

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

THE UNITED STATES OF AMERICA,

Respondent/Party.

**CLAIMANT METHANEX CORPORATION'S
COUNTER-MEMORIAL ON JURISDICTION**

Christopher F. Dugan
James A. Wilderotter
Gregory G. Katsas
Melissa D. Stear
Tashena Middleton Moore
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700

*Attorneys for Claimant
Methanex Corporation*

February 12, 2001

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE UNITED STATES' RESTRICTIVE THEORY OF TREATY INTERPRETATION HAS BEEN REPEATEDLY REJECTED BY OTHER NAFTA TRIBUNALS	2
III. METHANEX HAS STATED A CLAIM UNDER ARTICLE 1116	6
A. Methanex Has Adequately Pleaded Breaches of Chapter 11	7
1. Methanex Has Properly Alleged a Violation of Article 1105.....	8
2. Methanex Has Properly Alleged A Violation of Article 1110	16
B. Methanex Has Alleged Injury and Causation Sufficient to Satisfy the Pleading Requirements of Article 1116	22
1. Methanex Already Has Incurred Cognizable Loss and Damage	23
2. The United States' Proximate Cause Arguments Cannot Support Dismissal.....	31
3. Article 1116 Does Not Require "Direct" Injury	38
IV. THE CALIFORNIA MEASURES "RELATE TO" METHANEX AND ITS INVESTMENTS, BOTH IN LAW AND IN FACT	46
A. Under NAFTA Precedent, the Appropriate Standard for "Relating To" Is Whether the Measure "Affects" the Investor or Its Investments	47
B. The U.S. Interpretation is Inappropriate Under Well-Established Rules of Treaty Interpretation	48
C. The California Measures Are "Related To" Methanex and Its Investments	51
D. If Methanex's Proposed Amendment is Granted, the United States' Objection Will Be Mooted	51
V. THE WAIVERS SUBMITTED BY METHANEX AND ITS INVESTMENTS ARE SUFFICIENT TO FORM AN AGREEMENT TO ARBITRATE THIS DISPUTE	52
A. The Waivers Submitted by Methanex and Its Enterprises Satisfy Article 1121.....	52
B. An Invalid Waiver Would Not, At This Point, Strip the Tribunal of Jurisdiction.....	53
VI. CONCLUSION.....	55

I. INTRODUCTION

In its Memorial of November 13, 2000, the United States raised several wide-ranging objections purportedly addressed to this Tribunal's jurisdiction. As set forth below, each individual objection is without merit. Moreover, the objections collectively suffer several overarching flaws: they do not address jurisdiction at all, they proceed from erroneous legal premises, they demand that Methanex prove its case *before* a hearing on the merits, and they seek to force premature rulings on issues that may soon be eliminated from the case.

“The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties. Unlike ICSID and its Additional Facility Rules, there exist under the UNCITRAL Rules no other jurisdictional criteria.” *Ethyl Corp. v. Canada*, (Award on Jurisdiction June 24, 1998), ¶ 59, *reprinted in* 38 I.L.M. 708 (1999) (footnote omitted). The United States has expressly consented to arbitrate any “claim” filed under Chapter 11 of NAFTA (Art. 1122(1)), and Methanex has filed (and consented to arbitrate) just such a “claim.” For jurisdictional purposes, nothing more is required. *See* T. Weiler, *2000 in Review: NAFTA Investor-State Dispute Settlement Gains Steam* (2001) (unpublished manuscript) (soon to be published in *International Lawyer*) (author can be contacted at: tweiler@naftalaw.org) (“motions to dismiss have been brought and lost, not only over alleged procedural defects, but also over ‘merits’ defences that are not properly the subject of a jurisdictional hearing”). On that ground alone, the United States’ objections should be rejected.

On the merits, the United States’ objections all rest on the erroneous premise that NAFTA should be restrictively construed to protect its own sovereignty. Indeed, the United States’ creative legal arguments find no support in the text of NAFTA and would, if accepted, largely insulate the United States from liability for breach of its obligations under Chapter 11.

However, several tribunals have held that NAFTA should be liberally construed to effectuate its protective purposes, and have rejected the United States' arguments for a restrictive construction.

The United States' objections also repeatedly rest on alleged failures of proof with respect to causation and other similarly fact-intensive issues. At this preliminary stage of the proceeding, however, Methanex should not be required to prove any critical facts. International tribunals repeatedly have held that, in order to sustain jurisdiction, a claimant need only credibly *allege* the factual elements of a claim. Methanex easily has satisfied that modest pleading standard.

Finally, the United States' objections address issues that may be removed from the case in the near future. As Methanex has explained, if the Tribunal grants its request to amend its Statement of Claim, most of the pending objections will be mooted. (*See* Claimant Methanex's Request to Extend or Suspend Existing Jurisdictional Schedule of Dec. 22, 2000.) Accordingly, Methanex respectfully requests that the Tribunal defer ruling on these objections until it has considered the motion to amend.

II. THE UNITED STATES' RESTRICTIVE THEORY OF TREATY INTERPRETATION HAS BEEN REPEATEDLY REJECTED BY OTHER NAFTA TRIBUNALS

The United States makes a fundamental argument that “[u]nder the restrictive interpretation doctrine, any ambiguity in clauses granting jurisdiction over disputes between States and private persons must be resolved in favor of State sovereignty.” (U.S. Mem. at 13-14.) This argument is incorrect as a matter of law.

Rejecting the identical “restrictive interpretation” doctrine urged here by the United States, several NAFTA tribunals have held that the treaty must be broadly construed. In *Ethyl, supra*, the Tribunal refused to apply the “long . . . displaced” canon of restrictive interpretation:

The Tribunal considers it appropriate first to dispense with any notion that Section B of Chapter 11 is to be construed “strictly.”

The erstwhile notion that “in case of doubt a limitation of sovereignty must be construed restrictively” has long since been displaced by Articles 31 and 32 of the Vienna Convention [on the Law of Treaties of 1969 (“Vienna Convention”)¹].

Id. ¶ 55 (footnotes omitted). The *Ethyl* Tribunal held that NAFTA Chapter 11 must be construed according to its “object and purpose,” *id.* ¶ 56 (quoting Vienna Convention, Article 31(1)), which is to “create effective procedures . . . for the resolution of disputes” and “increase substantially investment opportunities.” *Id.* ¶ 83 (quotations omitted.)

More recently, the Tribunal in *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001), similarly rejected the “restrictive interpretation” doctrine:

[W]e do not accept the Respondent’s submission that NAFTA is to be understood in accordance with the principle that treaties are to be interpreted in deference to the sovereignty of states. . . . Whatever the status of this suggested principle may have been in earlier times, the Vienna Convention on the Law of Treaties is the primary guide to the interpretation of the provisions of NAFTA NAFTA is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.

Id. ¶ 51 (citations omitted). The *Loewen* tribunal concluded that NAFTA “must be interpreted in the light of its stated objectives and in accordance with applicable rules of international law” and that “[t]hese objectives include the promotion of conditions of fair competition in the free trade area, the increase of investment opportunities and the creation of effective procedures for the resolution of disputes.” *Id.* ¶ 50 (citations omitted). Accordingly, the *Loewen* tribunal adopted the principle that NAFTA must be liberally construed:

The text, context and purpose of Chapter Eleven combine to support a *liberal* rather than a restricted interpretation of the words “measures adopted or maintained by a Party,” that is, an interpretation which provides protection and security for the foreign investor and its investment.

¹ U.N. Doc. A/CONF.39/27, reprinted in B. Carter & P. Trimble, *International Law: Selected Documents* 49 (1999).

Id. ¶ 53 (emphasis added).

The Tribunal in *Pope & Talbot, Inc. v. Gov't of Canada* similarly concluded that NAFTA must be broadly construed “in the light of its object and purpose.” *Pope & Talbot*, (Interim Award June 26, 2000) ¶ 67 (quoting Vienna Convention, Art. 31(1)). The Tribunal also plainly held that “strict” construction of NAFTA is inappropriate:

[A]s rulings by this Tribunal and the *Ethyl* Tribunal have found, strict adherence to the letter of . . . NAFTA [A]rticles [1116-22] is not necessarily a precondition to arbitrability, but must be analyzed within the context of the objective of NAFTA in establishing investment dispute arbitration in the first place. That objective, found in Article 1115, is to provide a mechanism for the settlement of investment disputes that assures “due process” before an impartial tribunal. Lading that process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat that objective, particularly if employed with draconian zeal.

Pope & Talbot, Award Concerning the Motion by the Government of Canada Respecting the Claim Based Upon Imposition of the “Super Fee,” (Aug. 7, 2000) 26 (footnotes omitted).²

² Other modern tribunals have rejected the restrictive interpretation doctrine. In *AMCO Asia Corp. v. Republic of Indonesia*, 1 ICSID Reports 377 (1983), an ICSID tribunal rejected what it described as “the alleged principle of restrictive interpretation of limitations of sovereignty.” *Id.* at 397. Like the United States here, the government there argued that “[t]he consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty is to be construed restrictively.” *Id.* at 393. The Tribunal disagreed emphatically:

[L]ike any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.

Id. at 394 (emphasis in original); *see also Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, 62 (Advisory Opinion of Apr. 26) (separate opinion of Judge Shahabuddeen) (“Arbitral jurisprudence . . . rejects the proposition that ‘insofar as treaties of arbitration constitute conferrals of jurisdiction upon international authority, they are to be restrictively construed.’”) (citation omitted).

These tribunals correctly concluded that the Vienna Convention eliminated whatever canon of “restrictive interpretation” that might previously have existed. During negotiation of the Vienna Convention, Hungary proposed a provision that, where a treaty is otherwise ambiguous, “a restrictive interpretation shall be applied in view of the principle of State sovereignty.” U.N. Doc. A/CONF.39/6/Add.2 (Mar. 23, 1968), at 5. That proposal was rejected.

As Judge Torres Bernardez of the International Court of Justice has explained:

Old theories about the so-called “restrictive” interpretation of conventional instruments providing for the jurisdiction of international courts and tribunals do not correspond to present rules of treaty interpretation. They were consciously left out of those rules when the latter were codified by the Vienna Convention. No longer does restrictiveness in treaty interpretation govern *a priori* in any way the act of treaty interpretation of such kinds of conventional instrument.

Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. - Hond.: Nicar. Intervening), 1992 I.C.J. 351, 728-29 (Judgment of Sept. 11) (separate opinion of Judge Bernardez); *see also* C. Brower & J. Brueschke, *The Iran-United States Claims Tribunal* 265 (1998) (“Proper application of the principles embodied in [the Vienna Convention] should uniformly dispense with a principle popular in an earlier era, namely that of ‘restrictive interpretation.’”).³

³ It is far from clear that the supposed “restrictive interpretation” doctrine was ever accepted in international law. While there is some historical support for the doctrine, many authorities never accepted it. *See, e.g.*, H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int’l L. 48, 84 (1949) (restrictive interpretation “has received no substantial support either from the international tribunals in general or from the International Court in particular”); *United States v. Iran*, Case A17, 8 Iran-U.S. Cl. Trib. Rep. 189, 207-08 (1985) (concurring opinion of Charles N. Brower, joined by Howard M. Holtzmann) (restrictive interpretation doctrine was “never universally favored”). And for every authority urging the principle of “restrictive interpretation,” there are several applying the opposite interpretive principle that treaties should be construed broadly and equitably. *See, e.g.*, Friedmann, *The Changing Structure of International Law* 197-98 (1964) in 14 M. Whiteman, *Digest of Int’l Law* § 33, at 366 (“Probably the most widely used and cited ‘principle’ of international law is the principle of general equity in the interpretation of legal documents and relations.”), 5 Hackworth, *Digest of Int’l Law* § 493, at 223 (1943) (“where

For all of these reasons, NAFTA is not subject to the “restrictive interpretation” doctrine. On the contrary, its text and history “support a liberal rather than a restricted interpretation,” in order to “provid[e] protection and security” for foreign investors and their investments. *Loewen, supra*, ¶ 53. Absent the discredited “restrictive interpretation” doctrine, the United States’ purportedly jurisdictional objections are meritless.

