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

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

REJOINDER OF RESPONDENT UNITED STATES OF AMERICA

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In accordance with the Tribunal's order of June 30, 2003, respondent United States of America respectfully submits this Rejoinder to the Reply of claimant Methanex Corporation.

PRELIMINARY STATEMENT

1. The submission of this Rejoinder marks the completion of the evidentiary record in this case, subject only to cross-examination of witnesses. Each of the disputing parties has now submitted all of the evidence in support of its case-in-chief and all of its rebuttal evidence.

2. It is on the basis of the evidence in the record that the facts in this case must be determined. The allegations stated in the disputing parties' pleadings – no matter how emphatically asserted – may be sustained only to the extent that support for them exists in the record. In each of the sections that follow this preliminary statement,

therefore, the United States summarizes for the Tribunal the state of the record on the principal disputed points of fact.

3. A review of that record compels the conclusion that Methanex has failed to sustain its burden of proof. As demonstrated in greater detail in the sections that follow:

- Many of the Reply's most emphatically stated allegations are supported not by evidence, but by opinion pieces published in petrochemical industry newsletters;
- The evidence most prominently cited in the Reply does not prove the points asserted by Methanex. For example:
    - the fact that the federal government has decided that campaign contributions should be regulated because they may lead to corruption in some cases in no way establishes that any corruption in fact took place in *this* case (and indeed, Methanex itself has disavowed any allegation of corruption); and
    - the fact that the federal and some state governments have decided to promote renewable energy sources like ethanol through subsidies and tariffs expressly permitted by the NAFTA does not prove that any wrongful conduct of any type took place here.

By contrast, the principal evidence in support of the United States' case in chief stands unrebutted:

- Methanex does not dispute that Governor Davis's 1999 Executive Order accorded with the scientific findings of the UC Report and the overwhelming weight of public testimony;
- No evidence suggests that the more than 60 authors of the UC Report and members of the public who testified acted in anything other than good faith; and
- Methanex identifies no evidence whatsoever in the administrative record (or elsewhere) suggesting that any member of the California government intended to harm producers of methanol by banning MTBE.

In short, review of the record confirms that Methanex has not sustained its burden of proving the facts upon which it relies, or rebutting the United States' evidence.

Methanex's claims are without factual or legal merit, as demonstrated in greater detail below.

4. *First*, Methanex has failed to establish that California's ban of MTBE "relates to" it, a producer of methanol. Indeed, on the day that its Reply was submitted, Bruce Aitken, Methanex's President and Chief Operating Officer, succinctly confirmed that the MTBE ban did not even impact Methanex:

> Here we are in 2004. The methanol industry is very tight and prices are very high. You can see from the chart that we've already had big reductions in MTBE demand in the U.S. and *it's really had no impact on our industry.*[1]

The import of this statement is plain. The ban of MTBE in California gasoline reduced demand for MTBE. Methanex, however, does not make MTBE. It makes methanol. Because the ban does not address methanol, it has "had no impact on [the methanol] industry." This statement – merely the latest in a series of similar statements by Methanex officers – confirms what is apparent on the MTBE ban's face: the measure does not "relate to" Methanex within the meaning of Article 1101(1).

5. The evidence, moreover, does not support Methanex's assertion that the ban of MTBE was secretly intended to address methanol producers. The First Partial Award has already rejected Methanex's assertion that methanol, as a feedstock for MTBE, "competes" with ethanol. The record does not support that assertion in any event. And Methanex's assertion that the ban was intended to benefit ethanol to the detriment of MTBE is both legally irrelevant under the analysis of the First Partial Award and factually unsupported. Contrary to Methanex's assertions, the record shows that

[1] Bruce Aitken, President and Chief Operating Officer, Methanex Corp., Presentation, CIBC Investor Conference at 5:36 ("CIBC Investor Conference") (Feb. 19, 2004) (emphasis added) (accompanying CD, 25 JS tab 2).

California banned MTBE to prevent its drinking water from tasting like turpentine, not because it wished to make a gift to the ethanol industry.

6. *Second*, the record establishes no loss or damage to Methanex proximately caused by the MTBE ban. There is no dispute between the parties that Methanex's claim depends upon the effects of the ban on suppliers to suppliers to the persons directly regulated by the ban. Nor is there any disagreement that, under established principles of customary international law, a claim based on such remote effects cannot proceed.

7. Methanex's argument for the application of a more relaxed standard of causation cannot be squared with the text of the treaty, the agreement of the three NAFTA Parties as expressed in pleadings in this case or the decision of the only NAFTA tribunal to address the question. And Methanex's suggestion that its allegation of intentional conduct absolves it of proving causation fails on both the law and the facts.

8. Moreover, the record establishes no loss suffered by Methanex as a result of the ban. The Amended Statement of Defense documented this failure of proof in Methanex's evidence in chief. In its Reply, Methanex attempts to repair only a few of these failures. With respect to those few areas that it addresses – notably, the supposed decline in Methanex's debt rating and stock price – the Reply offers no evidence of any injury that Methanex has suffered to date, as opposed to speculation that it will suffer an injury in the future. Far from anomalous, Methanex's failure of proof of loss fully accords with its repeated statements to investors that the ban has had no effect on its business.

9. *Third*, the record establishes no national treatment violation. Methanex does not dispute that the ban accorded it and its investments precisely the same treatment

(to the extent it accorded them treatment at all) as that accorded to the substantial U.S.-owned methanol industry. The undisputed facts thus establish that the California measures satisfied the requirements of Article 1102: California "accord[ed] to [Methanex] treatment no less favorable than that it accord[ed], in like circumstances, to [U.S.] investors."[2] The national treatment provision requires no more than this.

10. The text and context of Article 1102 do not support Methanex's contention that the Tribunal should ignore the treatment of its U.S. counterparts and instead compare it to ethanol producers, whom, Methanex contends, are "like" it but not "identical." Methanex's contention cannot be reconciled with Article 1102's function of addressing nationality-based discrimination. It is without legal merit.

11. The evidence fails to support Methanex's claim that it is in like circumstances with ADM in any event. The GATT "like products" analysis that Methanex invokes is legally irrelevant and, in fact, supports the opposite conclusion. And its assorted other arguments based on the GATT and other WTO obligations have no bearing on the issue before this Tribunal: whether a violation of Article 1102 has been established. This evidentiary record establishes no such thing.

12. *Fourth*, the Reply makes no effort to respond to the showing in the Amended Statement of Defense that Methanex's claim under Article 1105(1) lacks legal merit. Methanex's Reply thus effectively abandons this claim.

13. *Fifth*, Methanex's Reply does not even argue that the evidence establishes an expropriation. Instead, the Reply limits itself to a discussion of Methanex's *allegations* on expropriation. This discussion is beside the point, however, for the

[2] NAFTA art. 1102(1).

Tribunal has ordered it to support its claims with evidence. The evidence of record provides no hint of an expropriation here. And there is no merit to Methanex's assertion that a measure to protect drinking water from contamination is not one to safeguard the public health. The measures are not expropriatory in any event.

14. *Finally*, and more generally, Methanex errs in repeatedly asserting that the United States has "conceded" various factual points by not specifically addressing every sentence of the allegations of the fresh pleading. We reiterate: this case is to be decided on evidence, not allegations. It is Methanex's "burden of proving the facts relied upon" and the UNCITRAL rules impose no obligation on the respondent to admit or deny each and every allegation in a statement of claim.[3] Lest there be any doubt on the subject, however, we shall be explicit: the United States denies every allegation made by Methanex except to the extent the Amended Statement of Defense or this Rejoinder states otherwise.

15. As demonstrated below, the evidence of record requires dismissal of Methanex's claims with prejudice.[4]

I. THE RECORD FAILS TO ESTABLISH THAT THE MEASURES "RELATE TO" METHANEX WITHIN THE MEANING OF ARTICLE 1101(1)

16. "The Tribunal has already decided that [its] jurisdiction can exist only in respect of that part of the claim alleging an 'intent' underlying the US measures to benefit the US ethanol industry and to penalise foreign methanol producers, such as Methanex."[5]

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[3] UNCITRAL Arbitration Rules art. 24(1); *see id.* art. 19(2).

[4] Terms defined in the United States Amended Statement of Defense have the same meaning in this Rejoinder.

[5] Letter to Disputing Parties from Tribunal ¶ 7 (Sept. 25, 2002).

Now that the record of evidence is complete (subject only to cross-examination of witnesses), it is clear that Methanex has failed to sustain its allegations of intent.

17. *First*, the record contains no competent evidence suggesting that California had any intent to penalize – or even address – producers of methanol by its ban of MTBE. This failure of proof in itself defeats Methanex's claim of jurisdiction under the investment chapter.

18. *Second*, the record does not support Methanex's allegation that methanol competes with the oxygenate additives MTBE and ethanol in any sense relevant to the analysis under Article 1101(1). To the contrary, the record establishes what Methanex conceded at the jurisdictional phase and the Tribunal noted in its First Partial Award: methanol is no more, and no less, than a feedstock for MTBE.

19. *Finally*, Methanex's assertion that California intended to benefit ethanol at the expense of MTBE is of no avail, and unsupported by the record in any event. The First Partial Award is clear: Even assuming an intent adverse to MTBE producers on the part of California, the Tribunal would lack jurisdiction absent a showing of specific intent to harm *methanol* producers, such as Methanex.[6] Despite the direction set forth in the First Partial Award, Methanex rehashes its unfounded allegations of California's intent *with respect to MTBE*. Those assertions are legally insufficient to establish that the ban of MTBE "related to" Methanex.

20. But the record does not support Methanex's assertions either as to an intent to harm producers of MTBE or an intent to benefit producers of ethanol in any event. The preponderance of the evidence shows that California banned MTBE in order

[6] *See* First Partial Award ¶ 154.

protect its drinking water from a contaminant that made it undrinkable, not because of any animus toward MTBE producers. Nor does the evidence show any intent to provide a windfall to ethanol producers. The record, in short, does not support Methanex's assertions.

A. No Competent Evidence Suggests An Intent By California To Harm Or Even Address Methanol Producers Or Methanex

21. A review of the record on California's supposed specific intent to harm methanol producers is not a time-consuming task. Methanex offers few materials on the subject, and none withstands scrutiny.

22. The *first* of such materials is the Supplemental Affidavit of Robert T. Wright.[7] That document sets forth Mr. Wright's recollection of a conversation that purportedly took place almost four years before. In that January 1999 conversation between him and unidentified persons, those persons ostensibly recounted a conversation they held with California Senator John Burton in which the Senator supposedly suggested "shorting" Methanex stock.

23. In its Amended Statement of Defense, the United States noted that international tribunals have repeatedly refused to ascribe any weight to hearsay-upon-hearsay statements such as these.[8] It further noted that Mr. Wright's statement did not establish that Senator Burton was sufficiently familiar with Methanex to understand that it was a manufacturer of methanol and not MTBE.[9]

24. Methanex's Reply denies neither that the statement is hearsay upon hearsay nor that international tribunals give no weight to such statements. Instead, with

[7] 12 JS tab A; *see also* Reply ¶¶ 36-38.

[8] *See* Amended Statement of Defense ¶ 127 n.221.

[9] *See id.* ¶ 127.

its Reply, Methanex produced "[c]ontemporaneous notes" that, it asserted, "demonstrate that Burton's statements are in context and that he did make the statements attributed to him by Methanex."[10]

25. The documents, which are neither "notes" nor "contemporaneous," do nothing of the kind.[11] None of the documents contains any mention of methanol or Methanex. To the contrary, each addresses only the topic of MTBE and whether it was likely to be phased out. The documents in no way "corroborate" Mr. Wright's supposed recollection of a single conversation with unidentified persons recounting hearsay statements concerning Methanex supposedly made almost four years before.[12]

26. *Second*, Methanex errs in placing repeated reliance on a single sentence in a U.S. EPA notice of proposed rulemaking from 1993.[13] The sentence predicts an impact on producers of methanol from a regulation that would have required that 30 percent of reformulated gasoline contain oxygenate additives produced from renewable sources. No evidence of record, however, suggests that California lawmakers in 1999 and 2000 had

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[10] Third Macdonald Affidavit ¶ 34 (19 JS); *see also* Reply ¶ 37 (referring to "contemporaneous documents that fully corroborate Burton's statements").

[11] The documents, the provenance of which is unexplained, consist of two memoranda to unidentified persons or the "MTBE Team." Each memorandum is dated two or four days after the date of the supposed meeting with Senator Burton. If any contemporaneous notes were taken during or immediately after the alleged meeting with the Senator, they are not in evidence. *Compare* 19 JS tabs 13 & 14A (memoranda dated Jan. 29, 1999 and Jan. 31, 1999) *with* Supplemental Affidavit of Robert T. Wright ¶ 13 (12A JS tab A) ("I am now aware of the actual date of the meeting . . . with Senator Burton: January 27, 1999.").

[12] Moreover, even without these evidentiary failings, Burton's alleged statement falls far short of proving that California intended to harm Methanex or methanol by enacting the MTBE ban. At most, Burton's statement, as alleged by Methanex, suggests that he foresaw an impact on Methanex, but not that the intent of California in enacting the ban was to harm Methanex. In addition, any knowledge or, even intent, on Burton's part could not be imputed to the entire California Government. The memoranda submitted by Methanex illustrate this point: the legislators whom Methanex lobbied allegedly expressed a range of reactions to the prospect of a California ban on MTBE in gasoline.

[13] *See* Reply ¶ 39 (quoting U.S. EPA, Notice of Proposed Rulemaking on Regulation of Fuels and Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline, 58 Fed. Reg. 68343, 68350 (Dec. 27, 1993) (22 JS tab 28) ("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."); *see also id*. ¶ 163 (same).

any knowledge of this sentence. Methanex advances no basis to impute a view held by federal U.S. EPA officers in 1993 to California lawmakers over half a decade later.[14] This U.S. EPA notice of proposed rulemaking, in short, says nothing about the intent of California in banning MTBE.

27. The attention devoted by Methanex to this irrelevant line in a 1993 U.S. EPA publication speaks volumes as to the rest of the record. Methanex has had access for over five years to the UC Report, the administrative record for the CaRFG3 Regulations and the legislative history of Senate Bill 989. Yet Methanex does not suggest that any of these sources contains any indication that the authors of the UC Report or California regulators or lawmakers considered that Methanex or any other methanol producer would be harmed by the ban. Methanex does not do so for a simple reason: the record contains no evidence that California had methanol in mind in banning MTBE.

28. Moreover, as both *amici* note, equating foreseeability with intent would have serious adverse policy consequences.[15] Governments in democracies tend to collect information from various sources before adopting legislation – including information on even distant ramifications of the proposed measure. Their objective in this regard is to make well-informed decisions that take into account all of the available information. To

[14] *See* Jamison Selby Borek, *Other State Responsibility Issues* in THE IRAN–UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 319 (1998) ("Large governments in fact are composed of numerous independent actors who engage in many activities without much contact or coordination among themselves. It must also be recognized that 'conspiracy theories' typically impute a degree of purposeful design and organization that is, to the practicing bureaucrat, rather obviously – and sometimes sadly – lacking."); *cf*. First Partial Award ¶ 158 ("Where a single governmental actor is motivated by an improper purpose, it does not necessarily follow that the motive can be attributed to the entire government.").

[15] *See* Amicus Curiae Submissions by the International Institute for Sustainable Development ("IISD Amicus Submission") ¶¶ 76-77 (Mar. 9, 2004); Submission of Non-Disputing Parties Bluewater Network, communities for a Better Environment and Center for International Environmental Law ("Bluewater Network, et al. Amici Submission") ¶¶ 21-23 (Mar. 9, 2004).

equate discovering a potential tertiary impact with intending such an impact, as Methanex suggests, would turn this process on its head. The NAFTA cannot be read to sanction such a result.

29. *Third*, Methanex errs in asserting that "it is overwhelmingly likely" that Dwayne Andreas and Richard Vind "talked about methanol and inevitably described it as a foreign product" during the August 4, 1998 dinner with gubernatorial candidate Davis.[16] This case must be decided on evidence, not speculation.[17] The fact that Mr. Andreas or Mr. Vind's son made such statements to other persons on two isolated occasions years before in no way establishes that Mr. Andreas or Mr. Vind made any such statement to candidate Davis at that dinner. The evidence that *is* of record on the subject of that dinner – three statements by eyewitnesses who were there – in no way supports Methanex's speculation. Moreover, even if there were evidence that such statements had been made – which there is not – nothing in the record supports the inference that those alleged statements, as opposed to the UC Report and public testimony, motivated Governor Davis to issue the 1999 Executive Order. Nor could any such intent based on the dinner meeting be ascribed to the California legislators who enacted Senate Bill 989's mandate that MTBE be removed from California gasoline.[18]

30. *Fourth*, there is no merit to Methanex's "secondary argument" that California's conditional prohibition of methanol and ten other compounds establishes

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[16] Reply ¶ 65.

[17] *See* UNCITRAL Arbitration Rules art. 24(1) ("Each party shall have the burden of *proving* the facts relied on to support his claim or defence.") (emphasis added).

[18] We note that Methanex has now abandoned its claim that a remark by California Senator Mountjoy is probative of any ill intent. In response to the United States' observation that Senator Mountjoy's statement taken in context provides no support for Methanex's allegation, Methanex accuses the United States of "nitpick[ing]," but does not defend its initial accusation. *See* Reply ¶ 54 n.78.

California's intent to harm methanol producers through a different ban – the absolute ban of MTBE in California gasoline.[19] As an initial matter, we note that Methanex has now disavowed any claim that the conditional prohibition of methanol itself violates any provision of the NAFTA – its claim is limited to one that "the United States is liable for the California MTBE ban."[20]

31. More importantly, a conditional ban of these eleven compounds does not suggest that California had an intent other than that which lawmakers stated for absolutely banning MTBE. The reason for the conditional ban stated in its accompanying Final Statement of Reasons – that the eleven compounds had not undergone a multimedia evaluation and were included in the prohibition because they were listed in the industry standard testing method that California relied upon to detect the presence of relevant compounds in gasoline – does not suggest any intent to harm methanol producers.[21] Nor can intent to harm to methanol producers be inferred from the impact of the California conditional prohibition, for there was no impact. As the Amended Statement of Defense makes clear (and as remains uncontested in Methanex's Reply), methanol is not, and cannot legally or practically be used as, an oxygenate additive in gasoline in California or anywhere in the United States.[22]

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[19] Reply ¶ 30.

[20] *See infra* ¶¶ 199-202.

[21] Amended Statement of Defense ¶ 149 n.267 (quoting 14 JS tab 19 at 540).

[22] *See* Amended Statement of Defense ¶¶ 141-149. Methanex's contention that the conditional ban shows that California did not make adjustments to its standards to "accommodate" methanol falls flat. *See* Reply ¶¶ 34-35. "Accommodating" methanol's use as an oxygenate additive would have been a futile exercise for California, since methanol could not be so used under federal law in any event.

32. Nor does methanol's use as an alternative fuel in flexible fueled vehicles shed any light on a supposed hidden intent behind the absolute ban of MTBE.[23] There is no dispute that the measures at issue in no way impede Methanex, or methanol producers generally, from exploiting the market for alternative fuels used in modified vehicles. The *unsuccessful* use of methanol blends in *modified* vehicles hardly supports Methanex's suggestion of *a possibility* of the "[u]se of methanol as a direct-blended oxygenate" in the traditional gasoline vehicle fleet.[24] U.S. EPA, automobile manufacturers and gasoline producers have resolved definitively that methanol cannot be used as an oxygenate additive, and the record reflects no realistic prospect for such use.[25]

33. Contrary to Methanex's allegation, the record, in fact, demonstrates that California harbored no animus toward methanol producers in general or Methanex in particular.[26] Indeed, in its Reply, Methanex added to this record, noting that California *promoted* use of methanol by using it "in it's [sic] vehicle fleet as an alternative to gasoline – over a period of 20 years beginning in 1978."[27] Nor does Methanex deny, in

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[23] *See* Reply ¶ 31.

[24] Reply ¶ 32; *see* Burke Expert Report ¶¶ 104-05 (13 JS tab B) (such modified vehicles have been demonstrated in California, but were commercially unsuccessful); Third Macdonald Affidavit ¶ 47 (19 JS) (Mr. "Burke correctly notes that M85 flexible fueled vehicles have not achieved great commercial success . . . .").

[25] *See* Amended Statement of Defense ¶¶ 144-47; *see also* Burke Expert Report ¶ 106 (13 JS tab B); Caldwell Statement ¶¶ 19, 30-31 (13 JS tab C). Methanex relies on an electronic industry newsletter to assert that methanol and "ethanol ha[ve] precisely the same corrosive problems." Reply ¶ 32 & n.46 (citing *Ethanol Blends May Corrode Zero-Emission Vehicle Systems, InsideEnergyPolicy.com* (Feb. 9, 2004) at 12 (22 JS tab 26 at 1-2)). However, Methanex ignores contrary sworn expert testimony of record: "Compared to methanol, ethanol is generally less corrosive to plastics and metals . . . ." Burke Expert Report ¶ 93 (13 JS tab B); *see also id.* ¶¶ 40, 57, 70 (presenting detailed discussion of corrosiveness of MTBE, ethanol and methanol).

[26] *See* Amended Statement of Defense ¶¶ 132-36.

[27] Third Macdonald Affidavit ¶ 46 (19 JS).

its Reply, the significance of the fact that the California Fuel Cell Partnership chose Methanex as its sole methanol industry representative.[28]

34. And, most important, as amply documented in the Amended Statement of Defense, the record establishes that the purpose of each of the measures at issue was to address MTBE contamination of state drinking water resources.[29] As the Tribunal recognized in its First Partial Award, those governmental acts are entitled to a presumption of regularity.[30] None of the evidentiary materials offered by Methanex even begins to overcome that presumption.

