

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

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**MOTION OF RESPONDENT UNITED STATES OF AMERICA
TO EXCLUDE CERTAIN OF METHANEX'S EVIDENCE**

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Barton Legum

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

Andrea J. Menaker

David A. Pawlak

Jennifer I. Toole

CarrieLyn D. Guymon

Mark S. McNeill

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

May 18, 2004

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In accordance with Article 25(6) of the UNCITRAL Arbitration Rules, the Tribunal's First Partial Award, Articles 4 and 5 of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules"), and the Tribunal's order of May 11, 2004, respondent United States of America respectfully requests that the Tribunal find inadmissible certain materials submitted by Methanex in these proceedings.

ARGUMENT

Methanex's disregard of the Tribunal's directives and the rules governing the submission of evidence in these proceedings warrants a finding of inadmissibility of certain of Methanex's evidence.

First, several documents offered by Methanex were illegally copied from the private files of Richard Vind. Mr. Vind authorized neither the disclosure of these

documents to Methanex nor the use of these documents in this arbitration. Admission of illegally obtained evidence is inconsistent with the principle of good faith that inheres in any arbitration agreement.

Second, several of the witness statements and expert reports submitted by Methanex fail to comply with the Tribunal's directives set forth in the First Partial Award, and the requirements of Articles 4 and 5 of the IBA Rules to which Methanex agreed to adhere. The United States called many of these deficiencies to Methanex's attention long ago. Not only did Methanex fail to correct them, it submitted reply statements and reports that contain even more defects.

Finally, Methanex submitted factual evidence on April 23, 2004, more than one year after the date by which the Tribunal ordered Methanex to submit all of its evidence on which it intended to rely.

Methanex's reliance on such evidence violates the principle of equality of the parties and denies the United States the opportunity to fully present its case and rebut Methanex's evidence. Pursuant to Article 25(6) of the UNCITRAL Arbitration Rules, the United States thus respectfully requests that the Tribunal find such evidence to be inadmissible.¹

¹ See UNCITRAL Arbitration Rules, art. 25(6) ("The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.").

I. ILLEGALLY OBTAINED DOCUMENTS FROM RICHARD VIND’S AND REGENT INTERNATIONAL’S FILES SHOULD BE EXCLUDED FROM THE EVIDENTIARY RECORD

Methanex’s submission of documents illegally obtained from the private files of Richard Vind contravenes fundamental notions of fairness.² As Mr. Vind testified in his witness statement of November 21, 2003, a number of documents submitted by Methanex as evidence are duplicates of documents that were illegally copied from his office.³ Many of these documents, such as Mr. Vind’s private address book and telephone messages, are personal in nature.⁴ One document is marked “PRIVILEGED MATERIAL” and “ATTORNEY WORK PRODUCT.”⁵

In other contexts, international courts have questioned the admissibility of evidence where that evidence “was secured in a manner that the court deemed harmful to public order and that it did not wish to encourage.”⁶ As recognized by Professor Reisman, “[r]etroactive validation of illegal seizures of evidence . . . could [result in]

² See *id.* art. 15(1) (“[T]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”).

³ Witness Statement of Richard Vind (Nov. 21, 2003) (13A JS tab I) (identifying the following as documents illegally copied from his office: 6 JS tabs 52-61, 64, 66; 7 JS tabs 151-53, 155-56, 159-60, 162, 165; 11 JS tabs 202, 216-19, 222-23, 226 and 258-59).

⁴ See 11 JS tab 258 (Mr. Vind’s private address book); 11 JS tab 259 (Mr. Vind’s telephone messages).

⁵ See 6 JS tab 61 (stamped “PRIVILEGED MATERIAL” and “ATTORNEY WORK PRODUCT”); see also 7 JS tab 153 (estimating ADM’s profit/loss on project); 7 JS tab 156 (calculating bond costs booked to shipments); 7 JS tab 160 (buy-sell agreement); IBA Rules, art. 9.2(b), (e) (“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence . . . any document . . . for any of the following reasons: (b) legal impediment or privilege . . . (e) grounds of commercial or technical confidentiality . . .”).

