and increase its own market share in California, and California's efforts to foster an indigenous ethanol industry, have both succeeded."

Now, if you will turn to page 7 -- that summarizes it, but if you turn to page 7, that is a description of the ethanol industry itself, and what that shows is that the ethanol industry exists only because it has received favorable treatment from government decisionmakers. It cannot survive without U.S. government assistance. It receives massive tax subsidies, and it receives massive -- "the U.S. ethanol industry has a powerful political lobby that is constantly seeking legislation and other measures granting ethanol higher subsidies and better protection from competition by other fuels and oxygenates."

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Next paragraph, "campaign contributions are a central element of the ethanol industry's lobbying program. 'Ethanol producers must heavily bankroll politicians because their product would otherwise vanish overnight from the nation's gas pumps.'"

"Other critics have concluded" -- in the paragraph above that -- "that 'the ethanol industry is trying to win through political muscle what it hasn't been able to prove through clean air studies.'"

MR. ROWLEY: I'm sorry. You've lost me.

MR. DUGAN: I didn't want to have to read every paragraph.

MR. VEEDER: You don't need to read it, but we need to mark it.

MR. DUGAN: Page 7 describes the fact that ethanol is so expensive to produce that the U.S. federal and state governments heavily subsidized -- okay. All of these paragraphs actually. All of these paragraphs support the idea that the ethanol industry cannot survive without massive government

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intervention. It cannot survive --

MR. VEEDER: Up to the top of page 10?

MR. DUGAN: Yes, up to the top of page 10. And so that tends to show that the only way that ethanol can survive, as I said, through government protection and that what happened in California was simply another step, another in the ethanol industry's long campaign to obtain government support, government protection, and government subsidies so that it can survive. It's the only way it can survive.

Now, with respect to allegations that methanol and MTBE were discriminated against because they are foreign, the starting place, I think, is page 13, and what we have set out there, what we have laid out there -- this is pages 13 through 20, inclusive. What we lay out there is that first ADM relentlessly characterizes methanol and MTBE as foreign products. We talk -- we quote from Dwayne Andreas: "It's corn farmers versus the oil companies." We quote from Martin Andreas in the next paragraph, and then we quote in the next two

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paragraphs from ADM's allies in the ethanol sector. Fuels for the Future news release is alleged here to be, in essence, an ADM front organization. The Renewable Fuels Association is the ethanol trade association, "supporting ethanol and funded by ADM, has repeatedly emphasized that 'MTBE is primarily imported from the Middle East while ethanol is grown right here in the United States from corn, a renewable, environmental friendly commodity.'"

We go on to the next page, and we quote Mr. Vaughn again, he's with the Renewable Fuels Association, and then in the center of that paragraph we summarize it. "The ADM campaign to focus attention on the foreign sources of methanol and MTBE has succeeded, for numerous officials at all levels of the United States government have characterized methanol as a predominantly non-U.S. substance, and believe that the use of MTBE will increase reliance on imports. In contrast, ethanol is regularly described as a domestic U.S. product whose increased use will protect national security."

And then we go on to cite the numerous

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U.S. officials who adopted this protectionist intent with respect to ethanol and its foreign competitors, methanol and MTBE. We cite Representative Jim Nussle. We quote Senator Charles Grassley. We quote Senator Thomas Daschle. We quote the Department of Energy, which is criticizing the increasing use of MTBE and methanol. We quote state governors, Illinois governor Jim Edgar, who is from a corn-producing state. We quote California State Senator Tom Hayden, who repeats ADM's themes. "During a special appearance at a California Assembly natural resources committee hearing on the use of ethanol as an alternative to MTBE, Senator Hayden stated: 'I've always wished for a source of fuel from the Midwest, not the Middle East."

Again, those are ADM's words. We quoted from public scripts. "The same interests that oppose the WTO and 'globalization' have also stressed that methanol and MTBE are foreign products."

This quote from Citizen Action warns about the dangers of foreign methanol import dependence.

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"These statements, by organizations and public officials supported by ADM, reflect the great success of ADM's efforts to paint methanol and MTBE as undesirable 'foreign' products. It would be extraordinary if ADM, during its secret meeting with Governor Davis, did not emphasize to him what it has stated publicly on numerous occasions -- that methanol and MTBE are 'foreign' products, and that banning MTBE would be a patriotic step to reduce U.S. independence on foreign fuels."

Now, if you turn to -- it should be "dependence," that's right.

If you turn to page 61, the same material is summarized.

MR. ROWLEY: What page, please?

MR. DUGAN: Page 61. Actually, page 61 talks about the labeling measure. "The labeling measure is also clearly intended to discriminate against MTBE as a 'foreign' competitor of ethanol. The labels are not intended to provide consumers with necessary information, or to prevent 'deceptive practices.' If this were the case, the label would

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include more information on the chemical makeup of the gasoline in the pump (particularly as a number of the components in gasoline pose serious health risks). Rather, by identifying only the presence of MTBE -- and not the presence of other oxygenates or other harmful components -- the labels simply give consumers the ability to choose away from MTBE. As 'technical regulations,' the labeling measures must be no more trade restrictive than necessary to achieve a 'legitimate objective' of protecting the environment. In view of the illegitimate objective of the labeling measure, the considerations discussed above with respect to the ban will apply equally to this measure as well."

Now, if you turn to page 66, the first full paragraph, "In this case, the United States has allowed California to take unreasonable, unfair actions that severely harmed Methanex and its investments. Moreover, these measures were intended to discriminate against Methanex and its investments as foreign competitors of the highly protected domestic ethanol industry. Methanol and MTBE have

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long been the victims of a smear campaign by ADM and the U.S. ethanol industry, which was designed to influence the government and the public against these 'foreign' products. This campaign was intended to inhibit methanol-based MTBE's ability to compete in the United States and, therefore, to cause the methanol and MTBE industries economic harm. The United States not only failed to protect foreign industries from this denigration, but it actually joined in their efforts and adopted their rhetoric in enacting the wide range of tax subsidies and regulatory requirements that favor and protect the domestic ethanol industry. Such actions cannot be reconciled with the duty to provide full protection and security."

Now, the material that -- the factual allegations that we believe support the inference -- actually, I might state that I think that the evidence of discriminatory intent with respect to protecting the domestic industry is not based on inference. It's based on direct evidence. I think the intent to harm a foreign industry is more

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clearly based on inference rather than direct evidence, but I think the material I just read to you with respect to the paragraph in the executive order setting up a California ethanol industry, the labeling requirement, the requirement that only ethanol can be used as a substitute for MTBE, and the allegation that ADM has now moved into the market and begun to take over the oxygenate market in California are direct evidence that Governor Davis acted with discriminatory intent.

Now, with respect to those portions of the complaint that deal with both allegations, I think they start right at the beginning. Page 1, where we talk about the secret meeting. "Methanex's decision to amend is the result of information it discovered in the fall of 2000 indicating that Archer-Daniels-Midland, the principal U.S. producer of ethanol, misled and improperly influenced the state of California with respect to MTBE. Specifically, Methanex discovered that -- during the middle of his 1998 gubernatorial campaign, and during a time when the future of all oxygenates in

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California was under active review -- now-Governor Gray Davis met secretly with top executives of ADM."

And we have more information with respect to this meeting that we didn't put into the complaint simply because this was a -- you asked us to file a draft complaint. We have evidence. We have the agenda of the meeting, or draft agenda, of the meeting which confirms conclusively that this was an ethanol meeting, and it puts the lie to ADM's later statement that no, this was a get-acquainted meeting with Governor Davis because of ADM's extensive business interests in California. I don't think they have extensive business interests in California, and the people who attended the meeting were ethanol executives, and we have documentary evidence of that.

But I mean, I think the focus here is that this was a secret meeting, and I think it's permissible to infer from a secret meeting that was not revealed in Governor Davis's campaign filings, we don't believe it was required to be revealed, but he certainly could have revealed it. It wasn't

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revealed in ADM's campaign filings. It wasn't announced by the governor at the time of the meeting that this -- the secrecy surrounding this meeting supports the inference that this was something other than a normal get-acquainted meeting.

The description of the secret meeting goes from page 1 through page 2, and then the start of the next set of material that we think supports both allegations starts at --

MR. ROWLEY: Tell me where you are.

MR. DUGAN: Page 6, bottom of page 6, up. The previous was right up until "summary of amendments" on page 2.

Now, if we move to page 6, please. Now, the material that I referred to between page 6 and page 33, I think it is, covers generally two headings. One, we explain the environmental background, and we think this is important because we think if you understand the environmental background, you will see that MTBE was not so serious a problem as to justify this draconian ban.

Something else explains what happens, and

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the inference that we think is best drawn from this is that the something else, the extraneous force that caused this ban to be put in place was political influence by ADM that induced Governor Davis to put the ban in place in order to protect the domestic industry and to penalize the foreign industry.