B. Methanol Does Not "Compete" With Ethanol In Any Sense Relevant Here

35. As the First Partial Award observed, "[e]thanol is . . . an oxygenate that competes directly with MTBE" whereas "[m]ethanol is a feedstock for MTBE."[31] The hundreds of pages of briefing and twenty-five volumes of evidence submitted in the interim have served only to confirm that observation. Indeed, Methanex has now retreated from the contrary position stated in its fresh pleading and concedes that methanol is not used directly as an oxygenate additive.[32]

36. In its Amended Statement of Defense, the United States demonstrated that methanol does not compete with ethanol in any meaningful sense in any of the three

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[28] *See* Amended Statement of Defense ¶¶ 132-36; Statement of Shannon Faith Baxter (attested Dec. 3, 2003) (13 JS tab A).

[29] Amended Statement of Defense ¶¶ 116-31.

[30] *See* First Partial Award ¶ 45; *see also* Amended Statement of Defense ¶ 118 n.205 (collecting authorities).

[31] First Partial Award ¶¶ 49, 50.

[32] *Compare* Reply ¶ 29 ("Methanex's primary argument is that methanol is, *through MTBE*, already used as an oxygenate . . . .") (emphasis added) *with* Second Macdonald Affidavit ¶ 9 (Second Amended Statement of Claim tab A) ("either ethanol or methanol can be splash blended with gasoline and in this way used directly as oxygenates"). Methanex's Reply thus no longer presses the argument that the Amended Statement of Defense (¶ 4) characterized as "invented from whole cloth."

markets identified by Methanex in its fresh pleading: distributors of gasoline, merchant oxygenate manufacturers and refiners that captively produce MTBE.[33] In its Reply, Methanex abandons its assertion that methanol and ethanol compete in the first two markets. Instead, it narrows its "competition" argument to a subset of the third market: those integrated refiners that own gasoline refining, MTBE production and gasoline distribution facilities. Methanex argues that because this subset of refiners purchases methanol as an upstream input for the production of MTBE at their refineries, and allegedly will now purchase ethanol for blending with gasoline stock at their distribution terminals, methanol and ethanol therefore "compete."

37. Methanex's contention fails on both legal and evidentiary grounds. *First*, the Tribunal has already held in the First Partial Award that the mere fact that methanol is an upstream input for MTBE does not establish the "legally significant connection" between a measure and an investment or investor required to satisfy Article 1101(1). *Second*, Methanex in any event makes no serious effort to prove its allegations of "competition" in this specific market, and the key assumptions on which those allegations are based are erroneous.

1. Methanex's Narrowed Contention On "Competition" Fails As A Matter Of Law

38. In its First Partial Award, the Tribunal found that "Methanex's claim, as originally pleaded in its Original Statement of Claim, does not meet the essential requirements of alleging facts establishing a legally significant connection between the

[33] Amended Statement of Defense ¶¶ 137-66.

US measures, Methanex and its investments."[34] The Tribunal further found that "Methanex's Amended Statement of Claim, *as a whole*, likewise fails to meet the requirements of" Article 1101(1), but that "[a]s regards part of [that] Amended Statement of Claim . . . , the Tribunal decides that certain allegations relating to the 'Intent' underlying the US measures could potentially meet the requirements of Article 1101(1)."[35]

39. A keystone of the case pleaded in both the Original Statement of Claim and the Amended Statement of Claim was that methanol was sold for use as a feedstock in the production of MTBE by California refineries.[36] The Amended Statement of Claim further alleged that those methanol sales would be replaced by sales from allegedly competing ethanol producers after the MTBE ban went into effect.[37] At the jurisdictional phase, these allegations were among those that the Tribunal assumed to be correct for purposes of rendering its First Partial Award.[38]

40. Yet the award held that, even if assumed to be correct, these allegations were not sufficient to establish the requisite legally significant connection. The award

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[34] First Partial Award ¶ 150; *accord id.* ¶ 172(2) (in operative part of award, "the Tribunal decides that Methanex's Original Statement of Claim fails to meet the requirements of [Article 1101(1)]; and, as there pleaded, the Tribunal would have no jurisdiction to hear Methanex's claims; . . . .").

[35] *Id.* ¶ 172(3)-(4) (operative part of award) (emphasis in original).

[36] *See* Amended Statement of Claim at 5 ("Approximately 40% of Methanex U.S.' 1998 methanol sales in the U.S. were to third parties that use methanol for the production of MTBE, including approximately 132,000 tons shipped to California refineries for MTBE production."); Original Statement of Claim ¶ 7 (same); Hearing on Jurisdiction and Admissibility, Transcript (Uncorrected) at 403 (July 31, 2001) (statement of Christopher Dugan, Esq.) (characterizing methanol as a feedstock for MTBE).

[37] *See* Amended Statement of Claim at 36 ("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.").

[38] *See* First Partial Award ¶ 112 ("the correct approach is to assume that Methanex's factual contentions are correct (insofar as they are not incredible, frivolous or vexatious) and to apply, under whatever appropriate test, the relevant legal principles to those assumed facts.").

unequivocally held that *only* "certain allegations relating to the 'Intent' underlying the US measures could potentially meet the requirements of Article 1101(1)."[39]

41. Methanex's allegations as to the use of methanol as a feedstock for integrated refiners that produce MTBE, however, do not concern the intent underlying the California measures. The allegations address the nature of the methanol market. The First Partial Award thus, by its operative terms, excludes the possibility that the alleged "competition" Methanex now relies upon could establish the requisite connection between the measures and Methanex or its investments.

42. As demonstrated in the United States' letter of March 30, 2004, the First Partial Award is "final and binding" within the meaning of Article 32(2) of the UNCITRAL Arbitration Rules and not subject to reconsideration.[40] The First Partial Award, as demonstrated above, squarely disallows Methanex's narrowed argument on "competition." As a matter of law "in respect of th[is] particular case," therefore, Methanex's narrowed argument cannot be entertained.[41]

43. Although it is not necessary to do so, the United States notes that the First Partial Award was correct in its rejection of the notion that a measure necessarily "relates to" producers of upstream inputs for a product merely because it bans that downstream product. While it may make sense in some contexts, such as certain competition-law applications, to consider final products to be in the same "relevant market" with upstream

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[39] *See id.* ¶ 172(2)-(4) (operative part of award).

[40] *See* Letter of U.S. to Tribunal at 1-4 (Mar. 30, 2004); *see also* NAFTA art. 1136(2) ("Subject to paragraph 3 and the applicable review procedure for an *interim award*, a disputing party *shall* abide by and comply with an award without delay.") (emphasis added).

[41] *See* NAFTA art. 1136(1) ("An award made by a Tribunal shall have . . . binding force . . . between the disputing parties and in respect of the particular case.").

inputs that are used in the production of those products, the NAFTA's investment chapter is not one of those contexts.

44. Competition law seeks to protect consumers from unreasonable restraints on trade, such as cartelization, monopolization and anticompetitive mergers, that would reduce supplies, raise prices to super-competitive levels, or stifle innovation. Consistent with this focus on consumer protection, a competition-law approach to market definition may include upstream inputs as well as downstream final goods in appropriate circumstances.[42]

45. There is, however, no basis to conclude that competition-law analysis is applicable in Chapter Eleven. Chapter Eleven seeks, *inter alia*, to increase substantially opportunities for investment in the territories of the NAFTA Parties, not to protect consumers from anticompetitve practices.[43] Methanex provides no reason to suppose that an approach to market definition expanded to include upstream inputs will enhance investment opportunities. In other contexts outside that of competition law, such an

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[42] However, the NAFTA's competition obligations are not subject to dispute settlement under Chapter Eleven. *See, e.g.,* NAFTA Ch. 15 (Competition Policy, Monopolies and State Enterprises); *see also* NAFTA art. 1305 (concerning telecommunications monopolies); *United Parcel Service of Am. v. Canada,* ¶¶ 69, 99 (Award on Jurisdiction) (Nov. 22, 2002) ("*UPS* Award") (dismissing anticompetitive practice claims for lack of jurisdiction).

[43] *See* NAFTA art. 102(1)(c); *see also UPS Award* ¶ 63 (acknowledging NAFTA objectives of fair competition and effective dispute resolution, but stating "[t]he critical relevant rule in this case is defined by article 1116(1)(b)").

expanded approach has been rejected.[44] The Tribunal was right to do so in the First Partial Award.[45]

2. Methanex's Allegation Of "Competition" Fails For Lack Of Proof

46. In any event, the evidentiary record does not support Methanex's claim of "competition" between methanol as an input for MTBE production by integrated refiners and ethanol as an oxygenate that is an additive to reformulated gasoline. Among other defects, Methanex does not establish either (i) that there are refiners in California that are "integrated" in the sense that the same company owns refineries, MTBE production facilities and distribution terminals; (ii) that Methanex ever made any sales of methanol to any such integrated refiners; (iii) that any of such integrated refiners purchased ethanol; (iv) that there is indeed a "market" with respect to such refiners in which methanol and ethanol can be considered to "compete" in an economic sense; or (v) that "in the eyes of refiners" methanol competes in the market for oxygenate additives, as Methanex asserts.[46]

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[44] WTO jurisprudence, for example, establishes that Methanex's suggested mode of analysis is *not* applicable universally. *See United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia*, WT/DS177/AB/R (May 1, 2001) ¶ 90 (rejecting focus on the degree of integration of production processes under the Safeguards Agreement and finding that upstream inputs were not properly included in the same "domestic industry" with the final products in which those inputs were used); *see also* IISD Amicus Submission ¶ 57 (discussing *Lamb Meat*).

[45] While it should be evident from the foregoing discussion, for the avoidance of doubt the United States notes that, contrary to the suggestion in Methanex's April 14, 2004 letter to the Tribunal (at 10), the United States fully supports the "specific intent" test articulated by the First Partial Award in cases, such as this one, where the measure on its face does not "relate to" the relevant investor or investment.

[46] Reply ¶ 29. In order to dispel any confusion concerning the class of chemicals under discussion, this Rejoinder uses the term "oxygenate additive" to describe chemicals, such as MTBE and ethanol, that can be added to gasoline to satisfy the oxygen content requirements of the Clean Air Act, as amended. *Cf.* Reply ¶¶ 27-28 (attaching significance to fact that methanol is one of a large class of chemicals known as oxygenates, even though methanol cannot legally or practically be added to gasoline to meet Clean Air Act oxygen content requirements).

47. Notably, Methanex has offered no testimony or other evidence by an economic expert to support the existence of either the "market" or the product competition it asserts. Such evidence is generally considered essential in those contexts, such as competition law, where it may be appropriate to consider upstream inputs for a product to compete with downstream, finished products. It is difficult to take seriously Methanex's attempt to engraft a competition-law approach onto the investment chapter when that attempt is unaccompanied by any supporting economic evidence.

48. Moreover, Methanex's failure of proof cannot be overlooked in light of the numerous false assumptions and unsubstantiated statements that underlie its assertions regarding California refiners' use of methanol and the oxygenate additives MTBE and ethanol.

49. *First*, Methanex's statement that "[t]hese integrated refiners do not buy MTBE to oxygenate their gasoline" is incorrect.[47] Historically, *all* California refiners – including those that also produced MTBE in-house – purchased MTBE.[48] Only five of the twenty-one refineries in California ever purchased any methanol and even then only in limited quantities for use in combining it with their in-house isobutylene streams to produce MTBE.[49] This small minority of refiners used their in-house production merely to supplement their purchases of the overwhelming majority of MTBE used.

50. *Second*, Methanex errs in relying on a press release reporting that "Phillips Petroleum . . . is blending a significant amount of ethanol in California today" to show

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[47] Reply ¶ 18.

[48] *See* Burke Rejoinder Report ¶ 30 & n.19 (24 JS tab A) ("the 5 California refiners with captive MTBE facilities were required to import 79 percent of the MTBE that they consumed").

[49] *See id*.

that integrated refiners own terminals at which ethanol is blended.[50] ConocoPhillips did not captively produce MTBE in California and therefore would *never have had occasion to purchase any methanol whatsoever for any purpose*.[51] It, in other words, may have been an integrated refiner, but it is not one that has any relevance to the "market" posited by Methanex.

51. *Third,* the lack of evidence to support Methanex's characterization of a unitary "market" for integrated refiners that purchase methanol is particularly significant in light of the well-documented complexity of the distribution and logistics infrastructure for California gasoline. As the U.S. Department of Energy noted in a report on California gasoline prices in 2003:

> As with the physical structure of the distribution system, the relationships between business entities involved in the marketing of gasoline from the refinery to the consumer are highly varied.[52]

Despite this complexity, Methanex fails even to attempt to establish the nature or extent, if any, of refiners' use of methanol or the oxygenate additives MTBE or ethanol.

52. *Fourth,* contrary to Methanex's suggestion, significant changes are required for refiners to switch from production of MTBE-ready to ethanol-ready blendstocks, and *vice versa*.[53] Neither type of gasoline blend is fungible within a distribution system that uses the other: a gasoline station distributing gasoline containing

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[50] *See* Reply ¶ 24.

[51] *See* Burke Expert Report Exh. 4 (identifying five California refiners that captively produced limited quantities of MTBE).

[52] *See* U.S. Department of Energy, Office of Oil and Gas, Energy Information Administration, *2003 California Gasoline Price Study, Final Report* ("EIA Report") at 41 (Nov. 2003) (26 JS tab 31 at 3556).

[53] *See* Third Macdonald Affidavit ¶ 51 (19 JS).

MTBE could not store and distribute gasoline containing ethanol, for example.[54] Given the lack of fungibility of MTBE and ethanol gasoline blends, there is and can be no historical basis for "competition" between methanol and ethanol.[55]

53. *Finally,* Methanex's only evidence of record pertaining to any particular refiner's view of methanol – a single undated, unsigned contract between it and Valero[56] – merely confirms that particular refiner did *not* use methanol as, nor perceive it to compete as, an oxygenate additive. To the contrary, the methanol to be provided under the contract was to be for use in Valero's "production of or demand for MTBE in California."[57] As the contract makes clear, methanol is a feedstock; MTBE is the oxygenate additive.

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[54] *See* Burke Rejoinder Report ¶¶ 26, 28-29 (24 JS tab A); *see also* EIA Report at vi, 59 (26 JS tab 31 at 5312); California Air Resources Board, Advisory 315 at 5 (Apr. 2003) (25 JS tab 5 at 2800) (outlining procedures that retailers and distributors need to follow to avoid commingling of gasoline containing ethanol and non-ethanol gasoline to avoid violating summertime RVP limits set forth in Cal. Code of Regs., tit. 13 § 2266.5(i)(1)); Amended Statement of Defense ¶ 165 (refiners that produce ethanol blendstock have no use for MTBE; refiners that produced MTBE blendstock have no use for ethanol); Press Release, Chevron to Eliminate MTBE from its California Cleaner-Burning Gasoline in Southern California (Jan. 8, 2003) (26 JS tab 26 at 3472) (describing the infrastructure changes needed to replace MTBE with ethanol in Southern California as "substantial"); Press Release, Chevron Awarded Patents on Low-Emission Gasolines Containing Ethanol and Methods for Blending (Nov. 19, 2002) (26 JS tab 25 at 3470) (describing award of patents to refiner for various reformulated ethanol gasoline blends and methods of blending).

[55] Methanex's own evidence undermines its claim that refiners constitute a market in which ethanol competes with methanol: "[I]so-octance or alkylates [are] the most logical substitutes for MTBE" production capacity. Testimony of A. Blakeman, Testimony Early, Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety, Senate Environment and Public Work Comm. at 4 (June 14, 2000) (19 JS tab 14B) (stating also the American Lung Association's support for the elimination of MTBE from gasoline).

[56] *See* Second Amended Claim Exh. A tab 1. The contract is not signed by representatives of either Methanex or Valero. *See id.* at 3. The bottom left hand corner of each page of the contract reads "c:\pkreter\contracts\valero\valerobenicia020113.doc," evidencing that the document originated from Methanex's representative Paul Kreter, who is named in paragraph 8 of the contract. *See id.* at 2; *see also* Amended Statement of Defense ¶¶ 104-08 (establishing the nature of the burden of proof in this case and Methanex's failure to satisfy it).

[57] Second Amended Claim Exh. A tab 1 ¶ 10; *see also id.* ¶ 4 (Valero contracted with Methanex for delivery to its Benicia, California facility for a mere 36 thousand metric tons of methanol "taken ratably through the contract term.").

C. In Any Event, The Record Does Not Support Methanex's Claim That The MTBE Ban's Purpose Was To Benefit Ethanol

54. Methanex's failure to demonstrate that California intended to address methanol producers by banning MTBE should end the analysis under Article 1101(1) and the First Partial Award. Given this failure of proof, Methanex's attempt to show that the ban was intended to benefit producers of ethanol at the expense of producers of MTBE is therefore of no avail.

55. As the First Partial Award makes clear, even if California intended to harm MTBE producers, without "specific intent to harm suppliers of goods and services to such MTBE producers," the Tribunal would have no jurisdiction to decide Methanex's claim.[58] Accordingly, Methanex's extensive arguments in the Reply concerning MTBE and ethanol have no bearing on the jurisdictional question before the Tribunal.[59]

56. In any event, as demonstrated below, the evidence does not support Methanex's assertions that California intended to benefit the ethanol industry rather than address MTBE contamination of California's drinking water. We address each of the principal arguments in the Reply on this topic in turn.

1. The August 1998 Dinner Does Not Advance Methanex's Claim

57. The record before this Tribunal contains three statements by eyewitnesses who attended the August 1998 dinner that included gubernatorial candidate Davis and

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[58] First Partial Award ¶ 154 ("[T]he intent behind the measures would be, at its highest, to harm foreign MTBE producers with no specific intent to harm suppliers of goods and services to such MTBE producers. If so, the measures would *not* relate to methanol suppliers such as Methanex; and accordingly, even with such intent as alleged by Methanex, we would have no jurisdiction to decide Methanex's amended claim.") (emphasis in original).

[59] *See, e.g.*, Reply ¶ 72 *et seq*.

ADM executives.[60] Those witness statements describe the meeting in some detail. They in no way support Methanex's speculation that the dinner somehow infected Governor Davis with a desire to betray the public trust by benefiting ethanol and harming MTBE producers for no legitimate public reason.

58. Because the evidence that is of record proves the contrary, Methanex asks the Tribunal to disregard that evidence and draw a number of inferences to support its speculation. The record before the Tribunal, however, supports none of the inferences Methanex suggests.

59. *First*, Methanex errs in inferring anything untoward based on the fact that gubernatorial candidate Davis met with a potential supporter for his campaign and discussed the possibility of financial support.[61] As noted in the Amended Statement of Defense, political campaigns in the United States are generally funded by private donations and candidates for political office routinely meet with potential supporters.[62] Methanex's Reply offers no evidence to contradict this fact. Given the political system in the United States, it is not reasonable to infer that illicit activity took place from the fact of such a meeting between a candidate and a potential supporter.

60. *Second*, the record in no way supports Methanex's continuing characterization of the dinner as "secret."[63] Methanex identifies no legal requirement or even practice contemplating a public announcement concerning a meeting such as this. Indeed, Methanex does not contend that the meetings its lobbyists held with various

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[60] *See* Statement of Roger Listenberger ¶ 7 (attested Oct. 24, 2003) (13 JS tab F); Statement of Richard Vind Statement ¶ 10 (attested Nov. 21, 2003) (13A JS tab I); Statement of Daniel Weinstein ¶ 6 (attested Nov. 18, 2003) (13A JS tab J).

[61] *See* Reply ¶¶ 59-60, 63.

[62] Amended Statement of Defense ¶ 177.

[63] *See* Reply ¶¶ 61-62.

California lawmakers were or were required to be publicly disclosed.[64] Nor does the record suggest that the participants viewed the August 1998 dinner as "secret." The Governor disclosed the use of ADM's plane on the date of the dinner to travel to the town where ADM's headquarters were located.[65] The dinner included Daniel Weinstein, a person with no affiliation with the ethanol industry. And it was held in a country club dining room where other unaffiliated persons could readily observe the candidate and ADM executives dining together.

61. *Third*, there is no basis for Methanex's speculation that the "meeting was about ethanol and MTBE" based, not on any account of the dinner, but on the fact that a minority of the participants were principally responsible for ethanol businesses.[66] The witness statements of record make plain that neither MTBE nor ethanol was a focus of discussion at the dinner. There is no evidentiary support for concluding otherwise.

62. *Fourth*, Methanex's suggestion that adverse inferences should be drawn against the United States because not every participant at the dinner submitted a witness statement stands the burden of proof on its head.[67] It is Methanex that relies on this dinner to support its claim, not the United States. There are indeed "empty chairs" here, but the conclusion to be drawn is that Methanex has not proved the facts it relies on to support its claims. Methanex's inventive theory – that the Tribunal should overlook

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[64] *See* 19 JS tabs 13 & 14A (memoranda showing that Methanex's lobbyists held meetings with various California State Senators on the issue of MTBE legislation).

[65] *See* California Form 490 Schedule C for Gray Davis (Non-Monetary Contributions Received) (July 1, 1998-Sept. 30, 1998) (16 JS tab 28 at 1255) ("Date Received: 08/04/98; Full Name and Address of Contributor: Archer Daniels Midland Company, 4666 E. Faries Pkwy., Decatur, IL 62525; Description of Goods or Services: Use of Plane; Fair Market Value: 2,400.00").

[66] *See* Reply ¶ 64.

[67] *See id.* ¶¶ 6, 8 & 66-67.