⁶ See W. Michael Reisman & Eric E. Freedman, *The Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 AM. J. INT’L L. 737, 745 (1982); *id.* at 738 (“the international tribunal must be very sensitive to the provocativeness of an unlawful gathering of evidence and the consequences it may precipitate . . .”).

frustration of the fundamental purposes of international adjudication.”⁷ Thus, illegally obtained evidence should be deemed inadmissible.⁸

Although Methanex disputes the veracity of Mr. Vind’s claims, it nowhere explains how it came into possession of Mr. Vind’s documents. Instead, it offers a one-page statement by a private investigator from Virginia, Robert Puglisi, that no one at his investigation firm stole documents from Mr. Vind.⁹ Mr. Puglisi’s statement, however, does not explain how Methanex obtained the documents. Mr. Vind’s testimony that his personal and privileged documents were unlawfully copied remains unchallenged. Under these dubious circumstances, these documents from Mr. Vind’s and Regent International’s files should be excluded from the evidentiary record.

II. METHANEX’S FACTUAL WITNESS STATEMENTS THAT DO NOT COMPLY WITH TRIBUNAL REQUIREMENTS SHOULD BE FOUND INADMISSIBLE

In its First Partial Award, the Tribunal set forth requirements for submissions by factual witnesses. Factual witness statements are required to be in writing, signed and dated by the witness and must contain the following information:

- (1) the full name and address of the factual witness;
- (2) the factual witness’s present and past relationship, if any, with either disputing party;
- (3) a description of the factual witness’s background, qualifications, training and relevant experience;

⁷ *Id.* at 752.

⁸ *See id.* at 753 (“At least for embassies, *if not for many other areas, any illegally gained evidence should be deemed inadmissible.*”) (emphasis added).

⁹ Declaration of Robert Puglisi (Mar. 28, 2003) (22 JS tab 35). The United States seeks to have this statement excluded from the evidentiary record on other grounds. *See infra* II(A).

- (4) a full and detailed account, capable of standing as that witness's examination-in-chief (direct examination) at an oral hearing, of all the facts to which that witness will testify, expressed in that witnesses's own words;
- (5) an identification of the specific source of the witness's information, whether it be from that witness's own knowledge or derived from another person or document; and
- (6) the factual witness's undertaking to attend and give evidence at an oral hearing, unless ordered otherwise by the Tribunal.¹⁰

As detailed below, certain of Methanex's factual witness statements do not comport with these requirements and, therefore, should be excluded from the evidentiary record.

A. The Statement Of Robert Puglisi Should Be Excluded From the Evidentiary Record

The Declaration of Robert Puglisi, dated March 28, 2003, and submitted by Methanex with its Reply on February 19, 2004, should be found inadmissible for failure to comply with several of the Tribunal's requirements and the IBA Rules.¹¹

First, Mr. Puglisi nowhere provides an explanation of his past and present relationship with Methanex.¹² While Mr. Puglisi states that he was retained to investigate ADM and Regent International, he does not state by whom he was retained, when he was

¹⁰ See First Partial Award ¶ 164. The Tribunal's requirements for factual witness statements largely mirror those of Article 4.5 of the IBA Rules (which also applies in these proceedings), which requires that "[e]ach Witness Statement shall contain: (a) the full name and address of the witness, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement; (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute; (c) an affirmation of the truth of the statement; and (d) the signature of the witness and its date and place."

¹¹ See Declaration of Robert Puglisi (Mar. 28, 2003) (22 JS tab 35). Articles 3 (except for 3.12), 4 and 5 of the IBA Rules govern the presentation of testimony by fact and expert witnesses in this arbitration. See Joint Letter of the Parties to the Members of the Tribunal § A(2)-(3) (Aug. 14, 2000); Minutes of Order of the Second Procedural Meeting, item 6.

¹² See *id.*

retained, or provide any information concerning his involvement with Methanex or this case.