III. METHANEX HAS STATED A CLAIM UNDER ARTICLE 1116

The United States argues at length that Methanex has not stated a claim under Article 1116 of NAFTA. That provision states, in relevant part:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: [Chapter 11, Section A] and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Thus, to state a claim under Article 1116, a claimant must allege three elements: (1) that it is an “investor” of a NAFTA Party; (2) that another NAFTA Party has breached an obligation under Chapter 11; and (3) that the claimant has suffered loss or damage “by reason of, or arising out of,” the breach.

At the jurisdictional stage, of course, a claimant need only *allege* these elements. As one NAFTA Tribunal has held:

On the face of the Notice of Arbitration and the Statement of Claim, Ethyl states claims for **alleged breaches** by Canada of its obligations under Article 1102 (National Treatment), Article 1106 (Performance Requirements) and Article 1110 (Expropriation and Compensation). The Claimant indisputably is an “investor of a Party,” namely the United States, and **alleges** that it has “incurred loss or damage by reason of, or arising out of,” such breaches, all as required by Article 1116(1) Claimant’s Statement of Claim

treaties are open to two constructions, one restricting the rights which may be claimed under it and the other enlarging those rights, the more liberal interpretation is to be preferred”); 5 Moore, *Digest of Int’l Law* § 763, at 251 (1906) (Statement of U.S. Secretary of State) (“In doubtful cases that construction is to be adopted which will work the least injustice — which will put the contract on the foundation of justice and equity rather than of inequality.”).

satisfies *prima facie* the requirements of Article 1116 to establish the jurisdiction of this Tribunal. As was stated in Administrative Decision No. II (1922), Decisions and Opinions, Mixed Claims Commission, United States and Germany (1925) 6-7, quoted in K.S. Carlston, *The Process of International Arbitration* 77 (1946): “When the *allegations* in a petition . . . bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches.” See also *Ambatielos Case (Greece v. United Kingdom)*, merits: *obligation to arbitrate*, 1953 I.C.J. Rep. 10, 11-12 (Judgment of May 19) (“[T]he words ‘claims . . . based on the provisions of the Treaty of 1886’ . . . can only mean claims depending for support on the provisions of the Treaty of 1886. . . . The fact that a claim purporting to be based on a Treaty may eventually be found by the Commission of Arbitration to be unsupportable under the Treaty, does not of itself remove the claim from the category of claims which, for the purposes of arbitration, should be regarded as falling within the terms of the Declaration of 1926.”).

Ethyl, supra, ¶ 61 (**emphasis added**; other emphasis in original).

Methanex’s original Statement of Claim clearly states a claim under Article 1116. The United States does not dispute that Methanex is a Canadian “investor.” Moreover, Methanex has alleged that the United States breached Chapter 11 in this case and that Methanex suffered damage “by reason of, or arising out of,” the U.S. breaches. As explained below, the United States errs in contending that Methanex has not credibly made those allegations.

Article 1116 requires nothing more to establish the jurisdiction of this Tribunal. Whether the United States has, in fact, breached NAFTA, and whether those breaches have, in fact, damaged Methanex are issues that can be decided only at the merits stage of this proceeding, once the evidence has been fully considered.

A. Methanex Has Adequately Pleaded Breaches of Chapter 11

The United States argues that Methanex has failed to allege a breach of Chapter 11. This argument is without merit. In fact, Methanex has adequately alleged breaches of both Article 1105 and Article 1110.

1. Methanex Has Properly Alleged a Violation of Article 1105

The United States argues at length that Article 1105 does nothing more than codify the standards of “customary international law.” (U.S. Mem. at 39-43.) But Article 1105 creates a heightened standard of “fair and equitable treatment” specifically designed to afford increased protection to foreign investors and their investments. Moreover, under either the “customary” standard or the heightened “fair and equitable treatment” standard, Methanex has plainly alleged breaches of Article 1105.⁴

a. Article 1105 Creates A Heightened Standard of “Fair and Equitable Treatment”

In pertinent part, Article 1105 states: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Article 1105(1). Accordingly, Article 1105 requires the United States (and its states) to provide “fair and equitable treatment” to Canadian investors and their investments.

By imposing this requirement of “fair and equitable treatment,” Article 1105 incorporates a standard used in the United States bilateral investment treaties (“BITs”). *See* M. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, Table C, at 237, *in* I. Shihata, *Legal Treatment of Foreign Investments: “The World Bank Guidelines”* (1993). This requirement does more than simply codify the “customary” standard of treatment otherwise imposed under international law. As one eminent scholar has explained:

The terms “fair and equitable treatment” envisage conduct which goes *far beyond the minimum standard* and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would

⁴ Article 1105 uses the term “international law,” not “customary international law.” The former phrase is broader for it encompasses treaty law, including the principles commonly embodied in bilateral investment treaties and international trade treaties.

not be concerned with a minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.

F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int'l L. 241, 244 (1981) (emphasis added); *see also* G. Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 14 Current Legal Probs. 213, 217, 220 (1961) (“fair and equitable treatment” standard “presents an imaginative attempt to combine the minimum standard with the standard of equitable treatment”).

Kenneth Vandeveld, a leading expert on BITs, confirms that the “fair and equitable treatment” standard is distinctively broader than the international “minimum standard of treatment.” K. Vandeveld, *United States Investment Treaties: Policy and Practice* 76-78 (1992). Vandeveld explains:

Th[e] phrase is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the dispute provisions. This clause provides a baseline of protection which will be useful principally in situations *where other substantive provisions of international and national law provide no protection*. It also provides a basic principle of equitable treatment to guide interpretation of other BIT provisions.

Id. at 76 (emphasis added). Because the “fair and equitable treatment” requirement applies “where other substantive provisions of international . . . law provide no protection,” it simply cannot be equivalent to the minimum standard of “customary international law.” *Id.*; *cf.* J. Johnson, *North American Free Trade Agreement: A Comprehensive Guide* § 7.3, at 277 (1994) (“Because of the *deficiencies* of *customary international law*, developed capital-exporting countries have endeavoured to protect direct foreign investments of their nationals in developing capital-importing countries through the negotiation of bilateral investment treaties. . . .” (emphasis added)).

In the recent NAFTA case of *Metalclad Corp. v. Mexico*, the Tribunal emphasized the broad protection afforded by the “fair and equitable treatment” standard. The *Metalclad* Tribunal found a breach of Article 1105 where a foreign investor had been arbitrarily prevented from operating a hazardous waste landfill. *See Metalclad Corp. v. Mexico*, ICSID Case No. ARB (AF)/97/1 (Award of Aug. 30, 2000) The Tribunal held:

The actions of the Municipality following its denial of the municipal construction permit, coupled with the *procedural and substantive* deficiencies of the denial, support the Tribunal’s finding, for the reasons stated above, that the Municipality’s insistence upon and denial of the construction permit in this instance was improper.

* * * *

Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. The totality of these circumstances demonstrates a *lack of orderly process* and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated *fairly and justly in accordance with NAFTA*.

Moreover, the acts of the State and the Municipality — and therefore the acts of Mexico — fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment. This is so particularly in light of the governing principle that internal law (such as the Municipality’s stated permit requirements) does not justify failure to perform a treaty.

The Tribunal therefore holds that Metalclad was not treated *fairly or equitably under the NAFTA* and succeeds on its claim under Article 1105.

Id. ¶¶ 97, 99-101 (emphasis added; citation omitted). The *Metalclad* Tribunal thus made no reference to “customary international law” in finding a violation of Article 1105. Rather, following Dr. Mann’s approach, it simply considered whether the measures at issue were “fair and equitable or unfair and inequitable.” 52 Brit. Y.B. Int’l L. at 244.

The United States itself has similarly interpreted comparable treaty provisions in previous international arbitrations. For example, the treaty provision at issue in the *Case Concerning Elettronica Sicula, S.p.A. (ELSI)* prohibited “arbitrary or discriminatory measures.” See I.C.J., *Pleadings, Oral Arguments, Documents, Case Concerning Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy), Vol. I, at 75 (Mem. of the U.S.) (emphasis omitted). In arguing that Italy had breached this provision, the United States urged construction by reference to the broad language of its literal terms, *not* by reference to the minimum standards of “customary” international law:

The prohibition of “arbitrary” measures conveys above all the commitment of the respective Governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of governmental authority. Following standard dictionary definitions, an “arbitrary” act may be one which is characterized by absolute power or an abuse of discretion. “Arbitrary actions” include those which are not based on fair and adequate reasons (including sufficient legal justification), but rather arise from the unreasonable or capricious exercise of authority. The terms “oppressive” and “unreasonable” are thus synonyms of “arbitrary.” As used in Italian and United States legal practice with reference to governmental action, “arbitrary” actions include those which are unreasonable, in the sense that they are not based on sufficient or legitimate reasons, or are unduly unjust or oppressive.

Id. at 76-77 (footnotes omitted); *see also id.*, Vol. III, at 101 (Argument of Professor Gardner on behalf of the U.S.) (“An arbitrary act is one that is characterized by the illegitimate exercise of power or an abuse of discretion. Thus, arbitrary actions include those which are not based on fair and adequate reasons – including sufficient legal justification – but rather arise from the unreasonable or capricious exercise of authority. In the light of the object and purpose of this Treaty, the prohibition on arbitrary measures constitutes a commitment of the respective Governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of government authority, authority exercised with no legitimate basis.”). This Tribunal should adopt the same approach here.

b. In Any Event, International Law Prohibits Inequitable, Unfair, or Arbitrary Conduct by States

Even if the “fair and equitable treatment” standard were merely an embodiment of customary international law, it has long been recognized that international law forbids inequitable, unfair, or arbitrary conduct. Thus, in the recent NAFTA case of *S.D. Myers, Inc. v. Canada*, (Partial Award Nov. 13, 2000), the Tribunal stated that Article 1105 “imports into the NAFTA the *international law requirements of due process, economic rights, obligations of good faith and natural justice.*” *Id.* ¶ 134 (emphasis added). Accordingly, the Tribunal concluded that a State violates Article 1105 if it accords treatment “in such an *unjust* or *arbitrary* manner that the treatment rises to the level that is unacceptable from the international perspective.” *Id.* ¶ 263 (emphasis added).

Other tribunals have recognized the requirements of fairness, reasonableness and good faith in international law. *See, e.g., Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253, 268 ¶ 46 (Judgment of Dec. 20) (“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.”); *Case Concerning Rights of Nationals of the United States of America in Morocco (France/U.S.)*, 1952 I.C.J. 176, 212 (Judgment of Aug. 27) (“The power of making the [customs] valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.”). As Sir Gerald Fitzmaurice wrote: “[A]lthough a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does, and not act arbitrarily or capriciously.” G. Fitzmaurice, *The Law and Procedures of the International Court of Justice* 12-13, Vol. 1 (1986).

The United States itself has asserted these equitable principles of international law in other cases. For example, in the *ELSI* case it stated: “Municipal legal systems, including those

of Italy and the United States, *and principles of international law*, recognize that where the means employed do not fit the expressed goal, or are legally impermissible, then those means are arbitrary and unreasonable.” *ELSI, supra*, Vol. II, at 385 (Reply of the U.S.) (emphasis added); *see id.*, Vol. I, at 80 (Mem. of the U.S.) (“It was an unreasonable action which did not rest on legitimate grounds, neither under Italian law nor under the governing principles of the Treaty. It was precisely the sort of ‘refined technique’, contrary to the *fundamental principles of ‘equitable treatment,’ and ‘fair play,’* which Article I(a) was intended to prohibit.” (emphasis added)).

c. Methanex Has Pleaded A Breach Under Either Standard

Under either the “fair and equitable treatment” standard or the “customary” prohibition against inequitable treatment, Methanex has adequately alleged that the measures at issue breached NAFTA Article 1105. (*See* Statement of Claim, ¶ 33.) Methanex alleges that California’s selective ban on MTBE was arbitrary and unreasonable. In support of that conclusion, it explained that MTBE is only *one* of several components leaking into California groundwater supplies from underground storage tanks (“USTs”); and that California has done nothing to control pollution from *other* far more dangerous components, including the known human carcinogen benzene. Methanex further explained that California never attempted to combat the problem of MTBE in groundwater by enforcing regulations already in place to deal with leaking gasoline tanks – which the Governor *knew* to be the cause of contaminated water, *see* California Executive Order D-5-99 at 1 (Mar. 25, 1999) (“while MTBE has provided California with clean air benefits, *because of leaking underground fuel storage tanks* MTBE poses an environmental threat”) (emphasis added). Methanex also explained that California could have better addressed its environmental problem by banning the use of two-stroke marine engines on drinking-water reservoirs. If those allegations are true (and they must be assumed true at this stage of the case), then California’s actions plainly would violate Article 1105.