But it's important to know the lack of any serious environmental problem in order to understand why that inference is so powerful. So starting at the bottom of page 6 and continuing to the next page to heading number 3, it talks about how MTBE is not a safety or a health risk. And then if you skip up to page 10, and then pages 10 and 11, we show that ethanol is not a superior oxygenate. There's nothing about ethanol that, if left to market forces or any environmental considerations alone, would cause a decisionmaker to shift from MTBE to ethanol.

And then starting midway on page 12 with heading number 4, we begin to talk about ADM, and we describe ADM as the agribusiness Goliath that dominates the domestic ethanol industry. We

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describe it as a potent lobbying force. And then on the top of page 13, first paragraph, we describe how "ADM has launched a systematic political attack on both MTBE and methanol, and the purpose of this lobbying campaign is simple: Remove MTBE from the market so that ethanol can take its place." And "to this end, ADM has for years advanced two consistent themes: MTBE and methanol are foreign products, and any increased use of MTBE increases U.S. reliance on energy imports; and, two, that methanol and MTBE are health hazards."

And then if you skip forward to page 20, it describes that part of the campaign where ADM has tried to portray methanol and MTBE as dangerous, environmentally unsafe products. That goes to the top of page 21. And then subsection 5, starting on page 21, going up through subsection B, describes ADM's modus operandi, how ADM gets these favors from the political machinery in the United States. It talks about ADM's beliefs; it doesn't believe in a free-market system, it believes in obtaining from the government what it needs to prosper and profit

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as a company.

"ADM's contributions are not motivated by any principled political beliefs. 'By giving huge contributions to Democrats and Republicans, ADM makes clear that these contributions are not about ideology, beliefs, or who wins the election. ADM's contributions are given to guarantee that no matter who wins, ADM will have a place at the table -- and access and influence in Washington.'"

It goes on to describe how its contributions, its "lobbying and political contributions have been the prime mover in creating the heavily protected ethanol industry. 'ADM has used big money over the years to ingratiate themselves and protect the ethanol subsidy. Over a 10-year period, ADM gave $2.2 million of soft money to the Republicans and $1 million soft money to the Democrats. ADM also gave direct political action committee contributions to congressional candidates over 10 years: $700,000 to Democrats and $500,000 to Republicans.'"

And then on page 23, it continues and

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gives more examples of public officials specifically adopting the ADM program, supporting a ban on MTBE in order to increase U.S. ethanol production. Lamar Alexander, a presidential candidate in 1996, asked for a ban on MTBE.

It goes on to allege that "political manipulation is not the only tactic ADM has engaged in to control the market. It uses other organizations to disguise its support while advancing its views. For example," the reference there is Oxy-Busters. As another example where we haven't put in information, one of the California contacts of Oxy-Busters is Senator Mountjoy who introduced the Senate bill that created the UC Davis study.

Then moving on to page 24, subsection 24 -- it goes on to detail ADM's criminal activity, but on subsection B, it talks about the source of the problem, and this is meant to show that the source of the problem is the leaking underground storage tanks, and if leaking underground gasoline storage tanks are the problem, you would think that

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the solution is to fix the tanks, not to ban one of the components of gasoline, and one that -- as I showed you with the exhibit that I gave to you on Wednesday, one that is not even among the top 25 of serious pollutants. Why would California single out one and not the others for a complete ban? And that material goes up through page 28.

Then starting with subsection C on page 28, we detail how we believe ADM took advantage of this minor water contamination problem and saw it as an opportunity to intervene into the political processes in California and use this as a pretext to obtain a ban of MTBE from Governor Davis, and that description goes up through really the middle of page 30.

Then the final piece that we include in this is the pages 33 through 35. Just by way of contrast, the fact that Europe and Germany have not banned MTBE, and what is the reason for that, and the inference that we ask the tribunal to draw is that the reason for that is that ADM intervened, misled, and improperly influenced Governor Davis,

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and by doing so convinced him, persuaded him to issue a measure that benefits ADM and the rest of the U.S. ethanol industry and that penalize foreign imports of methanol and MTBE.

We've already talked, I think, about page 53, which one of you pointed out, which again is a summary of the allegations that we make with respect to California. "The California MTBE ban is, in truth, a disguised trade and investment restriction intended to achieve the improper goal of protecting and advantaging a domestic industry through sham environmental regulations. It is fair to conclude that ADM promoted the ban on MTBE at its secret meeting with Governor Davis; it is fair to conclude that the meeting led to ADM's massive campaign contributions immediately thereafter; and it is fair to conclude that the MTBE measures were, at least in part, the result of the governor's political debt to ADM, and of his desire to favor and protect ADM, establish a California-based ethanol industry, and penalize producers of MTBE and methanol, the 'dangerous' and 'foreign' MTBE feedstock. As such,

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the ban violates international law and NAFTA Article 1105."

Now, again, like I said, those are the allegations that were included in the draft complaint.

MR. ROWLEY: Can I ask you a question about that? I'm troubled by a comment you made, and I may not get it exactly right, but I think you said when you were speaking about the so-called secret meeting, that you had direct evidence -- more evidence, more documentary evidence concerning what it had dealt with, particularly you identified an agenda, and I think you said that you had not made reference to these facts because you had been -- well, that you were dealing with a draft claim. I would be troubled to think that you have omitted to plead important relevant facts that are in your possession that you believe support your claim, and that you've not done so for some procedural reason that we may not have been aware of.

MR. DUGAN: Well, I think there is an element of that in it. I mean, the order that the

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tribunal issued specifically asked that the February 12th claim be a draft amended claim, and I think at the February 22nd proceeding, we tried to reserve our rights to supplement what's in the claim, but we didn't view it as the final version of the claim, number 1. And I guess, number 2, we didn't understand the -- maybe a fundamental misunderstanding about the purpose of an UNCITRAL statement of claim. We don't understand an UNCITRAL statement of claim of requiring the pleading of every known relevant fact. We understand it more as requiring a description -- a statement of the facts that support the claim, which we believe we have done amply.

It's true that it doesn't include all the facts, but there are many, many other facts that are relevant here that we have not pled, and we did not read, as I said, UNCITRAL Rule 18 as requiring that. And we checked with the -- we checked the history around U.S. Claims Reporter last night, the Iran-U.S. tribunal operates on a modified version of the UNCITRAL rules, and we couldn't find any

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requirement, we couldn't find any case in there where a case was dismissed because relevant facts were not pleaded in the statement of claim. And I don't think any Iran-U.S. case or any claim has ever been dismissed for failure to plead relevant facts that could have been pleaded.

And perhaps it was a procedural misunderstanding, but we did not understand this draft amended claim as requiring us to plead every relevant fact that we had in our possession. If we did, it would have been a monstrously long document. And once you get into the environmental aspects of the case, this becomes a very, very complex case if we get to the merits, as you will see.

The debate has been going on for years, and the evidence, with respect, for example, to the effect that MTBE is not a health hazard is massive, literally massive. I mean, 2 feet of studies showing that MTBE is not a health hazard, for example, or whether or not MTBE is a carcinogen, another massive piece of evidence, another massive set of evidence of facts that we neither pled nor

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were under the impression that we had to plead.

MR. VEEDER: I think Mr. Rowley's question is a bit more directed at the meeting and if you have an agenda for the meeting. There may be reasons why you haven't pleaded the agenda in the draft amended statement of claim, but it does look as though that's a pretty important fact, if there is fact evidence from that document.

MR. DUGAN: We're perfectly willing to plead it, put in it. It's not as if we're withholding anything. We can give it to you today, if you want it. It's not something that we withheld. It was just something -- we viewed this as -- remember, it was the tribunal that characterized this as a draft amended claim.

MR. VEEDER: In the order of the 8th of January, we required the Claimant to produce a draft amended statement of claim under Article 18, so we are talking about Article 18. We're talking about Article 18, Rule 2B, statements of the facts supporting the claim. Again, without having seen this agenda, I can't express an opinion, but it

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would seem to me if that document was in your possession at the time the draft amended statement of claims was produced, that might well have been a document you would wish to plead.

MR. DUGAN: In retrospect, it's a document we obviously should have pleaded; we wouldn't be discussing it now. We're certainly willing to plead it now. I think the fact that it's out there -- I mean, given, if nothing else, the liberal amendment policy, we're still at the jurisdictional stage.

And again, I might add, remember, these are facts that support our factual allegation. Our factual allegation is not that there was a secret meeting where ethanol was discussed. Our factual allegation is that Governor Davis discriminated against the foreign methanol industry and he discriminated in favor of the U.S. ethanol industry. And as I said, the facts reflected in the agenda are pled in the draft notice. It's a piece of evidence that supports the facts that are pled in the draft claim. We say at the secret meeting that ADM told Governor Davis about MTBE and about ethanol. The

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allegation, with respect to what we think ADM told Governor Davis, is based on the agenda.

MR. CHRISTOPHER: Do you know, Mr. Dugan, whether the agenda was followed?