Second, Mr. Puglisi fails to identify the source of his knowledge. In particular, Mr. Puglisi does not explain how he is qualified to represent that “at no time were documents secretly copied from Regent’s offices without permission.”¹³

Finally, Mr. Puglisi fails to give an undertaking in his declaration that he will attend and give evidence at the oral hearing, unless otherwise ordered.¹⁴ All of these defects warrant excluding Mr. Puglisi’s statement from the evidentiary record.¹⁵

B. The Statement Of Bob Hastings Is Inadmissible

The January 14, 2004 letter from Raymond James analyst Bob Hastings to Methanex is not competent evidence and should be excluded by the Tribunal.¹⁶ The letter purports to establish an injury to Methanex based on changes in Methanex’s share price in early 1999. Apart from being irrelevant for the reasons stated in the Rejoinder, the letter is inadmissible because it amounts to witness testimony that fails to meet the Tribunal’s directives and the IBA Rules governing submissions by factual witnesses.

First, the letter fails to disclose Mr. Hastings’ relationship with Methanex, as required by the Tribunal and the IBA Rules.¹⁷ The United States is aware, based on other evidence submitted by Methanex, that Mr. Hastings owns shares in Methanex, and thus

¹³ *Id.*

¹⁴ *See id.*

¹⁵ Mr. Puglisi also fails to supply his address in his Declaration, as required by the Tribunal. *See* First Partial Award ¶ 164.

¹⁶ *See* Letter from Bob Hastings, CFA, Senior Vice President, Raymond James Ltd., to Chris Cook, Director of Investment Relations, Methanex Corp. (“Hastings Statement”) (Jan. 14, 2004) (19 JS tab 6).

¹⁷ *See id.*; *see also* IBA Rules, art. 4.5(a).

cannot be considered a disinterested witness.¹⁸ The letter, however, fails to disclose this pertinent fact – or, more importantly, what other facts concerning Mr. Hastings’ relationship with Methanex are omitted from the statement.

Moreover, Mr. Hastings’ motivation for drafting the seven-page letter (which includes six charts and graphs) is far from clear. The letter purports to respond to an inquiry by Methanex’s Director of Investor Relations. It does not disclose, however, whether Mr. Hastings was compensated for his work, or any other reason why Mr. Hastings felt compelled in early 2004 to prepare a discussion of such length concerning events in 1999.

Second, the letter fails to identify, as required by the Tribunal and the IBA Rules, the specific sources on which Mr. Hastings relied for his opinion that the threatened MTBE ban in California was the “overriding” reason for Methanex’s temporary stock price decline.¹⁹ Mr. Hastings provides no contemporaneous evidence. Instead, the letter states that Mr. Hastings relied on unidentified file notes, press articles, analyst reports and “conversations with others.”²⁰

¹⁸ Bob Hastings & Juan Plessis, RAYMOND JAMES EQUITY RESEARCH INSIGHT CANADA, June 25, 2003 (19 JS tab 7) (“Bob Hastings or a member of his household has a long position in the securities of Methanex.”).

¹⁹ See First Partial Award ¶ 164; IBA Rules, art. 4.5(b).

²⁰ Hastings Statement at 1 (19 JS tab 6). The unreliability of such unsupported testimony is underscored by the fact that it is contradicted in key respects by Mr. Hastings’ own reports from March 1999. For example, Mr. Hastings’ March 1999 reports do not support the conclusion that Methanex’s depressed stock price was attributable primarily to an MTBE ban in California, as opposed to a ban across the United States, and to the severe oversupply situation in the methanol industry unrelated to California. See Robert J. Hastings & Tina Louie, GOEPEL MCDERMID SECURITIES MORNING NOTE, Mar. 17, 1999 (19 JS tab 3); Robert J. Hastings & Tina Louie, GOEPEL MCDERMID SECURITIES INSIGHT, Mar. 9, 1999 (19 JS tab 4). Moreover, the reports do not support a finding of permanent injury to Methanex resulting from the ban. To the contrary, they state that “a complete ban would likely be *better* for investors, in that the methanol industry would have to move more quickly to shut inefficient plants which would reduce the overhang on Methanex’s shares.” *Id.* (emphasis added).

