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

METHANEX CORPORATION,

Claimant/Investor,

and

UNITED STATES OF AMERICA,

Respondent.

CLAIMANT METHANEX CORPORATION'S MOTION CONCERNING EVIDENTIARY MATTERS

Christopher F. Dugan
Claudia T. Callaway
Alexander W. Koff
Matthew S. Dunne
Sabrina Rose Smith
PAUL, HASTINGS, JANOFSKY & WALKER LLP
Tenth Floor
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Attorneys for Claimant
Methanex Corporation

May 31, 2004

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE UNITED STATES SHOULD BE BOUND BY OFFICIAL ADMISSIONS MADE BY IT AND CALIFORNIA 1

A. A Party Is Bound By Its Prior Admissions 1

B. The U.S. EPA Has Admitted That Favoring Ethanol Would Have A Primary and Damaging Impact on Methanol 4

C. California Officials Admit The Impact Of The Ethanol Lobby And The Interest Of ADM In Securing The California Oxygenate Market 5

D. The United States Should Be Bound By Davis' Admission About His Decision to Shift Ethanol 6

III. THE TRIBUNAL SHOULD ADOPT ADVERSE EVIDENTIARY INFERENCES AGAINST THE UNITED STATES 7

A. It Is An Established Principle of Law That Failure to Produce Evidence Warrants An Adverse Inference 7

B. The United States Has Refused to Produce the NAFTA Negotiating History 11

C. The United States Has Failed to Produce Key Witnesses and Successfully Blocked Methanex From Gathering Third Party Evidence 12

IV. THE UNITED STATES' OBJECTIONS TO METHANEX' EVIDENCE ARE MINISTERIAL AND PROFFERED FOR HARASSMENT 14

A. The Regent Documents Were Obtained Lawfully 15

1. U.S. Law Is Clear: Anyone Discarding Documents Relinquishes All Ownership And Privacy Rights In Those Documents 15

2. Regent Discarded The Documents 17

3. Richard Vind's Witness Statement is False 17

4. The Regent Documents Are Genuine 18

5. The United States Objection To The Regent Documents Is Untimely 19

B. The United States' Objections To Methanex' Witness Statements Have No Merit 20

1. Dr. Gordon Rausser 20

2. Dr. Pamela Williams 20

3. Mr. Michael Macdonald 23

TABLE OF CONTENTS
(continued)

Page

4. Mr. Bob Hastings 24
5. Mr. Robert Puglisi 24
6. The United States Does Not Have Clean Hands 24
7. The United States Never Brought These Deficiencies to Methanex' Attention 26
8. There Is No Prejudice Here to the United States 27

C. Methanex Must Be Permitted to Respond to the Amici 28

V. CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Alcoa Steamship Co. v. M/V Nordic Regent,
654 F.2d 165 (2d Cir. 1979).....29

California v. Ayala,
6 P.3d 193 (Cal. 2000).....16

California v. Greenwood,
486 U.S. 35 (1988).....15, 16

Culbertson v. The Steamer Southern Belle,
59 U.S. 584 (1855).....9

Davis v. City of New York,
228 F. Supp. 2d 327 (S.D.N.Y. 2002), *aff'd*, No. 02-9174, 2003 WL 22173046
(2d Cir. Sept. 22, 2003).....3

Eby-Brown Co. v. Wisconsin Department of Agriculture,
2001 WL 1913622 (W.D. Wis. Oct. 24, 2001).....29

Feldman v. Mexico,
Award, ICSID Case No. ARB(AF)/99/1 (Dec. 16, 2002).....9, 10

Guandagno v. Wallack Ader Levithan Associates,
950 F. Supp. 1258 (S.D.N.Y. 1997).....3

Hartford Fire Insurance Co. v. Garvey,
109 F.R.D. 323 (N.D. Cal. 1985).....17

In re Horowitz,
482 F.2d 72 (2d Cir. 1973).....17

I.B.E.W., Local 894 v. Ellis-Don Ltd.,
1 S.C.R. 221 (Can. 2001).....8

Jaffray & Ors v. Society of Lloyd's,
2002 WL 1654876 (Ct. of Appeals (Civil) July 26, 2002).....9

Legal Status of Eastern Greenland (Denmark v. Norway),
1933 P.C.I.J., Series A/B, No. 53.....2

Levesque v. Comeau,
[1970] S.C.R. 1010.....8

TABLE OF AUTHORITIES
(continued)

Page

McConnell v. FEC,
No. 02-1674, slip op. (U.S. Dec. 10, 2003) 12, 13

Metalclad Corp. v. Mexico,
Award, ICSID No. ARB(AF)/97/1 (Apr. 30, 2004) 10

Nuclear Tests (New Zealand v. France),
1974 I.C.J. 457 1

Purgess v. Sharrock,
33 F.3d 134 (2d Cir. 1994).....3

R. v. Cook,
[1997] 1 S.C.R. 1113 8

Shephard v. Fortin,
2003 F.C. 1296 (Can. Fed. Ct. 2003).....29

In re Sealed Case,
877 F.2d 976 (D.C. Cir. 1989) 17

Suburban Sew N' Sweep Inc. v. Swiss-Bernina, Inc.,
91 F.R.D. 254 (N.D. Ill. 1981).....16, 17

Tonegusso-Norveil Guardian ad litem v. Burnaby Hospital,
[1994] 1 S.C.R. 114 8

United States v. Van Griffin,
874 F.2d 634 (9th Cir. 1989) 2, 3

Waste Management, Inc. v. Mexico,
Award, ICSID Case No. ARB(AF)/00/2 (Apr. 30, 2004) 10

Wisniewski v. Central Manchester Health Authority,
[1998] P.I.Q.R. P324.....9

TABLE OF AUTHORITIES
(continued)

Page

STATUTES and REGULATIONS

Regulation of Fuels & Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline, 58 Fed. Reg. 68,343 (proposed Dec. 27, 1993) (codified at 40 C.F.R. § 80) 4, 5

OTHER AUTHORITIES

4 Am. Jur. 2d § 6 Amicus Curiae (2003) 28

4 Am. Jur. 2d Amicus Curiae § 8 (2003) 29

29 Am. Jur. 2d Evidence § 247 (2003) 9

U.S. Fed. R. Evidence 801(d)(2) 3

I. INTRODUCTION

This motion seeks to focus the Tribunal on past U.S. admissions, the consequences of the United States' failure to submit relevant evidence, and the United States' efforts to block Methanex' attempts to obtain relevant evidence. This Motion also explains why the Tribunal should deny *in toto* the U.S.' Motion to Exclude Certain of Methanex' Evidence.

II. THE UNITED STATES SHOULD BE BOUND BY OFFICIAL ADMISSIONS MADE BY IT AND CALIFORNIA

A. A Party Is Bound By Its Prior Admissions

Courts and tribunals recognize that a party is bound by its prior admissions. This principle is rooted in U.S. and international law, and it applies not only to statements made by the party but also those made by the party's authorized agents.