Even at this preliminary stage, Methanex has proffered substantial evidence supporting its case. For example, as noted by Methanex (*see* Statement of Claim ¶¶ 17-18), the California State Auditor (“Auditor”), in a December 17, 1998 Report to the Governor of California (“Auditor’s Report”), criticized state officials for failing to take adequate steps to protect California groundwater and for not promptly addressing contamination resulting from leaking USTs. In particular, the Auditor’s Report stated: “The State of California has missed opportunities to aggressively address the problem of gasoline contamination [in] our drinking water even though the State has had sufficient evidence that leaking storage tanks and gasoline additives pose a major threat to California’s groundwater.” Auditor’s Report at 15.

Other nations that have examined the MTBE issue have reached conclusions starkly different from those of California, and have determined that it is not appropriate or environmentally beneficial to ban MTBE. For example, as a result of “increasing concern in certain areas of the US [a likely reference to California] over the use of MTBE in gasoline supplies,” the German Environmental Protection Agency (“German EPA”) “was asked June 9, 1999 to prepare a paper on the possible toxicological and ecological risks of the additive.” International Fuel Quality Center [“IFQC”] Special Report: German EPA Position Paper on MTBE (1999). According to the IFQC, the German EPA ultimately reached the following conclusions: (1) “MTBE is an important component for the production of gasoline. The use of MTBE leads to a reduction of HC [hydrocarbon] and CO [carbon monoxide] emissions, and benzene and aromatics in gasoline without any loss of quality”; (2) “There was no risk established for the environment from the use of MTBE in fuels in Germany, nor is such a risk expected to occur in [the] future”; (3) “About 94% of all gasoline sold in Germany contains MTBE at much lower concentrations than in California”; (4) “Based on the minimum requirements for underground storage tanks (USTs) as well as the relevant regulations, leakage

from tanks and pipes is clearly less frequent in Germany than in California”; (5) “Germany [in contrast with the U.S.] has almost completed its nationwide UST renewal and cleanup program”; (6) “The evidence points to the fact that the use of MTBE must be prioritized over the use of benzene and aromatics in gasoline”; and (7) “The German EPA recommended MTBE as a substitution for benzene and aromatics.” *Id.*

Similarly, the European Commission Working Group on the Classification and Labelling of Dangerous Substances (“EC Working Group”) “reached [an] agreement not to classify [MTBE] as dangerous for the environment.” *See Draft Summary Record, Meeting of the Commission Working Group on the Classification & Labeling of Dangerous Substances*, ECB Ispra, Nov. 15-17, 2000, No. ECBI/76/00, Jan. 8, 2001, at 20. The EC Working Group decided not to classify MTBE as a carcinogen, noting that “the suspicion that MTBE can cause cancer was not sufficiently founded by the available data.” *Id.* The European Union also has conducted a thorough and extensive risk assessment of MTBE, but did not recommend that it be banned. *See Risk Assessment, MTBE*, CAS-No.: 1634-04-4, Draft, Jan. 20, 2001.

Methanex has adequately alleged, and cannot properly be denied an opportunity to prove, that California’s selective ban on MTBE is unfair, inequitable, and arbitrary, and thus violates Article 1105 of NAFTA. Methanex has pleaded more than enough in order to overcome any jurisdictional or admissibility challenge.⁵

⁵ Methanex also intends to prove that the measures at issue violate the “full protection and security” requirement of Article 1105. As one recent investment tribunal noted with regard to that requirement:

The obligation incumbent upon [the State] is an obligation of vigilance, in the sense that [the State] as the receiving State of investments made by [the investor], . . . shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. [The State] must

d. Acceptance of Methanex’s Amended Claim Would Moot This Objection

Finally, Methanex notes that, should the Tribunal accept the amended claim, its allegations of discrimination would completely moot the United States’ pleading objection. (*See* Methanex’s Request to Extend or Suspend the Current Jurisdictional Schedule, Dec. 22, 2000, at 11-12.) It is beyond serious dispute that the prohibition against discrimination based on national origin is a long-established principle of customary international law. *See, e.g.*, F.A. Mann, *Studies in International Law* 476 (1973) (“The rule against discrimination . . . involves a principle which does not seem to have been challenged in any country or at any time.”); *Restatement (Third) of Foreign Relations Law* § 712(3) (1987) (“A state is responsible under international law for injury resulting from . . . arbitrary or *discriminatory* acts or omissions by the state that impair property or other economic interests of a national of another state.” (emphasis added)). Even under the construction urged by the United States, Article 1105 undoubtedly incorporates that principle. Thus, until the amendment issue is ruled upon, the Tribunal need not and should not address whether Methanex has adequately pleaded a violation of Article 1105.

2. Methanex Has Properly Alleged A Violation of Article 1110

The United States also argues that Methanex has failed to plead a breach of Article 1110 of NAFTA because it allegedly has identified no “investment” capable of being expropriated. (*See* U.S. Mem. at 30-38.) The United States’ assertion is simply without merit.

show that it has taken all measure of precaution to protect the investments of [the investor] on its territory.

American Mfg. & Trading, Inc. v. Republic of Zaire, 36 I.L.M. 1531, 1548 (1997).

a. Methanex's NAFTA Investments Include Enterprises, Market Shares, and Goodwill

Methanex has identified several investments capable of being expropriated, including its subsidiaries, Methanex U.S. and Methanex Fortier, as well as the respective market shares, operations, and goodwill of Methanex, Methanex U.S., and Methanex Fortier.

NAFTA Article 1139 broadly defines an “investment” to include the following:

- (a) an enterprise; . . .
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution . . .;
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes;

Thus, one type of NAFTA “investment” is an “enterprise,” which Article 201 defines as “any entity constituted or organized under applicable law.” Methanex U.S. and Methanex Fortier satisfy this definition. Methanex U.S. is a Texas general partnership of two companies, both of which are incorporated under the laws of the State of Delaware. Methanex Fortier is a company incorporated under the laws of the State of Delaware. Methanex indirectly owns all the shares of Methanex U.S. and Methanex Fortier. And despite its assertion that Methanex has failed to identify an investment capable of being expropriated, the United States elsewhere explicitly recognizes that Methanex U.S. and Methanex Fortier are “investments” under NAFTA. (*See* U.S. Mem. at 62 (“Methanex’s claims, however, are not claims of independent injury, but are, rather, merely derivative of injuries allegedly suffered by the *enterprises that constitute its U.S. investments.*” (emphasis added)).)

Goodwill and market share are other types of NAFTA “investments” capable of being expropriated. By its terms, Article 1139(g) defines an “investment” to include “property,

tangible or intangible, . . . used for the purpose of economic benefit.” A company’s goodwill, customer base, and market share are “intangible” assets routinely considered when appraising a business. *See Black’s Law Dictionary* 694-95 (6th ed. 1990) (defining “goodwill” as “an intangible asset” which includes “[t]he custom of patronage of any established trade or business; the benefit of having established a business and secured its patronage by the public” and “as property incident to business sold, favor vendor has won from public, and probability that all customers will continue their patronage”); *New Webster’s Comprehensive Dictionary of the English Language* 418 (1985) (defining “goodwill” as “the intangible value of a business, due to custom, reputation, or projected earning power”). Customers obviously produce “economic benefit” from their purchases. Similarly, antitrust law exists precisely because market share is an intangible interest “used for the purpose of economic benefit.”

At least two NAFTA tribunals have recognized that market share is an investment capable of supporting an expropriation claim under Article 1110. *See Pope & Talbot, supra*, ¶ 96 (“the Tribunal concludes that the Investment’s access to the U.S. market is a property interest subject to protection under Article 1110”); *S.D. Myers, supra*, ¶ 232 (“The Tribunal recognizes that there are a number of other bases on which SDMI could contend that it has standing to maintain its [Chapter 11 claims] including that . . . its market share in Canada constituted an investment.”); *id.* (separate opinion of Dr. Bryan Schwartz) ¶ 218 (noting that “goodwill” is a “property interest known in law”). In fact, the *S.D. Myers* Tribunal noted that “rights other than property rights may be ‘expropriated’ and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures.” *S.D. Myers, supra*, ¶ 281.

The *Pope & Talbot* Tribunal rejected the very argument urged here by the United States. The Claimant in that case, a United States corporation, asserted that performance requirements

imposed by Canada on its “investment,” a wood products company, limited the investment’s access to the U.S. lumber market. *See Pope & Talbot, supra*, ¶ 86. Canada responded that “the ability to alienate its product to [the U.S.] market, is not a property right.” *Id.* ¶ 87. The Tribunal flatly rejected that contention:

While Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the “business” of the Investment. Interference with that business would necessarily have an adverse effect on the property that the Investor has acquired in Canada, which, of course, constitutes the Investment. . . . [T]he true interests at stake are the Investment’s asset base, the value of which is largely dependent on its export business. The Tribunal concludes that the Investor properly asserts that Canada has taken measures affecting its “investment,” as that term is defined in Article 1139 and used in Article 1110.

Id. ¶ 98. Thus, the goodwill and market shares of Methanex, Methanex U.S. and Methanex Fortier also constitute “investments” capable of being expropriated under NAFTA Article 1110.

b. Methanex Has Adequately Alleged That California Expropriated These Interests

Methanex has plainly stated a claim that the challenged measures constitute an expropriation under Article 1110. Whether Methanex ultimately proves these allegations is a merits question that should not be considered at this time.

Methanex has credibly alleged that the United States took actions “directly or indirectly . . . tantamount to . . . expropriation,” within the meaning of Article 1110(c). In fact, the same allegations that support Methanex’s Article 1105 claim also support its expropriation claim under Article 1110. *See, e.g., Metalclad, supra* ¶ 104 (“By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the

project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).”)

Under settled international law, an expropriation occurs where government action interferes with an alien’s use or enjoyment of property. *See, e.g., Tippetts, Abbett, McCarthy, Stratton v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984); *Starrett Housing Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Cl. Rep. 122, 154, 172 (1983); *Restatement (Third) of Foreign Relations* § 712, Cmt. g (1987); L. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int’l L. 545, 553 (1961); *see also Pope & Talbot, supra*, ¶ 98 (implicitly adopting an “interference with business” test for expropriation). Thus, in *Metalclad Corp., supra*, ¶ 103, a NAFTA Tribunal explained that:

expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole, or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

See also Weiler, supra (“[A]n investor apparently does not need to prove that its subsidiary in the territory of another NAFTA Party has actually been taken over or shut down to seek compensation under Article 1110. It need only prove that some form of economic interest that can be identified as its ‘investment’ under NAFTA Article 1139 has suffered from substantial interference as a result of the imposition of some government measure”).

Expropriation can also occur where the State itself acquires nothing of value, but “has been the instrument of its redistribution.” A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* 66 (1994). *See, e.g., G. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal* 188 (1996); *Tippetts*, 6 Iran-U.S. Cl. Trib. Rep. at 225. *See also S.D. Myers* (separate opinion of Dr. Bryan Schwartz), *supra*, ¶ 218 (“It

is well settled in international law that an expropriation can include measures that transfer wealth from one private party to a third party that is favoured by the expropriating government.”).

The United States itself has recognized that expropriation covers “a multitude of activities having the effect of infringing property rights.” Statement of the President, *U.S. Government Policy in International Investment* (Sept. 9, 1983), reported in [1981-88] 2 Cumulative Digest of U.S. Practice in Int’l Law 2304, 2305; see also M. Whiteman, *Digest of Int’l Law* 1007 (1967); *Corn Prod. Refining Co. Claim*, 1955 Int’l L. Rep. 333, 334.

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 therefore constitute measures “tantamount to expropriation.” For example, Methanex has alleged that the Executive Order banning MTBE in California “will end Methanex U.S.’ business of selling methanol for use in MTBE in California.” (*See* Statement of Claim at 11.) In particular, approximately 40% of Methanex U.S.’ sales of methanol in the United States are to producers of MTBE. (*Id.* at 3.) Furthermore, Methanex Fortier temporarily shut down its operations in 1999, and as a direct consequence of the ban on MTBE, “the current oversupply in the methanol industry will be extended in time thereby resulting in a further extension of the Fortier plant closure.” (*Id.*) Methanex 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. If proven, such substantial interference with the use, enjoyment, and benefit of property would be tantamount to expropriation.