Third, the letter fails to provide a description of Mr. Hasting's background, qualifications, training or relevant experience.²¹ The letter is not even signed by Mr. Hastings, nor is there any attestation as to the truth of the matters stated therein. Nor does Mr. Hastings "undertak[e] to attend and give evidence at an oral hearing," as required by the Tribunal for all factual witnesses.²² As it is, Mr. Hasting's testimony is thus not subject to cross-examination by the United States.

Mr. Hastings' letter fails to comply with the requirements adopted by the Tribunal and set forth in the IBA Rules for submission of factual witness statements. It should be excluded from evidence.

C. The Second and Third Affidavits Of Michael Macdonald Should Not Be Admitted

The Second and Third Affidavits of Michael Macdonald, submitted by Methanex on November 5, 2002 and on February 19, 2004, respectively, should not be admitted to the evidentiary record because they fail to comply with the Tribunal's requirements.²³

Mr. Macdonald fails to explain the specific source of his information. For example, in his Third Affidavit, Mr. Macdonald, who has not established his corporate finance qualifications, offers several statements concerning Methanex's financial status.²⁴ He nowhere provides an explanation of the specific source of that knowledge. A further example of such failure is his presentation of a "table detail[ing] Methanex' methanol sales into Brazil" for use in unconventional vehicles.²⁵

²¹ First Partial Award ¶ 164.

²² *Id.*

²³ See Second Affidavit of Michael Macdonald (Nov. 28, 2002) (Second Amendment Statement of Claim, tab A); Third Affidavit of Michael Macdonald (Feb. 19, 2004) (19 JS).

²⁴ See Third Affidavit of Michael Macdonald ¶¶ 13-21 (Feb. 19, 2004) (19 JS).

²⁵ *Id.* ¶ 46.

Mr. Macdonald's Second Affidavit is similarly defective. For example, he provides no explanation of the sources of information on which he bases his assertions regarding the reasons for California refiners' purported unwillingness to "verify the relevant representations set forth in this affidavit" or that "those same refiners are fearful of retribution by California government officials."²⁶ He similarly failed to specify from where he derived his information that "[a]t the blending or distribution stage, . . . ethanol, or methanol can be added to the gasoline."²⁷

Mr. Macdonald's failures to comply with the Tribunal's requirements warrant a finding that his Second and Third Affidavits are inadmissible.²⁸

III. METHANEX'S EXPERT REPORTS THAT FAIL TO COMPLY WITH THE TRIBUNAL'S REQUIREMENTS SHOULD NOT BE ADMITTED

In its First Partial Award, the Tribunal set forth requirements for expert witness reports. Those reports must contain the following information:

- (1) the full name and address of the expert witness;
- (2) the expert witness' present and past relationship, if any, with either disputing party;
- (3) a description of the expert witness' background, qualifications, training and relevant experience;

²⁶ Second Affidavit of Michael Macdonald (Nov. 28, 2002) ¶ 29 (Second Amendment Statement of Claim, tab A) (Macdonald states "I believe that independent refiners in California would verify all the relevant representations," and "I understand and believe that these same refiners are fearful of retribution by California government officials under whose regulatory jurisdiction they operate.").

²⁷ *Id.* ¶ 12; *see also id.* ¶ 14 ("At the blending or distribution stage, any of the four primary oxygenates can be added to the gasoline, subject to their technical requirements.").

²⁸ Further, Mr. Macdonald's Third Affidavit does not contain an affirmation of the truth of the statement, nor is it dated. *See* IBA Rules, art. 4.5(c)-(d).

- (4) a statement of the facts on which the expert has based his or her expert opinions and conclusions, including a description of the method, materials or other information used in arriving at those opinions and conclusions;
- (5) a statement of the expert's opinions and conclusions;
- (6) an acknowledgment of the expert's independent duty to assist the Tribunal, including attendance at oral hearings, unless otherwise ordered, and that this duty overrides any obligation to the party retaining the expert's services;
- (7) a statement by the expert witness of the truth of the opinions and conclusions; and
- (8) the expert's signature and the date and location.²⁹

Since issuance of the First Partial Award, the Tribunal has reiterated its expectation of the parties' "full compliance" with the above requirements.³⁰ As detailed below, certain of Methanex's experts' failures to comply with these requirements warrants exclusion of their reports from the evidentiary record in this case.