MR. DUGAN: No, we don't know whether the agenda was followed, and when I made my candid admission that we don't have any direct evidence that Governor Davis acted with discriminatory intent in the sense that we don't have a smoking gun like we have with respect to, for example, Senator Grassley or Senator Daschle, we have all of the supporting evidence that we believe supports this inference and allows the inference to be drawn, and I think we certainly intended to plead the substance of what happened -- what we thought happened at the meeting in the complaint. That's why we said it would be extraordinary if, at a meeting with him, they didn't talk about methanol.

MR. VEEDER: Thank you.

MR. DUGAN: Like I said, we're perfectly willing to provide the draft agenda and some other related material to the tribunal.

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MR. VEEDER: Please draw a distinction between facts supporting your claim and evidence in support of the factual allegations. From what you're saying, I think you've pleaded the facts which you can derive from the agenda and other materials.

MR. DUGAN: Precisely.

MR. VEEDER: The agenda itself would simply be evidence at the merits hearing to support the factual allegations.

MR. DUGAN: That's exactly what it is. I think what we pled is the idea that ethanol was discussed at the meeting, and at the meeting, ADM urged Governor Davis to find that methanol and MTBE were imported products, and they urged Governor Davis to support and protect the U.S. ethanol industry, and the agenda that we have simply is evidence of that.

The fact that it was clearly an ethanol meeting just reinforces -- well, it proves what we said the purpose of the meeting was, but we already pled what the purpose of the meeting was. Just as

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we didn't include any of the actual Election Act filings either. The fact that we pled that they made these campaign contributions, there's a lot of evidence showing that they made the campaign contributions. There are a number of other -- well, there are bookshelves of relevant documents that we neither described nor pled.

MR. CLODFELTER: The allegation is that the new evidence shows that ethanol was on the agenda for the meeting, just to clarify, since we have not seen anything either, if I might?

MR. DUGAN: There hasn't been any marshalling of evidence ordered in the case. We aren't hiding anything. If you want it today, we will give it to you today.

MR. CLODFELTER: One time you said it listed ethanol as being on the agenda, and then you said that it shows that all kinds of other things were discussed. I'm just curious, is that the limit of the document, that it showed that ethanol was on the agenda?

MR. DUGAN: If you want me to characterize

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it, I will put it in front of me, and I will describe it for you. But as I recall it, what it shows is that the attendees at the meeting were ADM executives, with the exception of the top executives, that they were ADM executives who had responsibility for ethanol, not for, for example, corn meal or soybeans. It was ethanol executives who were there.

And in addition, there was, as I recall, someone from a California ethanol producer or industry association, something like that -- a distributor, an ethanol distributor, I'm advised, and from that, we inferred the purpose of the meeting was to discuss ethanol. And based on that, we made the allegations that we made in the complaint.

MR. VEEDER: Thank you.

MR. DUGAN: One last question. You all had asked that we address the question of our assertion that we were not claiming that Governor Davis violated any -- the assertion is found at paragraph -- footnote 2 on page 2. "Methanex is not

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alleging that Governor Davis or ADM in any way violated U.S. or California campaign statutes or other relevant laws. The issue, however, is not whether Governor Davis's and ADM's actions were legal in the United States, but whether they were so unfair, inequitable, and discriminatory that they violate NAFTA and international law."

It's our understanding, and the reason why we said this, is in order to show either a bribe or an illegal gratuity under U.S. law, and we believe under California law as well, what's required is a showing of some type of explicit agreement or understanding between the payee of the contributions and the recipient of the contributions that it is, in fact, a quid pro quo. And that is a very high showing to make, and we certainly don't have any evidence of that, and it would be irresponsible for us to make that claim, because we don't have evidence that rises to that level to show that type of criminal violation.

To answer one of your other questions, that's what we were talking about here, was

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violation of campaign statutes and other laws. We were talking about the bribery and illegal gratuity situations, and we don't have evidence of that type of explicit understanding. We are not accusing anyone of any type of criminal violation. That's all. That's where it was meant to stop.

MR. VEEDER: Thank you. Thank you very much, Mr. Dugan. We will go to the United States.

MR. LEGUM: Would it be possible to take a five-minute break. It's close to 1:00. Another possibility would be to break for lunch.

MR. VEEDER: Let's take a five-minute break.

(Recess.)

MR. VEEDER: Let's resume.

MR. BETTAUER: My colleagues will address each of the points in turn in the same order they addressed them in our original presentation, and then I shall only come back at the end with a few concluding remarks.

So we would first turn to Mr. Clodfelter.

MR. CLODFELTER: Thank you, Mr. Chairman.

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With regard to Article 1102, for purposes of preliminary determination, our argument is quite simple. Without more than the facts Claimant has here alleged, when there exists a domestic industry which is identical to that of the Claimant, and which is treated in exactly the same way as the Claimant, that industry and only that industry can be said to be in like circumstances with the Claimant. And because a determination of in like circumstances must be made before there can be any consideration of 1102 violation, that disposes of Claimant's case in its entirety on Article 1102.

Methanol producers are not in like circumstances with ethanol producers. Foreign methanol producers, like the Claimant, are in like circumstances with domestic methanol producers. It was alleged this morning that we're trying to equate the word "like" with "identical," and of course, it depends on the circumstances. In these circumstances, that's exactly what it means.

As the Pope & Talbot tribunal recognized at page 33 of their award, the concept of "like" can

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have a range of meanings, from "similar" all the way to "identical." In these facts, it's clear that the only group that can only be said to be in like circumstances with the Claimant are their fellow methanol producers who happen to be U.S.-owned as opposed to northern-owned.

How can it be reasonably said that there's been a violation of the national treatment obligation when that nation treats its own identical industry in exactly the same way? The Pope & Talbot tribunal's conclusion in their review of a like circumstances issue in that case, we think, is dispositive, and nothing that you heard this morning changes that conclusion.

Mr. Dugan pointed out, and as I've pointed out yesterday, the tribunal considered two factors in concluding that the Claimant there did not meet the in like circumstances requirement with respect to lumber producers in noncovered provinces.

The first was the tribunal's finding that the decision to implement the agreement through the particular regime of controls it exercised was a

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rational policy, but the key finding was that "since the decision affects over 500 Canadian-owned producers precisely as it affects the investor, it cannot reasonably be said to be motivated by discrimination outlawed by Article 1102."

Mr. Dugan suggested that what this means is you have to find a -- make a finding of rational relation in order to agree with our conclusion, and that's clearly not the case, because if you look at how the Pope & Talbot tribunal set up their analysis, the rational policy factor is the reverse of the motivation to discriminate factor. They are one and the same. A finding of one excludes a finding of the other. So a finding of rational policy is not necessary if there's a finding on the other. And of course, because in that case there was a substantial domestic industry treated exactly the same way as the Claimant, the tribunal ruled out as a matter of law any improper ground for the decision to create the regime that Canada did. It was based on that analysis that they found that there was no -- there were no in like circumstances

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between the two compared groups.

Now, this is merely not a factual conclusion. It's impossible to read the Pope & Talbot opinion without seeing it for what it is. It's a conclusion as a matter of law. It's not a question of evidence. And I think Mr. Dugan spoke incorrectly when he said there was no evidence of -- there was no question of evidence, the tribunal wasn't considering evidence of motivation. They were looking at specifically the industry and the comparison between the industry in the noncovered provinces and the covered provinces, but they weren't looking at evidence of motivation with regard to this finding of in like circumstances. It was clearly a conclusion of law.

This morning, Mr. Dugan also said that we were incorrect in our claim yesterday that they had failed to cite any cases where likeness was found or where the likeness -- excuse me, the likeness comparison went beyond an identical industry that was treated the same way as the foreign industry, and obviously, they attempted to scramble overnight

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to locate some case or another where this might be the case. I think the very fact that this is not an obvious point of their presentation so far shows that these facts are not likely to be encountered, that a finding of national treatment violation is not likely in any situation where you have a major domestic industry that's treated the same way.

Today, they cited three cases they claim do, in fact, do that, and unfortunately, none of these cases support their position. Mr. Dugan corrected his reliance upon the automobile luxury tax case, and he correctly did so, because in that case, the panel expressly found that the two compared groups were not like products. Obviously, it has nothing to do with this case if the two groups claiming to be identical there were determined by the panel to not to be like products. So he was correct in withdrawing their reliance upon that case. As it happens, that happens to be the same conclusion, however, of the panel in the animal feeds proteins case that they cited as well. The vegetable proteins at issue -- that were part of the

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issue there were held not to be a like product with the soybean -- excuse me, the skim milk powdered products at issue there.

So neither of these cases can possibly be seen as helping them, since the products involved, the products created domestically and produced abroad were held not to be like products under Article 3.2 of the GATT.

That brings us to the Japan tax case, the alcoholic beverages case out of Japan. We pulled that case, of course, when we saw it, and we heard about it today and we looked at it, and our reading of it -- and I would encourage you to look at it yourselves -- we see no discussion whatsoever of the relevance of a domestic vodka industry. In fact, we see no reference, either in the panel decision or in the appellate body decision, referring in any way to a domestic vodka industry.