Methanex's failure to prove its allegations by inferring that the evidence that was not presented would have bolstered its case – finds no support in the arbitral rules.[68]

63. Moreover, in a case such as this one, based on unfounded accusations, it is to be expected that officials such as the Governor of the most populous state in the United States would not voluntarily appear to contest spurious charges.[69] Similarly, ADM, which is not even a party to this arbitration, should be commended for voluntarily agreeing to have one of its employees submit a witness statement. It is unnecessary and burdensome to expect the top management of a large company to voluntarily involve themselves in an arbitration to which neither they nor their company are parties.

64. Furthermore, Methanex's complaint that Mr. Daniel Weinstein only attended the dinner "by accident," is not a ground for discounting Mr. Weinstein's testimony. To the contrary, this fact highlights Mr. Weinstein's independence and

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[68] *See* UNCITRAL Arbitration Rules art. 24(1) ("Each party shall have the burden of proving the facts relied on to support his claim or defence."); *cf.* International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") Art. 9(5) (June 1, 1999) (authorizing tribunal to draw adverse inference only where the tribunal has ordered such testimony).

[69] United States law recognizes the fact that elected officials often will be sued in their official capacities and that it would be crippling to the functioning of government if such officials had to respond to every harassment suit. *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941) (calling important government officials as witnesses should be discouraged); *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 586 (D.C. Cir. 1985) ("top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."); *Community Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983) ("Public policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases."); *State Bd. of Pharmacy v. Superior Court*, 78 Cal.App.3d 641, 644-45 (1978) ("It is patently in the public interest that the Attorney General be not *unnecessarily* hampered or distracted in the important duties cast upon him by law. And that public interest obviously transcends the convenience that would otherwise be afforded private litigants by the availability of that official as an expert witness on their attorneys' reasonable fees in successful litigation against the state or its agencies. . . . A highly placed public officer should not be required to give a deposition in his official capacity in the absence of "*compelling reasons.*") (emphasis in original) (citations omitted); *Deukmejian v. Superior Court*, 143 Cal.App.3d 632, 633-35 (1983) (finding no "compelling reasons" for the requested testimony of the Governor of California).

objectivity.[70] And Methanex's complaint that the witness statement of Mr. Richard Vind is somehow inadequate because he is a "small fry"[71] is difficult to reconcile with Methanex's behavior in this arbitration. After all, it was Methanex that introduced Mr. Richard Vind into this arbitration by repeatedly invoking his name in its submissions and by introducing into evidence numerous documents from Mr. Vind's files.[72]

65. *Finally*, Methanex gravely errs in asserting that an inference of untoward activity may be based on its assertion that Governor Davis "is notorious for selling influence."[73] The sole basis for this charge by Methanex is two opinion pieces published in newspapers.[74] For Methanex's public relations campaigns, it may suffice to base such serious accusations on the commentary of persons with no personal knowledge of the subject who happen to have their opinions published in news journals. In an international arbitration under a treaty, however, doing so is irresponsible and vexatious. The United States calls upon the Tribunal to condemn this practice in the strongest of terms.

2. No Inference Of Improper Conduct Can Be Based On Contributions To Candidate Davis's Campaign

66. No inference of wrongdoing can be drawn from the fact that Governor Davis received legal campaign contributions from ADM.

67. *First*, contrary to Methanex's assertions concerning *McConnell v. Federal Election Commission*, the U.S. Supreme Court did not find that receipt of a campaign

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[70] *See* Reply ¶ 7 (claiming that "Daniel Weinstein, a labor specialist [ ] was at the secret meeting only by accident.").

[71] *See id.* ("Instead of hearing from the big fish, the key actors who surely discussed ethanol at the secret meeting, the State Department sends in only the small fry, such as Richard Vind . . . . ").

[72] Mr. Wright mentions Mr. Richard Vind by name more than two dozen times in his ten-page Supplemental Affidavit filed on January 31, 2003 (12 JS tab A).

[73] *See* Reply ¶¶ 68-70.

[74] *See id.* ¶ 69 n.104 (citing 7 JS tab 142 at 2); *id.* n.105 (citing 23 JS tab 38 at 1).

contribution by any elected official gives rise to an inference that that official is corrupted by those donations.[75] The issue addressed in the portion of the *McConnell* opinion cited by Methanex was whether Congress had developed a sufficient record to reconcile a federal law regulating certain federal campaign contributions with the protections of the First Amendment to the U.S. Constitution. The Federal Election Commission's brief argued, and the Supreme Court found, that the record before Congress sufficiently documented the *possibility* that the particular type of campaign contribution at issue *could* lead to corruption in some cases.[76]

68. Neither, however, suggested that campaign contributions ineluctably lead to corruption, as Methanex argues. Congress, notably, did not ban campaign contributions; rather, it merely made all such contributions subject to certain disclosure requirements and limits already applicable to other forms of campaign contributions.[77]

69. Thus, *McConnell* in no way supports the inference Methanex seeks to draw. There is an elemental distinction between a finding that a position of trust creates a sufficient risk of misconduct to justify regulation and a finding that misconduct has in fact occurred in a particular case. The fact of regulation does not establish the fact of misconduct. Yet that is precisely the inference Methanex seeks to draw. It is not a reasonable inference.

70. *Second,* an inference of untoward activity cannot be drawn from the mere fact that candidate Davis received legal, and fully disclosed, contributions from ADM,

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[75] *See* Reply ¶¶ 42-43.

[76] *See McConnell v. FEC*, Brief of the Federal Election Commission *et al.* at 34-51 (21 JS tab 1).

[77] *See McConnell v. FEC*, No. 02-1674, slip op. at 47 (U.S. 2003) (23 JS tab 36) (finding the Government's interest in preventing corruption sufficient "to justify subjecting all donations to national parties to the source, amount and disclosure limitations of [the Federal Election Campaign Reform Act of 1971].") (23 JS tab 36).

MTBE-producer Atlantic Richfield and a wide base of other supporters. Indeed, it is difficult to credit Methanex's criticism of ADM's campaign contributions as somehow illegitimate and corrupting given that Methanex itself appears to have made similar contributions to both political parties.[78]

71. *Finally*, the unsupported allegations of corruption in Methanex's Reply cannot be squared with Methanex's repeated disavowals in these proceedings of any allegation that Governor Davis committed any crime.[79] As the United States made clear in its Amended Statement of Claim, Methanex thus cannot ask the Tribunal to draw the inference that Governor Davis signed the Executive Order in return for having received campaign contributions from ADM: if Governor Davis had done so, he would have committed a criminal offense under U.S. law.[80]

72. Yet, Methanex's most recent submission is replete with allegations that ADM contributed to Governor Davis's campaign with the expectation that, as a result, Governor Davis would find that MTBE posed a hazard to California's drinking water supply, and that Governor Davis did, in fact, sign the Executive Order in return for that

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[78] *See* Damon Chappie, *Republicans Return Illegal Donation From Canadian Company*, ROLL CALL 1 (Oct. 21, 1996) (25 JS tab 10 at 2938-39) (reporting that Methanex Management Inc., a U.S. subsidiary of Methanex Corporation, made a $10,000 donation to the Democratic National Committee and a $15,000 donation to the Republican National State Elections Committee one week apart).

[79] *See* Second Amended Statement of Claim ¶ 143; First Partial Award ¶ 70; Hearing on Jurisdiction and Admissibility, Transcript (Uncorrected) at 486-88 (July 13, 2001).

[80] *See* CAL. PENAL CODE § 68 (Deering 2001) ("Every executive or ministerial officer . . . who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment . . . ."). Methanex's attempts to distinguish between "overtly criminal behavior" and arrangements involving "no more than a wink and a nod" are unavailing. *See* Reply ¶ 69. Granting a political favor in return for money is considered a crime, whether done overtly or less conspicuously. *See* CAL. PENAL CODE § 68 (specifically addressing political action influenced based on an understanding).

campaign contribution.[81] Methanex's new accusations, notably, are based on the same evidentiary record that previously led it to disavow any suggestion of corruption.[82] A review of the record shows that Methanex's earlier position was the correct one, for there is no evidence to support the irresponsible charges of corruption it now asserts.

3. California Did Not "Single Out" MTBE For Regulation

73. The record does not support Methanex's claim, based principally on a single chart of contaminants in California groundwater, that California "singled out" one contaminant among many in banning MTBE.[83] *First*, California decision-makers recognized that MTBE's unique chemical properties presented a significant risk to drinking water supplies in California.[84] The UC Report and the process by which it was prepared and reviewed provided ample reasons for California decision-makers to act as

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[81] *See* Reply ¶ 3 (claiming that it is "naïve . . . to believe that even after Davis solicited ADM's money, ADM received nothing in return") (emphasis deleted); *id.* ¶ 5 (claiming that the Executive Order was "bought by ADM's contributions"); *id.* ¶ 6 (commenting on Governor Davis' "record of pervasive corruption"); *id.* ¶ 41 (claiming that in return for contributions from ethanol companies, Davis signed the Executive Order); *id.* ¶ 67 (claiming that cross-examination of Governor Davis would have established "a pattern of influence-buying"); *id.* ¶ 68 (alleging that Governor Davis does not want "to admit that California's clean air and its oxygenate market were for sale"); *id.* ¶ 70 (claiming that "[t]he only reasonable inference from this record is that Davis wanted large political contributions and, in exchange for them, the U.S. ethanol industry became the sole supplier for the California oxygenate market . . . ."); *id.* ¶ 83 (claiming that Governor Davis "was bought and paid for by large political contributions"); *id.* ¶ 153 (characterizing the ban as a "payback to ADM"); *id.* ¶ 161 (claiming that "Davis solicited ADM's money, and he gave ADM the California oxygenate market in return"); *id.* ¶ 167 (alleging that "the ban was corruptly motivated").

[82] *See supra* n.79; *see also* IISD Amicus Submission ¶ 6 ("In so far as Methanex has stated it is not arguing there was any criminal corruption or wrongdoing, it must fit its case into a narrow window between not putting the system on trial as a whole, and its own admission there was no criminal conduct. IISD submits that Methanex has failed to find such a window here.").

[83] *See* Reply ¶¶ 72-74.

[84] *See* Fogg Expert Report (13 JS tab D) ¶¶ 39-44 (discussing characteristics of MTBE in groundwater); *see also* Amended Statement of Defense ¶ 32 (identifying sources available to California decision-makers before the ban establishing the unique nature of the MTBE problem); *id.* nn.44-60 and accompanying text (collecting citations to record before California decision-makers that established that due to MTBE's characteristics – which are different than those of gasoline generally, or BTEX – spills and leaks of MTBE pose a substantial threat to water resources).

they did.[85] In all, data from many sources confirmed that MTBE posed a higher risk to groundwater than other gasoline constituents.[86]

74. *Second*, Methanex's argument fails to account for the undisputed fact that MTBE has a foul, turpentine-like taste and odor.[87] California decision-makers were aware that even at extremely low concentrations MTBE renders groundwater unpotable.[88] Methanex also fails to acknowledge that California decision-makers were aware that MTBE was stored in volume, underground, where leaks are not easily detected, in close proximity to water resources at tens of thousands of locations throughout the state.[89]

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[85] The Amended Statement of Defense collects the citations to the record that was before the California decision-makers leading up to the ban on MTBE. *See, e.g.,* Amended Statement of Defense ¶ 37. MTBE is more soluble in water than other components of gasoline, including BTEX. *See id*. (MTBE often migrates farther than BTEX); *id*. ¶ 38 (MTBE biodegrades much more slowly than BTEX or ethanol); *id*. ¶ 41 (due to its "chemical properties, when released into the environment, MTBE contaminates substantially more groundwater than other components of concern in gasoline, including BTEX"); *id*. ¶ 45 (MTBE contamination forced the closure of groundwater wells that prior to 1996 had supplied roughly half of the drinking water for the City of Santa Monica, California.); *id*. ¶ 46 (MTBE contamination of drinking water wells forced Glennville, California, as of 1997, to rely on alternative sources of drinking water); *id*. ¶ 47 (South Lake Tahoe closed 35 percent of its public drinking water wells due to MTBE contamination).

[86] *See* Rejoinder Expert Report of Dr. Anne M. Happel (Apr. 22, 2004) ("Happel Rejoinder Report") at 11-12 & tbl. 1 (24 JS tab C) (presenting Santa Clara Water District data reflecting greater frequency and concentration of MTBE detections than of other petroleum products such as benzene, noting California drinking water well closures were attributed to MTBE contamination, not contamination from other gasoline constituents, and petroleum industry fear of liability was based on contamination by MTBE, not other gasoline constituents).

[87] *See* Amended Statement of Defense ¶ 39.

[88] *See id.* ¶¶ 39-40 (citing record before California decision-makers that established MTBE may be tasted at concentrations of 2.0 parts per billion (ppb), and its odor detected at concentrations as low as 2.5 ppb, and noting one tablespoon of MTBE can render 586,000 gallons (2,220,000 litres) of water undrinkable).

[89] *See* Happel Rejoinder Report at 16 (24 JS tab C) (estimating 10,000-15,000 leaking underground storage tanks have caused MTBE pollution of groundwater in California); *see also* Happel Expert Report at 4 (13 JS tab E) (stating that in 1998-99, the California fuel supply consumed on average over 4,300,000 gallons (over 16 million litres) of MTBE each day); *id* at 10 (noting that as of March 2003, there were approximately 41,940 active underground storage tank systems located in California); *id.* at 15-17 (highlighting cases showing continuing leaks from upgraded underground tank systems that would have gone undetected but for environmental investigation); s*ee also* Fogg Expert Report ¶ 23 (13 JS tab D) (establishing that as of about 1999, just seven years after widespread use of MTBE had been federally mandated, California was aware that MTBE had been detected at more than 4,000 leaking underground fuel tank sites, more than 50% of which were located within 0.5 mile (800 meters) of a public drinking water well).

75. *Third*, Methanex errs in suggesting that California somehow was obligated to address other groundwater contaminants in the same manner as MTBE.[90] Of the contaminants Methanex identifies as ripe for California's action, seven occur naturally in the environment – and therefore present significantly different issues than those presented by a man-made chemical like MTBE.[91] Of the contaminants listed, gasoline appears to be the exclusive source only of one – benzene. In that case, California acted to protect its groundwater resources by, for example, imposing restrictions on the benzene content of gasoline that are more severe than those imposed by the federal government.[92]

76. *Finally*, even assuming Methanex had established its assertion that California acted against MTBE to the exclusion other contaminants (and it has not), California could not be faulted. To do so would preclude governments from responding to any problem without responding to all problems of a similar type.[93] Such a proposition finds no support in international law.

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[90] *See* Reply ¶ 72.

[91] *See* Fogg Rejoinder Report ¶ 147 (24 JS tab B) (identifying manganese, iron, fluoride, uranium, chloride, arsenic and sulfate as naturally occurring); *cf.* Reply ¶ 72 (tbl.) (presenting same contaminants as numbers 2, 6, 8, 13, 19, 20 and 23 on list of 23). The inclusion of DBCP, a pesticide developed in the 1950s and banned by California in 1977, on the list relied upon by Methanex only provides substantiation for Dr. Fogg's expert opinion that, because of decades-long lag times between the introduction of groundwater contaminants and their arrival at drinking water wells, MTBE's present-day impacts are not an accurate measure of its ultimate impacts. *See* Fogg Rejoinder Report ¶¶ 151-60 (24 JS tab B); *see also* Fogg Expert Report ¶¶ 45-49 (13 JS tab D). Further, Methanex's reliance on the table from California Department of Health Services Drinking Water Database ignores expert testimony regarding that database's limitations, including that by the end of 2000, the majority of groundwater sources had not been tested for MTBE. *See* Fogg Rejoinder Report ¶¶ 142-49 (24 JS tab B); *see also* Fogg Expert Report (13 JS tab D); Happel Rejoinder Report at 32-42 (24 JS tab C) (presenting data and analysis concluding "MTBE concentrations are among the highest of all [volatile organic compounds] in public supply wells in California").

[92] *Compare* CAL. CODE REGS. tit. 13 §§ 2262, 2262.3 (2004) (25 JS tab 4) (establishing 0.7-0.8% by volume per gallon limit on benzene in California reformulated gasoline) *with* 40 C.F.R. 80.41 (25 JS tab 9) (2004) (establishing 1% by volume per gallon federal limit on benzene in reformulated gasoline). Unlike MTBE, benzene is an essential component of gasoline, the complete removal of which is cost prohibitive. *See* Burke Rejoinder Report ¶¶ 34-37 (24 JS tab A).

[93] *See* Bluewater Network, et al. Amici Submission ¶¶ 25-28.

4. The Scientific Evidence Supported The Ban

77. Methanex places considerable emphasis on the adequacy of the scientific evidence supporting the ban. And both disputing parties have introduced as evidence voluminous reports by scientific experts. Before considering this scientific evidence, however, it is useful to recall the context in which that evidence has been offered.

78. The issue before this Tribunal is whether the California ban of MTBE was in fact specifically intended to address producers and marketers of methanol. There is no dispute that the conclusions of the UC Report and the overwhelming weight of public testimony accorded with the 1999 Executive Order's finding that "MTBE poses an environmental threat to groundwater and drinking water."[94] The question presented, therefore, is whether the scientific conclusions presented to the Governor were so faulty that the Tribunal may reasonably infer that the science merely provided a convenient excuse for hidden regulation of methanol producers.

79. Contrary to Methanex's suggestion, the question is not whether Methanex or the Tribunal might have made a different policy choice based on the scientific evidence California considered or scientific evidence that it did not consider. NAFTA investment chapter tribunals do not sit as a super-regulatory body, with authority to second-guess the policy judgments of the NAFTA Parties on regulatory or scientific matters. The question is not whether the scientific conclusions were right or whether they were wrong. Instead, the question before this Tribunal is whether the scientific conclusions were so wrong that they could only be viewed as a pretext.

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[94] 1999 EXECUTIVE ORDER, pmbl. (1 JS tab 1(c)); *see* Reply ¶ 82 (arguing not that the UC Report did not find MTBE to be a threat to drinking water, but only that it "recommended further study of other oxygenates, and that in the meantime, Governor Davis 'consider' phasing out MTBE").

80. As demonstrated below, however, the record provides no basis on which to question the good faith of the authors of the UC Report or that of the Governor in relying on the findings and conclusions of that report, public testimony and regulatory agencies. The preponderance of the testimony by scientific experts offered by the parties in this arbitration, while of limited value in assessing California's intent in 1999-2000, supports the decision to ban MTBE. Methanex's reliance on approaches to MTBE regulation taken by some other governments is misplaced on both legal and factual grounds. And the record does not support Methanex's contention that California rushed to approve ethanol without a scientific assessment.

(a) The UC Report

81. Methanex does not dispute that the UC Report's seventeen papers, authored by a highly credentialed, multidisciplinary team of more than 60 tenured researchers from several top research institutions, were prepared independently and in good faith.[95] Instead, it argues that "the UC-Davis study was known at the time Davis banned MTBE to be under funded, incomplete, and simply wrong on many critical points."[96] Methanex's argument is without merit.

82. *First*, Methanex's contentions concerning the funding and completeness of the UC Report are legally unsupportable and beside the point on this record. International law does not set minimum amounts that States must spend on scientific research before science-based regulatory measures may be adopted. The amount appropriated for the UC Report – $500,000 – was far from insubstantial. And, more

[95] *See* Reply ¶¶ 75-83.

[96] *Id.* ¶ 75. It is not clear why Methanex refers to the UC Report as the "UC-Davis study"; researchers at many University of California campuses in addition to that located in Davis, California participated in the research effort leading to the UC Report.

importantly, the result was a report that addressed the problem of MTBE contamination in a systematic manner.

83. As Methanex notes, the funding for the UC Report proved sufficient thoroughly to address only the human health and environmental impacts and benefits of MTBE contamination, although Senate Bill 521 had expressed a desire that the Report also compare those impacts to those for ETBE, TAME and ethanol.[97] Methanex does not explain, however, how a comparison to other chemicals could impact the certification the Governor was required to make under Senate Bill 521, which was limited to "the human health and environmental risks of using *MTBE* in gasoline in this state."[98] The fact that the UC Report did not provide a comparison to other potential oxygenate additives in no way undermines its firm support for the action that the Governor took in his 1999 Executive Order – action Senate Bill 521 required him to take.

84. *Second*, an error in one component of one calculation in the UC Report – the inclusion of sunk costs in the cost-benefit analysis – in no way calls into question the adequacy of the UC Report as a whole, as Methanex suggests.[99] To the contrary, because this error was noted in the public comments on the UC Report, the record shows that the Governor based his decision on information that was known to be correct at the time.

85. *Third*, the record does not support Methanex's assertions that the U.S. Government "heavily criticized" the UC Report. For example, the public testimony cited by Methanex as support for its assertion that "the U.S. Geological Survey . . . warned California that it had overestimated the future rate of MTBE impacts on drinking water

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[97] S.B. 521, 1997-98 Reg. Sess., § 3(a) (Cal. 1997) (18 JS tab 125 at 2476).

[98] *Id.* § 3(e) (18 JS tab 125 at 2477) (emphasis added).