In addition, the Executive Order effectively redistributes market share in the California oxygenate market from Methanex and its enterprises to the domestic ethanol industry. Indeed, the redistribution is apparent on the face of the Executive Order itself. *See, e.g.*, Exec. Order D-5-99 at 3 (banning MTBE and ordering the CEC to “evaluate what steps, if any, would be

appropriate to foster waste-based or other biomass *ethanol* development in California should ethanol be found to be an acceptable substitute for MTBE” (emphasis added)). By denying Methanex U.S. and Methanex Fortier of significant market share, the Executive Order constitutes an action tantamount to expropriation under Article 1110.

Moreover, Methanex has further alleged that the Executive Order substantially interferes with *its* U.S. market share. It is undisputed that Methanex itself sells or has sold substantial amounts of methanol to Methanex U.S., which in turn sells that methanol to producers of MTBE for U.S. consumption.⁶ (*See* Statement of Claim at 2-3.) In addition, Methanex, through its directly and wholly owned Canadian plants and at times other non-U.S. plants, ships methanol directly to the United States for use by U.S. customers. By foreclosing all such sales and shipments for use in the California market, the Executive Order thus deprives Methanex itself of significant market share.

To the extent the United States contends that the measures at issue imposed only minor economic harms, or were necessitated by environmental or other legitimate state interests, its objections go to the merits of Methanex’s expropriation claim, which cannot properly be resolved at this jurisdictional phase of the proceedings. For present purposes, it is sufficient that Methanex has credibly alleged a breach of Article 1110.⁷

B. Methanex Has Alleged Injury and Causation Sufficient to Satisfy the Pleading Requirements of Article 1116

The United States also repeatedly contends that Methanex has not adequately pleaded that it suffered “loss or damage by reason of, or arising out of,” the United States’ NAFTA breaches. As explained below, these contentions are meritless.

⁶ For legal reasons, all sales by Methanex in the U.S. are booked through Methanex U.S.

⁷ If Methanex is allowed to amend its claim to allege that the California measures were discriminatory, this would further support Methanex’s claim that the United States’ expropriatory conduct violated Article 1110. *See* Article 1110(b).

1. Methanex Already Has Incurred Cognizable Loss and Damage

The United States argues that the California legislature's adoption of Bill 521 and the Governor's resulting Executive Order "do not effect . . . a ban" on MTBE, and thus "could [not] have caused Methanex to incur any compensable loss or damage." (U.S. Mem. at 50-51.)⁸ This is so, it claims, because Methanex challenges only a "proposed" measure, (*id.* at 57), which did not have "any legal effect on Methanex or its U.S. affiliates" (*id.* at 53). The United States further contends that "even if the Executive Order had the legal effect of banning the use of MTBE in California's gasoline. . . this Tribunal would still lack jurisdiction because no ban would take effect until December 31, 2002." (*Id.* at 61.) These assertions are meritless.

a. The Executive Order Had Immediately Binding Effect

Under the law of the State of California, "[t]he Governor is authorized to issue directives, communicated verbally or by formal written order, to *subordinate* executive officers concerning the enforcement of law. Such *authority* emanates from his constitutional charge, as the 'supreme executive power' of this state, to 'see that the laws are faithfully executed'" Opinion No. 92-804, 75 Op. Att'y Gen. Cal. 263, 1992 Cal. AG LEXIS 42 (Nov. 12, 1992), at * 5-6 (emphasis added) (quoting Cal. Const., Art. V, § 1). In this case, the Executive Order did not simply offer advice or propose a possible course of action, as the U.S. suggests, but mandated that MTBE be banned in California gasoline:

NOW, THEREFORE, I, GRAY DAVIS, Governor of the State of California, do hereby find that "on balance, there is significant risk to the environment from using MTBE in gasoline in California" and, *by virtue of the power and authority vested in me by the*

⁸ The United States treats Bill 521 and Executive Order D-5-99 separately for the purposes of this argument. (*See* U.S. Mem. at 51, 52.) However, Methanex's Statement of Claim plainly asserts that "[t]he Bill and the resulting Executive Order, *collectively*, is a 'measure' under the provisions of Article 201 of NAFTA." (Statement of Claim, ¶ 31 (emphasis added).) Thus, Methanex will address the two simultaneously.

Constitution and the statutes of the State of California, do hereby issue this *order* to become *effective immediately*

Exec. Order D-5-99 (Preamble) (emphasis added). The Executive Order further stated: “The California Energy Commission (CEC), in consultation with the California Air Resources Board, *shall* develop a timetable by July 1, 1999 for the removal of MTBE from gasoline at the earliest possible date, but *not later* than December 31, 2002.” *Id.* ¶ 4 (emphasis added). This language is unequivocally compulsory.

In acknowledging that the Governor “direct[ed]” the California agencies to implement a ban on MTBE (U.S. Mem. at 52), the United States concedes the binding and effective nature of the Executive Order. In common parlance, the word “direct” means “to order or command.” *American Heritage Dictionary*, 400 (2d College ed. 1985). Indeed, the United States appears to recognize that California agencies cannot disobey executive orders issued by the Governor. (*See* U.S. Mem. at 52 (“An executive order . . . is a formal written directive of the Governor which by interpretation, or the specification of detail, *directs* and guides *subordinate* officers in the enforcement of a particular law.” (citation omitted; emphasis added)); (Expert Report of Joseph R. Grodin, ¶ 22 (“The Executive Order’s only effect was on specified California State agencies, which it *directed* to take certain actions.” (emphasis added).))

In other contexts, the United States has conceded that Executive Order D-5-99 was a final and binding action. *See, e.g.*, S. Rep. No. 106-426, at 22, App. 1 (2000) (noting under the heading of “Final Actions”: “In March 1999, California became the first State to *officially ban* MTBE when Governor Gray Davis issued an executive order for a three-year phase-out of the gasoline additive.” (emphasis added)); U.S. International Trade Commission, *Methyl Tertiary-Butyl Ether (MTBE): Conditions Affecting the Domestic Industry*, Investigation No. 332-404, 3-27 (Sept. 1999) (“On March 25, 1999, the Governor of California issued an executive order *mandating* the removal of MTBE from gasoline by December 31, 2002.” (emphasis added)).

The United States further concedes that the relevant California agencies have followed the Executive Order, and promulgated CaRFG3 regulations that prevent the production of MTBE blended gasoline in California after December 31, 2002. (*See, e.g.*, U.S. Mem. at 54 (“it is the CaRFG3 regulations that will ban the sale of California gasoline containing MTBE as of December 31, 2002”).) Furthermore, Section 4 of California Senate Bill 521 provides:

(a) If the sale and use of MTBE in gasoline is discontinued pursuant to subdivision (f) of Section 3 of this act [which provides that the Governor may take appropriate action if he finds that there is a significant risk to human health or the environment from using MTBE in gasoline in California], the state *shall not thereafter adopt or implement any rule or regulation that permits or requires the use of MTBE in gasoline.* (Emphasis added.)

Quite simply, the California agencies had no choice but to implement the Executive Order by promulgating the CaRFG3 regulations.

The assertion that executive orders rarely serve a “law-making function” in California (*see* Expert Report of Joseph R. Grodin, ¶ 20) is irrelevant. Chapter 11 of NAFTA applies generally to Party “measures” (Art. 1101(1)), and Article 201 of NAFTA defines the term “measure” as broadly including “any law, regulation, procedure, requirement or practice.” Thus, as the tribunal in *Ethyl* correctly concluded, “[c]learly something other than a ‘law,’ . . . which may not even amount to a legal stricture, may qualify” as a “measure.” *Ethyl, supra*, ¶ 66. Because the Executive Order clearly *required* the California agencies to implement a complete ban on MTBE, it plainly qualifies as a “measure” subject to challenge under Chapter 11. Furthermore, as the United States itself notes (U.S. Mem. at 54), shortly after the Executive Order, the California agencies enacted the CaRFG3 regulations to implement the ban. Those regulations are also unquestionably measures subject to challenge under Chapter 11.

Citing the *Ethyl* case, the United States attempts to characterize the Executive Order as a “*proposed* measure” not presently subject to review under Chapter 11. (U.S. Mem. at 56-58 &

n.74 (emphasis added).) In fact, however, *Ethyl* fully supports this Tribunal's exercise of jurisdiction.

In *Ethyl*, Canada sought dismissal on the ground that, when the Claimant filed its suit, the measure at issue was only "proposed." Specifically, Canada argued that "no legislative action short of a statute that has passed both the House of Commons and the Senate and has received Royal Assent constitutes a 'measure' subject to arbitration under Chapter 11." *Ethyl, supra*, ¶ 65. The Tribunal *rejected* that argument on the ground that the proposed legislation did, at the time of its decision, have immediate binding effect:

In the end, however, the MMT ACT [the proposed legislation] did come into force 24 June 1997, after having received Royal Assent on 25 April 1997, just eleven days following Claimant's delivery of its Notice of Arbitration. The MMT Act is, Canada concedes, a measure within the meaning of Article 1101(1). Canada's objection, then, is that *Ethyl* "jumped the gun," and, having done so, should be required to commence an entirely new arbitration, which, it is conceded, it can (subject to any scope limitations).

In any event, the MMT Act is, as of 24 June 1997, a *reality*, and therefore the Tribunal is now presented with a claim based on a "measure" which has been "adopted or maintained" within the meaning of Article 1101.

Id. ¶¶ 68-69 (emphasis added) (citation omitted). Here, the Executive Order had immediate binding effect at the time it was issued, and subsequent implementing regulations have been promulgated in any event. Under *Ethyl*, nothing more is required.

The *Ethyl* tribunal further explained that a ripeness dismissal would be pointless because, given the relevant post-filing events, the claim could be immediately re-filed in any event:

The Tribunal finds no need to address these arguments as to Articles 1119 and 1120 since the fact is that in any event six months and more have passed following Royal Assent to Bill C-29 and the coming into force of the MMT Act. It is not doubted that today Claimant could resubmit the very claim advanced here (subject to any scope limitations). No disposition is evident on the

part of Canada to repeal the MMT Act or amend it. Indeed, it could hardly be expected. Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA.

Id. ¶ 85. Under that reasoning, Methanex plainly could file a separate challenge to the CaRFG3 regulations, and dismissal of this arbitration thus would needlessly “disserve, rather than serve, the object and purpose of NAFTA.” *See id.*

Moreover, it is well-established that violations of international law can occur through a series of collectively wrongful actions. “The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act In such a case, the breach extends over the entire period starting with the *first* of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.” U.N. Draft Articles on State Responsibility, U.N. Doc. A/CN.4/L. 600, at 5 (Aug. 21, 2000) (emphasis added). In *Metalclad*, the Tribunal recognized that breaches of international law are often continuing, and that Claimants should not be required to bring separate NAFTA actions for each act in a series of wrongful conduct. There, Mexico “maintain[ed] that consideration of the Ecological Decree [one of the wrongful measures taken by Mexico] [was] outside the jurisdiction of the Tribunal because the Decree was enacted after the filing of the Notice of Intent of Arbitration.”

Metalclad, supra, ¶ 64. The Tribunal disagreed:

[T]he Tribunal . . . construes NAFTA Chapter Eleven, Section B, and Article 48 of the [ICSID] rules as permitting amendments to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim. A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity.

Id. 67.

The Tribunal in *Pope & Talbot* rejected a similar request to artificially isolate the measures at issue. In that case, Canada sought to foreclose consideration of certain regulatory amendments promulgated after the Statement of Claim had been filed. The Tribunal rejected Canada's request:

Based on any fair reading of the Claim, it is patent that the Investor was challenging the implementation of the SLA [Softwood Lumber Agreement] as it affected its rights under Chapter 11 of NAFTA and that, as the Regime changed from year to year, those effects might also change. In other words, the Claim asked the Tribunal to consider the Regime not as a static program, but as it evolved over the years.

Award Concerning the Motion By Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" (Aug. 7, 2000) ¶ 24.

The United States further errs in asserting that, even though the Executive Order does have the legal effect of banning the use of MTBE in California's gasoline, this Tribunal still lacks jurisdiction because no ban would take effect until December 31, 2002. International law recognizes that State responsibility can arise before the actual enforcement of an unlawful measure. As the International Court of Justice stated: "While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in *no way* requires that any contested decision must already have been carried into effect."

Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, ¶ 42 (emphasis added). This is only logical, because measures by a State will often have practical effects even before they are actually enforced. *See, e.g., Ethyl, supra*, ¶ 69, n.28 ("Canada concedes that a Bill becomes a

‘measure’ upon the giving of Royal Assent, *even though the Act may not come into force in accordance with its terms for some time.*”(emphasis added)).⁹

Finally, the United States errs in contending that dismissal is appropriate because “Methanex is currently free to challenge the CaRFG3 regulations in a United States court.” (U.S. Mem. at 57.) This consideration is irrelevant, as Methanex has *not* sought to challenge these regulations in a U.S. court, but rather seeks to do so *in this very arbitration*.¹⁰ Should this Tribunal permit that challenge, any possible ripeness objection would be foreclosed. (*See* Methanex’s Request to Extend or Suspend the Current Jurisdictional Schedule, Dec. 22, 2000, at 12.) Accordingly, there is no conceivable justification for a ripeness dismissal, given the pendency of Methanex’s challenge to the regulations as well as the Executive Order.

In sum, the Executive Order and implementing regulations collectively constituted a final and effective measure to ban MTBE. By permitting the amendment, or by adopting the reasoning of the Tribunals in *Ethyl*, *Metalclad*, and *Pope & Talbot*, this Tribunal should permit Methanex to challenge that measure on the merits, and should reject the United States’ attempt to frustrate review based on contrived distinctions between the compulsory Executive Order, the subsequently promulgated regulations, and the effective date of the ban.

⁹ Moreover, NAFTA contains a three year statute of limitations. Art. 1116. Had Methanex waited until January 1, 2003 to bring its challenge to the March 25, 1999 Executive Order, the United States would surely have argued that the claim was time-barred. Under the United States’ theory, states can avoid liability for breaches of NAFTA simply by allowing a time span of more than three years between the enactment and enforcement of illegal measures, because challenges to such measures would remain unripe until they became time-barred. So absurd a result cannot be right.

¹⁰ (*See* Amended Article 1119 Notice of Intent to Department of State of December 22, 2000; *see also* Methanex’s Request to Extend or Suspend the Current Jurisdictional Schedule, Dec. 22, 2000, 12 (“While Methanex disagrees with the position taken by the United States, it nonetheless has notified the United States that it will seek to amend its claim to challenge recently enacted California regulations that clearly serve to implement the ban on MTBE contained in the Executive Order. This measure clearly does ‘effect . . . a ban’ on MTBE and thereby ‘cause[s] Methanex to incur . . . compensable loss or damage.’” (citations omitted))).

b. Methanex Has Pleaded Immediate And Severe Injury

Given the immediate binding legal effect of the Executive Order, Methanex has properly alleged the “loss or damage” required by Article 1116. As explained above, Methanex has alleged loss of substantial goodwill and market share to itself and its U.S. investments. Moreover, as further evidence of the Executive Order’s injurious impact, Methanex has alleged that, as a direct result of the Executive Order, its share value plummeted by \$C0.55 on the day the Executive Order was announced, in trading nine times the average volume of the previous four days. (Methanex Reply to the Statement of Defense, Aug. 28, 2000, ¶ 6.) This decline translates to a loss of US\$70 million, or 10 percent of the company’s market capitalization.¹¹ The market thus clearly recognized the immediate economic consequences to Methanex of California’s compulsory ban on MTBE.

Even the United States Environmental Protection Agency (“EPA”) has acknowledged the immediate economic effect of MTBE restrictions on producers of methanol. In December of 1993, the EPA gave notice of a proposed program that would “require that 30 percent of the oxygen content of reformulated gasoline come from renewable oxygenates.” 58 Fed. Reg. 68343 at *1 (Dec. 27, 1993) (Notice of proposed rulemaking), *available at* <http://www.epa.gov/otag/reg/fuels/rfg/58-68343.txt>. The EPA specifically noted that “there could be economic impacts on a number of industries and economic sectors due to this program” and that “[r]evenues and net incomes of domestic methanol producers and overseas producers of both methanol and MTBE would *likely decrease* due to reduced demand and prices.” *Id.* at *13 (emphasis added).

¹¹ It now appears that the market loss was actually much greater. (See Draft Amended Claim, at 36-37).

The Executive Order has had severe and immediate practical effect on Methanex and its investments. In summarizing these effects (*see* Statement of Claim, ¶¶ 35, 36, 38), Methanex has adequately pleaded “loss or damage.”

2. The United States’ Proximate Cause Arguments Cannot Support Dismissal

The United States also seeks dismissal on the ground that Methanex’s injuries were not “proximately caused” by California’s NAFTA breaches. (U.S. Mem. at 15-30.) The United States’ objection misstates the applicable legal standards, mischaracterizes causation as a jurisdictional issue, and raises fact-intensive issues inextricably intertwined with the merits.

a. NAFTA Does Not Require Proximate Cause

Article 1116 requires that the Claimant incur loss or damage “by reason of, *or*, arising out of” the alleged breach. (Emphasis added). The United States contends that the terms “by reason of” and “arising out of” mean the same thing, “incorporat[ing] the requirement of proximate caus[e].” (*See* U.S. Mem. at 16.) By collapsing the two phrases, however, the United States ignores the ordinary meaning of the word “or,” which separates the two phrases, and it ignores the extensive municipal precedent that the two phrases refer to different standards of causation.

Under municipal law, it is well-established that the phrase “arising out of” does *not* incorporate a proximate cause requirement. Canadian law considers “arising out of” to be wider than the concept of proximate causation. *See Amos v. Ins. Corp. of British Columbia*, [1995] 3 S.C.R. 405, ¶ 21 (Can.) (“With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase ‘arising out of’ is broader than ‘caused by,’ and must be interpreted in a more liberal manner”); *Strickland v. Miller*, [1998] A.C.W.S.J. 140499, ¶ 33 (“The words ‘arising out of’ require a causal or consequential relationship between the accident and the use or operation of the vehicle, although a direct or proximate causal relationship is not required”)

(emphasis added); *United States v. Friedland*, [1998] A.C.W.S.J. 140040, ¶ 98 (Ont. Ct.) (“‘arising out of’ does not demand proof of a direct causal relationship”); *Chan v. Ins. Corp. of British Columbia*, [1996] A.C.W.S.J. 78003, ¶ 20 (stating that “on the fundamental question of the meaning to be given to the words ‘arising out of the use or operation’ . . . if the use or operation of the unidentified vehicle ‘contributes’ in some way to Ms. Chan’s injuries, or if there is ‘some connection’ between its use or operation and her injuries, then Ms. Chan’s claim would appear to fall within the ambit” of the phrase).

Likewise, British and Australian law have interpreted the term “*arising out of*” as requiring less than proximate causation. See *Dickinson v. Motor Vehicle Ins. Trust*, (1987) 74 A.L.R. 197, *4 (Austl.) (“The test posited by the words ‘arising out of’ is wider than that posited by the words ‘caused by’ and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.”) (citation omitted); *Repatriation Comm’n v. Law*, (1981) 36 A.L.R. 411, *10 (Austl.) (phrase “arising out of” is “satisfied by some less proximate causal relationship than the expression ‘caused by’ or ‘resulting from’”); *Re Hamilton - Irvine and the Companies Act of 1985*, (1990) 94 A.L.R. 428, *5 (S. Ct. Norfolk Island) (in interpreting the Jurisdiction of Courts Act, the court holds that “the words ‘arising out of’ import a relationship which has some causal element, even if not direct or proximate”); *Transport Accident Comm’n v. Jewell*, (1995) 1 V.R. 300, *28-29 (S. Ct. Victoria, July 7, 1994) (“there must remain a distinction between an incident ‘directly caused by’ and an incident ‘directly arising out of’ the driving of the motor vehicle - otherwise there would be no point in preserving the two concepts . . . Whatever is meant by the words ‘directly caused by’ the expression ‘directly arising out of’, appearing alongside them, is used in contrast to them and covers a wider field than ‘directly caused by.’”); *Gov’t Ins. Office v.*

R.J. Green & Lloyd Pty. Ltd., (1966) 114 C.L.R. 437, ¶ 10 (New South Wales) (“Bearing in mind the general purpose of the Act I think the expression ‘arising out of’ must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words ‘caused by.’”); *Dunthorne v. Bentley*, 1996 R.T.R. 428, *3 (C.A. 1996) (agreeing “that the phrase ‘arising out of’ contemplates a more remote consequence than is embraced by ‘caused by.’”).

United States law likewise construes the phrase “arising out of” to connote a lesser standard than proximate causation. See *Federal Ins. Co. v. TRI-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998) (“the phrase ‘arising out of’ should be given a broad reading such as ‘originating from’ or ‘growing out of’ or ‘flowing from’ or ‘done in connection with’ — that is, it requires *some* causal connection to the injuries suffered, but does not require proximate cause in the legal sense”) (emphasis added; citation omitted) (applying Oklahoma law); *Merchants Ins. Co. of New Hampshire v. United States Fid. & Guar. Co.*, 143 F.3d 5, 9 (1st Cir. 1998) (concluding that phrase “arising out of” “[was] synonymous with ‘originate’ or ‘come into being’”) (quotation omitted); *United Nat’l Ins. Co. v. Penuche’s, Inc.*, 128 F.3d 28, 32 (1st Cir. 1997) (“the concept of ‘arising out of’ is broader than proximate causation”) (citation omitted) (applying New Hampshire law); *Linden v. Chicago, Burlington & Quincy R.R.*, 483 F.2d 29, 32-33 (8th Cir. 1973) (“The plain and ordinary meaning attributed to the phrase ‘*in any manner arising out of*’ . . . does not . . . contemplate a showing of ‘proximate cause,’ . . . but instead contemplates only a causal connection. . . .”) (citation omitted) (applying Nebraska law); *Acceptance Ins. Co. v. Syufy Enter.*, 69 Cal. App. 4th. 321, 328 (Cal. Ct. App. 1999) (phrase

“arising out of” “broadly links a factual situation with the event creating liability and connotes only a minimal causal connection or incidental relationship”).¹²

On the other hand, “by reason of” generally connotes proximate causation. *Newcastle City Council v. GIO Gen. Ltd.*, (1997) 149 A.L.R. 623, *27 (Austl.) (“The phrase ‘by reason that’ ordinarily suggests a direct and specific causal connection between two things.”); *Janssen-Cilag Pty. Ltd. v. Pfizer Pty. Ltd.*, (1992) 109 A.L.R. 638, *6 (“by reason of” means that “[l]oss or damage must directly result from or be caused by the respondent’s conduct”); *Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258, 267-68 (1992) (interpreting “by reason of” language in RICO to impose a proximate causation requirement) (citation omitted) (applying Massachusetts law); *Summit Prop., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 558 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001) (phrase “by reason of” incorporates tort standard of proximate causation); *Sys. Mgmt., Inc. v. Loiselle*, 112 F. Supp. 2d 112, 114 (D. Mass. 2000) (same); *Medgar Evers Houses Tenants Ass’n v. Medgar Evers Houses Assocs.*, 25 F. Supp. 2d 116, 120 (E.D.N.Y. 1998) (same).