For instance, in the *Nuclear Tests* case, the International Court of Justice ("ICJ") determined that statements by the President of France and other French officials were made on behalf of the entire French government.

> There can be no doubt, in view of [the President of France's] functions, that his public communications or statements, oral or written, as Head of State are in international relations acts of the French State. His statements, and those of members of the French government acting under his authority, up to the last statement by the Minister of Defense, constitute a whole. Thus in whatever form these statements were expressed, they must be held to constitute an engagement of the State.[1]

[1] *Nuclear Tests* (New Zealand v. France), 1974 I.C.J. 457, 474.

In *Legal Status of Eastern Greenland*, the Permanent Court of International Justice ("PCIJ") was asked to decide the issue of the Danish claim to sovereignty over Greenland. The Court held that Norway could not object to the Danish claim because a Norwegian official had previously made a statement regarding Denmark's claim to sovereignty, which was not consistent with Norway's claim. The Court's position was clear:

> The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government ... in regard to a question falling within his province, is binding upon the country to which the Minister belongs.[2]

United States domestic law also recognizes that the U.S. government is bound by admissions of its competent agents. In *United States v. Van Griffin*,[3] the court determined that a manual published by the U.S. Department of Transportation ("DOT") could be admitted into evidence as a party admission. The manual dealt with the proper procedures for sobriety tests, which was a central issue in the case. The court found that **"the government department charged with the development of rules for highway**

---

[2] *Legal Status of Eastern Greenland* (Denmark v. Norway), 1933 P.C.I.J., Series A/B, No. 53, p. 22, 71 (Although the Court did not determine that the Minister of Foreign Affairs' statement constituted definitive recognition of Danish sovereignty, the Court did find that the Minister's statement had an effect tantamount to estoppel, preventing Norway from occupying any part of Greenland).

[3] 874 F.2d 634, 638 (9th Cir. 1989).

safety [*i.e.*, DOT] was the relevant and competent section of the government; its pamphlet on sobriety testing was [therefore] an admissible party admission."[4]

Similarly, judicial admissions are binding. Once a party concedes a material fact at issue, it may not contest that fact later in the proceedings.[5] Moreover, a "court can appropriately treat statements in briefs as binding judicial admission of fact."[6] In the words of a U.S. trial court, "Judicial admissions are formal concessions that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are not evidence at all but rather have the effect of withdrawing a fact from contention."[7]

Once a party admits a fact, it should not be allowed to later deny it. The United States has made prior admissions on key issues, and the Tribunal should not permit the United States to disregard statements which conclusively establish facts contrary to its argument. The applicable law governing admissions should guide the Tribunal's consideration of the record here.

---

[4] *Id.*; *see also* U.S. Fed. R. Evid. 801(d)(2) (defining an admission by party-opponent).

[5] *See, e.g., Davis v. City of New York*, 228 F. Supp. 2d 327, 333 n.12 (S.D.N.Y. 2002) ("[a] party's assertion of fact in a pleading is a judicial admission to which it normally is bound throughout the course of the proceeding") (citation omitted), *aff'd*, No. 02-9174, 2003 WL 22173046 (2d Cir. Sept. 22, 2003) (unpublished).

[6] *See also Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994).

[7] *Guandagno v. Wallack Ader Levithan Assocs*., 950 F. Supp. 1258, 1261 (S.D.N.Y. 1997) *quoting Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995).

B. The U.S. EPA Has Admitted That Favoring Ethanol Would Have A Primary and Damaging Impact on Methanol

In 1993, the U.S. Environmental Protection Agency ("EPA") proposed a rule that thirty percent of the oxygenate content for U.S. reformulated gasoline be reserved for "renewable oxygenates," principally ethanol.[8] In proposing to create a market for ethanol, the EPA was required to analyze the economic consequences of that action. After making that analysis, the EPA concluded that:

> The **primary impacts of this proposal include** the crude oil savings, the added cost of producing and using the renewable oxygenate, the reductions in revenues to the U.S. Highway Trust Fund, and **the impacts on the various oxygenate and fuel industries affected**.
>
> . . .
>
> Finally, there could be economic impacts on a number of industries and economic sectors due to this program. **The revenues and net incomes of both corn farmers and ethanol producers should rise significantly**, due to higher corn and ethanol demand and prices, respectively. Expenditures for government farm price supports could decrease. **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**. Oil refiners could experience transitional costs due to an additional requirement and would likely face higher oxygenate costs.[9]

The United States should be bound by this admission. The EPA is the U.S. government agency charged with the development of rules for environmental

---

[8] *See* Regulation of Fuels & Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline, 58 Fed. Reg. 68,343, 68,343 (proposed Dec. 27, 1993) (codified at 40 C.F.R. § 80) (22 JS tab 28).

[9] *Id.* at 68,350 (emphasis added).

protection and development. The EPA itself, prior to the underlying actions that gave rise to this dispute, admitted a **primary impact** of mandating ethanol use would be to severely damage foreign methanol producers such as Methanex.

In its Rejoinder, the United States argues that "Methanex errs in placing repeated reliance on a single sentence in a U.S. EPA notice of proposed rulemaking from 1993" and attempts to characterize the admission as an "irrelevant line" in an EPA publication.[10] To the contrary, the EPA admission is highly probative of a central issue in these proceedings, and the U.S. government made these statements when it was not influenced by a desire to defeat Methanex' NAFTA claim. It cannot now credibly argue that the California measures favoring ethanol have no impact on methanol producers.[11]

Accordingly, on the basis of the EPA's admission, the Tribunal should conclude that California's shift to ethanol had a primary and damaging impact on methanol, which satisfies the "relating to" test of Article 1101.

C. California Officials Admit The Impact Of The Ethanol Lobby And The Interest Of ADM In Securing The California Oxygenate Market

The United States may not credibly deny the influential effect of ADM's lobbying efforts. As California itself admits, ADM sought to secure the entire California oxygenate market for ethanol. It did so through "intense lobbying" that followed "a

---

[10] United States Rejoinder at ¶¶ 26-27.

[11] *See*, *e.g.*, Amended Statement of Defense at ¶¶ 110-111.

change in administration."[12] Throughout these proceedings, the United States has denied the influential effect of lobbying, and in particular ADM's efforts in the California oxygenate market. The United States should be bound by California's admissions to U.S. courts.

D. The United States Should Be Bound By Davis' Admission About His Decision To Shift To Ethanol

In sworn testimony to the U.S. Congress, a spokesman for Governor Davis admitted that California had decided to shift to ethanol long before any appropriate studies were completed. In October 1999, Michael Kenny, Executive Officer of the California Air Resources Board, appeared before Congress "on behalf of Governor Davis." He testified that, "Once MTBE is eliminated in California, the only feasible oxygenate **will be ethanol**."[13] This statement came long before California completed its analysis of the impact of shifting to ethanol, which only occurred in October 2001.[14] Thus, California admitted it intended to create a market for ethanol regardless of the

---

[12] Petitioners' Opening Brief, *Gray Davis, et al. v. United States E.P.A. et al.*, Case No. 01-71356 (9th Cir. 2002) at 23. (21 JS at tab 2) ("following a national election and a change in administration, and [after] intense lobbying by the ethanol industry, the US EPA reversed course and denied California's waiver request," purportedly on scientific grounds).