[99] *See* Reply ¶ 78.

sources, as well as the cost of remediation" addresses neither of these subjects; instead it discusses air quality impacts of ethanol.[100] Contrary to Methanex's suggestion, the U.S. Geological Survey "congratulated" the University of California faculty on the UC Report, noting that "[i]t contains an impressive amount of information and research that will prove useful in addressing" the use of MTBE and other oxygenate additives in gasoline.[101]

86. *Fourth*, Methanex's reliance on *post-hoc* second-guessing of some of the UC Report's conclusions based on data that emerged after the Report was issued in no way calls into question either the good faith of the scientists that authored it or that of the Governor who based his decision partly upon it.[102]

87. *Finally,* the good-faith nature of the UC Report is confirmed by the similar research results issuing contemporaneously from highly respected sources. For example, by July 1999 the U.S. EPA's Blue Ribbon Panel on Oxygenates in Gasoline had issued conclusions and recommendations similar to those of the UC Report.[103] So too did the Northeast States for Coordinated Air Use Management.[104] In April 2000, Denmark's Environmental Protection Agency added MTBE to its list of undesirable substances,

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[100] *See* Reply ¶ 79 & n.120 (citing Cal. EPA *Public Hearing to Accept Public Testimony on the University of California's Report on the Health and Environmental Assessment of Methyl Tertiary-Butyl Ether (MTBE)*, at 31:15-32:21 (Tr. Feb. 23, 1999) (5 JS tab 47)).

[101] 18 JS tab 148 at 2742. The comments nowhere even mention remediation costs. *See id.* at 2741-45.

[102] *See, e.g.,* Reply ¶ 80.

[103] *See id.* ¶¶ 193-94.

[104] *See* Fogg Expert Report ¶ 25 (13 JS tab D) (highlighting that NESCAUM recommended a "[t]hree year phase down and cap on MTBE in all gasoline" for several reasons including the findings that MTBE was one of the most commonly detected volatile organic compounds ("VOCs") in Northeast drinking water supplies and MTBE contamination adds $34 million to the cost of cleaning up gasoline spills in the Northeast, one third of that region's total cost of remediation of gasoline-contaminated groundwater).

indicating its view that "use of the substance should be limited as much as possible."[105] The fact that other esteemed scientific research groups reached similar conclusions confirms that the UC Report was no pretextual exercise.

(b) Scientific Expert Testimony

88. The preponderance of the scientific expert testimony offered in this case supports the conclusion that the ban of MTBE was indeed intended to address drinking water contamination and not producers or marketers of methanol.

89. *First*, as noted above, the scientific expert reports are of at best limited utility to the question of intent before this Tribunal. None of the California decision-makers had access to these reports at the times the measures were adopted. The criticisms of the UC Report in the reports submitted by Methanex shed no light, therefore, on the motivations of the Governor, the California Legislature or the CARB in adopting the 1999 Executive Order, Senate Bill 989 or the CaRFG3 Regulations.

90. As noted in the preceding discussion, the record does not support Methanex's assertion that the UC Report was known to be so faulty at the time of the relevant decisions that California decision-makers could not rely on its conclusions in good faith. The potential contribution of the scientific expert reports to this proceeding, given this record, is dubious.

91. *Second*, the expert reports submitted by the United States have, in any event, compellingly rebutted each of the principal conclusions of the reports submitted by Methanex. The reports of Drs. Fogg, Happel and Whitelaw each demonstrate that the central conclusions contained in the UC Report were valid and provided an appropriate

[105] *Id.* ¶ 202; *see also id.* ¶ 25.

basis for California's action. Each responds in detail to the contrary conclusions asserted by Methanex's experts.[106]

92. Both Drs. Fogg and Happel have laid bare Methanex's erroneous assertions that detections of MTBE contamination in California drinking water are on the decline.[107] Similarly, reviewing current data regarding underground storage tanks, Drs. Fogg and Happel have made clear that even those tanks that are fully compliant with California's uniquely stringent regulations could and do continue to leak.[108] Methanex's suggestion that a storage tank focus could be more effective than an MTBE ban is overly simplistic, and based on dubious evidence.[109] The record shows that such a focus could not have eliminated the threat posed by MTBE to California's groundwater. The record also establishes that cleaning up MTBE-contaminated groundwater is difficult, costly, and sometimes impossible.[110]

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[106] *See* Fogg Rejoinder Report ¶¶ 13-14 (24 JS tab B) (establishing that by 1998 it was clear that MTBE detections at more than 4,000 leaking underground storage tanks, over 50% of which were located within a half-mile of a public drinking water well, would result in degradation of California's water resources for decades); *see also id.* ¶ 237 & tbl. 5 (24 JS tab B) (demonstrating that even Methanex's analysis shows that "MTBE impacts on [public water supply wells] are growing with time, further supporting the U.C. Report's general analysis"); Happel Rejoinder Report at 16 (24 JS tab C) (finding "extent and magnitude of MTBE pollution in California's groundwater is indeed significant, widespread, and worse than predicted by the UC Report"); *id.* at 38-39 (24 JS tab C) (Methanex's expert Dr. Williams does not contest MTBE impacts are more common and more frequent than benzene impacts to public drinking water wells); Whitelaw Rejoinder Report at 4 (24 JS tab E) ("California's decision to ban MTBE is consistent with the information available on costs and benefits available during 1999-2000."). *See generally* Fogg Expert Report (13 JS tab D); Happel Expert Report (13 JS tab E); Whitelaw Expert Report (13A JS tab K).

[107] *See* Fogg Rejoinder Report ¶¶ 14, 198-237 (24 JS tab B); *see also* Happel Rejoinder Report at 46 (24 JS tab C); Fogg Expert Report ¶¶ 74-98, 112-19 (13 JS tab D); Happel Expert Report at 50 (13 JS tab E).

[108] *See* Fogg Rejoinder Report ¶¶ 165-75 (24 JS tab B); *see also* Happel Rejoinder Report at 12 (24 JS tab C); Fogg Expert Report ¶ 16 (13 JS tab D); Happel Expert Report at 6, 19 (13 JS tab E).

[109] *See* Reply ¶¶ 111-113, 116. Methanex claims to rely on "[a]n independent, neutral voice" and asserts that "'[t]he solution should have been to fix these leaking tanks . . . .'" *Id.* ¶ 116 (quoting Bill Ludlow, *An MTBE Review,* MTBE/Octane Report, dated Feb. 5, 2004) (emphasis omitted)). However, a long-time consultant to the MTBE industry is neither independent nor neutral and Methanex's quoting his statement in a February 2004 industry newsletter does not even begin to overcome the overwhelming expert evidence in this case and extensive record that was before California decision-makers in 1999.

[110] *See* Fogg Rejoinder Report ¶¶ 16, 176-97 (24 JS tab B); *see also* Happel Rejoinder Report at 30, 37 (24 JS tab C); Fogg Expert Report ¶¶ 13-14, 181-95 (13 JS tab D); Happel Expert Report at 57-58 (13 JS tab

93. Moreover, even assuming the record established that a focus on underground storage tanks could remedy the problem (and it does not), the mere existence of an alternative policy choice hardly could form the basis of a finding of an intent to harm, as Methanex suggests.[111] It is not for this Tribunal to second-guess California's policy judgments as to how it should address the MTBE problem.

94. *Third*, the record does not support Methanex's claim that the ban of MTBE is suspect because it will negatively impact air quality in California. In its Reply, Methanex does not dispute that its earlier allegations of increased air pollution were erroneously based on an analysis of gasoline that did not meet California's specifications. Rather, it concedes that "California's stringent air quality standards may in fact prevent ethanol fuel blends from producing negative air quality impacts," yet complains that there are not yet any "'real world' field measurements available on actual changes in pollutant air concentrations in California since the wide-scale substitution of ethanol for MTBE fuel blends."[112]

95. Methanex's complaint is without merit. "Real-world" data on the impact of use of a chemical does not become available until the chemical is used. As detailed in Mr. Simeroth's rebuttal statement, regulators necessarily use models to predict outcomes before adopting regulations.[113] Governments could not regulate if they had to introduce potentially harmful substances into the environment to gather "real-world" data on their effects before regulating those substances.

E); Whitelaw Rejoinder Report at 9, 16-19, 24 (24 JS tab E); Whitelaw Expert Report at 48-49 (13A JS tab K); *cf.* Reply ¶ 114 n.191 (reflecting Methanex's reliance on a quote from an L.A. Times article to support the view that MTBE clean-up costs, although substantial, could be less than previously predicted).

[111] *See* Reply ¶ 154.

[112] Williams Rebuttal Report at 66 (20 JS tab C).

[113] Second Witness Statement of Dean C. Simeroth ¶ 5 (attested Apr. 21, 2004) (24 JS tab D).

96. *Fourth*, in addition to the errors documented in the reports of Drs. Fogg, Happel and Whitelaw, there are other reasons to ascribe little weight to the expert reports submitted by Methanex.

97. Despite the Tribunal's clear directive that each witness must disclose "that witness's present *and past* relationship with Methanex,"[114] Dr. Pamela Williams' reports nowhere disclose the fact that her firm has been retained by Methanex since at least 1999 – or that Dennis J. Paustenbach, vice president of Exponent while Dr. Williams was there and founder of Dr. Williams' current employer ChemRisk, has been retained by Methanex since at least that date to provide litigation support, apparently for this case.[115] Nor do Dr. Williams' reports disclose that much of the research she relies upon was authored or co-authored by Dr. Paustenbach while on retainer by Methanex.[116]

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[114] First Partial Award ¶ 164(i) (emphasis added); *see id.* ¶ 165(i); *see also* IBA Rules, art. 5.2(a); Letter of V.V. Veeder to the Parties at 2 (Oct. 10, 2003) (stating that the Tribunal "expects Methanex's full compliance [with requirements of First Partial Award and IBA Rules for expert witnesses]; and where it has not complied, the Tribunal expects notification of prompt compliance").

[115] *See* Dr. Dennis Paustenbach, Curriculum Vitae (Exponent) at 15 (26 JS tab 23 at 3302) ("In 1999, Methanex Corp. retained us to address the environmental and human health hazards associated with the use of MTBE by the United States as an oxygenate. Their claim was that California banned MTBE in an arbitrary manner. Case will be argued in World Court in 2003 or later."); *id.* at 26 (26 JS tab 23 at 3313) ("In 1999-2001, was involved in work to evaluate the magnitude of the impact of MTBE on the groundwater in the State of California. During the course of the evaluation, a number of papers were presented at conferences and published in the literature."); *see also* Dr. Dennis Paustenbach, Curriculum Vitae (ChemRisk) at 17 (26 JS tab 24 at 3396) ("In 1999-2002, involved in work to evaluate the magnitude of the impact of MTBE on groundwater in the State of California. During the course of the evaluation, a number of papers were presented at conferences and published in the literature.") *and* 19 (26 JS tab 24 at 3398) ("In 1999, retained by Methanex Corp. to address the environmental and human health hazards associated with the use of MTBE by the United States as an oxygenate. Their claim was that California banned MTBE in an arbitrary manner. Case will be argued in World Court in 2003 or later.").

[116] Dr. Williams presents these sources as follows: (a) 2 are listed as references in Dr. Williams' Rebuttal Report of February 19, 2004 (20 JS tab C at 68-77); (b) 1 is listed as a reference in Dr. Williams' Expert Report (12 JS tab B); (c) 19 (6 articles, 1 book chapter and 12 abstracts/presentations) are listed in the resume accompanying her January 2003 Expert Report (12 JS tab B); (d) 1 is listed as a reference in the Exponent Report (2003a) that Dr. Williams authored (tab C at 22); 1 is listed as reference in Williams, *et al.*, *Evaluating the Risks and Benefits of MTBE and Ethanol as Alternative Fuel Oxygenates*, submitted to RISK ANALYSIS (Jan. 31, 2003) (Methanex's Summary of Evidence, tab E at 43 (Jan. 31, 2003)); and (e) 1 is listed as a reference in the Exponent and AES Report (2002) that Dr. Williams authored (Methanex's Second Amended Statement of Claim, tab E at 43 (Nov. 5, 2002)). In addition, Dr. Williams fails to disclose that a 2003 paper she relies upon "was funded by Methanex Corporation." Williams, P.R.D., L.

98. The United States respectfully submits that the Tribunal should take into account the above failures of disclosure in assessing the independence and weight of Dr. Williams' report.

99. With respect to the report by Methanex's cost-benefit analyst Dr. Gordon Rausser, it is noteworthy that Dr. Rausser's report in this case was so similar to the one he prepared for a MTBE manufacturer that he "accidentally included in the Methanex Report" information "based largely on the earlier estimate of the costs of an MTBE ban in California" that he presented for the MTBE producer.[117] A federal court recently held that Dr. Rausser's testimony in support of other MTBE interests on the economic impacts of a New York law banning MTBE was "speculative and has insufficient evidentiary support."[118] This finding accords with those of several other courts that rejected Dr. Rausser's testimony as unreliable, speculative and unsubstantiated by the evidence.[119]

Benton & P. Sheehan, *MTBE in California's Drinking Water: A Comparison of Groundwater Surface Water Sources*, 4 ENVIRON. FORENSICS 175, 188 (2003) (26 JS tab 37 at 3697) (cited in Williams Rebuttal Report at 76 (20 JS tab C)).

[117] Report of Gordon Rausser ("Rausser Reply Report") n.12 and accompanying text (Feb. 19, 2004) (20 JS tab A at 10) (citing *The Social Cost of an MTBE Ban in California,* Gordon Rausser, Gregory Adams, W. David Montgomery and Anne Smith, unpublished manuscript, University of California, Berkeley (2001)); *see* Expert Report of Dr. Ed Whitlaw ("Whitelaw Expert Report") at 6-7 (Nov. 26, 2003) (13 JS tab K) ("intentionally or unintentionally, Rausser offers two distinct sets of results in his Methanex Report" dated January 31, 2003, one set of which "is identical to" Dr. Rausser's Lyondell analysis except for a single assumption.). Dr. Rausser previously testified that MTBE producer Lyondell Chemical Corporation paid him or his company over $1 million to prepare his earlier cost-benefit analysis of California's MTBE ban. *See South Tahoe Public Utility District v. Atlantic Richfield Co.,* Deposition of Gordon C. Rausser, 1, 5-6 (Mar. 29, 2001) *and* 440, 460-65 (Sept. 6, 2001) (26 JS tab 28 at 3483-84); *South Tahoe Public Utility District v. Atlantic Richfield Co.,* Trial Transcript 8269, 8329 (Feb. 6, 2002) *and* 8395, 8492-8493 (Feb. 7, 2002) (26 JS tab 29 at 3488).

[118] *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 293 F. Supp.2d 170, 182 (N.D.N.Y. 2003) (26 JS tab 21 at 3275).

[119] *See Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1038 (8th Cir. 2000) (25 JS tab 3 at 2780) (stating that Dr. Rausser's econometric model in support of a price-fixing claim was "fundamentally unreliable" because it relied heavily on evidence not probative of conspiracy as a matter of law and failed to account for "significant" externalities); *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724 JCS, 2001 WL 176382 *6 (N.D. Cal. Dec. 6, 2001) (26 JS tab 22 at 3281) (concluding Dr. Rausser's report on behalf of plaintiffs was "entirely speculative" as it relied on assumptions rather than evidence); *In re High Fructose Corn Syrup Antitrust Litig.*, 156 F. Supp.2d 1017, 1054-55 (C.D. Ill. 2001) (25 JS tab 14 at

100. As Dr. Whitelaw's reports demonstrate, a similar finding with respect to Dr. Rausser's reports is called for here.

101. *Finally*, Methanex's Reply errs in relying for scientific support on opinion pieces published in MTBE industry newsletters.[120] Such views cannot be considered probative evidence of the intent of California decision-makers. Indeed, if the criteria for challenging a regulation were that one participant in an affected industry published a disfavorable opinion, few if any regulations in the world would stand.[121]

(c) The European Union Approach

102. Methanex also errs in its reliance on the European Union's approach to MTBE regulation.[122] Contrary to Methanex's suggestion, the European Commission in fact did find that "there is a need for specific measures to limit the risks" of MTBE contamination of groundwater.[123] That the EU took a different approach to the

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2977) (finding the *Blomkest* court's analysis of a "strikingly similar" opinion by Dr. Rausser to apply and concluding that "the economic experts essentially base their conclusions on . . . very weak circumstantial evidence and . . . assumption of inferences . . . not reasonably supported by the record.").

[120] *See* Reply ¶¶ 73-74, 86 (citing reports from MTBE industry consulting company, DeWitt, and a newspaper article).

[121] Similarly, Methanex relies on its cost-benefit analyst Gordon Rausser to support propositions not related in any manner to his area of expertise. *See* Reply ¶ 88 (citing Dr. Rausser for the proposition that "[g]reater release rates will increase environmental water contamination by benzene, ethanol and other chemicals classified as carcinogens with certainty, in contrast to MTBE"). Further, claiming to "directly contradict[] Dr. Fogg's testimony," Methanex purports to quote its expert Dr. Herb Ward as having stated, "'[i]n 'slow aquifers' with long (years) MTBE travel times natural attenuation . . . should be *fully protective* of groundwater resources.'" Reply ¶ 115 (citing Ward Reply Report at 18) (20 JS tab B) (emphasis in original). Page 18 of Dr. Ward's report contains no such statement. At page 19, Dr. Ward sets forth a far more qualified statement: "It is clear that natural attenuation, without engineering intervention, is generally not adequate to manage the risks of MTBE in all aquifers all of the time . . . . [ ] However, as previously demonstrated, *aerobic* aquifers with long travel times will enhance microbial exposure and adaption for biodegradation of MTBE. Hence, *in some cases*, natural attenuation of MTBE should be fully protective of groundwater resources." Ward Reply Report at 19 (20 JS tab B) (emphasis added).

[122] *See* Reply ¶¶ 103-06, 118-19.

[123] European Comm'n, Recommendation of 7 Nov. 2001, 2001/838/EC, at L319/43 (Dec. 4, 2001) (3 JS tab 22); *see id.* ("This conclusion is reached because of – concerns for the potability of drinking water in respect of taste and odour as a consequence of exposure arising from leaking underground storage tanks and spillage from overfilling of the storage tanks.").

recognized threat of MTBE to drinking water based on that region's topography, climate, population and other factors says nothing about the legality or the appropriateness of California's action.

103. The evidence of record demonstrates that the circumstances confronted by California decision-makers differed from those facing the EU.[124] In dry years, Californians can rely on groundwater for up to two-thirds of their total water consumption.[125] With California's population expected to grow by more than 30% by 2020, the state's reliance on groundwater resources will increase dramatically.[126]

104. The risk posed to California's groundwater was in part a result of California's consumption of MTBE, which amounted to almost double the volume consumed by sixteen European countries combined.[127] Methanex is wrong that "in some places [in Europe MTBE is] used more widely than in the U.S."[128] Unlike U.S. legislation, EU legislation does not mandate the use of oxygenates in gasoline.[129] In

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[124] *See* Happel Rejoinder Report at 5-6 (24 JS tab C) (stating California's unique history and circumstances concerning water resources were understood by California decision-makers). Specifically, with regard to Finland, Methanex is wrong that it "provides an excellent comparison." *See* Reply ¶ 105. As Dr. Fogg has explained, in Finland, the majority of gasoline contains an average of 8% MTBE by volume, not 15% as Methanex claims. *See* Fogg Rejoinder Report ¶ 244-45, fig. 9 & tbl 6 (24 JS tab B).

[125] *See* Fogg Expert Report ¶ 28 (13 JS tab D) (establishing California's unique dependence on groundwater resources).

[126] *See id*.

[127] *See* Fogg Rejoinder Report ¶ 240 & Fig. 8 (24 JS tab B) (highlighting graphically vastly greater use of MTBE in California than in any EU country); *see also* Fogg Expert Report ¶¶ 196-204 (13 JS tab D) (highlighting several reasons why the EU's experience with MTBE is of little value in assessing extent of risks posed to California water resources by MTBE, or in developing strategies to address them).

[128] Reply ¶ 104.

[129] *See* Fogg Rejoinder Report ¶¶ 240-42 (24 JS tab B) (noting MTBE is used only as an octane booster in Europe).

Europe, MTBE is used primarily as an octane booster and at substantially lower concentrations than it was used in California.[130]

105. Finally, Methanex errs in any event in suggesting that California was required to adopt the same level of environmental risk tolerance accepted by EU decision-makers.[131] As Professor Reisman has observed in a different context, "the content of the various legal codes of each state may be expected to vary, quite legitimately, reflecting the diversity of national political, economic, social, and cultural values that the international system permits and even encourages. . . . . The point of emphasis here is that the legislative expression of these variations in the law of different states is internationally lawful and entitled to respect."[132]

(d) The Supposed Rush To Embrace Ethanol

106. Methanex's assertion that California "selected ethanol as the oxygenate for the California market without any valid risk assessment and without comparing it to other oxygenates" has no basis in fact.[133] The 1999 Executive Order directed three California agencies to undertake extensive research on the risks associated with the use of ethanol in gasoline.[134] As required by the Executive Order, the results of that research

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[130] For example, to satisfy federal programs mandating oxygen content in gasoline, California reformulated gasoline contained approximately 11% by volume MTBE. *See* Witness Statement of James W. Caldwell, dated Dec. 1, 2003 ("Caldwell Witness Statement") ¶ 29 (13 JS at tab C at 10). In contrast, "MTBE is added *at less than 4%*, if at all, in most European countries." Fogg Rejoinder Report ¶ 244 & fig. 9 (24 JS tab B) (emphasis added). Thus, Methanex errs in its suggestion that Finland uses MTBE at 15% by volume and is left with no factual support for its assertion that Finland "provides an excellent comparison" to California. Reply ¶ 105.

[131] *See* IISD Amicus Submission ¶¶ 40-42.

[132] W. Michael Reisman, *The Regime for* Lacunae *in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID Review-F.I.L.J. 362, 367 (2000).

[133] Reply ¶ 84 (emphasis added).