Use of the word “or” in Article 1116 of NAFTA reinforces this settled difference between the phrase “by reason of” and the phrase “arising out of.” To collapse the two phrases into one proximate cause standard would contradict the ordinary meaning of the word “or,” in violation of settled principles of treaty interpretation. *See* Vienna Convention, *supra*, Article 31. Moreover, as the *Loewen* Tribunal noted, NAFTA “must be interpreted in the light of its stated

¹² The case *Hoffland Honey Co. v. Nat’l Iranian Oil Co.*, 2 Iran-U.S. Cl. Trib. Rep. 41 (1983), on which the United States principally relies for the proposition that “arising out of” means proximate cause, (*see* U.S. Mem. at 16-18), is inapplicable to this case and should be limited to its facts. Given the unusual and bizarre circumstances of that case, the Tribunal simply found that a U.S. beekeeper could not recover from an Iranian oil company who lawfully exported oil to the U.S. where that oil was then used to manufacture agrichemicals that were sprayed on various crops eventually resulting in the unforeseeable loss of bee colonies. *Hoffland Honey* must be limited to its extreme facts. Moreover, Methanex is not aware of any international tribunal that has followed the reasoning in *Hoffland Honey*.

objectives,” which “include . . . the increase of investment opportunities and the creation of effective procedures for the resolution of disputes.” *Loewen, supra* ¶ 50. In using the phrase “arising out of,” Article 1116 authorizes claims for injuries caused directly *or indirectly* by breaches of NAFTA Chapter 11.

b. Causation Is Not a Jurisdictional Issue

In any event, consideration of causation is inappropriate at the jurisdictional phase because that issue plainly addresses the merits. Causation is a question about which damages, if any, were sufficiently caused by a breach of law so as to require compensation. *See Ethyl, supra*, ¶ 73 (“Determination of the extent to which the damages claimed by Ethyl are in fact compensable under Chapter 11 is an issue that can be considered by the Tribunal *only* in the context of the merits.” (emphasis added)); *Anaconda-Iran, Inc. v. Islamic Republic of Iran*, Award No. 539-167-3, Iran-U.S. Cl. Trib. Rep. ¶¶ 14-18 (Final Award Oct. 29, 1992) (where the tribunal rejected an assertedly jurisdictional challenge because it “focus[ed] on issues of *causation* and attribution, *rather than jurisdiction*. Whether or not third parties are *liable for the damages* asserted by the [counterclaimant] is a question to be considered in the context of the *merits* of the counterclaims.” (emphasis added)). Causation thus cannot be considered in isolation from the inextricably intertwined merits issues of misconduct and damages.¹³

¹³ Because causation is inextricably intertwined with the merits issues of misconduct and damages, consideration of that issue would be inappropriate even if it could somehow be characterized as jurisdictional. *See, e.g.,* H. Lauterpacht, *The Development of International Law by the International Court* 113 (reprinted ed. 1982) (“It often happens that an objection to the jurisdiction is closely connected with a question relating to the very merits of the dispute and linked with other questions bearing upon the substance of the dispute. If the Court answers these questions in the Judgment relating to the jurisdiction it may be compelled to do so as the result of an examination which, having regard to the character of the procedure relating to preliminary objections, may be cursory and far from exhaustive. Accordingly, if in such cases the Court declines jurisdiction there is the danger that it may have done so by reference to pleadings which lack completeness. If it declares itself competent it may do so in reliance upon a reasoning which prejudices some of the aspects of the case on the merits.”); C. Schreuer, *Commentary on the ICSID Convention: Article 41*, 12 ICSID Review: Foreign Inv. L. J. 367, 394 (Fall 1997) (“some

At the jurisdictional phase of a proceeding, the Claimant needs only to credibly *allege* that the challenged measures gave rise to injury. Thus, in *Ethyl*, without determining whether the claimant had *proven* causation, a NAFTA tribunal concluded that the Claimant had sufficiently *alleged* causation to support the exercise of jurisdiction. *Ethyl, supra*, ¶ 61. The Tribunal stated:

The Claimant indisputably is an “investor of a Party,” namely the United States, and *alleges* that it has “incurred loss or damage by reason of, or arising out of,” such breaches, *all as required by Article 1116(1)*. . . . Claimant’s Statement of Claim satisfies *prima facie* the requirements of Article 1116 to establish the jurisdiction of this Tribunal.

Id. (emphasis added). *See also Rankin v. Islamic Republic of Iran*, Award No. 326-10913-2, Iran-U.S. Cl. Trib. Rep. ¶ 16 (Award Nov. 3, 1987) (“a U.S. claimant must *allege* facts indicating that his property or property rights were lost through conduct attributable to Iran and wrongful as a matter of law.” (emphasis added)).

Methanex has credibly alleged that the California measures caused injury to itself and its U.S. investments. In its Statement of Claim, Methanex identified at least five direct losses that arose out of the California measures: (1) loss to Methanex and its U.S. enterprises of a substantial portion of their customer base, goodwill, and market share for methanol in California and elsewhere; (2) losses to Methanex and its U.S. enterprises as a result of the decline in the global price of methanol; (3) loss of return to Methanex and its U.S. enterprises on capital investments made to develop the MTBE market; (4) loss to Methanex due to its increased cost of capital; and (5) loss to Methanex of a substantial amount of its investment in its U.S. enterprises. (Statement of Claim, ¶ 38.)

Further, Methanex has already proffered tangible evidence that the California measures directly injured Methanex and its U.S. investments. As Methanex stated in its Reply (*see*

jurisdictional questions are so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form”).

Methanex Reply at 2), the day after the issuance of Executive Order D-5-99, “the trading volume of Methanex shares on the [Toronto Stock Exchange] was nine times the average of the [proceeding] four days and the closing price was C\$0.55 lower than the closing price the preceding evening”, a decline representing almost 10% of the market capitalization of Methanex. Such credible, factually-supported allegations of injury and causation are easily sufficient to satisfy Methanex’s pleading burden at this stage of the case.

c. The Proposed Amendment Would Moot The United States’ Proximate Cause Objection

Moreover, if the Tribunal permits Methanex to pursue its allegations of intentional discrimination, the United States’ causation objection will be rendered immaterial. As Methanex demonstrated in its Request To Extend or Suspend the Current Jurisdictional Schedule, filed with the Tribunal on December 22, 2000, proximate cause is never an issue where, as in the case of discrimination, a claimant alleges that the harm was caused intentionally. *See, e.g.*, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 251 (1987) (“If intended by the author, such consequences are regarded as consequences of the act for which reparation has to be made, irrespective of whether such consequences are normal, or reasonably foreseeable.”); *Dix Case* (U.S. v. Venez., undated), 9 R.I.A.A. 119, 121 (1997) (“Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences, *in the absence of evidence of deliberate intention to injure.*”) (emphasis added); *cf. Provident Mut. Life Ins. Co. v. Germany* (U.S. v. Ger. 1924), 7 R.I.A.A. 91, 114-15 (1997); *Hickson v. Germany* (U.S. v. Ger. 1924), 7 R.I.A.A. 266, 268-69 (1997).

The United States itself has recognized that its proximate cause objection depends on the absence, in the original Statement of Claim, of any allegations of discrimination or other intentional wrongdoing. (*See, e.g.*, U.S. Mem. at 21-22, 22 n.37, 25-27, 30.) Where a State

intends to harm foreign investors or their investments, and where it succeeds in so doing, the applicable standards of legal causation are satisfied, and no additional showing of proximate cause is required.

Because Methanex's proposed allegations of discrimination would plainly foreclose the United States' proximate cause objections, the Tribunal need not, and should not, rule on those objections until it decides whether to permit the allegations to be raised in this arbitration.

3. Article 1116 Does Not Require "Direct" Injury

The United States further seeks dismissal because Methanex's claims assertedly "are not claims of independent injury, but are, rather, merely derivative of injuries allegedly suffered by the enterprises that constitute its U.S. investments." (U.S. Mem. at 62.) It argues "Article 1116 provides for claims for loss or damage incurred by an investor. Article 1117, on the other hand, addresses claims for loss or damage to an enterprise owned or controlled by an investor." *Id.* Thus, according to the United States, Methanex cannot recover under Article 1116 because "all of Methanex's claimed losses are derivative of injuries that its U.S. investments have allegedly suffered." (*Id.* at 64.) Moreover, the United States asserts that "to the extent that Methanex attempts to assert a claim for alleged losses of its own customer base, goodwill and market for methanol, those claims are not cognizable. . . . [under] Articles 1105(1) and 1110 . . . [because these sections] impose obligations with respect to *investments* of an investor of another Party, not with respect to the investor itself." (*Id.* at 65 (emphasis in original).) These assertions do not bear on this Tribunal's jurisdiction; in any event, they are meritless.

a. The United States' Reading of Articles 1116 and 1117 Is Inconsistent with NAFTA Text and Precedent

The United States' reading of Articles 1116 and 1117 is inconsistent with the text and purpose of NAFTA. Nothing in NAFTA restricts Article 1116 to claims for "direct" or "independent" injury to the investor that has no relation to damage done to the investment. On

the contrary, Article 1116 requires an investor to allege only that it “has incurred loss or damage,” *not* that it has suffered a specific *kind* of damage.

78. In contrast, Article 1117 is more limited. That Article states:

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under . . . [Chapter 11, Section A], and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

Article 1117 is thus limited to claims for damages suffered *only* by enterprises that are juridical persons. Accordingly, Article 1117 is by its terms inapplicable in cases where a foreign investor has suffered harm to an investment that is not a juridical person, such as real estate or goodwill. Moreover, even if Article 1117 were available in all cases involving an investment, the text of NAFTA makes Articles 1116 and 1117 cumulative remedies; nothing suggests that they are mutually exclusive.

The better explanation for Article 1117 is that it was intended to allow a foreign-owned, domestically-incorporated subsidiary corporation to recover for injuries inflicted by the state where it is incorporated.¹⁴ International law does not allow such a corporation to lodge a complaint against its own Government. *See, e.g.,* E. Borchard, *Diplomatic Protection of Citizens Abroad* 588 (1916) (“a person cannot sue his own government in an international court, nor can any other government claim on his behalf”). NAFTA implicitly recognizes this rule by providing that “[a]n investment may not make a claim under” Article 1117. Nonetheless, it permits a foreign parent corporation, or other “investor,” to bring a claim “on behalf” of the enterprise, and it further provides that the proceeds from an Article 1117 claim must be paid directly to the enterprise. *See* Article 1135(2). Thus, Articles 1117 and 1135 override the

¹⁴ A corporation’s nationality is generally considered to be that of its State of incorporation. *See, e.g.,* M. Shaw, *International Law* 567 (4th ed. 1997).

general rule that, where the subsidiary corporation shares the nationality of the Respondent State, the subsidiary is prohibited from pursuing an international claim.¹⁵

The United States agrees with this analysis that Article 1117 was designed to eliminate the shared-nationality problem. It asserts:

The drafters [of NAFTA] . . . recognized that investors often choose to carry out their investment activities in a State through a locally-incorporated entity. However, because of the customary international law principle of non-responsibility, customary international law remedies were not available to remedy injuries to such locally-incorporated entities. Thus, for example, no customary international law remedy could be sought against the United States on behalf of a United States corporation of which a Canadian investor was the sole shareholder.

To address this situation, the drafters of Chapter Eleven included Article 1117 By doing so, Article 1117 addresses the situation where the alleged violation of Chapter Eleven directly impacts a locally-incorporated subsidiary and also ensures that the claimant will be of a nationality different from that of the respondent State.

(U.S. Mem. at 67-68.)

However, the United States then argues that Article 1117 also serves a second purpose. It contends that Article 1117 overrides *both* the international prohibition on a national suing its own government (the “shared-nationality” prohibition) *and* the rule of customary international law that generally prohibits shareholders from claiming damages for injuries to the corporation (the “*Barcelona Traction* rule”).¹⁶ Moreover, it contends that Article 1117 addresses the

¹⁵ The United States errs in contending that “[w]ithout Article 1117, the investor would be denied a remedy because its injury is purely derivative of the corporation’s and the locally-incorporated corporation would not have standing to bring a claim against the respondent State.” (See U.S. Mem. at 69.) An *investor* is denied a remedy under the United States’ impermissibly narrow construction of Article 1116. Moreover, Article 1117 provides no such remedy, for it affords relief only to an *investment* that is foreign-owned and domestically-incorporated.

¹⁶ See *Case Concerning the Barcelona Traction, Light and Power Co. Ltd.*, 1970 I.C.J. 3, ¶¶ 44-47.

Barcelona Traction rule exclusively, thus restricting the operation of Article 1116 whenever a domestic investment suffers *any* harm.

These contentions are inconsistent with the text and structure of Articles 1116 and 1117. By its express language, Article 1116 itself solves the *Barcelona Traction* problem. Article 1116 gives all investors, including shareholders, the explicit right to claim damages caused by NAFTA breaches. It restricts neither the type of investor who may recover, nor the type of damages (i.e., “direct” v. “indirect,” etc.). Moreover, nothing in Article 1117 restricts the operation of Article 1116 in any way.

Thus, each provision serves its own purpose: Article 1116 gives “investors,” including shareholders, a direct right of action, thereby overriding the *Barcelona Traction* rule; and Article 1117 (in combination with Article 1135) gives subsidiary corporations that share the nationality of the Respondent State the ability to recover for their injuries, thereby overriding the shared-nationality prohibition.