Clearly, if there was a substantial domestic vodka industry, as we are alleging we have here with the U.S. methanol industry, that would have been a factor in the case. We suggest that the

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Japan Alcoholic Beverages Tax case also is not a situation like you face here today. And you're left in the same situation we thought you were in yesterday. You have no precedent for finding likeness between different products when there's an identical industry with which to compare a Claimant.

MR. ROWLEY: If I could ask you a question about that.

MR. CLODFELTER: Yes.

MR. ROWLEY: What I heard you to say is, without more facts than alleged here, where one home industry is identical and treated the same way, there can never be a breach of the national treatment provisions. My question relates to these circumstances, and it may be that you will say that these facts are not pleaded here. But if you have a state within a state which has power to take measures which, in fact, does not have a home industry that is the mirror of the industry that is affected by the measure, and that state intentionally discriminates against the industry, the foreign industry, in order to favor an industry

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that it wishes to compete with the foreign industry, are you saying that in those cases, that case, national treatment may not be engaged?

MR. CLODFELTER: I believe we are, Mr. Rowley. It doesn't matter that the decision was made, taken by the state of California, at issue here. The standard is still national treatment. I will point out one thing. The allegation is they discriminated against the methanol industry in favor of the ethanol industry, which they admit as well that at the time didn't exist in California. So I guess the allegation is that they made a decision in favor of one industry that didn't exist in California against another industry that didn't exist in California. I think it's irrelevant. It's a question of national treatment, and the affect on the domestic methanol industry is what has to be compared.

MR. ROWLEY: So I can take away from your statement without more facts than are pleaded here?

MR. CLODFELTER: Are there any relevant situations that might call for a different

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conclusion? I don't know. They're certainly not pled here. Nothing we see in this case calls for a different conclusion, and that's the only meaning I would ascribe to that phrase.

I will just point out one other thing. Throughout their pleadings, Methanex attempts to equate itself with MTBE. Half the pages we saw today were discussing MTBE and not methanol. Of course, they all allege there's a substantial MTBE industry in California because they sell to it. They say they supply -- that half of the industry is a captive MTBE industry which relies upon -- that also wouldn't exist but for methanol. So even if the state's structure -- particular state structure of the industry were relevant, you would certainly have to take into account the very factor they have alleged here, that it would have -- that this punishes a very big domestic MTBE industry in any case, if it punishes methanol at all.

So we think it's a national treatment standard, not a state treatment standard, and that it's -- if a state methanol industry is required

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to -- in order to establish our position, then a state ethanol industry is also required to establish their position, because the comparison has to be between the imported -- the foreign investor and the domestic investor. And as they admit, except for the fact they allege it was created after these actions, there was no industry in California.

So it's very difficult to understand how they could possibly make a difference out of the fact that there's not been pled in this case that there's a California methanol industry.

MR. ROWLEY: Thank you.

MR. CLODFELTER: I would like to turn now to these questions relating to intent. Our position is that intent isn't relevant if the parties aren't in like circumstances, and intent isn't relevant if there's no different treatment. If there's no different treatment, there can't be any intentional discrimination. So we don't believe in this case that any of these questions are relevant to the admissibility issue that we have posed. And I have to say that I was quite amazed by the presentation

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by Mr. Dugan just a minute ago, as he pointed to the pages of their amended statement of claim upon which they rely for these allegations.

We were wondering what pages were left out. What was breathtaking were the inferences that he has asked you to draw from the allegations. We don't believe any of the inferences they seek could possibly be drawn from the facts that they allege here. The phrase "fast and loose" comes to mind in reviewing what they claim to be bases for inferences, and nothing said today changes our conclusion that the whole case is based upon inference built upon inference, and we have to take it that this is it.

Yesterday, Mr. Dugan did, in fact, say they have no more evidence. Today, they say they have some other evidence that they have not referred to or pled; the other facts in those papers have not been pled. Yesterday, they were pretty clear that they have no evidence of the actual allegations they have made, that as circumstantial as the individual facts that they have already pled are, that they

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have nothing more direct than other facts relating to those very same circumstances.

So you only have to decide whether these are sufficient facts under Rule 18. The parties are in agreement, at least on one standard, that the Claimant has to meet in order to survive this stage of the proceedings. At page 2 of their counter-memorial on jurisdiction, Methanex stated that in order to sustain jurisdiction, a claimant need only credibly allege the factual elements of a claim. We think it would be a very easy decision for this tribunal to arrive at the conclusion that none of these bases for wild inferences, taken together, constitute "credible allegations."

The entire proposition of their intent case is weak at every step. We have a meeting. We have no suggestion of what went on in the meeting, an inference drawn that because of past conduct by ADM, that something must have been said. Just the description of such an inference discloses how unreasonable that is.

And what they asked you to infer was said

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at that meeting was that Governor Gray Davis was given misinformation about the methanol industry; that ADM, as it had in the past, and as its allies had in the past, engaged in a campaign to misportray methanol as a foreign product -- MTBE actually, not even methanol, but MTBE as a foreign product -- as if, you know, Governor Davis was not exposed to any other information on the topic, could not arrive at a judgment based upon what was said to him, even if such things were said to him, and that just on the possibility that such things were said in a meeting is sufficient to establish a conclusion about what he knew or believed. There's nothing credible about that allegation whatsoever.

The other element of their intent presentation I wanted to comment on is the executive order itself. Methanex alleges that paragraph 11 of the executive order, on its face, discloses a motivation to favor the ethanol industry that didn't exist, of course, at the time in California, according to Methanex.

Here, I'd like to make a general point,

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and this really goes to the question of the use of these trade cases that we've been talking about as well. And I made the point basically yesterday, it's very difficult to take any of these trade cases and directly apply them to issues in relationship to an investment treaty. It's difficult to apply them even to other trade cases, since the terms have different meanings under so many different contexts in WTO and GATT jurisprudence. But it's most difficult to apply them to investment issues, and this is a very clear example of that.

NAFTA at Chapter 11 protects investment. It's not a trade chapter. It's not about protectionism, for example. That is governed by other provisions of NAFTA. It's about protecting investment rights. And there's absolutely nothing on the face of paragraph 11 about favoring domestic owners of future ethanol facilities over foreign owners of those ethanol facilities. We know, for example, that Methanex owns a factory in Louisiana, one that they shut down before this measure, but a factory.

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There's nothing to prevent Methanex from joining in this hope of creating a new source of employment in California by entering the ethanol business in California, along with any American investor. There's nothing on the face of this provision which indicates any possible intent of discrimination against foreign investors. Of course, even if this were a trade case, it would be impossible to read paragraph 11 as expressing an intent to discriminate against -- or in favor of even a domestic product here.

The recognition that because federal regulations do require gasoline in California to have oxidants, and that they have determined as a matter of public safety and health and environmental protection to ban one particular oxidant, that there was going to be another oxidant in California gasoline, and that California, as part of a far-reaching and forward-thinking policy could, as well as any state, enjoy the benefits of that industry. It could not possibly be read on its face to suggest an intent to benefit a domestic industry.

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I'm talking about paragraph 11 of the executive order.

Mr. Chairman, I'm going to conclude my remarks there. We think that this case is ripe for disposition on the facts assumed to be true and uncontested, and we urge you to dismiss it on the grounds that it's impossible to determine that, as alleged by Claimant, methanol producers are in like circumstances with ethanol producers. Thank you.

MR. LEGUM: Mr. President, members of the tribunal, by my count, Mr. Dugan made approximately five principal assertions during the course of his discourse this morning. I'd like to address those in turn. The first of the assertions concerned general state practice with respect to fair and equitable treatment. The only evidence of state practice in this sense that Mr. Dugan and Methanex have offered is the number of bilateral investment treaties that contain those terms.

That practice, however, does not address the content of the provisions. That's the issue before the tribunal. What does "fair and equitable

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treatment" mean? The mere fact that those terms appear in a large number of treaties, which we don't dispute, doesn't help the tribunal with the issue that's before it.

As we demonstrated yesterday, however, all of the state practice that does address the content of fair and equitable treatment that is before this tribunal supports the NAFTA parties' position that "fair and equitable treatment" is a shorthand reference to the customary international law minimum standard of treatment.

And this brings me to a related point, which is, the reason why you have fair and equitable treatment in a large number of bilateral investment treaties is, as Mr. Dugan pointed out this morning, there are some states that, in the past, express doubt as to whether the customary international law minimum standard of treatment was, indeed, a customary international law obligation.

The incorporation of those terms in treaties removes that doubt. As Mr. Dugan noted before, in the past, Mexico has expressed doubt

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about the international minimum standard. It now, having agreed to the NAFTA, embraces that standard.

The next point that I'd like to address is the Vienna Convention on the law of treaties, and its provisions concerning agreements as to interpretation. And I will begin by addressing subsequent state practice, and then I will turn to the question of subsequent agreement.

Mr. Dugan asserted again that there is a requirement of consistency and duration of practice for it to be considered by the tribunal. He did not address my discussion yesterday of the International Court of Justice's decisions in the arbitral award made by the King of Spain case and the certain expenses of the United Nations case. Those International Court of Justice decisions, we submit, dispose of the question.