[13] Testimony of Michael P. Kenny, Executive Officer, California Air Resources Board, before the U.S. Senate Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property Nuclear Safety, Oct. 5, 1999, at 1, 6 (23 JS tab 45) ("As the California state representative on the panel, I am pleased to be here on behalf of Governor Gray Davis, the California Environmental Protection Agency and the California Air Resources Board to discuss our state's perspective on the [Report of U.S. EPA's Blue Ribbon Panel on Oxygenates in Gasoline] and its findings.").

[14] *See* Report to the California State Water Resources Control Board, California Environmental Protection Agency, *Environmental Assessment of the Use of Ethanol as a Fuel Oxygenate: subsurface fate and transport of gasoline containing ethanol*, UCRL-AR-145380 (October 2001) (25 JS tab 15).

environmental consequences. This admission is totally contrary to the United States' current position, and the Tribunal should not allow the United States to now deny this fact.

III. THE TRIBUNAL SHOULD ADOPT ADVERSE EVIDENTIARY INFERENCES AGAINST THE UNITED STATES

The Tribunal can and should adopt adverse evidentiary inferences against the United States as a result of its efforts to suppress relevant evidence. An adverse inference is appropriate where a party fails to put certain evidence before the Tribunal, such as providing the NAFTA negotiating history or calling key witnesses. It is also appropriate when a party prevents the introduction of evidence that is both relevant and material to the proceeding, such as the United States' efforts to block Methanex from gathering additional evidence from third parties. Such a failure justifies the drawing of an inference that the evidence would have been unfavorable to that party's position had it been presented, and there are compelling reasons for the Tribunal to do so against the United States based on this record.

A. It Is An Established Principle of Law That Failure to Produce Evidence Warrants An Adverse Inference

It is widely accepted that a party's failure to produce evidence provides ample justification to a court or Tribunal to adopt an adverse inference as to whether the material would have supported that party's position. For example, in a Canadian case the trial judge drew adverse inferences against a hospital because the hospital failed to call the key witness, the treating neurological pediatrician. In affirming the decision, the

Canadian Supreme Court found that the trial judge who "drew the inference from the failure to call [the treating pediatrician]" was permitted to find "that his evidence would not have favored the [hospital]."[15] The Canadian Supreme Court has consistently found that a party's failure to produce witnesses can constitute an "implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it."[16] Furthermore, a Canadian court must, not simply may, draw adverse inferences in at least some civil contexts.[17]

Courts in the United Kingdom similarly permit the adoption of adverse inferences: "[W]here the evidence points in a certain direction an adverse inference can be drawn from a failure to call the witness to deal with it."[18] To put it bluntly, "the effect of a party failing to call a witness who would be expected to be available to such a party to give evidence for such party and who in the circumstances would have a close

---

[15] *Tonegusso-Norveil Guardian ad litem v. Burnaby Hosp.*, [1994] 1 S.C.R. 114.

[16] *I.B.E.W., Local 894 v. Ellis-Don Ltd.,* 1 S.C.R. 221 (Can. 2001) ("Whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts. The union, though challenged to do so, declined to call any witness with knowledge of the events of 1971. 'Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.'"); *see also R. v. Cook*, [1997] 1 S.C.R. 1113 ("Failure by the Crown to call the victim or complainant should not be treated differently from that of any other witness. In most cases, the Crown who does not call the victim does so at its peril, as such testimony would be crucial to its case. Legitimate question would arise in the mind of the trier of fact where the victim, though able to testify, was not called, an adverse inference could be drawn against the Crown's case.").

[17] *See Levesque v. Comeau* [1970] S.C.R. 1010.

[18] *Jaffray & Ors v. Society of Lloyd's*, 2002 WL 1654876 ¶ 406 (Ct. of Appeals (Civil) July 26, 2002).

knowledge of the facts on a particular issue, would be to increase the weight of the proofs given on such issue by the other party and to reduce the value of the proofs on such issue given by the party failing to call the witness."[19]

This is also a bedrock principle of U.S. law. "If a party knows of the existence of an available witness on a material issue and such witness is within his control, and if, without satisfactory explanation, he fails to call him, the jury may draw the inference that the testimony of the witness would not have been favorable to such party."[20]

The IBA Rules are to the same effect. They provide that "[i]f a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time … the Arbitral Tribunal may infer that such evidence would be adverse to the interests of the Party."

NAFTA tribunals have also drawn adverse inferences. The Tribunal in *Feldman v. Mexico* stated:

> In weighing the evidence, including the record of the five day hearing, the majority is also affected by the Respondent's approach

[19] *Wisniewski v. Central Manchester Health Auth.*, [1998] P.I.Q.R. P324, P339 CA (examining authorities from *Blatch v. Archer* [1774] 1 Cowp. 63 right up to *Earle v. Eastbourne District Community Hosp.* [1974] V.R. 722).

[20] 29 Am. Jur. 2d Evidence § 247 (2003); *see also Culbertson v. The Steamer Southern Belle*, 59 U.S. 584, 588 (1855) (a steamboat captain's failure to testify about his collision with a flatboat raised a "strong presumption" that his testimony would have been unfavorable).

> to the issue of discrimination. If the Respondent had had available to it evidence showing that … [there was no discrimination], it has never been explained why it was not introduced. Instead, the Respondent spent a substantial amount of its time during the hearing and in its memorials seeking (unsuccessfully in the Tribunal's view) to demonstrate that CEMSA and the Poblano Group were related companies (as there could be no discrimination, presumably within a single company group). Yet, if the Poblano Group firms had not received the rebates, that evidence of relationship would have been totally irrelevant. **Why would any rational party have taken this approach at the hearing and in the briefs if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant**, that is, denied IEPS rebates for cigarette exports where proper invoices were not available? Thus, it is entirely reasonable for the majority of this Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue.[21]

The Tribunal in *Waste Management* reached a similar conclusion. In considering a party's failure to provide certain documents identified by the other party, that Tribunal examined whether it could draw the corresponding inferences from a failure to produce requested materials. In finding that it could, the Tribunal noted that the party in possession of the documents "had neither disclosed them nor explained why they were not available[.]"[22]

---

[21] *Feldman v. Mexico*, Award, ICSID Case No. ARB(AF)/99/1 (Dec. 16, 2002), at ¶ 178 (emphasis added).

[22] *Waste Management, Inc. v. Mexico*, Award, ICSID Case No. ARB(AF)/00/2 (Apr. 30, 2004) at ¶ 30; *see also Metalclad Corp. v. Mexico*, Award, ICSID No. ARB(AF)/97/1 (Apr. 30, 2004) at ¶¶ 90-92 (examining a municipality's denial of a construction permit).