[134] *See* 1999 EXECUTIVE ORDER ¶ 10 (1 JS tab C) ("The [CARB] and the State Water Resources Control Board shall conduct an environmental fate and transport analysis of ethanol in air, surface water, and groundwater. The Office of Environmental Health Hazard Assessment shall prepare an analysis of the

were peer reviewed and presented on December 31, 1999 – fully four years before the MTBE ban took effect – in a five-volume report to the California Environmental Policy Council ("CEPC").[135]

107. The CEPC held a public hearing on the report on January 18, 2000.[136] At the hearing, authors of the report, nearly three-dozen representatives from industry, environmental groups, academia, grass-roots organizations and state and municipal officials addressed the nearly one dozen high-ranking California officials who constituted the CEPC.[137] As one of the report's authors testified, "[t]he conclusion of [the] study was that the water resource impacts associated with the use of ethanol would be significantly less and more manageable than those associated with the continued use of MTBE."[138] The CEPC voted unanimously to approve the report and subsequently passed a resolution determining that no "significant adverse environmental impact on public health or the environment" would result from the use of ethanol in California gasoline.[139]

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health risks of ethanol in gasoline, the products of incomplete combustion of ethanol in gasoline, and any resulting secondary transformation products. These reports are to be peer reviewed and presented to the Environmental Policy Council by December 31, 1999 for its consideration.").

[135] California Air Resources Board, et al., *The Health and Environmental Assessment of the Use of Ethanol as a Fuel Oxygenate: Report to the California Environmental Policy Council in Response to Executive Order D-5-99* (Dec. 1999) (25 JS tab 6 at 2801-30).

[136] Under Senate Bill 529, adopted by the California legislature in 1999, the CEPC was charged with reviewing environmental evaluations of new motor vehicle fuels specifications considered by the CARB. *See* SB 529, PMBL., § 1(b), § 3(a), (d) (26 JS tab 27 at 3474-75); *see also* California Environmental Policy Council, Transcripts of Public Hearing: *Meeting to Consider Staff Reports on the Environmental Fate and Transport and Potential Health Effects of Using Ethanol in California Reformulated Gasoline* ("CEPC Tr.") (Jan. 18, 2000) (25 JS tab 7 at 2837-49) (statement of CEPC Chairman and Secretary of CalEPA, Winston Hickox regarding CEPC's mandate under Senate Bill 529 and with respect to environmental impacts of the use of ethanol in California's gasoline supply).

[137] *See* CEPC Tr. (25 JS tab 7 at 2833-35) (index of speakers).

[138] CEPC Tr. (25 JS tab 7 at 2848) (testimony of Robert Rice, Project Manager, Lawrence Livermore National Laboratory).

[139] Environmental Policy Council, Resolution (Cal. Jan. 18, 2000) (25 JS tab 13 at 2948); *see* CEPC Tr. (25 JS tab 7 at 2907-10).

108. The record does not support Methanex's claim that California "decided to favor ethanol long before the risk assessment was complete."[140] Rather, it is clear that long before California's use of ethanol became widespread, it had determined based on ample record support that the risks associated with ethanol use are less than those associated with the use of MTBE.[141]

(e) Toxicity Of MTBE

109. Methanex does not explain the relevance of its many assertions that MTBE is neither toxic nor carcinogenic.[142] While the record does not clearly support Methanex's assertion that "MTBE is neither toxic nor carcinogenic," this assertion is of little consequence to the issues in this case.[143] The record shows that California banned MTBE principally because of its threat to the potability of drinking water, not because of findings that it was toxic or carcinogenic.[144] There is no requirement that a State deem a chemical to be carcinogenic – or even toxic – before banning it. To the contrary, California has every right to protect itself by regulation from chemicals that render water

[140] Reply ¶ 85.

[141] Dr. Happel explains, "at the time of California's decision to ban MTBE and during the Blue Ribbon Panel proceedings, decision makers determined that ethanol's negative impacts to groundwater would be less significant than MTBE's negative impacts to groundwater." Happel Expert Report at 58 (13 JS tab E). In preparing her December 2003 Expert Report, Dr. Happel reviewed information and data that "further support the assessment of the relatively greater negative impact of MTBE to groundwater." *Id.*

[142] *See, e.g.,* Reply ¶¶ 10, 117-18.

[143] Reply ¶ 117; *see* National Toxicology Program Board of Scientific Counselors Report on Carcinogens Subcommittee, Summary Minutes of Meeting (Dec. 2-3, 1998) (25 JS tab 19 at 3124) (reflecting five out of twelve scientists (one abstained) on the U.S. National Toxicology Program (NTP) Board of Scientific Counselors Report on Carcinogens (RoC) Subcommittee voted to list MTBE in the RoC as "*reasonably anticipated to be a human carcinogen*") (emphasis in original); *see also id.* (25 JS tab 19 at 3123) (NIEHS Review Committee for the Report on Carcinogens (RG1) "voted four to three to recommend listing MTBE in the *Report* as *reasonably anticipated to be a human carcinogen*.") (emphasis in original); *see also* Office of Environmental Health Hazard Assessment, *Public Health Goal for Methyl Tertiary Butyl Ether (MTBE) in Drinking Water* at 4-7 (Mar. 1999) (25 JS tab 20 at 3237-65) (collecting numerous studies on the toxicity and carcinogenity of MTBE, which conclude that MTBE is toxic to humans, MTBE is an animal carcinogen and MTBE is a possible human carcinogen); U.C. Report, Vol. II at 175 (4 JS tab 37) ("[W]e conclude that MTBE is an animal carcinogen with potential for human cancer.").

[144] *See* Amended Statement of Defense ¶ 72; *see also id.* ¶¶ 60, 70.

undrinkable even assuming they do not make water unhealthy. Methanex has not rebutted and cannot rebut the undisputed evidence that MTBE renders water putrid at extremely low concentrations. Methanex's contentions on toxicity are therefore beside the point.

5. The Record As A Whole Establishes That California Did Not Intend To Benefit Ethanol

110. Methanex does not refute the evidence put forth by the United States establishing that California's intent in banning MTBE was not to benefit ethanol. At the same time that Governor Davis signed the 1999 Executive Order, he directed California to seek a waiver of the federal oxygenate requirement.[145] As set forth at length in the Amended Statement of Defense, California has fought vigorously for this waiver.[146]

111. It is uncontested that, if granted, the waiver will *harm* the ethanol industry.[147] Methanex argues that even if the waiver is granted, some ethanol will still be used in California gasoline. While that may be true, Methanex does not and cannot dispute that substantially more ethanol will be used in California gasoline if the waiver is not granted. If California's motivation in banning MTBE in gasoline had been to benefit the ethanol industry, it would not have sought the federal oxygenate waiver.

112. The 2002 Executive Order provides further confirmation that California's intent in banning MTBE in gasoline was not to benefit the ethanol industry. That order postponed the date of the MTBE ban by one year.[148] As set forth in the Amended Statement of Defense, the ethanol industry vigorously opposed postponement of the

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[145] *See* Amended Statement of Defense ¶ 64 (citing 1999 EXECUTIVE ORDER ¶ 2 (1 JS tab 1(c))).

[146] *Id.* ¶¶ 64-67.

[147] *See* Second Amended Statement of Claim ¶ 131 (noting that "the U.S. ethanol industry bitterly opposed the waiver.").

[148] 2002 EXECUTIVE ORDER (16 JS tab 46 at 1415).

ban.[149] Again, if California intended to benefit the ethanol industry by banning MTBE in gasoline, it would not have postponed the ban. Methanex has no response to this evidence.

113. Finally, and more generally, Methanex's repeated statements to its investors that the MTBE ban has had no impact on its business demonstrates that the ban does not "relate to" Methanex or its investments.[150] The First Partial Award correctly held that Article 1101(1) requires more than such an impact to establish that a measure "relates to" an investor or an investment.[151] The fact that the record does not even show such an impact, however, necessarily means that Methanex's showing has fallen short of the more stringent test adopted by the Tribunal. The preponderance of the evidence shows that the MTBE ban does not "relate to" Methanex.

II. THE RECORD ESTABLISHES NO LOSS PROXIMATELY CAUSED BY THE BAN

114. Methanex's Reply merely repeats the same defective arguments on causation it asserted in its counter-memorial on jurisdiction over three years ago.[152] It does not attempt to respond either to the arguments the United States advanced in its subsequent submissions or to important intervening developments on the subject. In 2001, it was evident that there was no merit to Methanex's argument that the NAFTA incorporated a lower causation standard than the standard of proximate cause

[149] *See* Amended Statement of Defense ¶ 174.

[150] *See* Amended Statement of Defense ¶¶ 103, 262 & 442.

[151] *See* First Partial Award ¶¶ 137-139.

[152] *See* Counter-Memorial at 31-38.

overwhelmingly applied by international tribunals. In 2004, it is plain that Methanex's argument lacks any basis.

115. In addition, Methanex has still not met its burden under the NAFTA of demonstrating that it "*has* incurred" – in the past tense – "loss or damage" attributable to the ban on MTBE, as required by NAFTA Articles 1116(1) and 1117(1).[153] The lack of evidence of any existing loss confirms what Methanex has been advising its own investors all along: that the ban has had no measurable effect on Methanex or the methanol industry generally. Methanex's only support – consisting of bare allegations and immaterial stock analyst reports – is, at best, speculation that the ban may have some effect in the future. Neither Chapter Eleven nor international claims law, however, provides a remedy for such future, speculative losses.

116. In Section A below, we address the causation standard under Articles 1116(1) and 1117(1) and demonstrate that nothing in the Reply cures Methanex's failure to meet that standard. In Section B, we examine the state of the evidentiary record pertaining to each of Methanex's alleged categories of loss, and address Methanex's recent admissions that is has suffered no loss and its contention concerning mitigation of damages.

A. Methanex's Alleged Losses Are Too Remote And Speculative

117. There is no dispute between the parties as to the nature of the causal chain on which Methanex's claim depends. The Amended Statement of Defense established that Methanex's claim depends on the alleged effects of the ban on *suppliers to suppliers*

[153] NAFTA art. 1116(1) (emphasis added); *see also id.* art. 1117(1) (investor of a Party may submit, on behalf of enterprise, claim that another Party has breached a Section A obligation "and that the enterprise *has* incurred loss or damage by reason of, or arising out of, that breach") (emphasis added).

to the parties regulated.[154] Methanex's Reply offers neither evidence nor argument to suggest the contrary. Nor is there any dispute that, under established principles of international law, a claim based on an action's effects on a claimant's contractual counter-party is too remote to establish proximate cause.

118. The only contested issues of law on causation are: (i) whether Articles 1116 and 1117 incorporate the proximate cause standard or some lower, undefined standard; and (ii) whether Methanex's allegations of intentional harm exempt it from proving causation altogether. We address each of these issues in turn below.

1. Chapter Eleven Incorporates The Proximate Cause Standard

119. In its reply and rejoinder submissions on jurisdiction and its Amended Statement of Defense, the United States demonstrated the fallacies in Methanex's contention that "arising out of" in Articles 1116(1) and 1117(1) embodies a broad and undefined causation standard.[155] Methanex simply ignores these arguments and restates the same baseless contentions it made in its counter-memorial on jurisdiction.[156]

120. Notably, it does not address the fact that the municipal law decisions it cites concerning insurance contracts are irrelevant to a treaty governed by international law.[157] Nor does it even attempt to distinguish the numerous authorities cited by the United States applying the proximate cause standard under similar, or even broader, treaty language (except to repeat its discredited argument that one of those authorities should be ignored because the case in which the treaty interpretation question was

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[154] *See* Amended Statement of Defense ¶¶ 224-25 (citing cases).

[155] *See id.*

[156] *See* Reply ¶¶ 230-33.

[157] *See* NAFTA art. 102(2) ("The Parties shall interpret and apply the provisions of this Agreement . . . in accordance with applicable rules of international law."); *see also id.* art. 1131(1) (tribunal shall decide issues "in accordance with this Agreement and applicable rules of international law").

presented contained "bizarre" facts).[158] Methanex does not respond to the United States' arguments for a simple reason: there is no response.

121. Nor, critically, does Methanex take into account two important developments intervening since 2001 that undo its arguments. *First*, all three NAFTA Parties have now agreed, through their submissions to this Tribunal under Article 1128, that Articles 1116 and 1117 incorporate the proximate cause standard.[159] As the United States established in earlier submissions, Article 31(3)(a) of the Vienna Convention on the Law of Treaties requires that such a subsequent agreement of the parties to a treaty be taken into account by a tribunal interpreting the relevant treaty language.[160]

122. If ever there was any doubt that Articles 1116 and 1117 incorporate the standard of proximate causation, the agreement of the NAFTA Parties on the subject dispels it.

123. *Second*, the only other NAFTA Chapter Eleven tribunal to address the question contravenes Methanex's argument. Interpreting Articles 1116(1) and 1117(1),

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[158] *See* Reply ¶ 233 (referring to *Hoffland Honey*). As the United States noted, the Iran-U.S. Claims Tribunal has repeatedly confirmed, in a wide variety of factual contexts, that the principle of proximate cause is incorporated in the phrase "arises out of." *See* Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, April 12, 2001, at 8-9, n. 9 (citing *Mohsen Asgari Nazari* and *Behring Int'l*).

[159] *See* Mexico Fourth Article 1128 Submission ¶ 2 ("Mexico agrees with the United States' Amended Statement of Defense (at paragraphs 218-22) that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase 'has incurred loss or damage by reason of, or arising out of' a Party's breach of one of [the] NAFTA provisions listed in Articles 1116 and 1117."); Canada Second Article 1128 Submission ¶ 47 ("The ordinary meaning of the words 'by reason of, or arising out of' establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred."); *see also Pope & Talbot Inc. v. Canada*, *Counter-Memorial of Canada (Damages – Phase 3)*, dated Aug. 18, 2001 at 9-10 ("Due to Articles 1116 and 1117, only damages with a direct and causal relation to the breach found by the Tribunal are compensable. Article 1116 requires a clear and direct nexus between the breach and the loss by expressly stating that damages must be "by reason of, or arising out of" the breach. International law also requires that damages be the proximate, direct and immediate consequence of the breach.").

[160] *See* Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(3)(a), 1155 U.N.T.S. 331 ("There *shall* be taken into account . . . any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.") (emphasis added); *see also* Post-Hearing Submission of Respondent United States of America at 2-5 (July 20, 2001) (addressing issue at length).

the tribunal in *S.D. Myers v. Canada* concluded that "the breach of the specific NAFTA provision must be the *proximate* cause of the harm."[161]

124. *Finally*, Methanex's contention that California *foresaw* harm to Methanex does not make its remote claims actionable.[162] Even if there was competent evidence to support that allegation – and, as noted above, there is none[163] – foreseeability is not the test of proximate cause applied by international tribunals.[164] As noted, holding democratic governments accountable for all foreseen consequences of their decision-making would have dire policy consequences.[165] There is no evidence or reason to believe that the Parties intended to subject themselves to such consequences in consenting to investor-State arbitration.

2. Methanex's Intentional Harm Allegations Are Insufficient

125. Methanex's new contention that remote losses are recoverable merely because it has alleged intentional harm on the part of California is without merit. *First*, this arbitration is long past the stage where *allegations* alone are sufficient. The Tribunal has ordered Methanex to produce *evidence* of California's intent.[166] As noted further

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[161] *S.D. Myers Inc. v. Canada* ¶ 140 (Second Partial Award) (Oct. 21, 2002) ("[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.") (emphasis in original).

[162] *See* Reply ¶ 238.

[163] *See supra* ¶¶ 22-28.

[164] *See, e.g., S.D. Myers* ¶¶ 153-54 (Second Partial Award) (rejecting foreseeability test as a measure of contractual damages under municipal law); *see also Behring Int'l, Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 238, 271-72 (June 21, 1985) (reasonable forseeability is an *additional* jurisdictional requirement to proximate cause) (emphasis added).

[165] *See supra* ¶ 28.

[166] *See* First Partial Award ¶ 163; *see also id.* ¶ 167 ("the Tribunal cannot continue what has become an impossible forensic exercise, composing a jigsaw of assumed facts and inferences with too many missing and incomplete pieces").

above, the evidentiary record is lacking on that score.[167] Moreover, as a policy matter, allowing recovery for remote losses based on mere *allegations* would vitiate the proximate cause standard.

126. *Second*, even if Methanex could support its intent allegations, it would not be relieved of the burden of proving losses proximately caused by the breach. Indeed, proximate causation is a fundamental principle of delictual law, whether or not intent is an element. No municipal legal system of which we are aware, for example, holds that because the tort of battery is intentional the plaintiff need not prove damages proximately caused by the battery. A showing that a tortfeasor specifically intended an indirect harm may allow a tribunal to overlook the indirect nature of the injury. But such a showing in no way abolishes the rule that a *loss caused* by the tort must be shown, as Methanex suggests.

127. *Finally*, Methanex's own authority suggests that intentional harm is relevant to the causation analysis (if at all) only where it is directed both at the claimant and at the *specific harm* alleged.[168] There is no competent evidence that California had Methanex in mind when it enacted the measures at issue, let alone that it specifically intended a decline in Methanex's stock price or any of the other losses alleged by Methanex. Moreover, the NAFTA Chapter Eleven tribunal in *S.D. Myers* rejected the notion that even a specific intent to harm an investor permitted it to award remote damages.[169] Methanex's intentional harm allegations thus do not in any way relieve it of

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[167] *See supra* ¶¶ 21-34.

[168] *See* Reply ¶ 226 n.338 (citing *Dix* and BIN CHENG, GENERAL PRINCIPLES OF LAW (1953)).

[169] *See S.D. Myers* ¶¶ 147-49 (Second Partial Award) (concluding that such damages "would be clearly punitive, and thus prohibited by Article 1135(4)").

its burden of proving losses proximately caused by the supposed breach.[170] As demonstrated below, Methanex has not discharged that burden.

B. Methanex's Loss Allegations Remain Unsupported

128. The record contains no evidence of an *existing* loss to Methanex. Methanex's unsupported witness testimony and scant documentary evidence relate solely to Methanex's concern that it may suffer ill effects from the ban at some time in the future. Articles 1116 and 1117, however, recognize only losses or damage that a claimant "*has* incurred";[171] they do not contemplate claims based on future, speculative losses. Nor are such claims recognized under international law, as the principal authority cited by Methanex expressly notes.[172]

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[170] Methanex's reliance on dictum in the *Dix* case is misplaced. *See* Reply ¶¶ 226-28 & n.338. As the United States has noted, the commission in that case *denied* compensation to the claimant who alleged that he was forced to sell his cattle at below-market prices, on the basis that "the loss complained of . . . is too remote." *Dix*, 9 R.I.A.A. 119, 121 (Am.-Venez. Comm'n of 1903). Methanex ignores this holding, and focuses instead on the commission's remark that compensation for remote losses should be denied "in the absence of evidence of deliberate intention to injure." *See* Reply ¶ 228 (citing *Dix*, 9 R.I.A.A. at 121). Notably, the commission thereafter observed that "there is in the record no evidence of any duress or constraint on the part of the military authorities to compel [claimant] to sell his remaining cattle to third parties at an inadequate price." *Dix*, 9 R.I.A.A. at 121. Although unclear, the commission's observation appears to suggest that the claimant may have had an actionable claim if he could have shown that the respondent intended the *specific* harm alleged – the under-priced sales. Methanex's other authorities likewise appear to suggest that, for intentional harm to play any role in the proximate cause analysis, it must be directed not only at the claimant, but also at the specific consequences alleged. *See* BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW 251 (1953) ("If intended by the author, such *consequences* are regarded as the consequences of the act for which reparation has to be made . . . .") (emphasis added); *see also Hickson v. Germany*, 7 R.I.A.A. 266, 268-69 (Germ.-U.S. Mixed Claims Comm'n 1924) ("[T]he great diligence of claimant's counsel has pointed this Commission to no case, and it is safe to assert that none can be found, where any tribunal has awarded damages to one party to a contract claiming a loss as a result of the killing of the second party to such a contract by a third party not privy to the contract with out any *intention of disturbing or destroying such contractual relations*.") (emphasis added).

[171] NAFTA arts. 1116(1)-(2), 1117(1)-(2) (emphasis added).

[172] *See Chorzow Factory,* 1928 P.C.I.J. (ser. A) No. 17 (Judgment No. 13 (Indemnity) (Sept. 13)) at 54 (alleged damages arising from competition between factories "come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.").

1. Debt Rating And Stock Price

129. Methanex has provided no evidence to suggest any concrete negative effect on it from the temporary decline in its long-term debt rating or its stock price.

130. With respect to the downgrade in credit rating, Methanex merely speculates that such a downgrade could have "increase[d] the cost of any new debt the Company *might* have raised."[173] It offers no evidence to suggest that Methanex did, in fact, raise new debt at any relevant time or that the downgrade had any adverse effect on the terms of that debt. The record thus does not provide any basis for establishing the fact of any injury from the downgrade.[174]

131. Methanex does not even attempt to explain how, as a factual matter, it might have been injured from its share price decline. Rather, that claim is based solely on its legal argument that *any* decline in share price necessarily injures a corporation.[175] The student notes and law review article Methanex cites, however, do not support this argument and Methanex points to no case in which an international tribunal has awarded damages based on the radical theory that States are responsible to corporations for fleeting changes in the price of their shares.[176]

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[173] Third MacDonald Aff. ¶ 32 (emphasis added).

[174] The United States therefore need not reiterate its showing that the causal chain leading to the downgrade was too remote to fall within the ambit of proximate causation in any event.

[175] *See* Reply ¶ 242 & n.366.