This analysis explains why Article 1117 deals only with “enterprises” that are “juridical persons,” and not with all types of investment. Article 1139 defines “investment” to include considerably more than just “enterprises” that are “juridical persons” on whose behalf an Article 1117 claim may be brought. An “investment” may also be, for example, “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.” Article 1139(g); *see* J. Johnson, *The North American Free Trade Agreement* § 7.7(1)(a), at 284 (1994) (“Besides enterprises and controlling interests in enterprises, an ‘investment’ under NAFTA includes: equity securities, debt securities with terms of at least three years; debt securities regardless of term where the issuing enterprise is an affiliate of the investor; interests entitling sharing in an enterprise’s assets on dissolution or income or profits; real estate and other tangible and intangible property acquired for economic

benefit or other business purposes; and various other contractual interests.”). Thus, many types of “investments” do *not* qualify as “enterprises” or “juridical persons.” However, because such investments are not juridical persons of the Respondent State, the shared-nationality prohibition is inapplicable, and there is thus no need to include them within the ambit of Article 1117.

Accordingly, Article 1116 *must* be used to bring a claim for “derivative” injuries to an investor arising out of damage done to a non-juridical “investment” such as real property, market share, or goodwill. Such investments are clearly entitled to protection under Articles 1105(1) and 1110, and a claim for loss or damage to such non-juridical investments may be brought only under Article 1116. Hence, the United States cannot possibly be correct in asserting that Article 1116 is inapplicable for *any* “derivative” injury resulting from harm to an “investment;” under that theory, NAFTA contains a huge and inexplicable coverage gap between Articles 1105 and 1110, which afford substantive protection to non-juridical investments, and Articles 1116 and 1117, the remedial provisions through which NAFTA seeks to enforce those protections.¹⁷

Several recent NAFTA Chapter 11 decisions confirm the wide scope of Article 1116. In *S.D. Myers*, the U.S. claimant/investor, SDMI, asserted claims only under Article 1116 to challenge alleged breaches of Articles 1105 and 1110. *S.D. Myers, supra*, ¶¶ 258-68, 279-88. The injury alleged by SDMI (the investor) flowed from an alleged injury to its investment, *Myers Canada. Id.*, ¶¶ 144, 222. Nonetheless, the Tribunal reached the merits, found a violation of Article 1105, and concluded that the Article 1116 claim was therefore meritorious. *See id.* ¶ 268. The Tribunal stated:

[This] is a claim by SDMI itself as an “investor” on its own behalf.
It is a dispute in relation to SDMI’s alleged investment in Canada

¹⁷ Nothing in the text of Articles 1105(1) or 1110 suggests that these articles cannot be enforced through Article 1116. Moreover, Article 1116 specifically allows for claims resulting from a breach of “Section A” of Chapter 11, which obviously includes Articles 1105(1) and 1110.

and is for damages arising out of the alleged breach by CANADA of its obligations under Section A of Chapter 11. SDMI asserts that it . . . *has suffered economic harm to its **Investment** through interference with its operations, lost contracts and opportunities in CANADA*. That is, that it has sustained damages because its *investment* in Canada has suffered harm.

Id. ¶ 222 (all emphasis in original). The “derivative” nature of the alleged injury did not bar recovery in *S.D. Myers*, and should not do so here.

Similarly, in *Pope & Talbot*, the “derivative” nature of the alleged injury did not bar jurisdiction over the Article 1116 claim. The investor in that case (*Pope & Talbot*) alleged injury because Canadian regulations precluded its Canadian investment (*Pope & Talbot, Ltd.*, a British Columbia corporation) from access to the United States market. *Pope & Talbot*, Interim Award (June 26, 2000), *supra*, ¶¶ 2, 9, 81, 95. *Pope & Talbot* alleged breaches of numerous articles of NAFTA Chapter 11, including Articles 1105 and 1110. *See id.* ¶ 11. The Tribunal considered the merits of the investor’s Article 1110 claim, as raised under Article 1116, and “conclude[d] that the *Investment’s* access to the U.S. market is a property interest subject to protection under Article 1110” *Id.* ¶ 96 (emphasis added). More specifically, the Tribunal noted:

While Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the “business” of the *Investment*. Interference with that business *would necessarily have an adverse effect on the property that the Investor has acquired* in Canada, which, of course, constitutes the *Investment*. While Canada’s focus on the “access to the U.S. market” may reflect only the Investor’s own terminology, that terminology should not mask the fact that the true interests at stake are the *Investment’s asset base*, the value of which is largely dependent on its export business. The Tribunal concludes that *the Investor* properly asserts that Canada has taken measures affecting its “investment,” as that term is defined in Article 1139 and used in Article 1110.

Id. ¶ 98 (emphasis added). *See also* Weiler, *supra* (noting that the *Pope & Talbot* Tribunal concluded that “an investor was entitled under Article 1116(1) to make a claim for all losses it suffered as a result of an alleged breach, including consequential ones,” where the claimant

alleged that it incurred loss through its investment). As in *S.D. Myers*, what the United States describes as “derivative” injury supported a claim by the investor under Article 1116.¹⁸

In sum, the United States’ contention that “derivative” injuries are not actionable under Article 1116 is inconsistent both with the text of NAFTA and with each of the pertinent NAFTA decisions.

b. In any Event, Methanex Has Suffered Direct Injury From the United States’ Breaches of NAFTA

Even if Article 1116 permitted recovery only where the investor has suffered an injury independent of injury to its enterprises, Methanex still has stated a proper claim under that article. Methanex *has* alleged direct injury to itself that is *not* derivative of injuries to its enterprises. While Methanex has been injured through the injuries inflicted upon its U.S. enterprises, it has *also* alleged several direct and independent injuries.

Methanex has alleged that *it*, as well as its investments, suffered loss of “customer base, good will and market for methanol in California and elsewhere.” (Statement of Claim ¶ 38(i).) As noted above, Methanex itself sells methanol to Methanex U.S., which then sells that methanol to U.S. customers.¹⁹ Moreover, Methanex – through its directly and wholly-owned Canadian or other non-U.S. plants – directly ships methanol into the United States.²⁰ As a result of the California measures, Methanex and its U.S. enterprises have substantially lost the ability to conduct business in California. Methanex U.S. therefore has made substantially fewer purchases from Methanex, which in turn has made substantially fewer direct shipments from Canada (and

¹⁸ The *Ethyl* Tribunal also implicitly recognized this point in assuming jurisdiction over claims brought *only* under Article 1116 for alleged breaches of Articles 1110. See *Ethyl, supra*, ¶¶ 45, 96.

¹⁹ For legal reasons, all U.S. sales are booked by Methanex U.S., which markets methanol throughout North America.

²⁰ When the Methanex Fortier plant was open, shipments for U.S. consumption also originated there.

other countries) to the U.S. Thus, Methanex has directly lost a substantial portion of *its* goodwill and market share.²¹

Methanex has further alleged that the measures at issue have directly harmed business that *it* conducts outside of the United States. Specifically, Methanex alleges that “methanol is a commodity, and MTBE represents approximately 30% of the world demand for methanol.” (*Id.* ¶ 36.) Moreover, “California MTBE usage [alone] represents approximately 6% of the world demand for methanol.” (*See id.*) Thus, a ban on MTBE would “cause a general depression of the global methanol price,” and Methanex would suffer losses as a result.” (*Id.*; *see id.* ¶ 38(ii).) Because this price decrease has been felt outside of the United States, Methanex has suffered injuries independent of those suffered by its U.S. investments.²²

²¹ Goodwill and market share are non-judicial investments under NAFTA, and injury to such investments must be claimed under Article 1116. *See, supra* pp. 17-19, 42.

²² Damages from a breach of Articles 1105 and 1110 can be felt in several countries, as the *Ethyl* tribunal explicitly recognized. In that case, the Respondent, Canada, had argued that “Ethyl’s [Article 1116] claim in respect of expropriation of its intellectual property, reputation, and goodwill throughout the world is not within the scope of NAFTA,” because Articles 1101(1)(b) and 1110 address only investments “in the territory” of the Respondent. *Ethyl, supra*, ¶ 70. The Tribunal disagreed:

A distinction must be made, however, between the locus of the Claimant’s breach and that of the damages suffered. It is beyond doubt that the MMT Act was adopted, and purports to have, and in fact has, legal force only in Canada . . . Ethyl’s claim is premised on the legal force the MMT Act has in relation to its investment in Canada, *i.e.*, Ethyl Canada.

Ethyl has argued, however, that the damages resulting to it in consequence of the MMT Act include losses suffered outside of Canada. As Ethyl itself succinctly notes . . . “the Investor [Ethyl] claims that an expropriation occurred inside Canada, but the Investor’s resulting losses were suffered both inside and outside Canada.”

Id. ¶¶ 71-72. The Tribunal refused to “exclude any portion of the claim due to considerations of territoriality” and held that “[d]etermination of the extent to which damages claimed by Ethyl are in fact compensable under Chapter 11 is an issue that can be considered by the Tribunal only in the context of the merits.” *Id.* ¶ 73.

Methanex has also alleged, as a result of California's unfair, inequitable and expropriatory conduct, "loss to [itself only] due to the increased cost of capital," as well as "loss to [itself only] of a substantial amount of its investment in Methanex US and Fortier." (Statement of Claim ¶ 38.)

In any event, the Tribunal should refrain at this time from adopting the fine parsing between Articles 1116 and 1117 urged here by the United States. Methanex has sought to amend its claim to add an Article 1117 claim. If accepted, that amendment would render the United States' objection entirely academic. (*See* Methanex's Request to Extend or Suspend the Current Jurisdictional Schedule, Dec. 22, 2000, at 12-13.) If the Tribunal does agree with the United States' contentions, it should, at the very least, allow Methanex to amend its Statement of Claim to incorporate an Article 1117 claim, given Methanex's reliance, in drafting its original claim, on the arguments and decisions in *S.D. Myers* and *Pope & Talbot*, as well as the very text of Article 1116.

IV. THE CALIFORNIA MEASURES "RELATE TO" METHANEX AND ITS INVESTMENTS, BOTH IN LAW AND IN FACT

NAFTA Article 1101(1) states: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party." The United States argues that, as a matter of law, "[m]easures of general applicability . . . aimed at the protection of human health and the environment" cannot satisfy the "relating to" requirement of Article 1101(1) because they have no "legally significant connection" to investors or investments. (U.S. Mem. at 48-49.) That contention, which does not address the jurisdiction of this Tribunal, is also without merit.

A. Under NAFTA Precedent, the Appropriate Standard for “Relating To” Is Whether the Measure “Affects” the Investor or Its Investments

Two NAFTA tribunals have *rejected* arguments similar to the one now advanced by the United States. In *Pope & Talbot*, Canada sought dismissal on the ground that the measures at issue merely “‘affect[ed]’ an investor or investment,” but did not “‘relate’ to the investor or investment in a ‘direct and substantial’ way.” *Pope & Talbot*, Preliminary Motion (Jan. 26, 2000), ¶ 27. Canada further argued that if the challenged measure was related to trade in goods under NAFTA Chapter 3, then it could not also relate to investment under Chapter 11. *See id.* ¶ 32. The Tribunal rejected these arguments:

[T]he fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investments or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. *But it is clear from the terms of Article 1106 that it is also a measure relating to investment insofar as it might affect an enterprise owned by an investor of a Party.*

For these reasons, the Tribunal *rejects* Canada’s submissions that a measure can only relate to an investment if it is primarily directed at that investment

Id., ¶¶ 33-34 (all emphasis added).

The general nature of the “relating to” requirement of Article 1101(1) was also discussed in the separate opinion of Dr. Bryan Schwartz in *S.D. Myers, supra*. Dr. Schwartz asked the question: “how high a hurdle is presented by the requirement that a measure be ‘relating to’ an investor or an investment?” *Id.* ¶ 49. He rejected the idea that the “relating to” requirement was difficult to satisfy:

Canada suggests that “relating to” in Article 1101 of NAFTA has this effect: measures that “incidentally” or “inadvertently” affect foreign investors or investment cannot be the subject of Chapter 11 (investment) challenges.

Is it always true that any measure that only “incidentally” or “inadvertently” affects investors is outside the scope of Chapter 11 (Investment)? I would think not. . . . Inadvertence would not necessarily be a successful defence.