B. The United States Has Refused to Produce the NAFTA Negotiating History

The United States has neither disclosed the NAFTA negotiating history nor explained why the materials are not available. Almost three years ago, on September 24, 2001, Methanex submitted its first request for the NAFTA negotiating history. It reiterated its request twice at the time of the Second Amended Claim, *i.e.*, on August 28, 2002 and again on September 30, 2002. Methanex repeated its request a fourth time on April 7, 2004, and yet again on May 10, 2004. The United States has neither disclosed nor adequately explained why the negotiating history materials are not available.[23]

As Methanex explained in its most recent correspondence, the materials would shed significant light on the intent of the parties regarding issues squarely before this Tribunal. Although not exhaustive, Methanex provided examples of how the NAFTA negotiating history is both relevant and material.

The United States has yet to produce the negotiating history or explain why it reasonably cannot be made available to Methanex.[24] Its refusal warrants the following adverse inferences:[25]

---

[23] *See* Letter from the United States dated October 2, 2001 (arguing there is no basis for granting Methanex' request because the proceedings pertaining to the United States' objections on jurisdiction and admissibility are closed); *see also* Letter from the United States dated September 23, 2002 (arguing that Methanex offers no explanation as to how the NAFTA's negotiating history could be necessary, or even useful, for the tasks of producing a fresh pleading of fact and evidentiary materials).

[24] *See* Letter from the Tribunal dated May 28, 2004 (ordering the United States to respond to this issue no later than June 3, 2004).

- Article 1101. The contracting states did not intend for Article 1101 to act as a gatekeeper and that the phrase "relating to" is broader than the phrase "in like circumstances" of Article 1102.

- Article 1102. The contracting states referenced GATT/WTO dispute settlement practice and legal standards when drafting the national treatment provision and intended that GATT/WTO law be looked to in resolving NAFTA Chapter 11 disputes. The contracting states also intended the phrase "in like circumstances" to be broader than the phrase "like product." Similarly, the contracting states intended that competition play the central role in determining whether the "in like circumstances" test is met.

- Article 2101. In accordance with international economic practice, such as the GATT/WTO system, the parties intended that environmental rules and regulations be permitted by NAFTA Chapter 11, albeit as exceptions, *i.e.*, the burden of showing that an environmental regulation is not an arbitrary or unjustifiable discrimination or a disguised restriction on trade should be borne by the NAFTA Party in any NAFTA Chapter 11 dispute, which is the party seeking the affirmative of that particular position.

C. The United States Has Failed to Produce Key Witnesses and Successfully Blocked Methanex From Gathering Third Party Evidence

Methanex believes it has established a *prima facie* case that the State of California enacted measures intended to favor the United States ethanol industry and harm its competitors, and that such measures were motivated partially or even wholly by political and financial inducements offered by the United States ethanol industry.[26] The Supreme Court's factual conclusions in *McConnell v. Federal Election Commission*[27] validate Methanex' claims here. As the Supreme Court found, "[t]he idea that large contributions … can corrupt or, at the very least, create the appearance of corruption of

(...continued)

[25] Methanex reserves the right to ask for additional, relevant inferences.

[26] *See* Second Amended Claim at ¶ 143.

[27] *McConnell v. FEC*, No. 02-1674, slip op. at 2 (U.S. Dec. 10, 2003).

federal candidates and officeholders is neither novel nor implausible."[28] It went on to link political contributions to favors, noting the danger "that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[29] "Too often, [an elected officials'] first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue?"[30]

ADM's contributions and Davis' subsequent actions fit this pattern precisely. Within ten days of the secret meeting, ADM sent a $100,000 contribution to Davis' campaign coffers.[31] Thereafter, Davis banned MTBE and, as noted above, decided to mandate ethanol before testing was complete. As a consequence, ADM has benefited enormously.

These undisputed facts establish a *prima facie* case and shift the burden to the United States. Methanex advised the United States in February 2004 that "it bears the risk of adverse evidentiary inferences" regarding these missing witnesses for blocking all

---

[28] *Id.* at 34-35.

[29] *Id.* at 43.

[30] *Id.* at 39.

[31] Second Amended Claim at ¶ 229 (ADM contributed over $200,000 to Davis in 15 months.).

third party evidence gathering pursuant to 28 U.S.C. § 1782.[32] Nevertheless, after the Tribunal overruled the U.S.' objection to Methanex' exercise of its procedural rights pursuant to § 1782, and after Methanex immediately started the evidence gathering process in California, the United States again sought to block these efforts.[33] Consequently, Methanex withdrew its application because it was clear that "Methanex will be unable to schedule the necessary depositions and obtain the relevant additional evidence prior to the hearing."[34] These circumstances warrant an inference that the United States cannot rebut Methanex' claims concerning the ethanol industry's undue influence over the now-disgraced Gray Davis.

IV. THE UNITED STATES' OBJECTIONS TO METHANEX' EVIDENCE ARE MINISTERIAL AND PROFFERED FOR HARASSMENT

Three weeks before the hearing, the United States asks the Tribunal to exclude all but two of the witness statements submitted by Methanex.[35] With the

---

[32] *Id.* at ¶ 6 n.5 (arguing the United States could have agreed to evidence gathering pursuant to 28 U.S.C. § 1782 and could thus have compelled Davis to testify).

[33] *See* Email from the United States dated May 5, 2002 (e-mail from B. Legum attaching copies of the United States' memoranda of law in opposition to Methanex' requests for discovery under 28 U.S.C. § 1782, which were filed by the U.S. Department of Justice on May 4, 2002, in the United States District Courts for the Central and Eastern Districts of California).

[34] *See* Methanex' Application for Withdrawal filed in E.D. and C.D. District Courts of California on May 14, 2004.

[35] This list does not include Messrs. Jennings and Ehlermann, who submitted witness statements regarding legal interpretations rather than evidentiary issues. Methanex notes, however, that the United States seeks to exclude material appended to Mr. Wright's Supplemental Affidavit (Jan. 29, 2003), *e.g.*, tabs 7, 10-12, 14-15, 17-21, and 38 (12 JS tab A).

exception of the U.S.' objections to Regent International's documents,[36] the U.S.' objections are all unsupported or based on hyper-technical grounds. As discussed in greater detail below, the proffered objections lack substance and fail to establish any prejudice to the United States. Accordingly, the United States' Motion should be denied.

A. The Regent Documents Were Obtained Lawfully

The United States claims that the Regent International documents were obtained illegally. This allegation is based on Mr. Vind's false testimony. In fact, Mr. Vind threw the documents away, thus losing all legal rights to them. As an ethical matter, the State Department should never have publicly accused Methanex of illegality based only on what Mr. Vind himself admits are merely "suspicions."