A. Works Authored By Pamela Williams Should Be Found Inadmissible

Dr. Pamela Williams has submitted two expert reports in her own name, and four reports of which she was the primary author.³¹ Each of these reports fails to comply with

²⁹ First Partial Award ¶ 165. These requirements largely mirror those set forth in Article 5.2 of the IBA Rules. *See* IBA Rule art. 5 ("(2) The Expert Report shall contain: (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience; (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions; (c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions; (d) an affirmation of the truth of the Expert Report; and (e) the signature of the Party-Appointed Expert and its date and place."); *see also* UNCITRAL Arbitration Rules, Art. 25(5) ("Evidence of witnesses may also be presented in the form of written statements *signed by them.*") (emphasis added).

³⁰ *See* Letter of V.V. Veeder to the Parties at 2 (Oct. 10, 2003) (stating that the Tribunal "expects Methanex's full compliance [with requirements of First Partial Award and IBA Rules for expert witnesses]; and where it has not so complied, the Tribunal expects notification of prompt compliance").

³¹ *See* Williams Expert Report (undated) (12 JS tab B); Williams Reply Report (Feb. 19, 2004) (20 JS tab C); Exponent & AES Report (2002) (Second Amended Statement of Claim tab E); Exponent Report (2003a) (12 JS tab C); Exponent Report (2003b) (12 JS tab D); Pamela R.D. Williams, *et al.*, *Evaluating the Risks and Benefits of MTBE and Ethanol as Alternative Fuel Oxygenates*, submitted to RISK ANALYSIS (Jan. 31, 2003) (12 JS tab E).

the Tribunal's requirements in various respects. Consequently, these reports should be excluded.

First, Dr. Pamela Williams has failed to disclose her “present *and past* relationship with Methanex,” as required by the Tribunal.³² Specifically, Dr. Williams' reports nowhere fully disclose the scope and extent of Methanex's retainer of her firm, which dates back to 1999 at least.³³ Nor do Dr. Williams' reports disclose the fact that Dennis J. Paustenbach – vice president of Exponent while Dr. Williams was employed there and founder of Dr. Williams' current employer ChemRisk – has been retained by Methanex since at least 1999 to provide litigation support, apparently for this case.³⁴ Moreover, Dr. Williams fails to disclose that a 2003 paper she relies upon “was funded by Methanex Corporation.”³⁵ Dr. Williams also has failed to disclose in her reports that she relies upon research that was authored or co-authored by Dr. Paustenbach while on retainer by Methanex.³⁶ Given these failures of disclosure, the United States is left only

³² First Partial Award ¶ 165 (emphasis added).

³³ See Dr. Dennis Paustenbach, Curriculum Vitae (Exponent) at 15 (26 JS tab 23 at 3302) (“In 1999, Methanex Corp. retained us to address the environmental and human health hazards associated with the use of MTBE by the United States as an oxygenate. Their claim was that California banned MTBE in an arbitrary manner. Case will be argued in World Court in 2003 or later.”); *id.* at 26 (26 JS tab 23 at 3313) (“In 1999-2001, was involved in work to evaluate the magnitude of the impact of MTBE on the groundwater in the State of California. During the course of the evaluation, a number of papers were presented at conferences and published in the literature.”); see also Dr. Dennis Paustenbach, Curriculum Vitae (ChemRisk) at 17 (26 JS tab 24 at 3396) (“In 1999-2002, involved in work to evaluate the magnitude of the impact of MTBE on groundwater in the State of California. During the course of the evaluation, a number of papers were presented at conferences and published in the literature.”) and 19 (26 JS tab 24 at 3398) (“In 1999, retained by Methanex Corp. to address the environmental and human health hazards associated with the use of MTBE by the United States as an oxygenate. Their claim was that California banned MTBE in an arbitrary manner. Case will be argued in World Court in 2003 or later.”).