Mr. Dugan also mischaracterized the United States' position with respect to Mexico's statements in its counter-memorials in the Azinian and Metalclad cases. It is not our position that the positions taken by parties in submissions to Chapter

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11 tribunals cannot be considered state practice. Instead, our position is that if the tribunal reviews those submissions in their context, it will find that Mexico did not take a definitive position in those submissions as to the context of "fair and equitable treatment."

Instead, it observed that there have been a number of interpretations of that phrase offered and proposed, as any good litigant would, that it could meet its opponent's case under any standard.

I'd now like to turn to Article 31(3)(a) of the Vienna Convention. Again, what that provision says is an agreement is required. It does not use the term "treaty" or the term "international agreement" that are used in Article 2(1)(a) to describe a more formal document. In fact, the commentators are in agreement on this point.

For example, the article by Professor Mustafa Yasseen that is cited and quoted in our rejoinder at page 21, note 26 at page 45, says the following -- this is my quick translation from the French. I could threaten to read the French to you,

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but I'm happy to read my translation.

MR. VEEDER: American will do.

MR. LEGUM: "It is above all not necessary that an interpretive agreement be clothed with the same form as that of the treaty it concerns, however solemn and important this treaty may be. The interpretive agreement may be in simplified form, may be realized by an exchange of notes, or even by concordant oral declarations."

Similarly, the book by Mark Villager that is cited in our reply at page 34, note 46, says, here discussing paragraphs 2 and 3(A) and (B) of the Vienna Convention, that it "covers any express agreement (which term is clearly wider than the treaty defined in Vienna Convention Article 2) between all parties."

The commentators thus support the notion that is clear from the text that agreement in Article 31 is broader in scope than the formal agreement that is envisioned by the provisions of that convention dealing with treaties. This makes sense, because it's an agreement that relates to the

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meaning of an original treaty. It's not a treaty in itself, and it's not an amendment.

On a procedural point, Mr. Dugan suggested that posthearing briefing on this point might be necessary. It's the United States' view that posthearing briefing is not necessary on this point. The normal course is to address points of law at the hearing. However, if the tribunal were to grant Methanex's application, we would request equal time to respond.

The final point that Mr. Dugan made with respect to Article 31(3)(a) is that there are provisions of the NAFTA that allow the Free Trade Commission to render interpretations of the NAFTA. That is, indeed, correct, but nothing in the NAFTA suggests that that is an exclusive means for the parties to reach an agreement as to the interpretation of the NAFTA.

And finally, of course, for all of the reasons that we've submitted over the past day and this morning, what the NAFTA parties are doing here is not an amendment. It is an interpretation. It

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is the most reasonable interpretation. It is the best interpretation. But it is not an amendment.

The third point that I'd like to address is the Maffezini case. Now, again, as I mentioned yesterday, the Maffezini award does not explain its legal reasoning. It does, as Mr. Dugan quoted it this morning, briefly use the word "transparency." It's unclear what the tribunal meant by that word in that context. In our view, it doesn't add or subtract from the analysis, and the case could very easily have been characterized as one of expropriation under traditional international law.

The fourth point is that of good faith -- yes?

MR. CHRISTOPHER: I was interested in Mr. Dugan's point that the asserted agreement between the parties used different terms. When you look at what the parties said with respect to the alleged agreement, the asserted agreement, the terms are various. There doesn't seem to be any focus on a similar term -- on a single term. Could you comment on that?

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MR. LEGUM: Well, I believe, first of all, that if they're not identical in their language, I believe that they're very close, and that is, in our view, a question that's for the tribunal to address. The question is, can you, by looking at these submissions, conclude that there is, in fact, an agreement among the three parties?

MR. CHRISTOPHER: I suppose that you might say that Mexico begins by saying we agree with the United States, and then elaborates on that. And that elaboration may not detract from the agreement, but I think that is, as you put it, up to the tribunal to try to fathom for themselves whether the agreement is complete and exact enough.

MR. LEGUM: In our rejoinder, we cite the three parties' submissions in our footnote. Perhaps I'm overly impressional, but it did seem to me that the statements were really quite similar. I'm just going to see briefly if I can provide that reference to the tribunal. It's page 19, note 25. "Canada states, paragraph 26, Article 1105 incorporates the international minimum standard of treatment

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recognized by customary international law."

MR. CHRISTOPHER: Page 19, you say?

MR. LEGUM: Of our rejoinder, yes, page 19, note 25. And then it goes on at paragraph 33 to state that "fair and equitable treatment is subsumed in the international minimum standard recognized by customary international law," and paragraph 39, it says the same thing with respect to "full protection and security." And then in Mexico's submission at paragraph 9 it states "Article 1105 establishes only an international minimum standard of customary international law in which fair and equitable treatment is subsumed." And then later observes at paragraph 12 that "Article 1105 clearly indicates that both fair and equitable treatment and full protection and security are included as examples of the customary minimum standards subsumed within and in no way add to it."

MR. CHRISTOPHER: I thought Mr. Dugan was addressing the asserted agreement with respect to "relating."

MR. LEGUM: I see. If you don't mind,

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I'll allow my colleague, Mr. Birnbaum, to address that. I apologize for the division of functions here.

MR. VEEDER: We understand.

MR. LEGUM: Good faith. The United States agrees we have, in fact, always maintained that as the Vienna Convention on the law of treaties plainly provides, treaty obligations must be performed in good faith. That conclusion, or that proposition, however, doesn't have any relevance here, because there are no treaty obligations that Methanex has identified that were implemented by the executive order or the regulations here. Its assertion really is that there is somehow an obligation of good faith.

Clearly there are treaties between the United States, but none are implicated by the executive order or the regulations. We are, therefore, left with only a general obligation of good faith which all parties agree cannot be the basis of a claim under customary international law, and therefore, there are no facts that are relevant

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to the issue of good faith, because Methanex has identified no legal obligation that is implicated here.

The fifth point is that of most favored nations treatment and the application of the most favored nations treatment clause in the NAFTA. Mr. Dugan did not respond to any of the points that I made yesterday on most favored nations treatment. They dispose of his assertions, and unless the tribunal has any further questions about most favored nations treatment, I will conclude by noting that the international minimum standard is not a standard frozen in the 1920s. It is an evolving standard. It is one that, like other rules of international law, evolves through state practice. There are accepted ways in international law for a tribunal to determine whether state practice has evolved such that a new rule of customary international law has been agreed to by the state community. Methanex's assertions here do not meet those standards, and with that, I would invite the tribunal to call on Ms. Menaker to address Article

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1110.

MR. VEEDER: Thank you. Ms. Menaker?

MS. MENAKER: Thank you. Mr. President, members of the tribunal, I just have a few quick points in response to Methanex's argument on Article 1110. Yesterday, I explained why the United States contends that market issue is not an -- market access, excuse me, is not at issue in this case, and yesterday, I also explained why, in any event, the Pope & Talbot decision, which is the only authority that Methanex relies on in support of its view that market access is a property right that, by itself, can be expropriated does not support it.

Methanex today only repeated its bare allegation that its market access had been expropriated, and I have nothing further to add on this point, and I would just like to refer the tribunal to our written and oral submissions on this point, if it has no questions.

MR. VEEDER: Thank you.

MS. MENAKER: Today, in response to our argument that goodwill is neither an investment nor

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a property right that can, by itself, be expropriated, Methanex posed three hypothetical situations which it contended warranted a different result.

First, it posed the hypothetical where an individual would purchase a doctor's business, and it stated that in that case, you would be paying for the goodwill of that business, and as we explained yesterday, we agree that if one purchases an enterprise, often a portion of the purchase price may include goodwill, and that would indeed be the case if you were buying a doctor's business.

However, we contend that there would be no instance where you would purchase goodwill by itself without that goodwill being attached to another physical or legal asset. If you were buying a doctor's business, for example, you would likely be buying the office building where it was located or the piece of real estate or another piece of property, for instance, like a customer list, and a customer list as opposed to customers is a property right that may be purchased. Customer list is

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property, but customers clearly are not a property right that may be purchased or sold or expropriated. Customers have their free will, and they may very well choose a different doctor. But we submit if you were purchasing a doctor's business and you were not buying any physical asset and not any intangible property right or legal interest, there would be nothing to pay for. You would not just pay for goodwill. You would have purchased nothing.

Second, Methanex posed a hypothetical where a state established an insurance monopoly and said this would be a case where an investor's goodwill may be expropriated. I would like to refer the tribunal to the Oscar Chinn case, which is cited in our memorials and which I alluded to yesterday in my argument. In that case, a British river carrier was operating in what was then the Belgian Congo. The state increased government funding for a state-owned competitor, and that resulted in the competitor being granted a de facto monopoly. The Permanent Court of International Justice denied Claimant's claim in that case and found that nothing

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had been expropriated. The claim -- neither the Claimant's goodwill nor the clientele. So we submit that that does not support Methanex's contention here, and I would refer the tribunal or just bring to the tribunal's attention the existence of chapter 15 in the NAFTA.