1. U.S. Law Is Clear: Anyone Discarding Documents Relinquishes All Ownership And Privacy Rights In Those Documents

It is black-letter law in the United States that an owner loses all privacy rights in documents that are thrown away. As the U.S. Supreme Court found:

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted

[36] *See* U.S.' Motion to Exclude Certain of Methanex' Evidence at 3 (claiming "a number of documents submitted by Methanex as evidence on duplicates documents that were illegally copied from [Mr. Vind's] office"); *see id.* at 3 fn 3 (identifying specific documents allegedly illegally copied from Mr. Vind's office, referenced herein collectively as either the "Regent International documents" or the "Vind documents").

> through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it' … respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded … Our conclusion that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeal … [and] the vast majority [of state appellate courts].[37]

As the Supreme Court noted, federal and state courts in the United States have repeatedly emphasized that parties must actively protect and limit access to confidential documents, lest the confidentiality be lost. In *California v. Ayala,* the Supreme Court of California held that the "overwhelming weight of authority" rejects the proposition that a reasonable expectation of privacy exists with respect to discarded materials.[38]

Discarded documents also lose any privileges.[39] By discarding documents, the former owner no longer seeks to protect and limit access to the privileged

---

[37] *California v. Greenwood*, 486 U.S. 35, 40-42 (1988).

[38] 6 P.3d 193, 214 (Cal. 2000).

[39] *Suburban Sew 'N' Sweep, Inc. v. Swiss-Bernina, Inc.,* 91 F.R.D. 254, 258-59 (N.D. Ill. 1989) ("when the parties to the communication themselves do not … take reasonable steps to insure and maintain its confidentiality, the privilege does not apply ... .").

documents, and, as a result, loses the privilege.[40] U.S. courts require that those claiming a privilege take affirmative steps to protect and limit access to privileged materials.[41] Failure to do so waives any claim of privilege.[42]

2. Regent Discarded The Documents

In March 2003, well-over a year ago, Mr. Puglisi declared, under penalty of perjury, that the documents were obtained lawfully. His declaration submitted with this motion affirms that this statement is true and correct,[43] and states that the documents were obtained from material that Regent International discarded. Any doubts harbored by the United States regarding Mr. Puglisi's credibility or how the documents were

---

[40] *Id.* at 260-61 ("[I]f the client or attorney fear such disclosure, it may be prevented by destroying the documents of rendering them unintelligible before placing them in a trash dumpster … [I]t is within their power to decide what precautions to take, and so to protect against disclosure."); *see also In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989) ("Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant."); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 331 (N.D. Cal. 1985) (holding that privilege was lost where "there was a complete failure to take reasonable precautions").

[41] *See In re Horowitz*, 482 F.2d 72, 80-82 (2d Cir. 1973) (the attorney-client privilege was "lost" when a client transferred confidential attorney-client files to an office where his accountant had "unrestricted access" to them). *Id.* at 82 ("It is not asking too much to insist that if a client wishes to preserve the privilege …, he must take some affirmative action to preserve confidentiality.").

[42] Vind complains about the use of allegedly privileged material. However, on its face, the one document marked "PRIVILEGED MATERIAL" and "ATTORNEY WORK PRODUCT" contains no privileged material that would exempt its production in U.S. domestic courts (or courts in the United Kingdom or Canada). *See* 6 JS tab 61 (containing a draft letter from Mr. Vind to Mr. Bruce Jordan of the Minnesota Coalition for Ethanol). Other than a stamp noting that the document is privileged, the United States fails to justify why it believes this material would be exempt from production.

[43] *See* Witness Statement of Robert Puglisi, attached hereto as Exhibit 1.

obtained could have been probed through cross-examination. The United States elected not to do so, but instead decided to recklessly accuse Methanex of illegal conduct.

3. Richard Vind's Witness Statement is False

Mr. Vind testifies that the documents at issue "were illegally copied from my office, and were never voluntarily provided by me to Methanex or anyone else."[44] That unqualified statement is false, as Mr. Puglisi's sworn declarations make clear. Moreover, Mr. Vind had no personal knowledge of how the documents were obtained. Indeed, he concedes as much by noting that he merely "suspected" that Methanex agents were behind the alleged burglary.[45] Suspicions are not knowledge, and cannot be the foundation for an unqualified statement that another party has committed a crime.

Similarly, it was improper for State Department attorneys to publicly accuse Methanex of a crime when that accusation could only have been based on Vind's "suspicions" and not on his personal knowledge. Such poorly-investigated accusations are unbecoming of officers of the court and agents of the U.S. government, and are likely unethical under governing rules of professional conduct.

4. The Regent Documents Are Genuine

It is undisputed that the documents are genuine. Mr. Vind himself authenticates them in his witness statement: "Documents attached to Methanex's

[44] Vind Witness Statement at ¶ 12.

[45] Vind Witness Statement at ¶ 14 ("I feel it is necessary to state how I **suspect** these documents found their way into Methanex's hands.") (emphasis added).

Appendix of Factual Materials to its Second Amended Statement of Claim at tab numbers 52-61, 64, 66, 151-153, 155-156, 159-160, 162 and 165, and documents attached to Methanex' Summary of Evidence submitted on January 31, 2003, at tab numbers, 202, 216 -219, 222-223, 226 and 258-259 **are copies of documents contained in Regent's files**."[46]

5. The United States Objection To The Regent Documents Is Untimely

Methanex also objects to the United States Motion to Exclude as an untimely, eleventh-hour effort to distract Methanex and the Tribunal from the central issue—the impending hearing on the merits. The United States could have raised these objections long before now.[47] The documents allegedly stolen from Mr. Vind were submitted with Methanex' Summary of Evidence well over a year ago, and the materials in Methanex' Reply were submitted over three months ago. The United States had an opportunity to object to these materials in its Amended Statement of Defense and its Rejoinder. It decided instead that the month before the hearing would be a more opportune time.

---

[46] Vind Witness Statement at ¶ 12 (emphasis added); *see also* U.S.' Motion to Exclude Certain of Methanex' Evidence at 3-4 (conceding the material is genuine).

[47] The *amici* documents were timely submitted in response to the *amici* submissions, and this issue is addressed in greater detail, below.

B. The United States' Objections To Methanex' Witness Statements Have No Merit

1. Dr. Gordon Rausser

In his Expert Report, Dr. Rausser affirmed the truth of his statements and confirmed his independent duty to the Tribunal. In his Reply Report, he cross-referenced his Expert Report, but did not repeat the affirmation of truth and acknowledgment of his independent duty, believing those were covered by the statements in his Expert Report. Indeed, the Tribunal's order does not state that experts were required to repeat these affirmations in their Reply Reports.[48] If necessary, Dr. Rausser will supply a supplemental declaration including those statements.

2. Dr. Pamela Williams

The United States claims that Dr. Williams failed to disclose prior relationships between her firm, Exponent, and Methanex. Specifically, the United States argues that Dr. Williams failed to disclose the "scope and extent of Methanex' retainer of her firm," and the fact that one of her colleagues, Dr. Dennis J. Paustenbach, has been retained by Methanex since 1999.[49] These allegations are simply not true, for Dr. Williams and her reports fully disclosed those relationships.