[176] *See id.* (citing Craig W. Hammond, Note, *Limiting Directors' Duty of Care Liability: An Analysis of Delaware's Chapter Amendment Approach*, 20 U. MICH. J.L. REF. 543, 551 (1987) (addressing effect of director's negligence on corporation's stock price); Orit Goldring & Antonia & Hamblin, Note, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 HOFSTRA LAB. L.J. 383, 397-400 (2003) (noting that anonymous defamatory messages posted to on-line stock trading boards have affected stock price of defamed corporations); Barry E. Adler & Ian Ayres, *A Dilution Mechanism for Valuing Corporations in Bankruptcy*, 111 YALE L.J. 83, 97 n.36 (2001) (addressing circularity issue when drop in stock price is used as proxy for injury to corporation because post-tort price may reflect expectation of judicial recovery for tort); *see also id.* ¶ 242 (citing *Pope & Talbot, Inc. v. Canada* ¶ 80 (Award on Damages) (May 31, 2002)) (suggesting that shareholder may bring claim for loss to corporation, not that corporation may bring claim for loss to shareholders)).

132. Contrary to Methanex's argument, the decline in share price, at best, reflects market participants' speculation about the *future* effects of any MTBE ban on Methanex's business. It does not reflect any past or present injury to Methanex. As demonstrated above, however, speculation as to future injury cannot support a claim under Articles 1116(1) and 1117(1).

133. Methanex's documentary evidence to support this argument is in any event irrelevant or unreliable. *First*, three of the stock reports submitted concern Methanex's stock price *before* the March 1999 Executive Order.[177] There is no claim before this Tribunal, however, with respect to that time period.

134. *Second*, Methanex's February 14, 2004 letter from a Raymond James analyst represents an attempt by Methanex to manufacture evidence after the fact.[178] The letter amounts to a witness statement, except that it fails to meet any of the requirements for a witness statement and is untimely. Moreover, the letter and three of the analyst reports offered are authored by an analyst who, according to Methanex's own evidence, owns Methanex shares and therefore whose interests are aligned with those of Methanex.[179] The letter cannot be considered reliable, unbiased evidence.

135. *Third*, Methanex's documents do not establish that the downgrade and share price decline were caused by the ban, as opposed to other factors. The Fitch IBCA Report, for example, states that "[t]his rating action is *primarily* due to deterioration of methanol price caused by oversupply with significant new capacity still scheduled to

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[177] *See* Third Macdonald Affidavit tabs 3-5 (19 JS).

[178] *See id.* tab 6.

[179] See *id.* tab 7 ("Bob Hastings or a member of his household has a long position in the securities of Methanex."); *see also* Reply ¶ 235 (erroneously stating that its analyst reports constitute "independent . . . and unbiased" evidence).

come on stream in the latter half of 1999, which Fitch IBCA expects will further depress prices."[180] No remedy exists under international law for losses that, even if causally connected to a breach, primarily resulted from other, more proximate causes.[181]

136. *Finally*, Methanex's claim of harm based on its share value cannot be credited in light of the performance of its shares after the measures at issue in this case were adopted. Methanex's stock price has risen approximately five-fold since the March 1999 Executive Order as the price of methanol has increased. Moreover, two of Methanex's documents suggest that an MTBE ban in the United States would actually *benefit* the company's shareholders in the long term by accelerating needed rationalization in the methanol industry.[182]

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[180] Third Macdonald Affidavit. tab 11 (19 JS); *see also id.* tab 6 (attributing stock price decline to MTBE lawsuits against U.S. refiners and concern among shareholders that Methanex's largest shareholder may suddenly sell its shares); tab 7 (attributing short-term weakness in methanol demand primarily to "seasonal weakness," "SARS in Asia" and a "weak driving season."); tab 4 (noting that concern over MTBE legislation was not limited to California, but included "North America and the world"); tab 12 ("The downgrade reflects the impact of continued weak industry fundamentals on the company's financial performance."); tab 10 ("The rating action reflects the poor medium-term outlook for the supply-demand balance in methanol, and regulatory uncertainties that might effect future demand levels for MTBE.").

[181] *See Responsabilité de l'Allemagne à Raison des Dommages Causés dans les Colonies Portugaises du sud de l'Afrique, ("Angola I"),* (Port.-Germ.), 2 R.I.A.A. 1011, 1031 (1928) (noting that the Germany-United States Mixed Claims Commission has "not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by Germany, *also resulted from other and more proximate causes*.") (emphasis added) (translation from BIN CHENG, GENERAL PRINCIPLES OF LAW 242 (1987)); *see also Hickson*, 7 R.I.A.A. 266, 267 (Germ.-U.S. Mixed Claim Comm'n 1924) (claim against Germany for failure of business for which passenger lost in sinking of *Lusitania* was key employee; holding that "[i]t is by no means clear from the records that these difficulties [experienced by claimant's apparel business] resulted from the loss to the business of Mrs. Kennedy's genius. The strong inferences are that they resulted from the improvidential financial ventures of the claimant."); *American Chicle Co. (U.S. v. Mex.)*, SPECIAL MEXICAN CLAIMS COMMISSION: REPORT TO THE SECRETARY OF STATE 591 (1940) (undated decision) ("No allowance can be made for losses resulting from increased cost of chicle consequent upon the inability of the company to operate normally from 1913 to 1915 [during time of raids by revolutionaries]. Such losses are too speculative and, moreover, were repercussions of general revolutionary conditions and not proximately due to acts of specified forces . . .").

[182] *See* Third Macdonald Affidavit tab 4 (19 JS) ("[A] complete ban would likely be *better for investors*, in that the methanol industry would have to move more quickly to shut inefficient plants . . . .") (emphasis added); *see also id.* tab 3 ("[T]he *stock price should improve* once the Governor of California has given his decision on the retention of MTBE in the RFG program and industry rationalization begins.") (emphasis added).

2. Goodwill, Customer Base And Market Share

137. The record also lacks any competent evidence of harm to Methanex's customer base, goodwill or market share. The record contains no evidence at all on Methanex's supposed share of the California market for methanol. Mr. Macdonald's statements concerning tangible assets Methanex allegedly acquired in 2002 and 2003 does not show what goodwill, if any, it had before the ban was announced, or what effect the ban supposedly had on that goodwill.[183] Nor does the mere assertion that Methanex was "excluded" from the market demonstrate that Methanex US suffered any actual harm to its revenues or profits as a result of the ban.[184] Notably, Methanex does not dispute that its sales of methanol in California were declining at a time when the market for methanol in that state underwent a significant expansion.[185]

138. Moreover, the statements concerning Methanex US's financial information contained in Mr. Macdonald's recent witness statement are not competent under international law, the IBA Rules on the Taking of Evidence or the Tribunal's instructions in its Partial Award. Mr. Macdonald, who does not appear to have a corporate finance background, does not, in the words of the First Partial Award, "identif[y] the specific source of the witness's information, whether it be from that witness's own knowledge or derived from another person or document."[186] The Iran-U.S. Claims Tribunal in *Avco* dismissed the portion of the claim seeking lost profits there for lack of proof because it was supported only by testimony of its corporate officers and

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[183] *See* Third Macdonald Affidavit ¶ 19 (19 JS).

[184] *See id.* ¶ 6.

[185] *See* Amended Statement of Defense ¶ 234 & chart at 99.

[186] First Partial Award ¶ 164; *accord* IBA Rules art. 5(2)(b).

not by documentary evidence.[187] Methanex's similarly defective showing calls for a similar result.

3. Downward Pressure On Global Methanol Price

139. The record also lacks any evidence of a drop in the global price of methanol caused by the ban. In fact, Methanex concedes in these proceedings and elsewhere that, with methanol prices at historic highs, the ban has had no measurable market effects at all.[188] Rather, Methanex's claim is based on the mere *possibility* that a loss of MTBE methanol demand in California might have some effect on the global methanol industry in the future.[189] As noted, the NAFTA does not recognize, and international tribunals disregard, such future, speculative losses.

4. Continued Idling Of Methanex Fortier

140. Methanex's claims concerning the idling of its Fortier plant – now expanded to include the Fortier write-off and an alleged decision in February 2004 to shut it permanently[190] – likewise has no support in the record. As the United States noted with respect to Methanex's original claim, it strains credulity to believe that

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[187] *See Avco Corp. v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200, 209 (1988).

[188] *See* Reply ¶ 144 ("By mid-2003, the market for methanol had changed for the better and supply and demand, the two principal determinants of price for any commodity, were in a balanced-to-tight situation. Because of the strong price, *the immediate damage of the MTBE ban was not felt.*") (emphasis added); *see also* CIBC Investor Conference at 5:36 (Feb. 19, 2004) (25 JS tab 2) (U.S. reductions in MTBE demand to date have "*had no impact on our industry*") (emphasis added); Transcript of Methanex 2002 Second Quarter Earnings Conference Call at 2 (18 JS tab 140 at 2659) ("[W]e don't expect the impact of [the loss of California MTBE demand] to have much of an impact on pricing, *if at all*.") (emphasis added); Transcript of Methanex 2002 Second Quarter Earnings Conference Call at 2 (18 JS tab 140 at 2659) (the loss of the California MTBE market "just happens to be coming at a time when it's *unlikely to have any significant impact*") (emphasis added); Transcript of Methanex 2003 First Quarter Earnings Conference Call at 3 (18 JS tab 142 at 2679) ("[T]he reduction in [MTBE] consumption in the United States is taking place, but of course it's overshadowed by supply constraints, *so it's hard to see the impact of the reduction*.") (emphasis added).

[189] *See, e.g.,* Reply ¶ 146 (speculating that the ban may reduce the future growth rate for MTBE demand); Third Macdonald Affidavit ¶ 35 (19 JS) (suggesting that the ban may have a future impact on the methanol industry if the market shifts from an undersupply situation to an oversupply situation).

[190] *See* Reply ¶¶ 121-24.

Methanex does not have a single document in its files concerning its motivation for these major corporate decisions. Methanex's Reply, which relies exclusively on a single, inapposite line in a company annual report, does nothing to fill this hole in the record.[191]

141. Contrary to Methanex's allegations, the overwhelming weight of the evidence shows that Methanex idled the Fortier plant because of the high cost of natural gas in North America and as part of its corporate plan to shift all its production out of North America to more cost-effective, offshore locations.[192] The record does not support a causal relation between the ban and the closure of Fortier.

142. Moreover, there is no dispute that the Fortier plant did not serve the Calfornia market. Rather, Methanex's assertions are based entirely on the supposed *indirect* effect on the plant from any change in the global price of methanol and from MTBE bans in other states.[193] Since Methanex concedes that the ban has had no impact on the global methanol price, *a fortiori* it could not have caused the alleged injuries to

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[191] Methanex's sole piece of evidence on this point, a page from its 2002 annual report, only further undermines Methanex's causation argument. *See* Third Macdonald Affidavit tab 2 (19 JS). Methanex contends that report states that the California ban injured Fortier. *See id.* ¶ 9. The report says no such thing: rather, it merely speculates, in boilerplate warning language, that a *nationwide* MTBE ban could affect Fortier's operations *in the future.* *See* Macdonald Affidavit tab 2 at 53 (19 JS). Moreover, in the "Summary" section concerning methanol demand in the United States, the report concludes that the favorable methanol market conditions "will *minimize the impact of the phase out of MTBE by California gasoline producers*." *Id.* (emphasis added).

[192] *See* Amended Statement of Defense ¶¶ 241-47 (citing, among other things, Press Release, Methanex Corp., *Methanex Announces Write-off of Fortier Methanol Facility* (Nov. 25, 2002) (17 JS tab 107 at 2267)); *see also* Third Macdonald Affidavit ¶ 12 (19 JS) (conceding that the supposed recent decision to permanently close Fortier was also motivated by causes other than the California ban, including the plant's high operating costs and MTBE legislation in other states).

[193] *See* Third Macdonald Affidavit ¶¶ 9-11 (19 JS) (failing to show that Methanex Fortier lost any sales to California and merely alleging indirect effects); *id.* ¶ 12 ("The permanent loss of California MTBE demand, with the ban now having been fully implemented, and the losses triggered by similar bans in other states, was a substantial consideration in our decision [to shut Fortier permanently].").

the Fortier plant. And there is no basis for Methanex to state a claim based on bans in other states.

5. Methanex's Admissions That The Ban Has Had No Adverse Effect

143. That Methanex has failed to produce evidence of an existing injury comes as little surprise, for Methanex has for years advised its investors that it has felt no adverse impact from the ban.[194] In fact, as recently as February 19, 2004 – the very day Methanex submitted its Reply – Bruce Aitken, Methanex's President and Chief Operating Officer, made the following comments at an investor conference:

> MTBE has hung like something of a dark shadow over our industry for the last year or so. *We have always felt it's been a bit – not much of an issue*. Here we are in 2004. The methanol industry is very tight and prices are very high. You can see from the chart that we've already had big reductions in MTBE demand in the U.S. and *it's really had no impact on our industry*.[195]

Likewise, in its Reply, Methanex concedes that, at least as of mid-2003, it had not felt any "immediate damage [from] the MTBE ban."[196] These statements alone bar Methanex's claims under Articles 1116(1) and 1117(1), which, as noted, contemplate only actual existing losses.

144. Methanex cannot resolve the discrepancy between what it has been stating to this Tribunal and what it has been advising its investors. Its only response is a half-hearted attempt to explain away one statement made by its Chief Executive Officer Pierre

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[194] *See* Third Macdonald Affidavit tab 2 (19 JS).

[195] CIBC Investor Conference at 5:26 (Feb. 19, 2004) (emphasis added) (accompanying CD, 25 JS tab 2).

[196] *See* Reply ¶ 144 ("By mid-2003, the market for methanol had changed for the better and supply and demand, the two principal determinants of price for any commodity, were in a balanced-to-tight situation. Because of the strong price, *the immediate damage of the MTBE ban was not felt.*") (emphasis added).

Choquette in mid-2003.[197] Contrary to Methanex's arguments,[198] Mr. Choquette's words are plain and clear: even a nationwide MTBE ban would be "not that big a deal" for Methanex. Mr. Aitken's repetition of the same message at a conference six months later confirms that Mr. Choquette's words meant precisely what they said.

6. Methanex's Claim Of Mitigation

145. Finally, Methanex's argument concerning its supposed mitigation of losses is baseless. First, it is difficult to see how Methanex's forsaking sales in a rapidly expanding methanol market could be considered "mitigation." Rather, the uncontested evidence shows that Methanex began pulling out of the California market *years* before the ban had any effect because it was losing money in that market.[199]

146. Moreover, Methanex's claim of mitigation in no way relieves it of the requirement that it prove damages. At the very least, Methanex would have to show that it could have profitably produced methanol for sale in the California market after the ban went into effect. No such evidence of record exists. To the contrary, the evidence shows that Methanex has been on "order control" – unable to meet even its current customers' demands – and the plant that supplied the California market was unprofitable.[200] This record supports no finding of loss or damage from the ban.

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[197] *See* Reply ¶ 146.

[198] Methanex's contention that Mr. Choquette's projection of a future decline in the annual growth rate for MTBE demand demonstrates an existing harm to Methanex attributable to the ban is without merit. First, the comment relates to a *future possible* event, not an existing injury. Second, there is nothing in the text cited by Methanex to suggest any connection between the California ban and the anticipated growth rate decline. Rather, the context suggests that Mr. Choquette was referring to other states in the U.S. where MTBE was in the process of being phased out.

[199] *See* Amended Statement of Defense ¶ 234 (chart showing Methanex withdrawing from the California market as demand was increasing).

[200] Transcript of Methanex 2003 First Quarter Earnings Conference Call at 7 (18 JS tab 142 at 2683) ("with the capacity that we've lost in New Zealand, we currently are on order control"); *see also* Press Release, Methanex Corp., Statement to Local Media Regarding Kitimat Methanol Plant (May 24, 2000) (17 JS tab

147. In sum, Methanex's remote and speculative claims fall far short of the proximate cause standard under Chapter Eleven. Methanex has failed in any event to show any existing loss or damage that is attributable to the ban.

III. THE RECORD ADMITS NO NATIONAL TREATMENT VIOLATION

148. In its Reply, Methanex abandons any attempt to prove the elements of a breach set out in the text of Article 1102. Article 1102 is clear: to establish a national treatment violation Methanex must prove that it or an investment has been accorded less favorable treatment than that accorded to U.S. investors and investments in like circumstances.

149. Because the record supports no such showing, Methanex invents a three-step analysis designed to shift the burden of proof to the United States to justify California's ban.[201] Methanex's three-part "test," however, finds no support in the text of Article 1102 and cannot be reconciled with other relevant NAFTA provisions.

A. The Undisputed Facts Establish That Canadian-Owned Methanol Producers Received National Treatment

150. The uncontested evidence of record establishes the existence of a substantial U.S.-owned methanol industry in the territory of the United States.[202] The undisputed facts also demonstrate that Methanex is in like circumstances with those U.S. investors and Methanex US and Methanex Fortier are in like circumstances with those

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113 at 2273) (Methanex shut down the Kitimat plant in July 2000 because it had been "losing substantial sums of money"); Brian Lewis, *Outlook is Grim: Kitimat's Reopened Methanol Plant May Not Survive*, VANCOUVER PROVINCE, at A35 (May 31, 2001) (16 JS tab 69 at 1587) (after temporarily reopening the plant in 2001, it was, according to Methanex, "at best . . . a break-even operation.").

[201] *See* Reply ¶ 168.

[202] *See* Amended Statement of Defense ¶¶ 286-96 (identifying U.S.-owned companies that produce and market methanol in the United States and U.S. companies that own or control U.S. companies that produce and market methanol in the United States).

U.S.-owned investments. The uncontested record establishes that, to the extent that the California measures accorded the methanol industry any treatment, they did not differentiate between methanol producers, marketers or investors on the basis of their nationality of ownership.

151. This record by itself is more than sufficient to establish that there was no breach of Article 1102 here. The record shows that California accorded Canadian-owned investments "treatment no less favorable than that it accords, in like circumstances, to investments of its own investors."[203] Article 1102, by its plain terms, requires no more than this.

152. Methanex's argument in response – based on the observation that one need not be in identical circumstances to be considered to be "in like circumstances" – misses the mark. As the title of the Article, "National Treatment," and its text make clear, the function of the national treatment provision is to address discrimination on the basis of nationality of ownership of an investment.[204] The function of addressing nationality-based discrimination is served by comparing the treatment of the foreign investor to the treatment accorded to a domestic investor that is most similarly situated to it. In ideal circumstances, the foreign investor or foreign-owned investment should be

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[203] NAFTA art. 1102(2); *see also* Amended Statement of Defense (¶¶ 287-93) and evidence cited therein; Methanex Rejoinder on Jurisdiction, Admissibility at 29 ("domestic methanol producers are equally damaged by the MTBE ban."); Hearing on Jurisdiction and Admissibility, Transcript (Uncorrected) at 403 (July 31, 2001) (statement of Christopher Dugan, Esq.) ("U.S. methanol producers were equally damaged by the ban."); *id*. ("[W]e 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.").

[204] *See* NAFTA art. 1102(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors . . . ."); *id.* art. 102(1) ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, *including national treatment* . . . .") (emphasis added); *see also Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 181 (Award) (Dec. 16, 2002) ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.'") (citation omitted).

compared to a domestic investor or domestically-owned investment that is like it in all relevant respects, but for nationality of ownership. When nationality is the only variable, such a comparison serves the Article's purpose of ascertaining whether the treatment accorded differed on the basis of nationality of ownership. In the words of the Government of Canada, expressed in its most recent Article 1128 submission, in a national treatment case, a tribunal ought to examine "an investor or investment where *all* the circumstances of the according of the treatment are 'like', *except* that the investor or investment is domestic."[205]

153. In this case, the treatment accorded is precisely the same for foreign and domestic investors in identical circumstances. There is no differentiation on the basis of nationality of ownership and, thus, no discriminatory treatment. In terms of the ordinary meaning of Article 1102 in its context, "National Treatment" has been accorded in such a case and the "Party [has] accorded[ed] to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors . . . ."[206]

154. By contrast, Methanex's approach, which would compare it and its investments to ethanol producers, does not accord with the function of Article 1102 or its ordinary meaning and context. The United States agrees that the phrase "in like circumstances" allows for a certain degree of flexibility in the national treatment analysis, such as where there is no identical domestically-owned counterpart to the foreign-owned investment. In such a case, a tribunal may look farther afield and expand the scope of domestically-owned comparators as long as they are similar enough to justify considering their circumstances to be "like" that of the foreign investor or investment. Where,

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[205] Canada Fourth Article 1128 Submission ¶ 11 (emphasis in original).

[206] NAFTA art. 1102(1) & title.

however, there are substantial domestically-owned investments in identical circumstances, tribunals should not look farther afield for less similar comparators.

155. Accepting Methanex's approach would compel a tribunal to ignore the treatment accorded the identical domestic investor and investment and, instead, compare a foreign investor's treatment to the treatment accorded a less similar group that is in some respects arguably "like" the foreign investor. This reading of Article 1102 would prevent a NAFTA Party from according different treatment to distinct groups of its own nationals whenever an investor or investment of another NAFTA Party forms part of one of those groups. For example, in this case, such a reading would prevent the United States from according different treatment to domestically-owned methanol and domestically-owned ethanol producers. Such a reading does not accord with the function of Article 1102 as addressing nationality-based discrimination.[207]

156. Another Chapter Eleven tribunal has rejected Methanex's approach, recognizing that such a reading would transform Article 1102 into a provision addressing treatment of unlike groups of domestic investors, and defeat the ability of the NAFTA Parties to adjust their regulation to take into consideration the different circumstances of similar but distinct national groups. In *Pope & Talbot v. Canada*, the U.S. owner of a softwood lumber producer located in British Columbia challenged Canada's imposition of export fees on softwood lumber exports to the United States from certain Canadian provinces, including British Columbia. The claimant argued, among other things, that it was in like circumstances with Canadian-owned lumber producers located in other Canadian provinces that were not subject to the export fees. In dismissing the claimant's

[207] *See Feldman* ¶ 171 ("Article 1102 says nothing regarding discrimination among different classes of a Party's own investors.").

national treatment claim, the tribunal found that the claimant was not "in like circumstances" with the Canadian-owned lumber producers in non-fee provinces precisely because there were more than 500 Canadian-owned producers that, like claimant, were located in provinces where they were subject to the export fees.[208] Similarly, here, where there are substantial domestically-owned investors and investments in precisely the same circumstances as Methanex and its investments, those investors and investments are appropriate comparators for a national treatment analysis.