³⁴ See *id.*

³⁵ See Williams, P.R.D., L. Benton & P. Sheehan, *MTBE in California's Drinking Water: A Comparison of Groundwater Versus Surface Water Sources*, 4 ENVIRON. FORENSICS 175, 188 (2003) (26 JS tab 37 at 3697) (cited in Williams Reply Report at 76 (20 JS tab C)).

³⁶ See, e.g., Williams, P.R.D., P.K. Scott, P.J. Sheehan and D.J. Paustenbach, *A Probabilistic Assessment of Household Exposures to MTBE in California Drinking Water*, 6 HUMAN ECOL. RISK ASSESS. 827 (2000) (listed as a reference to Dr. Williams' Expert Report (12 JS tab B at 8)); *id.* (listed as a reference to

to speculate on what other relationships Dr. Williams, her firm, her colleagues and her research may have with Methanex.

Second, Dr. Williams' Reply Report fails to comply with several additional requirements imposed by the Tribunal. That Report does not contain an affirmation of truth, and it is not signed.³⁷ Dr. Williams also fails in her Reply Report to confirm her independent duty to the Tribunal that overrides any obligation that she has to Methanex.³⁸

The United States previously brought many of these defects to Methanex's attention and Methanex, in turn, acknowledged that several of its experts had failed to comply with the Tribunal's directives.³⁹ Nevertheless, Dr. Williams not only failed to correct the deficiencies in her earlier reports, but her Reply Report exhibits similar deficiencies. The failure of Dr. Williams' reports to comply with the Tribunal's directives and the rules governing this arbitration warrants a finding that each of those works is inadmissible.

Exponent and AES Report (2002) (Second Amended Statement of Claim tab E at 43); *id.* (listed as a reference to Exponent Report (2003a) (12 JS tab C at 22)); *id.* (listed as a reference in Dr. Williams' Reply Report of Feb. 19, 2004 (20 JS tab C at 76)); *id.* (listed as a reference to Williams, *et al.*, *Evaluating the Risks and Benefits of MTBE and Ethanol as Alternative Fuel Oxygenates*, submitted to RISK ANALYSIS (Jan. 31, 2003) (12 JS tab E at 43)); Williams, P.R.D., Scott, P.K., Hays, S.M., and Paustenbach, D.J., *A Screening Level Assessment of Household Exposures to MTBE in California Drinking Water*, SOIL SEDIMENT & GROUNDWATER (2000) (listed as a reference to Dr. Williams' Reply Report (20 JS tab C at 76)).

³⁷ See First Partial Award ¶ 165; IBA Rules, art. 5.2(d)-(e); UNCITRAL Arbitration Rules, art. 25(5) ("Evidence of witnesses may also be presented in the form of written statements *signed by them.*") (emphasis added).

³⁸ See First Partial Award ¶ 165.

³⁹ See Letter of Barton Legum to the Tribunal at 3 (Aug. 27, 2003) (noting that four of Methanex's seven scientific expert reports were unsigned, and that no author was identified for three of them); Letter of Christopher Dugan to the Tribunal at 1, n.1 (Sept. 3, 2003) (recognizing that four of the expert reports submitted by Methanex were unsigned and that three other reports did not identify an author, and noting additionally that Dr. Pamela Williams is the testifying expert with respect to the reports for which no author is listed).

B. The Expert Reports Of Gordon Rausser Should Be Excluded From The Evidentiary Record

Dr. Gordon Rausser also has failed to comply with the Tribunal's requirements for expert witnesses.⁴⁰ *First*, Dr. Rausser does not affirm the truth of the statements made in his Reply Report.⁴¹ *Second*, Dr. Rausser's Reply Report does not confirm his independent duty to assist the Tribunal or his undertaking to testify.⁴² That Dr. Rausser's reports fail to conform to applicable requirements despite the United States' earlier protestations of non-compliance and the Tribunal's having reiterated its expectation of full and prompt compliance warrants exclusion of his reports from the evidentiary record.