First, Dr. Williams was not required to make these disclosures in her expert reports. The Tribunal ordered that an expert witness disclose the "witness's

---

[48] Partial Award at ¶ 165 (indicating requirements for "the expert report" and requiring "an acknowledgment" of an independent duty to assist the Tribunal).

[49] U.S.' Motion to Exclude Certain of Methanex' Evidence at 11.

present and past relationship with Methanex."[50] The Tribunal did not require that an expert disclose the names of every one of the expert's colleagues and the colleagues' relationships to each of the parties. Thus, Ms. Williams was not required to disclose the relationship between her firm and Methanex.

More importantly, Ms. Williams did, in fact, disclose those relationships. Her first expert report, submitted to this Tribunal on January 30, 2003, states: "Exponent has prepared several reports ... on behalf of Methanex that support the following opinion." She then listed the four Exponent reports she relied upon.[51] Moreover, three of the four reports expressly state that they were prepared "on behalf of Methanex," or for Methanex' attorneys, *i.e.*, Jones Day or Paul Hastings.[52]

Next, the United States argues that Dr. Williams failed to disclose that one of her colleagues and co-authors, Dr. Paustenbach, had also been retained by Methanex. Again, Dr. Williams is not required to disclose every relationship of every employee of her firm. Moreover, the papers prepared by Dr. Paustenbach upon which Ms. Williams relied and which are referenced in the U.S. Motion were **not**, in fact, funded by

---

[50] First Partial Award ¶¶ 164-65.

[51] Expert Report at ¶ 11 (12 JS tab B).

[52] *See Evaluation of UST/LUST Status in California and MTBE in Drinking Water* (Nov. 2002), at cover page; Evaluation of the 1999 Cal-EPA Report Titled, *Health and Environmental Assessment of the Use of Ethanol as a Fuel Oxygenate* (Jan. 2003), at cover page; *Evaluation of the University of California Report Titled Health & Environmental Assessment of MTBE* (Jan. 2003), at cover page.

Methanex, and Dr. Paustenbach was **not** "retained" by Methanex to prepare those reports.[53]

Finally, the United States argues that Dr. Williams failed to disclose in her expert report that one of the papers she relied on in forming her opinion was "funded by Methanex Corporation."[54] But this relationship was disclosed in the paper itself, as is shown by the fact that the U.S. Motion cites to the very page within the research paper that clearly states: "This work was funded by Methanex Corporation."

The relationships between Exponent, Dr. Paustenbach, and Methanex were not concealed, rather they were fully disclosed. Consequently, the United States has no grounds for complaint.

As with Dr. Rausser, in Dr. Williams' Expert Report she affirmed the truth of her report, signed it, and confirmed her independent duty to the Tribunal. In her Reply Report, she cross-referenced her Expert Report, but she did not repeat her affirmation or cite her independent duty, believing her Expert Report was sufficient for this purpose. If necessary, she will supply a supplemental declaration incorporating all of the purported ministerial requirements of which the United States complains.

---

[53] U.S.' Motion to Exclude Certain of Methanex' Evidence at 11 n.36 (listing two reports).

[54] *Id* at 11 n.35 (listing one report).

3. Mr. Michael Macdonald

The three affidavits (collectively "Macdonald Witness Statements") submitted by Mr. Macdonald list in considerable detail his background, qualifications, and relevant experience. For example, his most recent affidavit states:

> 2. I have been affiliated with either Methanex or its predecessor companies since 1983. During this time, I have served the company in various capacities. In January 2004, I took on the position of Senior Vice President of Technology and Corporate Development, with the responsibility of guiding Methanex' use of technology, developing and implementing our overall strategy, and pursuing initiatives of a transactional nature along with new investments. Before this, I served for just over one year as Senior Vice President of Technology and Emerging Markets, and prior to that for three years as Vice President of Planning and Strategic Development, with responsibility for developing, articulating, and, in some circumstances, implementing Methanex' general corporate strategy and certain specific corporate initiatives. For two years prior to that, I served as Director of Investor Relations and Corporate Communications, and I held that position at the time the California MTBE ban was announced. That announcement, and its aftermath, dominated investor and media inquiries for quite some time, so I became very familiar with the MTBE issue, and have been closely involved with the matter ever since.

To the extent that Mr. Macdonald does not rely on the materials appended to his Witness Statements, it is apparent that his statements are based on his own knowledge and his personal and professional experience. If the United States believed Mr. Macdonald was not sufficiently qualified, the proper course would have been to probe the foundation for his statements in cross-examination. Moreover, in order to cure

any purported deficiency, attached is a supplemental declaration including the ministerial statements.[55]

4. Mr. Bob Hastings

The United States claims that Bob Hastings' witness statement is inadmissible. Bob Hastings, however, never submitted a witness statement. The January 14, 2004 letter from him is attached as tab 6 to Michael Macdonald's Third Affidavit. Mr. Macdonald is the testifying factual witness as to that affidavit, and Methanex made him available for cross-examination. Had there been any material relied upon in Mr. Macdonald's witness statement that the United States believed was not be credible, it could have questioned Mr. Macdonald at the hearing.

5. Mr. Robert Puglisi

To remedy any purported objections or ministerial errors argued by the United States, Methanex hereby attaches another declaration of Mr. Puglisi, as noted above. Mr. Puglisi again declares that the documents submitted by Methanex were obtained lawfully. At no time during his investigation did he, or anyone else whom he supervised, copy documents from within Regent International without permission.

6. The United States Does Not Have Clean Hands

The United States does not have clean hands regarding its own experts, and elects to ignore the flaws in its own evidentiary submissions. For example, on

---

[55] *See* Macdonald Declaration, attached hereto as Exhibit 2.

October 10, 2003, the Tribunal ordered that the parties must produce copies of all material, documents, data or other information on which the scientific experts relied for the opinions and conclusions they expressed in their Expert Reports.[56] In his Expert Report, Dr. Fogg references a "personal communication with the County of Lake Health Services Department,"[57] regarding a water sample taken from a home in the County. The County reportedly "collected a sample" of the water and then "sent it to a state certified laboratory for chemical analysis."[58] Dr. Fogg's report further notes "a strong chemical odor in the water" and that the home "receives water from an on-site domestic well."[59] However, Dr. Fogg has yet to provide the entire letter and analytical results to Methanex or its experts.

In addition, the United States submits Dean Simeroth as a factual witness, although he testifies to issues typically reserved for an expert.[60] If the Tribunal properly views him as an expert rather than a factual witness, he has failed in both his first and second witness statements to acknowledge his independent duty to assist the Tribunal or

---

[56] *See*, *e.g.,* Letter of the United States dated August 27, 2003 (seeking material from Methanex the United States claimed was not publicly available).

[57] *See* Expert Report of Graham E. Fogg (Dec. 1, 2003) at ¶ 136 (13 JS tab D).