Chapter 15 is entitled "competition policy, monopolies, and state enterprises," and that provides particular rules with respect to the establishment and conduct of monopolies, and in particular, in Articles 1116 and 1117. Those articles specifically provide that, with the exception of two subparts to two articles in Chapter 15, a violation of Chapter 15 could not be the subject of an investor/state dispute resolution. But in any event, we contend that Methanex's hypothetical there does not support its contention that goodwill by itself can be the subject of an expropriation.

Finally, Methanex's third hypothetical did not have a lot of facts attached to it, but essentially, I believe it was contending that if

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there were a measure that prohibited Canadian films from being shown in California, that could be an example of an expropriation of goodwill. On those bare facts, we would contend that that is really a trade issue. That might implicate some trade obligations that a particular state had, but there, I don't see that as an investment issue at all falling under Chapter 11, as stated by Methanex.

Finally, I would just like to respond to Methanex's assertion when it closed its argument today. It says that the United States had not presented a shred of evidence that goodwill by itself could not be expropriated, and I would just refer the tribunal, again, to the Oscar Chinn case, among others, that are cited in our written submissions and the several commentators as well who we rely on in our written submissions and who support our view. And I think our position can be summed up quite succinctly by Gillian White, a noted international legal scholar, in the White book, "the notion of goodwill is too vague to be regarded as a separate property right apart from the enterprise to

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which it is attached."

There are also other commentators such as Lilick and McGraw and Mory who subscribe to that same view. I would submit it is Methanex who has not come forward with a scintilla of authority in support of its view that goodwill, by itself, is an investment or property right that may be expropriated.

Thank you.

MR. VEEDER: Before you leave us, the page in Gillian White's book?

MS. MENAKER: I will find that for you.

MR. BIRNBAUM: Thank you, Mr. President, Mr. Rowley, Mr. Christopher. I'm responding to four points. First, the issue of intent in the context of proximate cause and relating to, direct and indirect losses issue, the issue of reasonable foreseeability, and the issue of relating to.

As we stated in our memorials and yesterday, Methanex's allegation of intentional discrimination is based on the allegation that California intended to benefit the U.S. domestic

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ethanol industry. This is reflected in the very first sentence of the draft amended claim which Mr. Rowley referred to today and throughout the draft amended claim, as Mr. Dugan referred to, over and over and over again.

As he said today before the break, Mr. Davis's primary focus was to effect competition within the oxygenate sector. He said "the intent was to benefit the U.S. domestic ethanol industry and to set up protection for the U.S. ethanol industry." The focus of Mr. Dugan's comments regarding the draft amended claim are on competition, not an intent specifically to harm foreign-owned methanol producers, and this distinction is critical.

As we explained in our rejoinder and yesterday, even assuming for the sake of argument that an intent to injure MTBE producers could be inferred from an intent to benefit the U.S. domestic ethanol industry, it again is a leap of logic. It is irrational to infer an intent to injure suppliers of products or services to MTBE producers, an intent

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to injure foreign-owned suppliers of products or services to MTBE producers, whether methanol suppliers or any other suppliers from the intent alleged to benefit the U.S. domestic ethanol industry. As we noted previously, this is so because California fully attains the alleged objective of benefiting the U.S. ethanol industry simply by banning MTBE. It need go no further.

Again, because California does not need to harm suppliers of products or services to MTBE producers to fully obtain its alleged objective, there would be no reason for and, therefore, there is no basis to infer, no basis at all that California intended to injure suppliers of products or services to MTBE producers. Again, whether they're methanol suppliers or any other suppliers.

Now, there is also an issue with respect to whether Methanex asserts that California and Governor Davis intended to injure foreign-owned methanol producers and marketers, not to benefit the domestic ethanol industry, but merely to harm them because they are foreign-owned.

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Mr. Dugan conceded on Wednesday that "what we haven't alleged is that we have any actual evidence that that's what he did, because we don't." Not only does Methanex not have any evidence because there is none, but even assuming at this phase of the proceedings that this second type of intent also is pleaded, it is not logically or rationally pleaded. There is no credible allegation.

Assuming that all the facts pleaded are true, it is not a logical inference based on those facts, and therefore, it deserves to be dismissed at this jurisdictional stage.

I'd just like to go through the categories of alleged facts. First, these are the categories of alleged facts in their draft amended claim. First, on one occasion, Governor Davis met privately with top ADM executives. Second, ADM made $210,000 in campaign contributions to the governor. Third, ADM has conducted an extensive and aggressive lobbying and public relations campaign against MTBE and methanol, characterizing them as dangerous foreign products. Again, this is ADM's, not

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California's or the governor's, extensive and aggressive lobbying campaign and public relations campaign. Fourth, Governor Davis issued the executive order calling for an MTBE ban according to a certain schedule, and California promulgated regulations and that those regulations, in fact, banned MTBE, although there is no ethanol industry in California.

Fifth, the MTBE ban was not based on a reasoned analysis of the evidence, and MTBE is better for the environment and public health than ethanol, which is heavily subsidized to compete with MTBE. Sixth, better alternatives existed to banning MTBE to deal with the problems California was addressing with respect to its groundwater. Seventh, numerous federal officials have echoed ADM's disparagement of MTBE and methanol as foreign products.

It is hard to see how these alleged facts could support a reasonable inference of an intent to harm anyone, but even if this tribunal were to disagree, these facts would, at most, evidence an

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intent to injure MTBE producers, not methanol producers, to benefit the U.S. domestic ethanol industry. Methanex does not allege, for example, any facts such as a pattern of behavior or statements by the governor on which to infer that he was motivated by nationalistic or xenophobic, or any other related sentiments to harm foreign-owned methanol producers. Nor, for example, does Methanex allege any facts on which to infer that the governor has a particular axe to grind with respect to foreign-owned methanol producers or any other facts of that nature.

Finally, we'd like to note that in addition, that whatever Mr. Davis's alleged intent, his executive order merely created a schedule for certain California agencies to follow, and neither he nor those agencies at that time had the authority to effectuate the ban. Therefore, no allegation that such intent affected the actual California regulations banning MTBE has even been made. Thus, even assuming all the facts pleaded are true, no reasonable inference of the specific intent to harm

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foreign-owned methanol producers can be made.

There is no circumstantial case pleaded that could reasonably, that could logically support such an inference. Thus, to whatever extent Methanex pleaded an intent on the part of California and Governor Davis to injure foreign-owned methanol producers on the basis of nationality, contrary to UNCITRAL arbitration Rule 18.2, the statement of claim does not include a statement of facts supporting the claim.

Turning to our second point with respect to direct and indirect losses. Methanex, this morning, alleged that it has asserted the existence of direct losses in the form of a decline in stock value and an effect on their credit rating. Preliminarily or initially, I'd like to note that a decline in stock value isn't relevant, because it's not legally cognizable as a damage to the corporation issuing the shares. We've already addressed that topic.

In any event, a decline in stock value and credit rating is even more indirect rather than

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direct than the other effects Methanex complains of. Moody's and shareholders or potential shareholders might modify their behavior only because of the subject measure's anticipated primary effects on gasoline distributors, their anticipated secondary effects on MTBE producers, and, in turn, the anticipated tertiary effects. In fact, these alleged injuries, the decline in stock value and the credit rating, are even one step further removed than the effect of the measures on the contractual relations between MTBE and methanol producers.

With respect to foreseeability, Mr. Dugan stated that the United States identified no comprehensive statement in international law defining a standard of proximate cause. This is a remarkable assertion in light of the many, many international law cases and other international law authorities cited and discussed in our memorials, in particular our memorial at page 23 to 29 and our reply memorial at pages 7 to 14.

Mr. Dugan's statement is also remarkable given that Methanex cites not one international law

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case or other authority that is analogous to this case and cites only one international law case for its proposition that reasonable foreseeability alone is the test of proximate cause. This case is the Angola case, and we've comprehensively addressed this case in our rejoinder at pages 8 to 9, so I won't address it again here, unless you have any questions.

Turning to the fourth point, "relating to." Mr. Dugan stated this morning -- excuse me. Would it be okay if I conferred with my colleagues for a second? Thank you.

(Pause.)

MR. BIRNBAUM: Thank you for your indulgence. Turning to "relating to," Mr. Dugan stated this morning that the relating to requirement is satisfied if a measure has a significant effect on the Claimant. This is incorrect because the issue is not whether a measure happens to affect, significantly or otherwise, a claimant. Again, on this, all three NAFTA parties unambiguously agree -- and we've noted so in our rejoinder at page 46,

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footnote 54, and given the important answer of this issue, I would like to refer to it directly and note that in Mexico's May 15th, 2001 1128 submission at page 3, paragraph 7, Mexico stated "Mexico agrees with the proposition of the United States and disagrees with Methanex's contention that measures that merely affect investors or investments are covered by Chapter 11."