157. Adopting Methanex's reading, in sum, would mean that it and its investments would receive *better* treatment than *all* U.S.-owned methanol producers and marketers. The treaty sanctions no such result. When compared with domestic investors and domestically-owned investments in like circumstances, the evidence demonstrates that Methanex and its investments were accorded national treatment.

B. Methanex Is Not In Like Circumstances With ADM

158. Methanex's argument that it should be deemed to be in like circumstances with ethanol producers and marketers because they allegedly "compete" with one another fails on the law and the facts in any event. As the Government of Canada recognizes, while a competitive relationship may be one factor to be taken into account in determining whether investors and investments are in like circumstances with one another, that factor is not determinative.[209] Rather, account must be taken of all of the

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[208] *Pope & Talbot Inc. v. Canada* ¶¶ 87-88 (Merits Award – Phase 2) (Apr. 10, 2001). For this reason, Methanex's reliance on Article 1102(3) is misplaced. That provision provides that investors and investments of another Party are entitled to the best in-state or out-of-state treatment provided to domestic investors and domestically-owned investments in like circumstances. The provision does not expand the notion of "in like circumstances" in any manner.

[209] *See, e.g.,* Canada Fourth Article 1128 Submission ¶ 8 ("A determination that investors or investments compete for the same business may be one of several relevant factors in determining whether the treatment accorded by a NAFTA Party is 'in like circumstances.' However, it cannot be the sole or determining factor."); *see also* IISD Amicus Submission ¶ 39 ("Commercial substitutability is not an appropriate

relevant circumstances, which will inevitably vary depending on the nature of the measure at issue.

159. For instance, regulations limiting business activities in certain environmentally sensitive areas or imposing additional limitations on emissions where air pollution is more severe will not *ipso facto* violate national treatment even though some of these regulations may be applied to some operations and not to other, competing operations. In those cases, direct competitors may be deemed not to be in like circumstances for the purpose of the measure at issue because of their operations' differing locations.

160. Thus, in *Feldman v. Mexico* – a Chapter Eleven case concerning a tax rebate available for manufacturers, but not resellers, of cigarettes – the tribunal rejected competition as determinative in an analysis of whether investments are "in like circumstances." Taking into account the nature of the measure at issue, the tribunal considered foreign resellers of Mexican cigarettes to be in like circumstances with domestic resellers of Mexican cigarettes, notwithstanding the fact that such resellers do, in fact, compete with cigarette manufacturers.[210] The tribunal recognized that focusing exclusively on competition could impede States from enacting legitimate regulation and

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limitation to apply to the notion of circumstances: there is no textual basis for this and the contextual element that the term 'circumstances' implies clearly suggests that substitutability is not enough."); Bluewater Network, et al. Amici Submission ¶ 31 ("A narrow analysis that looks only at economic competition would ignore circumstances that explain the need for health and environmental measures . . . ."); *id.* ¶ 32 ("[A]n investor whose investment poses a threat to health or the environment is, for purposes of NAFTA, in a different circumstance from an investor whose investment poses no such threat.").

[210] *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶¶ 170-72, Award (Dec. 16. 2002).

would not serve Article 1102's purpose of prohibiting discrimination *on the basis of nationality*.[211]

161. The WTO likewise has eschewed relying on competition as the sole factor in determining whether products are "like." As noted in the United States' Amended Statement of Defense, the WTO Appellate Body reversed a panel's findings that cement-based products containing chrysotile asbestos fibres and cement-based products containing PVC fibres were like products. A primary reason given by the WTO Appellate Body in support of its determination was that the asbestos-containing products – but not their non-asbestos containing substitutes – had been demonstrated to pose risks to human health. Methanex's reliance on competition between companies as the sole factor for determining whether investments are in like circumstances is unsustainable.

162. Moreover, the *S.D. Myers* case, on which Methanex relies extensively, does not support its claim that it and its investments should be considered to be "in like circumstances" with ethanol manufacturers. The tribunal in that case found the claimant, a U.S. company that remediates PCB waste in the United States, to be in like circumstances with a Canadian company that remediates PCB waste in Canada.[212] There, however, it was undisputed that the claimant and the Canadian-owned comparator engaged in *precisely* the same business, *i.e.,* remediation of PCB waste and, therefore, were direct competitors. The differences between the companies relevant to the

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[211] *See id.* ¶ 170 ("[T]here are at least some rational bases for treating producers and re-sellers differently, *e.g.,* better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit gray market sales, even if some of these may be anti-competitive. Thus, . . . the Tribunal does not believe that such producer-reseller discrimination is a violation of international law."); *id.* ¶ 171 ("Article 1102 says nothing regarding discrimination among different classes of a Party's own investors.").

[212] *S.D. Myers v. Canada* ¶ 251 (Partial Award) (Nov. 13, 2000). As the United States noted in *ADF Group Inc. v. United States of America,* the *S.D. Myers* tribunal erred in comparing the treatment accorded to investments with that accorded to investors. That criticism, however, is immaterial to the point addressed in the text.

tribunal's analysis were the location of the respective companies and the nationalities of their owners.

163. Here, by contrast, that is not the case. As the United States demonstrated in its Amended Statement of Defense and in Part I above, Methanex and its investments do not compete with ADM. Methanex Fortier is an idled factory that once produced methanol, and Methanex US is a marketing company whose sole function is to market methanol in the United States. Methanex's role as an investor in the United States is its alleged ownership and control of both Methanex Fortier and Methanex US. ADM, on the other hand, is an agricultural conglomerate that procures, transports, stores, processes and sells a wide-range of agricultural products, one of which is ethanol. ADM cannot be said to compete with an idled methanol factory or with a company whose sole purpose is to market methanol, which ADM does not produce. Nor can ADM be said to compete with the investor that owns either of these enterprises. In sum, Methanex's argument that it and its investments are "in like circumstances" with ADM because they compete is legally and factually without merit.

C. The GATT Analysis Advanced By Methanex Is Legally Irrelevant And Does Not Support Its Claim

164. As the United States demonstrated in its Amended Statement of Defense, the national treatment provision of Article 1102 addresses discrimination on the basis of the nationality of investors and their investments. The Article does not address discrimination based on the origin of goods.[213] All three NAFTA Parties have now stated that they share this view, and concur that jurisprudence interpreting provisions governing the national treatment of *goods* in the GATT is inapposite in ascertaining whether an

[213] Amended Statement of Defense ¶¶ 300-04.

investor or an *investment* has been accorded less favorable treatment within the meaning of Article 1102 of the NAFTA.[214]

165. Such an agreement among all of the Parties to a treaty "shall be taken into account" in the interpretation of the meaning of the treaty's terms.[215] Thus, despite Methanex's reluctance "to take seriously" the United States' contention in this regard,[216] there can no longer be any doubt that the NAFTA Parties did not intend GATT jurisprudence interpreting the phrase "like products" to govern the interpretation of the phrase "in like circumstances" in NAFTA Article 1102.

166. Despite its demonstrated inapplicability to NAFTA Chapter Eleven cases, Methanex continues to rely on GATT jurisprudence interpreting a different phrase in a different agreement.[217] In its Amended Statement of Defense, the United States demonstrated that application of the GATT jurisprudence that Methanex relies upon would result in the conclusion that methanol and ethanol would *not* be considered like

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[214] *Id.*; *accord* Canada Fourth Article 1128 Submission ¶ 7 ("Canada disagrees with any interpretation [of Article 1102] that relies largely on authorities relating to [GATT] Article III . . . . The GATT 'like products' test is not the same as the 'in like circumstances' test in Article 1102."); *id.* n.3 ("[T]he decisions respecting Article III of the GATT 1994 and its predecessor have, at best, very limited application to the provisions of Chapter Eleven and certainly cannot be applied *mutatis mutandis*."); Mexico Fourth Article 1128 Submission ¶ 16 ("Mexico agrees with the U.S. submissions at paragraphs 300-304 of the Amended Statement of Defense."); *see also* IISD Amicus Submission ¶ 35 ("IISD does not agree with the broader viewpoint that trade law approaches can simply be transferred to investment law."); *id.* ¶ 36 ("[T]he differences [in the terms 'like products' and 'in like circumstances'] reflect the different nature of trade in goods as compared to the making of investments."); Bluewater Network, et al. Amici Submission ¶ 30 ("As the United States has rightly noted, [the phrase 'like products' as used in GATT] has a different meaning from 'like circumstances.'"); *id.* ¶ 35 (noting that WTO rules and decisions concerning a "least trade-restrictive" requirement are irrelevant to a NAFTA Article 1102 analysis).

[215] Vienna Convention art. 31(3)(a)-(b); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 73 (1989) ("If the parties to a treaty agree on a common interpretation either by a formal treaty or otherwise, this interpretation acquires an authentic character and prevails over any other.").

[216] Reply ¶ 181 ("The U.S. assertion that the international law of the GATT and WTO is not relevant to these proceedings is difficult to take seriously.").

[217] Reply ¶¶ 181-83.

products.[218] Methanex does not offer evidence to refute the United States' conclusions in this regard. Instead, and despite the WTO's admonition that in a "like products" analysis, *all* of the evidence must be taken into account,[219] Methanex focuses exclusively on one factor – end use – and incorrectly concludes that this factor favors its position. Review of the record on all four of the factors advanced by Methanex, however, establishes that methanol and ethanol would not be considered to be "like products" under the GATT.

167. *First*, the evidence in the record conclusively establishes that methanol and ethanol are physically dissimilar in essential respects.[220] Methanex has introduced no evidence to contradict this finding.

168. *Second*, Methanex does not dispute that methanol and ethanol have different tariff classifications.[221]

169. *Third,* the evidence demonstrates that methanol and ethanol do not share the same end-use as a gasoline additive.[222] In the face of this evidence, Methanex again invokes the conclusory, unsupported statement made by Professor Ehlermann in his November 2002 Opinion.[223] Methanex does so despite the fact that, as the United States pointed out in its Amended Statement of Defense, Professor Ehlermann expressly stated

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[218] Amended Statement of Defense ¶¶ 309-25.

[219] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R ¶ 102 (Mar. 12, 2001); *see also id.* ¶ 109.

[220] Amended Statement of Defense ¶¶ 310-14 (citing relevant portions of the Burke Report).

[221] *Id.* ¶¶ 323-24 (citing relevant tariff classifications).

[222] *Id.* ¶¶ 315-21; Burke Expert Report ¶¶ 13-15, 94-95, 100 (13 JS tab B); Caldwell Statement ¶¶ 6, 30-31 (13 JS tab C).

[223] Reply ¶ 182.

that he was opining on the *legal* analysis that a WTO tribunal would employ and, in doing so, *assumed* the very proposition for which Methanex cites him for support.[224]

170. The evidence, however, demonstrates that ethanol is used as an oxygenate additive in gasoline and methanol is not.[225] Apparently conceding this point, Methanex asserts that methanol and ethanol "compete" because they both provide the "essential oxygenating element for RFG."[226] The evidence does not support Methanex's contention, however.

171. Because methanol is not and cannot be used as an oxygenate additive, it is not (and has never been) added to California gasoline to provide the "oxygenating element" in gasoline. MTBE, and not methanol, was used to provide the "essential oxygenating element for RFG," and now ethanol is used to provide the oxygenating element in California gasoline. Thus, while MTBE and ethanol "compete" to provide the oxygenating element in California gasoline, methanol and ethanol do not and never have so competed as oxygenates.

172. In any event, even if one were to ignore the fact that MTBE, and not methanol, provides the oxygenating element in California gasoline and, thus, competes with ethanol, this would not help Methanex. As the United States demonstrated in its Amended Statement of Claim, the evidence demonstrates that *MTBE and ethanol* would

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[224] Amended Statement of Defense ¶ 317 & n. 516.

[225] *See* Burke Expert Report ¶¶ 13, 97, 103, 106; *see also* Caldwell Statement Exh. 1 & ¶¶ 28, 30-31 (13 JS tab C). While Methanex argues that products with multiple end-uses may be considered "like" for purposes of their overlapping end-uses, the *only* end-use that is relevant in this case is a product's availability for use as an oxygenate additive in gasoline.

[226] Reply ¶ 183.

not be considered like products under a GATT analysis either.[227] In its Reply, Methanex offers no evidence to the contrary.

173. *Finally*, because ethanol and methanol are not used for the same purpose, customers naturally distinguish between the two products. Thus, the factor concerning consumer tastes and preferences supports the United States' conclusion that ethanol and methanol would not be considered "like products" under a GATT analysis.

D. Methanex Has Not Proven "Less Favorable" Treatment

174. Not only has Methanex failed to meet its burden of demonstrating that it or its investments are in like circumstances with ethanol producers, Methanex has also failed to show that it or its investments have received any less favorable treatment that could constitute the basis for a national treatment violation.

175. Methanex cannot show that the ban of MTBE in California gasoline accords less favorable treatment to it and its investments, in favor of ethanol producers and marketers because neither it nor its investments manufacture or market MTBE. As the United States has demonstrated and Methanex has acknowledged, methanol is not and cannot be used as an oxygenate additive in gasoline.[228]

176. Thus, the ban accords *no* treatment to methanol producers and marketers: Methanex and its U.S. investments may continue to produce and sell methanol anywhere in the United States. As amply demonstrated in Part II(B) above, Methanex has offered no evidence to show how these measures accord it or its investments "treatment" at all.

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[227] Amended Statement of Defense ¶¶ 326-42.

[228] *See supra* ¶ 18 & n.225.

E. GATT Article XX Does Not Shift The Burden Of Proof To The United States

177. Methanex's reliance on Article XX of the GATT is misplaced. NAFTA Article 2101(1) explicitly provides that GATT Article XX is incorporated into certain chapters of the NAFTA, including those governing trade in goods (Part Two), "*except* to the extent that a provision of that Part applies to . . . *investment*."[229] Article 2101 does not incorporate GATT Article XX into Chapter Eleven, which is in Part Five of the NAFTA. If the NAFTA Parties had intended for GATT Article XX to apply to *investment,* there is every indication that they knew how to achieve that result. The NAFTA Parties did not, however. Under the clear terms of the treaty, GATT Article XX has no application to NAFTA Article 1102.[230]

178. Nor do the authorities Methanex cites support the proposition that the United States bears the burden of proof in Article 1102 claims and that "exceptions to national treatment are narrowly construed."[231] The case of *Ethyl Corporation v. Canada* was settled before any award on the merits was issued.[232] That tribunal made no determinations regarding the legitimacy of the challenged regulation and propounded no

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[229] NAFTA art. 2101(1)(a) (emphasis added).

[230] In a seeming contradiction, Methanex acknowledges that Article 1102 does not incorporate Article XX of the GATT or contain a provision similar to it and, yet, it proceeds as if Article XX of the GATT nevertheless applies to its claims. *See* Reply ¶ 188 (acknowledging that Article XX of the GATT does not apply to Chapter Eleven, yet arguing that "GATT and WTO case law clearly places on the U.S. the burden of proof regarding the validity of an environmental measure that denies national treatment."); *id.* ¶¶ 189-90 (analyzing its national treatment claim as if Article XX of the GATT were applicable); *see also* IISD Amicus Submission ¶ 18 (criticizing Methanex's attempt to "incorrectly incorporate certain trade law rules into Chapter 11, as well as to incorrectly impose the limitations surrounding the exception provisions of the General Agreement on Tariffs and Trade and the NAFTA itself into Chapter 11, which deals with investment-related and not trade-related obligations of the host states."); *id.* ¶ 22 (noting the inapplicability of GATT Article XX to NAFTA art. 1102).

[231] *See* Reply at III(B)(4)(b).

[232] *See Ethyl Corp. v. Canada* (Procedural Order) (Nov. 9, 1998) (providing that, pursuant to Article 34 of the UNCITRAL Arbitration Rules, arbitration is terminated).

view on whether a "narrow exception" for environmental measures exists under Article 1102. Nor did the *Metalclad* tribunal opine on NAFTA Article 1102: the award in that case addressed only NAFTA Articles 1105(1) and 1110.[233] Finally, the *S.D. Myers v. Canada* case supports a conclusion opposite to that asserted by Methanex: the tribunal there found environmental impacts to be part of the "like circumstances" that an investor must prove, not a narrowly construed defense that the Party may assert, as Methanex contends.[234]

179. In sum, contrary to Methanex's contention, it is not the United States' burden under Article 1102 to justify California's ban by "showing that the measures . . . implement valid environmental goals."[235] And, Article 1102 certainly does not require the United States to bear the burden of demonstrating that the California ban does not "constitute a disguised restriction on international trade."[236] Rather, it is Methanex that must shoulder the burden of demonstrating that it or its investments are in like circumstances with domestic investors and investments – taking into account *all* of the relevant circumstances, including environmental and public health impacts – and that they have received less favorable treatment than those domestic investors or investments. This Methanex has failed to do.

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[233] *See Metalclad v. Mexico*, ICSID Case No. ARB(AF)97/1 ¶¶ 1, 72 (Award) (Aug. 30, 2000) (stating that claimant alleges violations of NAFTA arts. 1105(1) and 1110).

[234] *See S.D. Myers, Inc. v. Canada* ¶ 250 (Partial Award) ("The assessment of 'like circumstances' must also take into account circumstances that would justify government regulations that treat them differently in order to protect the public interest.").

[235] Reply ¶ 168; *see also id.* ¶ 197 ("[T]he U.S. cannot show the California measures were necessary. . . . Accordingly, the United States has failed to meet its burden under Article 1102 . . . . ").

[236] Reply ¶ 195.

F. Methanex's Suggestion That U.S. Ethanol Policies Violate Other Treaty Obligations Is Irrelevant

180. Tacitly recognizing that it has no claim under the national treatment provision of the investment chapter, Methanex's Reply now argues that "support and protection" provided to the ethanol industry "violates the United States' WTO obligations" as well as various provisions of the NAFTA governing trade in goods.[237] Chapter Eleven plainly bars consideration of these assertions by a tribunal established under its dispute resolution provisions.[238] Nor do such assertions provide any support for Methanex's national treatment claim.

181. *First*, far from barring differentiation on the basis of nationality in the granting of subsidies, the NAFTA expressly *permits* it. Article 1108(7)(b) states that "Article[] 1102 do[es] not apply to subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance." Thus, it is legitimate for a NAFTA Party to favor domestic industries in granting subsidies.

182. *Second*, Methanex errs in suggesting that California's examination of the possibility of an in-state ethanol industry could be illegitimate under the investment chapter in any event.[239] Chapter Eleven applies only to "investments . . . in the territory

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[237] Reply ¶ 198; *see also id.* ¶¶ 199-200.

[238] *See* NAFTA art. 1116(1) (limiting claims of breach subject to arbitration to breaches of Section A of the investment chapter); *id.* art. 1117(1) (same); *see also Access to Information under Article 9 of the OSPAR Convention (Ireland v. U.K.)*, Final Award ¶ 85 (July 2, 2003) ("the competence of a tribunal established under the OSPAR Convention was not intended to extend to obligations the Parties might have under other instruments (unless, of course, parts of the OSPAR Convention included a direct *renvoi* to such other instruments).").

[239] *See, e.g.,* Reply ¶¶ 93-101 (sub-section of Methanex's Reply entitled "Davis Intended To Establish a California Ethanol Industry"); *id.* ¶ 101 ("The U.S. does not, in fact, deny that California intended to create an in-state industry. . . . And that protectionist game is evidence of illegal, discriminatory intent.") (emphasis omitted); *id.* 198-200 ¶¶ (sub-section of Methanex's Reply entitled "U.S. Protection of Its Ethanol Industry Violates Numerous WTO Obligations").

of the Party."[240] Indeed, a principal objective of the NAFTA is to "substantially increase investment opportunities *in the territories of the Parties*."[241] Thus, it is consistent with the very purpose of the investment chapter for States to foster investment *within their borders*. California's studies of the potential for an in-state ethanol industry are fully consonant with this purpose.

183. *Third*, Methanex's allegations concerning the United States' support for the ethanol industry through subsidization could not support a national treatment violation in any event. What Article 1102 prohibits is discrimination on the basis of nationality of ownership with respect to, among other things, the establishment or operation of investments within a NAFTA Party's territory.[242] While California has investigated the possibility of an in-state ethanol industry (which has not to date materialized), Methanex has submitted no evidence to suggest that California has granted less favorable treatment to foreign-owned investments, as compared with U.S.-owned investments. All investors, whether domestic or Canadian, and all investments, whether U.S.-owned or Canadian-owned are entitled to take advantage of any opportunities in California with respect to the establishment of any in-state ethanol industry. Thus, the mere hope that an in-state ethanol industry will be established cannot form the basis for a national treatment violation.

184. Methanex is thus wrong as a matter of both fact and law that the United States' granting of subsidies to the ethanol industry and California's studies of the

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[240] NAFTA art. 1101(1).

[241] *Id.* art. 102(1)(c) (emphasis added).

[242] *See, e.g.,* NAFTA art. 1102(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.").

potential for an in-state ethanol industry can in any way support its national treatment claim. Methanex admits this when it hypothesizes that perhaps "U.S. trade partners will challenge the ethanol programs at the WTO,"[243] implicitly acknowledging that an investment-chapter tribunal is an inappropriate forum to air such grievances. Similarly, Methanex does not even purport to explain how its conclusion that *if* a certain bill *were* to become law sometime in the future this *might* trigger a *WTO complaint* is germane to this dispute. It is clear that it is not. These allegations lend no support to Methanex's Article 1102 claim.