[58] *Id.*

[59] *Id.*

[60] *See, e.g.,* Witness Statement of Dean C. Simeroth at ¶ 13(Dec. 3, 2003) (13A JS tab D) (arguing that the California Air Resources Board "does not believe that PAN levels will increase as a result of the use of CaRFG3").

that his duty to the Tribunal overrides his obligation to the United States government as a party to this dispute.[61]

Although aware of deficiencies in the United States' submissions, Methanex has not sought, nor does it seek here, to exclude any of the United States' witness materials.

7. The United States Never Brought These Deficiencies to Methanex' Attention

The U.S. did not bring these alleged witness statement deficiencies to Methanex' attention before filing its Motion. Any claim that the United States had "called many of these deficiencies to Methanex's attention long ago" is disingenuous, at best.[62] The only support referenced in the United States' motion is a letter dated August 27, 2003.[63] The citation is to one paragraph buried at the end of a four page letter seeking discovery of materials relied upon by Methanex' scientific experts.[64] Methanex provided a one-sentence reply to the discrete matter the United States now claims it

---

[61] *See* Witness Statement of Dean C. Simeroth (Dec. 3, 2003) (13A JS tab D); Second Witness Statement of Dean C. Simeroth (Apr. 21, 2004) (24 JS tab H).

[62] U.S.' Motion to Exclude Certain of Methanex' Evidence at 2.

[63] *Id.* at 12 n.39 (citing a Letter from the United States dated August 27, 2003, and a reply letter from Methanex dated September 3, 2003).

[64] *See* Letter from the United States dated August 27, 2003 at 3 (characterizing the issue as one of "[t]hree final points" of the letter).

raised "long ago."[65] In fact, the point was so tangential to the United States' letter that Methanex' reply to this issue was located in a footnote.[66]

8. There Is No Prejudice Here to the United States

The United States fails to explain how any of the alleged minor inconsistencies warrant the extraordinary penalty of exclusion from the evidentiary record. All of the U.S.' objections could have been remedied through cross-examination, which the United States elected not to do. In fact, the United States claims that it "has rebutted Methanex's witnesses to the point that little further would be gained by cross-examination at the hearing."[67] Accordingly, the United States concedes that no prejudice flowed from any of Methanex' perceived omissions.

Rather, the U.S.' motion seeks only to detract from the timely and efficient resolution of these proceedings. The Motion has needlessly increased Methanex' costs and, in Methanex' view, was filed with the intent of providing the United States with a litigation advantage, as addressed above. Despite the fact that the United States has unclean hands, it raises misleading and hyper-technical objections which should be dismissed by the Tribunal.

---

[65] *See* Letter from Methanex dated September 3, 2003 at 1 n.1 (noting that the issue related to the four expert reports attached to Dr. Williams' submitted Expert Report).

[66] *See id.* (noting that "Dr. Williams is the testifying expert with respect to these four reports.").

[67] United States Letter to Tribunal, May 14, 2004 at 2.

C. Methanex Must Be Permitted to Respond to the *Amici*

In its Motion, the United States asks the Tribunal to exclude three documents submitted with Methanex' Reply to the *amici* submissions.[68] The United States argues that by submitting the three documents, Methanex is trying to "circumvent" the Tribunal's order that all evidence on which Methanex intended to rely be submitted by January 31, 2003. Nothing could be further from the truth.

Throughout these proceedings, the United States has championed the right of the *amici* to "address the full range of issues," including all legal and factual issues.[69] As a result, the *amici* not only addressed the "full range of issues," but also made numerous misstatements of law and fact, repeatedly mischaracterized Methanex' claim and arguments, and overstepped their role as *amici* to assume the role of litigants.[70]

---

[68] Specifically, the United States asks for the Tribunal to exclude: (1) *MTBE – The Lawsuits Begin*, NITROGEN & METHANOL (Sept. 1, 2000) (I Methanex Amici Reply tab 3); (2) USTR Press Release, *U.S. and Cooperating Countries File WTO Case Against EU Moratorium on Biotech Foods and Crops: EU's Illegal, Non-Science Based Moratorium Harmful to Agriculture and the Developing World*, May 13, 2003 (I Methanex Amici Reply tab 13); and (3) Ambassador Peter Scher, U.S. Special Trade Negotiator for Agriculture, Trade Policy and the Scientific Revolution: The Case of Agricultural Biotechnology, Nov. 24, 1999 (I Methanex Amici Reply tab 14).

[69] *See* Statement of Respondent United States of America in Response to Canada's and Mexico's Submissions Concerning Petitions for *Amicus Curiae* Status, Nov. 22, 2000, at 3 (distinguishing between *amici*, who may address the "full range of issues," and tribunal-appointed experts, who may only address factual issues); *see also* Response of Respondent United States of America in Response to Methanex's Request to Limit *Amicus Curiae* Submissions to Legal Issues Raised by the Parties, Apr. 28, 2003 (arguing that *amici* are entitled to comment on factual and legal issues).

[70] *See* Methanex Reply to *Amici* Submissions at ¶¶ 73-76 (arguing that the *Amici* overstepped their role by requesting that the Tribunal award costs to the United States); 4 Am. Jur. 2d § 6

(continued...)

By seeking to exclude evidence that rebuts the numerous misstatements and mischaracterizations of the *amici*, the United States seeks to deprive Methanex of its right to respond to these submissions. The Canadian Federal Court has stated that one of the "two principles of natural justice" is "the right to respond to the case against you."[71] U.S. courts clearly permit litigants to respond to arguments and issues raised by *amici* submissions.[72] The structure of the *amicus* process provides further confirmation of litigants' inherent right to respond to the submissions of non-litigants.[73] As a matter of equity and fairness, Methanex must be provided the opportunity to respond and rebut misstatements and mischaracterizations raised in *amici* submissions, not only through argumentation but also through evidence.

Finally, Methanex notes the impossible burden that the United States seeks to impose upon Methanex. The United States argues that Methanex should have supplied all the evidence it needed to respond to the *amici* submissions in January 2003,

---

(...continued)

Amicus Curiae (2003) ("An amicus curiae is not a party and generally cannot assume the functions of a party.").

[71] *Shephard v. Fortin*, 2003 F.C. 1296 (Can. Fed. Ct. 2003).

[72] *See, e.g., Eby-Brown Co. v. Wisconsin Dep't of Agric.,* 2001 WL 1913622, at *1 (W.D. Wis. Oct. 24, 2001) ("[P]laintiff should be given an opportunity to respond to the amicus brief"); *Alcoa Steamship Co. v. M/V Nordic Regent,* 654 F.2d 165, 173 (2d Cir. 1979) (Timbers, J., dissenting) (criticizing the majority for failing to give the appellee an opportunity to respond to an *amicus* submission).

[73] The *amicus* process is structured to ensure that a litigant has no less opportunity to be heard than an amici. 4 Am. Jur. 2d *Amicus Curiae* § 8 (2003) (setting out the requirement that *amicus* filings must be timely submitted in order to allow litigants to have the opportunity to respond).