And also, Canada's second submission at page 5, paragraph 22 to 23. "The NAFTA parties clearly did not intend that every regulatory measure of general application which merely affects or has an inadvertent affect on an investor or its investments would give rise to a claim under NAFTA Chapter 11." Furthermore, Canada agrees with the United States that the term "relating to" requires a significant connection between the measure at issue and the essential nature of investment.

The issue is not -- I'm sorry. The issue is the nature of the connection between the measure and the investor or the investment, not the extent of any alleged losses. Also, I would like to answer

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Mr. Rowley's question on "relating to" from yesterday. Mr. Rowley, I believe you asked -- I'll quote, just so it's clear from the transcript.

MR. ROWLEY: That doesn't mean it will be necessarily clear.

MR. BIRNBAUM: You had asked Mr. Legum, and it was referred to me, if there was an allegation to discriminate against foreign producers of a product to benefit domestic producers of another product, for those two products, read methanol and ethanol, if there is such an allegation, do we get over the "relating to" hurdle. This question backs us into an assumption that we strongly believe is inaccurate. So I'll answer the question by breaking it down and hopefully be clear.

MR. ROWLEY: Do you accept the assumption there?

MR. BIRNBAUM: There's an assumption within an assumption. So it's hard to accept.

The assumption I'm having trouble with is "read methanol and ethanol." We don't read methanol and ethanol. I mean, if you want, I will read

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ethanol and MTBE, but I can't read ethanol and methanol and make sense of the question. It wouldn't -- or I have to say the answer is no, but there's a question within this on intent that I'd like to address.

MR. ROWLEY: Please answer it the way you would like to.

MR. BIRNBAUM: Okay. If the purpose of the measure is an intent to harm foreign-owned investors or investments on the basis of nationality, then the measure relates to the foreign-owned investor or investment. However, if such an allegation is not a credible allegation, then it can't survive a preliminary challenge to admissibility.

If there aren't any questions on relating to, I will just wrap up with a sentence or so.

MR. VEEDER: Please continue.

MR. BIRNBAUM: Okay. So as the United States has shown, with respect to proximate cause and relating to, as well as all of our other defenses, these issues do not implicate any factual

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questions requiring resolution. These issues must be resolved now as a matter of law.

Thank you.

MS. MENAKER: First, Mr. Veeder, I would just like to let you know, in response to your question earlier, the Gillian White book, that was page 49 of that book from which I was quoting.

Members of the tribunal, I only have three brief remarks to make in response to Methanex's arguments on cognizable loss or damage. First, contrary to what Methanex suggested this morning, the United States' timing or ripeness objection does not go away with the provisional acceptance of the amended complaint.

To the extent that Methanex claims that the ban expropriated its investments or that the ban discriminates against it in violation of the national treatment provision, their claims are not ripe. As I described at some length yesterday, there can be no Article 1110 or Article 1102 violation before the date that the ban goes into effect.

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I refer the tribunal to page 35 of Methanex's amended claim where it states "the California ban on MTBE has substantially damaged Methanex, its U.S. affiliates, its U.S. investments, and its shareholders."

The second point I'd like to make is that Methanex today conceded that just because a company's stock price drops, that does not mean that the corporation has suffered an injury. It then went on to state that that also doesn't mean that the converse can't also be true.

Our point is that a decline in stock prices can merely be an indicator that the corporation has suffered an injury, but that does not constitute the injury suffered, and that's because a decline in share value is not an injury to the company that's issued the shares.

The company is not injured or damaged to the extent that its share value declines, and therefore, Methanex's allegations that it sustained loss or damage in the amounts of nearly 1 billion because that represents lost market capitalization

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should be dismissed by this tribunal, because those claims do not constitute claims for legally cognizable loss or damage.

And finally, Methanex today discussed its claim that its allegation of increased costs of capital had been suffered by it already prior to the ban having gone into effect, and that constituted a legally cognizable loss or damage. As I discussed yesterday in my arguments, it is our position that that also is not a legally cognizable loss or damage, because that loss cannot have been sustained by Methanex in its capacity as an investor in the United States, and I elaborated on this objection yesterday. I won't do so further now, unless you have questions regarding it.

I would also like to make clear that that is not a factual issue that needs any more evidence to be decided. There does not need to be any evidence to make the determination that that type of loss is not a loss sustained in one's capacity as an investor in the U.S.

Now I will just turn my attention to just

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commenting briefly on Methanex's arguments that it has standing under Article 1116. Methanex this morning stated there were no restrictions on the types of injuries an investor can bring under Article 1116, but it does concede that those injuries have to be an injury to the investor, and that's our point.

Our point is that an injury to a corporation is not an injury to a shareholder of that corporation. It's a derivative injury to a shareholder of the corporation, and the municipal law of developed legal systems recognizes this distinction, as has the International Court of Justice, and shareholders are simply not given standing to recover for derivative injuries that they sustain. There's absolutely no indication that there was any intent on the NAFTA parties' part to abrogate this fundamental principle of corporate law.

Now, Methanex argues that accepting this interpretation would be unfair because it would leave minority shareholders without a remedy under

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the NAFTA, and this is not the case. Of course, a minority shareholder would not have standing to bring a claim under Article 1117, because that minority shareholder will not own or control the enterprise, and this, of course, should be the case. I should not have standing to bring a claim on behalf of IBM because I own a few shares there. I don't act on behalf of IBM. But under appropriate circumstances, a minority shareholder may have standing to bring a claim under Article 1116, and that is when that minority shareholder has suffered a direct loss.

Yesterday, I gave a number of examples of situations when that might occur in my presentation, and I won't repeat those examples here unless the tribunal would like further elaboration, but I would refer the tribunal to our written submissions, and also to the Barcelona Traction cases, and the article by Mr. Arechaga which was cited by the United States in our written submissions and which addresses this point.

Methanex also argued that the United

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States' interpretation of the function of Article 1116 was incompatible with Article 1121. We dealt with this issue in our rejoinder at pages 50 through 51, and unless the tribunal has any questions with respect to that argument, I won't repeat it here now.

Finally, once again, Methanex alleged that it maintains standing under Article 1116 because it had alleged direct damages, and once again, I just repeat that this is not an issue of extraterritoriality as Methanex seems to suggest, but it is rather an issue -- our same objection that I just referred to, that the losses claimed by Methanex to be direct losses are actually losses that are not cognizable because they were not sustained by Methanex in its capacity as an investor in the United States. And that is a legal issue that is ripe for decision at this time. Thank you.

MR. VEEDER: Thank you. Mr. Bettauer?

MR. BETTAUER: Before I close, my colleague, Mr. Clodfelter, will address two of the questions that were raised yesterday that you asked

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us to address.

MR. CLODFELTER: You asked, actually -- it was yesterday; the days are blurring -- the question of whether or not the actions of the governor would be illegal under California or other law if the allegations that have been made by Methanex were true. They have, of course, said that they do not -- they're not alleging that there's any illegality whatsoever.

We'd actually like to just review with you our findings on that. In our pleadings and, of course, our reply, we've already referred to the provisions of the California penal code that relate to bribery. I will just note again that's at page 4, footnote 2 of our reply, and I won't repeat those again. But more interesting, I think, is provision of California common law which, I think, is similar to the English law provision that you made reference to, Mr. Chairman, on targeted malfeasance.

It is a common law misdemeanor in California when a public officer, while exercising his or her official duties or acting under color of

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law, inflicts injury on a person with improper motive or corrupt intent. And this is described at -- I guess the most prominent California treatise in California criminal law, Whitcomb California criminal law, volume 2, section 1216.

We would also like to note, however, that under U.S. law, if a state enacts a measure for the sole purpose of harming out-of-state -- and that would include foreign producers of a product -- in order to promote or protect in-state economic interests with no legitimate state interest, that would give rise to a very viable cause of action under the dormant commerce clause of the United States Constitution.

One other point, I believe Mr. Christopher asked about the possibility of a bill of attainder. We believe, as has been noted by both the United States and the California Supreme Court, any state legislative action which constitutes a punishment of specifically designated persons or groups would be an unlawful bill of attainder and would violate Article 1, Section 10 of the United States

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constitution. We would not express an opinion and cannot at this point on whether that would be applicable to executive actions or not, however.

The other preliminary -- or, I guess, housekeeping point you raised yesterday was whether or not we had any views in relationship to the form of an award, and also a question about costs.

Of course, we have requested costs involved in this matter so far, and we've asked for relief that would cause the entire claim of Methanex to be dismissed. Should that relief be given, we, of course, would still like to recover our costs, and we don't want you to -- we want that relief. We want it before you become functus officio or unable to award us costs. We're not sure whether it makes sense to prepare a formal application for costs; unnecessary documentation. So we would suggest that, should our relief be given, that your decision be included in an instrument styled as an award on jurisdiction and admissibility, specifically reserving for the subsequent application and award of costs.

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MR. VEEDER: Effectively a partial award?

MR. CLODFELTER: Technically, it would be a partial award, because not all claims have been -- or claims of costs would not be disposed of. I don't think you need to call it a partial award, however. It would be sufficient to call it an award on jurisdiction and admissibility, but that would be our suggestion.