IV. THE MEASURES DO NOT VIOLATE ARTICLE 1105(1)'S MINIMUM STANDARD

185. In its Reply, Methanex all but abandons its claim under Article 1105(1). It does not deny that the overwhelming weight of decisions under NAFTA Chapter Eleven rejects its view of Article 1105(1) and accepts the validity of the FTC Interpretation. Nor does it attempt to identify any principle of customary international law that could support any claim under Article 1105(1) on these facts.

186. Instead, it argues principally that the FTC Interpretation was "suspect" because it "specifically addresse[d] a key assertion in Methanex' claim," notably, its claim under Article 1105(1).[244] There is a certain irony to this argument from the United States' perspective. *Every one* of the claimants in cases pending against the United States in 2001 has made this same argument – that the FTC Interpretation specifically targeted

[243] Reply ¶ 198.

[244] Reply ¶ 203.

that claimant.[245] This fact confirms what is evident on the face of the Interpretation: that it was designed to clarify an issue of general importance to the proper operation of Chapter Eleven, and not to address a question specific to any one case.

187. Moreover, Methanex's argument, if taken to its logical conclusion, would render the NAFTA's provision for FTC interpretations ineffective. Under Methanex's view, it would be improper for the FTC to issue an interpretation during any period in which any claim under the Article interpreted was pending. Under Methanex's theory, it would never be appropriate for the FTC to issue a clarification of Article 1105(1) based on the operation of the investment chapter – because at least one claim under that Article has been pending against at least one NAFTA Party since the first such claim was submitted to arbitration in 1997.[246]

188. In short, the text of Articles 1131(1) and 2001 do not limit the FTC's authority to issue interpretations to periods in which no claim under the provisions interpreted is pending. Methanex's argument to the contrary cannot be squared with either the text of the treaty or the treaty-interpretation principle of effectiveness.

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[245] *See Loewen Group, Inc. v. United States*, Fourth Jennings Opinion at 4-5 (Sept. 6, 2001) (25 JS tab 16 at 2987-88) ("In the present case, without even asking for leave, one of the actual Parties to the arbitration has quite evidently organized a démarch intended to apply pressure on the tribunal to find in a certain direction by amending the treaty to curtail investor protections."); *ADF Group Inc. v. United States*, Investor's Reply to the Counter Memorial of the United States of America on Competence and Liability ¶ 213 (Jan. 28, 2002) (25 JS tab 1 at 2768) ("The Investor is compelled to notice the arrival of the 'Notes of Interpretation of Certain Chapter 11 Provisions [sic] . . . issued 'out of the blue', without any prior public consultation, even less any warning to investors party to ongoing Chapter Eleven arbitrations, and *more particularly with respect to the Investor in the instant case, on the eve of the submission of its Memorial* on August 1st, 2001.") (emphasis added); *Mondev International, Ltd. v. United States*, Hearing Transcript, Vol. I at 224:4-12 (May 20, 2002) (25 JS tab 18 at 3102) (presentation of Sir Arthur Watts) ("In this present instance the Respondent State Party to these ongoing proceedings saw fit to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part. It did so after it had already become aware of the Claimant's arguments as set out in its Memorial, and indeed it did so in a sense which conformed with its own argument as advanced in its own Counter-Memorial.").

[246] *Azinian et al. v. Mexico* was the first NAFTA claim submitted to arbitration that asserted a breach of Article 1105(1). By the time that arbitration concluded in 1999, a number of other claims asserting such breaches had been submitted to arbitration.

189. Finally, although it tersely asserts that "intentional discrimination violates even the minimum standard of treatment required by Article 1105," Methanex's Reply does not attempt to address the extensive authorities showing that the minimum standard of treatment imposes no obligation of non-discrimination on facts such as these.[247] Methanex's unsupported assertion to the contrary cannot be credited.

V. METHANEX'S EXPROPRIATION CLAIM LACKS MERIT

190. Methanex fails to prove an investment expropriated by the California measures. As demonstrated below, no evidence in this case suggests an expropriation. Moreover, the measures at issue are not expropriatory in any event.

A. The Record Establishes No Expropriation Here

191. Methanex's Reply does not even assert that it has proven an expropriation of any of its investments. Instead, the Reply merely observes that Methanex "has *alleged* that the California measures at issue substantially interfere with the business and property rights of Methanex and its U.S. investments . . . . [and has] thus *alleged* that the measures at issue severely infringe its ability, and the ability of Methanex U.S. and Methanex Fortier to conduct business in the United States."[248] Methanex has indeed offered conclusory allegations to that effect, but, as noted earlier, this case long ago passed the point where mere allegations could suffice to keep a claim alive.[249] The record, however, contains no proof of any allegations and therefore no proof of any expropriation.

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[247] *See* Amended Statement of Defense ¶¶ 366-83.

[248] Reply ¶ 217 (emphasis added).

[249] *See* First Partial Award ¶ 163 (ordering Methanex to file in its fresh pleading "copies of *all evidential documents* on which it relies . . . .") (emphasis added).

192. Methanex asserts on the subject of goodwill that, in 2002, Methanex US paid $25 million for Terra Corporation's methanol customer list in the United States and for certain rights to its Beaumont, Texas methanol plant, and paid $10 million to Lyondell for certain assets.[250] There is, however, no evidence in the record that any of those assets were recognized as goodwill, and not even an allegation that those assets have been taken from Methanex US. In short, Methanex's assertion that the "Tribunal should consider these assets as Methanex investments that were expropriated" fails for lack of proof.[251] Its contentions as to market share and customer base are similarly unsupported.[252]

193. In addition to failing for lack of proof, Methanex's expropriation claim fails on legal grounds as well. The Amended Statement of Defense demonstrated that goodwill, market share and customer base are incapable, by themselves, of being expropriated.[253] Neither the international nor domestic legal authorities cited in the Reply support Methanex's contention that goodwill may be deemed a property right that, *by itself*, can be expropriated.[254] Moreover, to the extent that the *Pope & Talbot* or *S.D. Myers* awards can be construed to favor a different result, the NAFTA Parties have expressed their disagreement with those decisions.[255]

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[250] Third MacDonald Affidavit ¶ 19 (19 JS).

[251] Reply ¶ 224.

[252] *See supra* II ("The Record Establishes No Loss Proximately Caused By The Ban").

[253] *See* Amended Statement of Defense ¶¶ 391-95.

[254] *See Amoco Int'l Finance v. Iran*, 27 I.L.M. 1314, 1377 (1988) (taking goodwill into consideration when valuing property that the tribunal had determined was expropriated); *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993) (determining whether goodwill was a depreciable asset for tax purposes); *Manitoba Fisheries v. Queen*, [1979] I.S.C.R. 101 (finding that the business, along with its goodwill, had been expropriated).

[255] *See, e.g.,* Canada Second Article 1128 Submission ¶ 62 (Apr. 30, 2001) (stating that the *Pope & Talbot* tribunal erred in equating market access to intangible property); Mexico Second Article 1128 Submission ¶

B. The California Ban Is Not Expropriatory

194. There is agreement among the disputing parties that "as a general matter, States are not liable to compensate . . . for economic loss incurred as a result of a nondiscriminatory action to protect the public health."[256] This principle in public international law is not an exception that applies after an expropriation has been found but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[257]

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21 (stating that insofar as *Pope & Talbot* or *S.D. Myers* can be read to support Methanex's position on goodwill, market share and customer base, those tribunals erred in interpreting Article 1139); Mexico Fourth Article 1128 Submission ¶ 8 (stating that goodwill, market share and customer base are not property rights subject to protection under Article 1110).

[256] Reply ¶ 208 (quoting Amended Statement of Defense ¶ 411 (internal quotations omitted)); *see also* Mexico Fourth Article 1128 Submission ¶ 13 (stating that Mexico agrees that Article 1110 "incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health."); Canada Fourth 1128 Submission ¶ 14 ("At international law, expropriation does not result from *bona fide* regulation: a state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure protecting legitimate public welfare objectives."); *Accord* IISD Amicus Submission ¶ 86 ("The initial formulation of the United States, which IISD submits is correct, leaves *bona fide* public health and welfare measures, traditionally understood as measures under the police powers of a state, *outside* the concept of an expropriation: they are not expropriations of any kind.").

[257] *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 712, cmt. g (1987) ("A state is *not responsible* for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.") (emphasis added); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 539 (1998) ("Cases in which expropriation is allowed to be *lawful* in the absence of compensation are within the narrow concept of public utility prevalent in *laissez-faire* economic systems, i.e. exercise of police power, health measures, and the like.") (emphasis added); Louis B. Sohn and R.R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes*, art. 10(5) (1961), *reprinted in* F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974) ("An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results . . . from the action of the competent authorities of the State in the maintenance of public order, health, or morality; . . . *shall not be considered wrongful*, provided . . . it is not a clear and discriminatory violation of the law of the State concerned, [and] it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world . . . .") (emphasis added); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that *there has been no 'taking'* of property.") (emphasis added).

195. Methanex errs, however, in denying that California's ban of MTBE in gasoline is a non-discriminatory action to protect public health. *First*, there is no merit to Methanex's assertion that the California ban is not a legitimate public health measure because it addressed an environmental threat. The evidence in the record makes clear that California banned the use of MTBE in California gasoline because MTBE was contaminating the state's drinking water supply, rendering it unpotable.[258] Methanex does not dispute that potable drinking water is critical to public health, and that protecting drinking water supplies is an essential function of government. The 1999 Executive Order's characterization of MTBE as "an environmental threat to groundwater and drinking water" is fully consistent with the ban's nature as a measure to protect the public health.[259]

196. *Second*, there is no merit to Methanex's suggestion that because the ban was not implemented immediately it cannot be deemed a public health measure. When public health measures are implemented varies depending on both the nature of the risk and the attendant consequences of acting. As the 2002 Executive Order indicates, California's MTBE ban was made effective at the earliest possible date.[260] An immediate ban would have substantially increased gasoline prices and severely harmed California's

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[258] *See* Amended Statement of Defense ¶¶ 39, 414-15; UC Report, Vol. II at 20 (4 JS tab 37); 1999 EXECUTIVE ORDER pmbl. (1 JS tab 1(c)); California Environmental Protection Agency, Public Hearings to Accept Public Testimony on the University of California's Report on the Health and Environmental Assessment of Methyl Teriary-Butyl Ether (MTBE) (Feb. 19, 23-24, 1998) (15 JS tab 22); *see also* Fogg Expert Report ¶ 40 (13 JS tab D); Happel Expert Report at 42 (13 JS tab E); *Final Statement of Reasons, Secondary Maximum Contaminant Level for Methyl tert-Butyl Ether and Revisions to the Unregulated Chemical Monitoring List, Title 22, California Code of Regulations* at 2-4 (1997) (14 JS tab 20 at 547-49).

[259] 1999 EXECUTIVE ORDER pmbl. (1 JS tab 1(c)).

[260] 2002 EXECUTIVE ORDER pmbl. (16 JS 1414) ("[I]f use of MTBE is prohibited January 1, 2003, California's motorists will face severe shortages of gasoline, resulting in substantial price increases.").

economy.[261] Methanex offers no authority to support its suggestion that a State must act precipitously, even if doing so would imperil its economy, in order for a measure to be deemed for the public health. And, indeed, none of the authorities on the police power under international law before this Tribunal suggest otherwise.[262]

197. Nor do the examples cited by Methanex of States responding to outbreaks of disease by slaughtering the infected animals support this contention.[263] States indeed have slaughtered animals suspected of carrying disease within days of discovering the problem where there was a grave risk of infection – but where there was also a minimal risk of resulting starvation.[264] By contrast, other actions with clear public health purposes – such as eliminating lead from gasoline and banning asbestos in the United States – have taken years to implement.[265] Although the public health risks of lead and asbestos were well documented,[266] it would have been infeasible to implement a ban of those products

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[261] *Id.*; *see also generally* EIA Report (26 JS tab 31 at 3556).

[262] *See* authorities collected at Amended Statement of Defense ¶ 411 & n.640.

[263] Reply ¶ 193.

[264] *Id.* n.297 (collecting examples).

[265] As early as 1973, the U.S. EPA passed regulations requiring the gradual reduction of lead content in gasoline based on the health risks associated with leaded gasoline emissions. U.S. Environmental Protection Agency, *Regulation of Fuels and Fuel Additives*, 38 Fed. Reg. 33734 (Dec. 6, 1973) (26 JS tab 34). After the existence of lead in gasoline had reached less than one percent of its 1970 levels (*see* 61 Fed. Reg. 3832, 3833 & n.1 (Feb. 2, 1996) (26 JS tab 35 at 3670)), the 1990 Clean Air Act Amendments called for a five year "phasedown" in order to rid gasoline completely of lead content. P.L. 101-549, 104 Stat. 2399 § 220, (codified as amended at 42 U.S.C. § 7545(n) (1990)) (25 JS tab 11 at 2941) ("After December 31, 1995, it shall be unlawful for any person to sell, offer for sale, supply, offer for supply, dispense, transport, or introduce into commerce, for use as fuel in any motor vehicle . . . any gasoline which contains lead or lead additives."); *see also* 40 C.F.R. 80.22(b) (implementing same) (25 JS tab 8 at 2918).

The U.S. EPA instituted a phaseout of asbestos in three stages, spanning seven years, beginning in 1990. *See* U.S. EPA, *Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29460 (July 12, 1989) (26 JS tab 32) (initial final rule imposing the ban on asbestos); 59 Fed. Reg. 33208 (June 28, 1994) (26 JS tab 33) (technical amendment to regulations banning asbestos).

[266] *See, e.g.,* 38 Fed. Reg. 33734, 33734-37 (26 JS tab 34 at 3660-64) (detailing the known health effects of lead in 1973); 54 Fed. Reg. 29460, 29466-71 26 JS tab 32 at 3608-13) (detailing the known health effects of asbestos in 1989).

immediately after discovering their adverse health effects. The fact that certain actions may take longer than others to implement thus does not exclude their being public health measures.

198. *Finally*, as demonstrated above, Methanex's argument that the California ban is discriminatory lacks foundation.[267] California's ban of MTBE is a non-discriminatory regulatory action taken to protect the public health, which may not be deemed expropriatory.

VI. METHANEX NOW ASSERTS NO CLAIM BASED ON THE CONDITIONAL PROHIBITION OF OXYGENATE ADDITIVES OTHER THAN MTBE

199. In its Reply, Methanex no longer asserts that any measure other than the MTBE ban violated the NAFTA's investment chapter. By abandoning any attempt to base a separate violation of the chapter on the CaRFG3 Regulations' conditional prohibition of the use of oxygenate additives in gasoline other than MTBE or ethanol, Methanex has rendered moot the new jurisdictional objection asserted in the United States Amended Statement of Defense.[268]

200. Although the terse paragraph of the Reply that addresses the new jurisdictional objection is not entirely clear on the subject,[269] elsewhere the Reply expressly denies "that Methanex' case hinges on the premise that methanol can now be used as an oxygenate by *directly* splash blending it with gasoline":

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[267] *See supra* III ("The Record Establishes No National Treatment Violation").

[268] *See* Amended Statement of Defense Part VI (¶¶ 418-24).

[269] *See* Reply ¶ 246.

> That is not Methanex' primary case. Methanex' primary argument is that methanol is, through MTBE, already used as an oxygenate in the manufacture of RFG and oxygenated gasoline . . . .
>
> 30. Methanex's secondary argument is that California's ban on direct use of methanol is *further evidence* of its intent to discriminate against and harm all non-ethanol producers, including methanol producers.[270]

201. This statement that the ban of MTBE, not the conditional prohibition of other substances, is Methanex's asserted basis for liability is confirmed by its prayer for relief in the Reply: "Methanex respectfully urges the Tribunal to find the United States liable under NAFTA for the California MTBE ban."[271]

202. Given Methanex's clarification that it is not asserting that the conditional prohibition of other substances breaches the NAFTA, the United States' new jurisdictional objection has been rendered moot.

VII. METHANEX FAILS TO ESTABLISH ITS OWNERSHIP OF INVESTMENTS IN THE UNITED STATES

203. In support of its $970 million claim, Methanex offers no evidence of its ownership of investments in the United States other than a one-page organizational chart and an unsworn statement by a company officer that Methanex "indirectly owns" Methanex Fortier and Methanex US.[272] The statement provides no indication of the company officer's source of information.[273]

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[270] Reply ¶¶ 29-30 (emphasis in original).

[271] Reply ¶ 249.

[272] Third Macdonald Affidavit ¶ 5 & tab 1A (19 JS).

[273] *But see* First Partial Award ¶ 164 (requiring that witness statements "identif[y] the specific source of the witness's information, whether it be from that witness's own knowledge or derived from another person or document."); IBA Rules art. 5(2)(b) (same).

204. A showing based on such unauthoritative materials cannot discharge Methanex's burden of proving that it owns investments in the United States. For example, in *Tradex Hellas S.A. v. Albania*, the claimant asserted that it owned an investment in the form of payments made for a joint venture in Albania.[274] The claimant offered a variety of documents in support of that assertion, including a liquidator's report, a joint venture agreement, articles of association and a governmental authorization.[275] The tribunal held that the claimant had not proved ownership of this investment, finding that the evidence submitted had not "provided proof that actual payments were made . . . though, if actually money was transferred or paid in cash, such proof should be available."[276]

205. Similarly, here Methanex has offered no proof of actual ownership, though such proof should be readily available in the form of corporate minute books and share registers, corporate shares or partnership agreements. Under Delaware law – the law under which Methanex claims the corporations concerned were organized – "the corporate books [are] the sole evidence of stock ownership" for most purposes.[277] Methanex's failure to come forward with probative evidence on this essential element of its claim provides yet another ground for dismissal.

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[274] 14 ICSID REV. - FOREIGN INV. L.J. 197, 228 ¶ 117 (Final Award) (Apr. 29, 1999).

[275] *See id.* at 228-29 ¶¶ 119-22.

[276] *Id.* at 229 ¶ 123; *see also id.* ¶ 125.

[277] *Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 263 (Del. 1995) (only shareholders registered in corporate records entitled to invoke appraisal procedure); *see Salt Dome Oil Corp. v. Schenck*, 41 A.2d 583, 585 (Del. 1947) ("The term 'stockholder' ordinarily is taken to apply to the holder of the legal title to shares of stock. In most jurisdictions registration, or its equivalent, is essential to pass the legal title as against the corporation . . . .").

VIII. THE TRIBUNAL SHOULD AWARD THE UNITED STATES COSTS

206. As set forth in greater length in the United States' Amended Statement of Defense, the United States requests that, in accordance with the UNCITRAL Arbitration Rules, the Tribunal award costs to the prevailing party in this arbitration and award the United States its costs of legal representation and assistance. There is no merit to Methanex's arguments that the Tribunal should either order the United States to bear the costs of this arbitration or order "that each party split the expenses of the Tribunal and the Secretariat."[278]

207. *First,* Methanex errs in relying on the *Loewen* award as support for its request for an order that the disputing parties equally share the costs of arbitration.[279] The *Loewen* case was decided under the ICSID Arbitration (Additional Facility) Rules. Those rules, unlike the UNCITRAL rules applicable here, do not expressly establish a "loser-pays" presumption for the costs of arbitration.[280] Moreover, the facts of that case and that award are significantly different from those present on this record.

208. *Second*, Methanex's argument that the United States should bear the costs because the United States has engaged in "repeated, deliberate attempts to prolong the proceedings [that] have needlessly increased the cost of this litigation," is without merit.[281] The sole support for this accusation by Methanex is the United States'

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[278] *See* Reply ¶¶ 247-48.

[279] *See* Reply ¶ 248.

[280] *Compare* ICSID Arbitration (Additional Facility) Rules art. 59(1) (art. 58(1) in the rules as amended effective January 2003) ("Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne.") *with* UNCITRAL Arbitration Rules art. 40(1) ("Except as provided in paragraph 2 [on costs of legal representation and assistance], the costs of arbitration shall in principle be borne by the unsuccessful party.").

[281] Reply ¶ 247.

argument, made in its Amended Statement of Defense, that the record does not support Methanex's assertions of "greatly reduced . . . sales" as a result of the MTBE ban and its assertions of ownership of investments.[282] Methanex nowhere explains how a pleading's disagreement that Methanex discharged its burden of proof amounts to an attempt to prolong these proceedings.[283]

209. *Third*, the United States respectfully reiterates its request that the Tribunal, in assessing whether to award costs of legal representation, take into consideration all of Methanex's conduct during the course of these proceedings. In addition to those points made in the Amended Statement of Defense, the United States requests that the Tribunal take note of the following, among other things, as concerns Methanex's Reply:

(a) the repeated, vexatious allegations made by Methanex in its Reply that Governor Davis is corrupt, notwithstanding the lack of evidence in support of that serious allegation and Methanex's prior disavowals of any claim that Governor Davis committed any crime;

(b) that Methanex, after having asserted the existence of relevant "markets" for gasoline distributors and merchant oxygenate producers – and put the United States to considerable expense in responding to such assertions – abandons those assertions in its Reply; and

(c) that Methanex makes no attempt to establish the existence of any principle of customary international law to support its claim under Article 1105(1), despite having caused the United States to address this question at considerable length in its Amended Statement of Defense.

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[282] *Id.*

[283] *Id.*

RELIEF SOUGHT

210. For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (*a*) in favor of the United States and against Methanex, dismissing Methanex's claims in their entirety and with prejudice; and (*b*) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that Methanex bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

Respectfully submitted,

_____

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