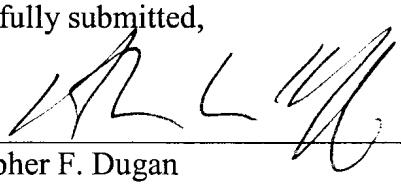
or more than a year before Methanex had even received the *amici* submissions. Surely such a requirement is unreasonable.

V. CONCLUSION

For the foregoing reasons, the Tribunal should accept as conclusive the prior admissions of the United States and California, adopt the adverse evidentiary inferences requested by Methanex, and deny in its entirety the U.S.' Motion to Exclude Certain of Methanex' Evidence.

Dated: May 31, 2004

Respectfully submitted,



Christopher F. Dugan
Claudia T. Callaway
Alexander W. Koff
Matthew S. Dunne
Sabrina Rose Smith
PAUL, HASTINGS, JANOFSKY & WALKER LLP
Tenth Floor
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Attorneys for Claimant
Methanex Corporation

EXHIBIT 1

Puglisi Declaration

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

METHANEX CORPORATION,
Claimant/Investor,

and

UNITED STATES OF AMERICA,
Respondent.

DECLARATION OF ROBERT PUGLISI

I, Robert Puglisi, pursuant to 28 U.S.C. § 1746, declare and state as follows:

1. My full name is Robert Puglisi, and my address is 11211 Waples Mill Rd. in Fairfax, Virginia 22030. I am a registered private investigator in the State of Virginia and am employed by M. Morgan Cherry and Associates Ltd. ("**the firm**"), a private investigation firm licensed in Virgina, DCJS License No. 11-1239. I have been a registered and/or licensed investigator for approximately 24 years. I was retained in 1997 by counsel representing Methanex Corporation to investigate the activities of Archer Daniels Midland ("**ADM**") and Regent International. With the exception of the investigation of ADM and Regent International, I have no past or present relationship with either of the parties to this arbitration. At the time the

documents at issue were collected, my address was 8540 Cinder Bed Road in Newington, Virginia 22122. The statements made below are based on my own knowledge and personal experience and statements made by others whom I supervised.

2. I submitted a witness statement executed on March 28, 2003 ("**the Witness Statement**"), to attorneys for Methanex Corporation to be used in accordance with this proceeding. I hereby incorporate by reference the Witness Statement in its entirety.

3. I understand that the United States filed a motion to exclude certain of Methanex' evidence dated May 18, 2004 (**"the Motion"**). I have read the Motion, in particular Section I ("Illegally Obtained Documents from Richard Vind's and Regent International's Files Should Be Excluded from the Evidentiary Record") and Section II.A ("The Statement of Robert Puglisi Should Be Excluded From the Evidentiary Record"). I refer to the documents referenced in Section I and Section II.A of the Motion collectively as "**the Vind Documents**."

4. This response sets forth my views on the question of whether the Vind Documents were obtained illegally. A full and detailed account, capable of standing as my examination-in-chief (direct examination) at an oral hearing, of all the facts to which I would testify, expressed in my own words, is already provided in the Witness Statement. Because of the claims of illegal conduct raised in the Motion,

however, I provide the following additional information, which I understand is normally provided in response to cross-examination.

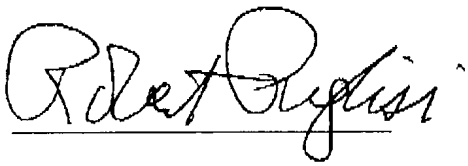
5. The Vind Documents were found discarded on public property behind Regent International's offices at 910 E. Birch Street in Brea, California, 92821. I supervised a licensed California private investigator who collected the discarded materials. The documents were forwarded to me via express mail, overnight delivery in a sealed box. I made copies of those documents and forwarded these copies to counsel for Methanex during the course of my investigation. A subset of these materials are the Vind Documents.

6. I informed counsel for Methanex of how I came into possession of the documents. I understand that in the State of California anyone discarding documents relinquishes all of their ownership and privacy rights in those documents.

7. I reiterate that at no time during the investigation into the activities of Archer Daniels Midland and Regent International did I, or anyone else that I supervised, unlawfully obtain documents from the premises of Regent International or Richard Vind. In particular, at no time were the Vind documents "unlawfully copied" as the United States claims at page 4 of the Motion.

8. I undertake to attend and give evidence at an oral hearing in this case unless otherwise ordered by the Tribunal.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Fairfax, Virginia, on May 31, 2004.



Robert Puglisi

EXHIBIT 2

Macdonald Declaration

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

METHANEX CORPORATION, *Claimant/Investor,* *and* UNITED STATES OF AMERICA, *Respondent.*

DECLARATION OF MICHAEL MACDONALD

I, Michael Macdonald, pursuant to 28 U.S.C. § 1746, declare and state as follows:

1. My full name is Michael Glencoe Macdonald, and my business address is 1800 Waterfront Centre, 200 Burrard Street, Vancouver, B.C. V6C 3M1, Canada. I am the Senior Vice President, Technology & Corporate Development, for Methanex Corporation, the Claimant in these proceedings. The statements made below are based on my own knowledge and personal experience.

2. I submitted three prior affidavits in these proceedings, executed on May 25, 2001, November 5, 2002, and February 19, 2004 (collectively "**the Witness Statements**"), to attorneys for Methanex Corporation to be used in accordance with

these proceedings. I hereby incorporate by reference the Witness Statements in their entirety.

3. I understand that the United States filed a motion to exclude certain of Methanex' evidence dated May 18, 2004 (**"the Motion"**). I have read the Motion, in particular Section II.B ("The Statement of Bob Hastings Is Inadmissible") and Section II.C ("The Second and Third Affidavits of Michael Macdonald Should Not Be Admitted"). I refer to the argument referenced in Section II.B and Section II.C of the Motion collectively as "**the United States' Objection**."

4. This response sets forth my views on the United States' Objection. A full and detailed account, capable of standing as my examination-in-chief (direct examination) at an oral hearing, of all the facts to which I would testify, expressed in my own words, is already provided in the Witness Statements.

5. Because of the claims raised in the United States' Objection, I provide the following additional information, which I understood to be self-evident in the Witness Statements. Unless there was a document or other material appended to the Witness Statements, the specific source of the information contained in the Witness Statements are based on my own knowledge or personal experience.

6. If the United States seriously believed that I do not possess the: (i) requisite corporate finance qualifications; (ii) knowledge of the Brazilian market; (iii) knowledge concerning California refiners that once bought methanol and now buy ethanol; or (iv) understanding of the gasoline blending or distribution process to

make the factual statements contained in the Witness Statements, as they claim at pages 8 and 9 of the Motion, then the United States should have designated me for cross-examination. I understand that they had an opportunity to do so and declined. Moreover, I was prepared to testify at the hearing regarding all of these issues as well as the material contained in the letter sent from Bob Hastings that is attached at tab 6 to my Third Affidavit dated February 19, 2004.

7. I undertake to attend and give evidence at an oral hearing in this case unless otherwise ordered by the Tribunal.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Vancouver, British Columbia, on May 31, 2004.

Michael Macdonald