Should, in fact, you not dispose of all of our -- all the claims as we have requested and only dispose of some of them, you could certainly call -- and we would suggest that you style the award as a partial award on jurisdiction and admissibility, and we can follow-up with a subsequent application for costs which could be awarded in a yet additional partial award.

MR. VEEDER: So on any view of the result, it would be a partial award. If it were in your favor, it would be a partial award because we wouldn't want to be functus because of the costs. So it is a final award, but would be called a partial award.

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MR. CLODFELTER: Final with respect to the award and, in fact, enforceable.

MR. VEEDER: Filing the award at the seat of the arbitration, this would simply be an award that would be communicated to the parties? There's no formal requirement?

MR. CLODFELTER: That's correct.

MR. DUGAN: That's my understanding as well, with respect to the form of the award. I agree with Mr. Clodfelter. We also would like to reserve for costs.

MR. VEEDER: You also have an application, and if you don't, you might want to advance it. If it's a partial award, I think you're both protected whichever way it goes.

MR. DUGAN: That's correct.

MR. VEEDER: Fine. That's very helpful.

MR. BETTAUER: If I may, I would like to take just a very few minutes and wrap up with some of the more general points. I think my colleagues have effectively demonstrated that each of Methanex's claims can be disposed of based on the

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allegations made as a matter of law.

As noted by some of the tribunal members this morning, UNCITRAL Rule 18(2)(b) requires an allegation of facts supporting the claim, and that's a prerequisite for the claim to proceed. While this certainly does not mean all the facts in the case have to be alleged, certainly it does suggest that the facts needed to sufficiently make out the alleged violation need to be alleged, and we don't believe that has happened here.

Methanex has also said, in its pleadings, that the allegations have to be credible to be sustainable. We have agreed with that as a basis for judging allegations of fact, and we have, I think, demonstrated that the inferences that Methanex has asked you to draw are simply not credible.

If the facts as alleged are not credible, there can be no violation of the applicable NAFTA provisions. Moreover, we have also shown that as a matter of law, looking at those NAFTA provisions, the elements of those -- the elements of a violation

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of those provisions are not made out.

Now, Mr. Dugan, this morning, said that I had suggested that this tribunal could not decide this case, could not -- that I had said that the tribunal does not have the power to decide claims under NAFTA. Mr. Dugan clearly overstated what I said, as you can tell if you look at the record and what I said before.

MR. VEEDER: I think we have this in mind. You don't need to take this at great length.

MR. BETTAUER: I will not. I want to emphatically say that we do have confidence in the tribunal. We recognize that NAFTA provides for independent tribunals. We favor such tribunals. And such rights for investors as are created by Chapter 11, but they are specific rights, and claimed allegations must be proved.

We share Mr. Dugan's confidence that the tribunal will reach a fair decision, but we also have confidence that the decision will be more than fair, that it will be grounded in the terms of NAFTA and in applicable rules of international law as

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required by Article 1131, paragraph 1 of the NAFTA and 331 of the UNCITRAL rules. That is the only test of fairness that NAFTA allows, a decision in accordance with its terms and the law.

Now, Mr. Dugan asserted that we had not explained any other purpose for NAFTA than increasing liability of the three state parties, and it's incredible that one might be thought to be called on to explain that. Article 101(1)(c) of NAFTA concerning investment suggests the purpose of Chapter 11; that is, to increase substantially investment opportunities. Thus, Chapter 11 sets up specific investment protection obligations and means by which, if they are breached, investors can vindicate their rights. The intent of the parties, I'm sure all of the NAFTA parties, is to live up to those obligations. We, as has been commented by Mr. Legum, have always thought that the principle of practice on sovereignty is critical to our behavior in international relations, but we did not, in setting up these obligations, provide an insurance policy for any damage that may occur to investors.

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They, Methanex, suggest a reading of NAFTA that, as I've pointed out to you before, would protect them against any change in the economic environment, no matter how attenuated. NAFTA's provisions just do not do that, and I would like to reemphasize that on this, all the three NAFTA parties agree.

The fact that there are not many cases on this point is not surprising in the NAFTA jurisprudence. NAFTA is a relatively recent instrument, and the cases are just getting started. Any decision to accept a claim such -- as attenuated as the claim put before you today, based on such novel legal theories as put forward surely would result in the situation I described in my opening and closing yesterday, and I won't repeat those comments. But we think those comments are accurate.

We think this is a case that is critical for NAFTA, and we leave that to the tribunal to judge. Mr. President, we think we have shown that this case can be decided at this point based on the law. To do so would be most efficient. It would

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save time and expense for the disputing parties, and it would help set a general framework for NAFTA that does not encourage untenable claims. Therefore, it is our final submission that we urge you to dismiss this claim. Thank you, Mr. President, members of the tribunal.

MR. VEEDER: Thank you very much. This brings us to the end of the two parties' replies. There were a few housekeeping matters that we have to go through. First of all is the question of written submissions on the effect of section 31(3)(a) of the Vienna Convention. The timetable proposed was a week or so. If it needs to be a bit longer, that's no difficulty with the tribunal.

Mr. Dugan, it was your suggestion. Is a week still effective?

MR. DUGAN: Yes, a week's fine.

MR. VEEDER: On the State Department side, is there any more time that you would need? Is a week all right?

MR. LEGUM: I think a week would be fine, yes.

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MR. VEEDER: There are two questions. We'd like both of you to do it at the same time, simultaneously. Obviously, if there's something you want to reply to because you were caught by surprise, we can't exclude a right of reply within a week thereafter. So I think if you can put your best shot forward within a week from now, and if there's something you need to respond to, please do it within a week thereafter, but it would simply be a response.

The other matter we'd like to raise is something that -- it's strange that we should be doing this, because we really have received an enormous amount of material, for which we're really grateful. But there's one case that's struck us as possibly relevant, relevant to both disputing parties' cases, as regards the test for jurisdiction, and that's a decision of the International Court of Justice in the case concerning oil platforms. It's the Islamic Republic of Iran against the United States. It's reported in 1996 ICJ HO 3, but we have copies here that you can

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take away.

It seems to us that this would be an interesting discussion, particularly in the separate opinions of Judge Shahabuddeen, and certainly Judge Higgins, which may touch upon some of the submissions you've made. Now, if it's helpful, it's interesting, I think, that we should have your observations on this judgment; in particular, the separate opinions I've just mentioned. Again, if you could do that within a week, and if there's a need to be a further response, a week thereafter as to what you each produce.

MR. LEGUM: Could I ask for a little bit of guidance. This is on the subject of fair and equitable treatment?

MR. VEEDER: No. In this case, it was the International Court of Justice, as to what it's being asked to do and what it does when it adjudicates upon a challenge to its jurisdiction. It won't, I don't think, necessarily catch you by much surprise, but it's a useful judgment, and I would be unhappy if we relied upon it without giving

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you a chance to read it and address it.

MR. LEGUM: Thank you for the clarification.

MR. DUGAN: You mentioned Judge Higgins. And the other judge was?

MR. VEEDER: Judge Shahabuddeen. Let me make sure I've got the right one. Yes, Judge Shahabuddeen. It's the first separate opinion that follows a decision of the court, and then Judge Higgins follows on from that.

MR. CHRISTOPHER: It's a difficult name. S-h-a-h-a-b-u-d-d-e-e-n.

MR. VEEDER: Subject to those responses from the parties, we propose to close the file. There will be no further submissions or materials from the parties, unless the tribunal requests the parties to produce them. I hope that's accepted by both parties. I call upon the Claimants.

MR. DUGAN: That's fine by us, yes.

MR. LEGUM: And by the United States.

MR. VEEDER: Thank you. We mentioned the question of costs, and we will bear in mind what the

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parties would like us to do. I should indicate that we'll have to look at the overall costs on our side, and we shall be asking the parties for further interim deposit, but that will come in due course. It's not something for today.

I think the only thing we'd like to do as a tribunal is to thank ICSID for the hospitality that we've received, and I'm sure the parties would like to join with me in thanking Ms. Margrete Stevens and her staff. It couldn't have been more perfectly arranged and more perfectly administered. We're immensely grateful that a hearing like this can actually proceed so easily.

We'd like to thank our shorthand writer, Sara Edgington. We've had a very efficient two days and, I hope, the third day transcript.

But again, from our side, we recognize what an enormous effort this is for the parties' counsel. You've given us an enormous amount of research and industry, and the last three days have been a wonderful display of your work. I don't say that it's made our task easier, and that's why when

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you might want to ask when you will get this award, we will do it as soon as we reasonably can, but it is an important case. We do want to give reasons, and we do want to arrive at the fair and just result, but we will do it as soon as we can without giving you a deadline.

On that note, is there anything else we need to address. Can I ask the Claimants first?

MR. DUGAN: Nothing from the Claimants, no, thank you.

MR. VEEDER: From the Respondents?

MR. LEGUM: Nothing further. Thank you.

MR. VEEDER: Well, I close the proceedings. Thank you all very much and a safe journey home.

(Whereupon, at 2:25 p.m., the hearing was concluded.)