IV. METHANEX'S UNTIMELY FACTUAL SUBMISSIONS SHOULD NOT BE ADMITTED

Along with its April 23, 2004 Reply to the *Amicus Curiae* Submissions of EarthJustice and the International Institute for Sustainable Development ("Reply to *Amici* Submissions"), Methanex submitted evidentiary materials that should be excluded from the record. In its Appendix of Exhibits, Methanex submitted three documents that it alleges constitute factual evidence. These documents fall into two categories: (i) a newspaper article cited by Methanex in support of its allegation that ethanol contaminates groundwater;⁴³ and (ii) two documents purporting to support Methanex's claim that governments may not "respond to threats that are not based on credible scientific

⁴⁰ See Rausser Reply Report (Feb. 19, 2004) (20 JS tab A); Rausser Expert Report (Jan. 31, 2003) (12 JS tab F)

⁴¹ See *id.*

⁴² See *id.*

⁴³ See Methanex Reply to *Amicus* Submissions ¶ 10 n.11 (citing *MTBE – The Lawsuits Begin*, NITROGEN & METHANOL (Sept. 1, 2000) (I Methanex *Amici* Reply tab 3)).

evidence.”⁴⁴ Methanex’s attempt to use its Reply to *Amici* Submissions to circumvent the Tribunal’s orders and, thus, prejudice the United States should not be countenanced by the Tribunal.

The Tribunal ordered that Methanex submit *all* evidence on which it intended to rely by January 31, 2003.⁴⁵ Along with its Reply filed on February 19, 2004, Methanex was permitted to submit only evidence to rebut the arguments made and evidence submitted by the United States in its Amended Statement of Defense.⁴⁶ Neither the Tribunal’s orders nor the rules governing this proceedings sanction Methanex’s submission of new evidence on April 23, 2004. Methanex’s untimely factual submissions should be deemed inadmissible.

Moreover, neither *amicus* submitted any evidence in support of its submission. Nor were the arguments made by Methanex – in support of which it submitted the untimely evidence – new arguments made by Methanex for the first time in its Reply to the *Amici* Submissions.⁴⁷ Further, the documents in question date back to 1999, 2001 and

⁴⁴ See *id.* ¶ 25 n.38 (citing USTR Press Release, *U.S. and Cooperating Countries File WTO Case Against EU Moratorium on Biotech Foods and Crops: EU’s Illegal, Non-Science Based Moratorium Harmful to Agriculture and the Developing World*, May 13, 2003 (I Methanex Amici Reply tab 13) and Ambassador Peter Scher, U.S. Special Trade Negotiator for Agriculture, *Trade Policy and the Scientific Revolution: The Case of Agricultural Biotechnology*, Nov. 24, 1999 (I Methanex Amici Reply tab 14)).

⁴⁵ See First Partial Award ¶¶ 163, 172(5) (ordering that Methanex submit all of its evidential material, including witness statements and expert reports by November 5, 2002); Tribunal Letter, dated Sept. 25, 2002 ¶¶ 20-21 (same); Tribunal Letter dated Oct. 21, 2002 (extending deadline for Methanex to submit its expert reports until January 31, 2003).

⁴⁶ See Joint Letter of the Parties to the Members of the Tribunal § A(3) (Aug. 14, 2000), (“Presentation of Argument and Evidence”) (“The party submitting the reply shall simultaneously submit any additional documents and witness statements permitted by Articles 3.10 and 4.6 of the IBA Rules”); Minutes of Order of the Second Procedural Meeting, item 6 (Dec. 4, 2000) (“The Tribunal took note of the parties’ procedural agreements contained in Part A of their joint letter dated 14th August 2000 to the Tribunal.”).

⁴⁷ See, e.g., Second Amended Statement of Claim ¶ 193 (arguing that California addressed MTBE only and ignored “the consequences of leaking gasoline USTs, including the release of benzene and ethanol (also a known carcinogen), as well as other toxic chemicals into California’s water supply.”); Reply ¶ 194 (asserting that government action must be based on “a valid risk assessment supported by sufficient scientific evidence”).