The most sensible approach to understanding “relating to” in Article 1101 avoids viewing that phrase in isolation. Rather, a tribunal must read Article 1101 in conjunction with the specific provisions of NAFTA that protect investors. It would be rare that the clear purpose and scope of such provisions will be frustrated by reference to Article 1101.

* * * *

Chapter 11 (Investment) largely incorporates norms that have a long history of being incorporated into BITs (Bilateral Investment Treaties). These agreements generally do not say that they apply to measures “relating to” investments. Rather, BITs generally define investment and then provide a series of norms that protect investments.

It seems obvious that the framers of NAFTA, in incorporating standard phrases from BITs, intended that they would have their standard meaning, or something very close to it. It is implausible that the phrase “relating to” at the beginning of Article 1101 is somehow a signal that these norms are generally weaker, or have less scope or application, in NAFTA than they do elsewhere.

Id. ¶¶ 53-55, 58-59 (footnote omitted).

The United States asserts that “relate to” requires a showing of “legally significant connection.” (U.S. Mem. at 49.) With all due respect, the United States has created that requirement out of thin air, and it is directly contradicted by all applicable NAFTA Chapter 11 precedent. The appropriate question is whether, as stated by the *Pope & Talbot* tribunal, the measures at issue “affect” the investor or its investments. That standard is readily satisfied here.

B. The U.S. Interpretation is Inappropriate Under Well-Established Rules of Treaty Interpretation

The rules of treaty interpretation also require a rejection of the United States’ argument. Under the Vienna Convention, *supra*, “[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light

of its object and purpose.” *Id.*, Article 31(1) (“General Rule of Interpretation”) (emphasis added); *see S.D. Myers, supra*, ¶ 202 (“In interpreting the NAFTA the Tribunal must start by identifying the plain and ordinary meaning of the words in the context in which they appear and also must take due account of the object and purpose of the treaty.”); *Loewen, supra*, 51 (“NAFTA is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”); *see also Pope & Talbot, supra*, ¶ 69 (“the analysis and interpretation of Article 1106 of NAFTA is initially informed by the ordinary meaning of its terms”).

The United States’ proposed interpretation is inconsistent with the ordinary meaning of the words “relating to.” The dictionary defines “relate” as meaning: “To bring into logical or natural association,” or “To have connection, relation, or reference.” *American Heritage Dictionary, supra* at 1043; *see Oxford English Dictionary* 549 (2d ed. 1989) (“To connect, to establish a relation between”). The word “related” is defined as “Connected; associated,” *American Heritage Dictionary, supra* at 1043, or “Having relation to, or relationship with, something else.” *Oxford* at 549 (emphasis omitted); *see Funk & Wagnalls New Comprehensive International Dictionary of the English Language* 1063 (1980) (“Standing in relation; connected”). And the thesaurus lists the following synonyms for “relate to”: “have to do with, have connection with, link with . . . , connect, tie in with, deal with, . . . touch upon.” *Roget A to Z* 586 (R. Chapman, ed. 1994). Indeed, in the I.C.J.’s *Headquarters Agreement Case*, 1988 I.C.J. 12, Judge Shahabuddeen noted that Judge Schwebel, in a prior decision, had broadly interpreted the phrase “relating to,” based on its ordinary meaning:

“The terms of Article 11 of the Statute of the [United Nations Administrative] Tribunal, as well as its travaux préparatoires, make clear that an error of law ‘relating to’ provisions of the United Nations Charter need not squarely and directly engage a provision of the Charter. It is sufficient if such an error is ‘in

relationship to' the Charter, 'has reference to' the Charter, or 'is connected with' the Charter."

Id. at 63. Hence, the ordinary meaning of "relating to," as it is used in NAFTA Article 1101(1), has nothing to do with a "legally significant connection."

The "context" and "purpose" of NAFTA, which are significant interpretive considerations under the Vienna Convention (Art. 31(1)), undercut the United States' proposed construction even more. The purpose of NAFTA is to "increase substantially investment opportunities in the territories of the Parties," and to "create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes." NAFTA Article 102. As the *Loewen* Tribunal explained, NAFTA "must be interpreted in the light of its stated objectives [which] include the promotion of conditions of fair competition in the free trade area, the increase of investment opportunities and the creation of effective procedures for the resolution of disputes." *Loewen, supra*, ¶ 50. It would undercut these stated treaty objectives to interpret the scope of Article 1101 as imposing a restrictive and non-textual requirement of "legally significant connection."

Canada has interpreted the "relating to" requirement in the same liberal fashion as the NAFTA Tribunals. The Canadian Statement of Implementation summarizes the relevant article as follows: "Article 1101 states that section A covers measures by a Party (i.e., any level of government in Canada), that *affect*: investors of another Party . . .; investments of investors of another Party . . .; and . . . for purposes of the provisions on performance requirements and environmental measures, all investments" Canadian Statement on Implementation, *North American Free Trade Agreements, Treaties*, Vol. 2, Booklet 12A, at 68-69 (1994) (emphasis added). The United States' proposed construction is entirely unsupported.

Finally, the United States falls back on the naked policy argument that, unless the phrase "relating to" is restrictively construed, NAFTA tribunals will be continuously inundated with

claims by foreign investors “incidental[ly] impacted” by the “untold numbers of local, state and federal measures” regularly promulgated by governments. (U.S. Mem. at 49.) That argument ignores the numerous other elements of any NAFTA claim, including (1) a breach of the investment rules of Chapter 11, Section A; (2) loss or damage to the investor or the enterprise; (3) a requirement that such loss or damage occurred “by reason of, or arising out of, that breach”; and (4) a strict three-year statute of limitations. *See* Articles 1116 and 1117. The “relating to” requirement of Article 1101 is merely one of several elements of liability under NAFTA, and, despite the broad and straightforward construction of that element in *Pope & Talbot* and the *S.D. Myers* concurrence, the “floodgates” problem asserted by the United States simply has not materialized.

C. The California Measures Are “Related To” Methanex and Its Investments

Methanex has plainly alleged that the California measures affected, and are therefore “related to,” Methanex and its investments. As explained in detail above, those measures affected Methanex in several dramatic ways, and evidence of that effect is the US\$70 million loss in market capitalization following the issuance of the Governor’s Executive Order.

D. If Methanex’s Proposed Amendment is Granted, the United States’ Objection Will Be Mooted

Should the Tribunal allow Methanex to pursue its allegations of discrimination in this case, the United States’ “relating to” argument will be rendered academic. (*See* Methanex’s Request to Extend or Suspend the Current Jurisdictional Schedule, at 9-11.) Accordingly, the Tribunal should defer its ruling on this issue pending resolution of the motion to amend.

In *S.D. Myers*, Canada asserted that the measures at issue were not “related to an investor or an investment in Canada.” *S.D. Myers, supra*, ¶ 145. On the merits, the Tribunal concluded that the challenged measures “were *intended* primarily to protect the Canadian PCB disposal industry from U.S. competition,” *id.* ¶ 194 (emphasis added), and thus violated Article 1102.

Having found discriminatory intent, the Tribunal held that the “‘relating to’ requirement” of Article 1101 was “easily satisfied” because the measure at issue “was raised to address specifically the operations of SDMI and its investment.” *Id.* ¶ 234.

V. THE WAIVERS SUBMITTED BY METHANEX AND ITS INVESTMENTS ARE SUFFICIENT TO FORM AN AGREEMENT TO ARBITRATE THIS DISPUTE

The United States’ last argument is that Methanex failed to submit waivers that are adequate under Article 1121 of NAFTA. (U.S. Mem. at 70.) The United States concedes that this argument cannot be dispositive. (*See* U.S. Mem. at 77 (“The United States recognizes that if this Tribunal were to dismiss Methanex’s claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers.”).) And, as Methanex noted in its Amended Article 1119 Notice of Intent, dated December 22, 2000, and its Request to Extend or Suspend the Current Jurisdictional Schedule of the same date, Methanex has agreed to submit new waivers for all claims at the time it submits its Article 1102 claim, should such amendment be allowed, in order to resolve the spurious objections of the United States. But in any event, the original waivers are adequate and afford no basis for dismissal.

A. The Waivers Submitted by Methanex and Its Enterprises Satisfy Article 1121

Under both Texas and Delaware law (which control the relevant enterprises), a parent corporation may bind its subsidiary corporation where the subsidiary has either implicitly authorized the action or subsequently ratified the action taken on its behalf. *See Hinkle v. Metallurg Alloy Corp.*, No. A14-91-00862, 1992 WL 105799, at *2 (Tex. Ct. App. May 21, 1992); *Hanson S.W. Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712, 719 (Tex. Ct. App. 1977); *Eisenmann Corp. v. Gen. Motors Corp.*, No. 99C-07-260, 2000 WL 140781, at *12 (Del. Super. Ct. Jan. 28, 2000); *USH Ventures v. Global Telesystems Group, Inc.*, No. 97C-08-086, 1998 WL 281250, at *3 (Del. Super. Ct. May 21, 1998).

On December 3, 1999, Methanex submitted a waiver on behalf of itself and its U.S. enterprises, signed by Randall Milner of Methanex. On September 12, 2000, Methanex provided the United States with consents of the partners of Methanex U.S. and the board of directors of the general partners of Methanex U.S., and Methanex Fortier (“the Consents”). These Consents ratify the waiver initially made by Methanex on behalf of its U.S. enterprises, and thus bind those enterprises to the waiver under their governing law. This is sufficient to meet the requirements of Article 1121.

B. An Invalid Waiver Would Not, At This Point, Strip the Tribunal of Jurisdiction

In any event, any defect in the waivers would not render Methanex’s claim invalid or strip this Tribunal of jurisdiction over Methanex’s claim.

In *Pope & Talbot*, Canada made a similar argument to the one that the United States now makes. The Claimant had failed to submit a formal waiver on behalf of one of its subsidiary investments. Canada argued that this failure “was an essential pre-condition for a valid claim under NAFTA Articles 1116 and 1117.” Award on Motion to Dismiss Regarding Harmac (Feb. 24, 2000), ¶ 2. The Tribunal rejected Canada’s assertions and concluded that “consent to arbitration and the initiation of arbitral proceedings may be taken as a constructive waiver” by the investor, which also would be applicable to the investment:

[I]t might be argued that the waiver requirement plays a more important role *with respect to an investment* and that that importance should be respected by making the waiver a precondition to the validity of a claim grounded on injury to the claimant caused by harm to its investment. The short answer to such a contention is that the investment would likely be subject to the same constructive waiver that would apply to the investor itself. . . . For these reasons, the Tribunal is not willing to attribute such importance to the requirement for an investment’s waiver in Article 1121(1)(b) as to make that waiver a precondition to the validity of a claim.

Id. ¶ 17 (emphasis added). Thus, the Claimant’s complete failure to submit a waiver on behalf of its investment did not strip the tribunal of its jurisdiction over the claims.

Here, where Methanex *did* in fact submit waivers on behalf of its U.S. investments, technical complaints about the waivers likewise cannot negate the Tribunal’s jurisdiction over Methanex’s claims. Further, Methanex not only submitted the initial waiver on behalf of its U.S. enterprises but submitted the Consents, which effectively ratified the waivers and cured any alleged defect.

Finally, as noted above, Methanex offered in its Amended Article 1119 Notice to submit additional waivers effective not only for the new claims, but also for all pre-existing claims on behalf of itself and its U.S. investments, upon the filing of its Amended Statement of Claim. (See Amended Notice of Intent to Submit a Complaint to Arbitration Under Chapter 11 of the North American Free Trade Agreement, (Dec. 22, 2000).) As recognized by the tribunal in *Pope & Talbot, supra*, Article 1121 does not prevent a waiver from applying retroactively:

In any case, there is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date. The requirement in Article 1121(3) that a waiver required by 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather, it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected.

Id. ¶ 18. Any remaining defect in the waivers thus can still readily be cured. Accordingly, the waivers afford no basis for dismissal.

VI. CONCLUSION

For the reasons listed above, the United States' objections should be rejected or, at a minimum, deferred pending resolution of the pending motion to amend.

February 12, 2001

Respectfully submitted,

Christopher F. Dugan

James A. Wilderotter

Gregory G. Katsas
Melissa D. Stear
Tashena Middleton Moore
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700

*Attorneys for Claimant
Methanex Corporation*

WA:1232209v6