May 2003. Methanex, therefore, could have introduced these documents into evidence at an earlier date in accordance with the Tribunal's orders.⁴⁸ Methanex should not be permitted to prejudice the United States by submitting documentary evidence at this late date. The Tribunal thus should rule these documents inadmissible.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Tribunal grant its motion to exclude from the evidentiary record certain of Methanex's submissions as set forth in the attached Proposed Order.

Respectfully submitted,

Mark A. Clodfelter
*Assistant Legal Adviser for International
Claims and Investment Disputes*
Barton Legum
*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*
Andrea J. Menaker
David A. Pawlak
Jennifer I. Toole
CarrieLyn D. Guymon
Mark S. McNeill
*Attorney-Advisers, Office of International
Claims and Investment Disputes*
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

May 18, 2004

⁴⁸ See W. Michael Reisman & Eric E. Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 AM. J. INT'L L. 737, 741 (1982) (noting that "evidence purposely withheld for late submission, with the intent of gaining an unfair advantage, has on occasion been rejected by international jurists" and noting examples where "tribunals have shown some reluctance to admit evidence not submitted within time limits fixed by them.").

PROPOSED ORDER

In accordance with Article 25 of the UNCITRAL Arbitration Rules, and in light of the Tribunal's First Partial Award and Articles 4 and 5 of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules"), the Tribunal excludes from the evidentiary record the following submissions made by Methanex:

1. All documents from Richard Vind's and Regent International's files, including documents found at 6 JS tabs 52-61, 64 & 66; 7 JS tabs 151-53, 156, 159-60, 162 & 165; 11 JS tabs 202, 216-19, 222-23, 226 & 258-59;
2. The Declaration of Robert Puglisi (Mar. 28, 2003) (22 JS tab 35);
3. The Statement of Bob Hastings (Jan. 14, 2004) (19 JS tab 6);
4. The Second Affidavit of Michael MacDonald (Nov. 28, 2002) (Second Amendment Statement of Claim, tab A) and the Third Affidavit of Michael Macdonald (Feb. 19, 2004) (19 JS tab A).
5. The article and reports prepared in whole or in part by Dr. Pamela Williams, to include the following:
 - (a) Dr. Williams' Expert Report (undated) (12 JS tab B);
 - (b) Dr. Williams' Reply Report (Feb. 19, 2004) (20 JS tab C);
 - (c) Exponent & AES Report (2002) (Second Amended Statement of Claim tab E);
 - (d) Exponent Report (2003a) (12 JS tab C);
 - (e) Exponent Report (2003b) (12 JS tab D); and
 - (f) Williams, *et al.*, *Evaluating the Risks and Benefits of MTBE and Ethanol as Alternative Fuel Oxygenates*, submitted to RISK ANALYSIS (Jan. 31, 2003) (12 JS tab E).

6. Reports submitted by Dr. Gordon Rausser, including the following:
 - (a) Expert Report of Gordon Rausser (Jan. 31, 2003) (12 JS tab F); and
 - (b) Reply Report of Gordon Rausser (Feb. 19, 2004) (20 JS tab A).

7. The factual materials submitted with Methanex's Reply to the *Amicus Curiae* Submissions of EarthJustice *et al.* and the International Institute for Sustainable Development filed on April 23, 2004, including:
 - (a) *MTBE – The Lawsuits Begin*, Nitrogen & Methanol (Sept. 1, 2000) (I Methanex Amici Reply tab 3);
 - (b) USTR Press Release, *U.S. and Cooperating Countries File WTO Case Against EU Moratorium on Biotech Foods and Crops: EU's Illegal, Non-Science Based Moratorium Harmful to Agriculture and the Developing World* (May 13, 2003) (I Methanex Amici Reply tab 13); and
 - (c) Ambassador Peter Scher, U.S. Special Trade Negotiator for Agriculture, *Trade Policy and the Scientific Revolution: The Case of Agricultural Biotechnology* (Nov. 24, 1999) (I Methanex Amici Reply tab 14).

Made by the Tribunal on _____, 2004 at _____.

William Rowley, Q.C.

Van Vechten Veeder, Q.C.

Professor W. Michael Reisman