

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

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**REJOINDER OF  
RESPONDENT UNITED STATES OF AMERICA**

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UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

September 14, 2000

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**REJOINDER OF  
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In accordance with the Tribunal's First Procedural Order, Respondent United States of America respectfully submits the following Rejoinder to the Reply of Methanex Corporation ("Methanex") to the United States' Statement of Defense (the "Reply").

Introduction

1. The United States does not attempt here to address each of the errors of fact and law that pervade Methanex's Reply. Instead, this Rejoinder highlights only a few of the most fundamental misapprehensions in the Reply. The United States denies each and every allegation of the Reply not specifically and unambiguously admitted in this Rejoinder.

Chapter 11 Provides No Claim For Policy Disputes

2. Methanex's Reply confirms that its claims are founded on its view that California should have made different policy choices in addressing MTBE contamination of its drinking water supply. Methanex thus acknowledges that MTBE contamination "poses some degree of risk," Reply at 7 ¶ 36, but asserts that the Executive Order was not an "appropriate action" to take in response to the findings of the UC Report and the additional information on the MTBE problem provided through public hearings and comment. *Id.* ¶ 32.<sup>1</sup> Similarly, Methanex faults California for its approach to the MTBE issue, suggesting instead that California should have "select[ed] the least burdensome alternative," similar to the decision-making process required under the federal Toxic Substances Control Act ("TSCA"). *Id.* ¶ 35.

3. Methanex fundamentally misconstrues the nature of Chapter 11 and the role of this Tribunal. Chapter 11 does not task arbitral tribunals to sit in judgment on whether a State's policy choices are or are not "appropriate" in some undefined sense. Nor is it a function of such tribunals to determine whether a State's policy-making process is best suited to prioritizing government objectives. Rather, the function of Chapter 11 tribunals is to apply definite legal standards to the facts before them: Article 1105(1), for example, requires a tribunal to evaluate a State's actions against the established standards of customary international law. California, however, was under no legal obligation, whether under domestic or customary international law, to adopt or apply the standards set forth in

<sup>1</sup> Abbreviations in this Rejoinder have the meaning given to them in the Statement of Defense.

TSCA. And, as noted in the Statement of Defense, California's actions implicate no other customary international law standard. Methanex's claim is without merit.

#### Public Health Measure

4. Contrary to Methanex's assertion, the California measures at issue were plainly taken to protect public health. Methanex's Reply asserts, in essence, that measures addressing a toxic chemical threatening to make the drinking water of tens of millions of Californians taste and smell like turpentine do not concern public health. Merely to state the proposition is to demonstrate its lack of merit. Water is an element critical to human survival – perhaps the most critical element. A steady supply of potable drinking water is essential to public health in any civilization. Even accepting Methanex's dubious contention that the presence in drinking water of MTBE – a known animal carcinogen and a possible human carcinogen – is not harmful when ingested by humans, measures to safeguard California's drinking water from MTBE's potent taste and odor effects are clearly public health measures.

#### Neither The Bill Nor The Executive Order Is A Ban Of MTBE

5. Methanex grossly distorts the plain meaning of the Bill and the Executive Order in suggesting that they, individually or together, can be read as a ban of MTBE. Specifically, and contrary to Methanex's contention, the Executive Order did not "trigger" the application of Section 4 of the Bill and, thereby, ban the use of MTBE in California gasoline. Section 4(a) of the Bill explicitly provides that *if* the sale and use of MTBE in gasoline is discontinued in the

future, then the state shall not permit or require the use of MTBE in gasoline. And Section 4(b) merely provides that *if* California discontinues the sale and use of MTBE in gasoline, the California Air Resources Board must notify the U.S. EPA of that fact. Neither of these provisions transform the Bill into a self-implementing ban on the use of MTBE in California's gasoline. It is the California Reformulated Gasoline 3 regulations that ban the use of MTBE in California's gasoline, not the Executive Order or the Bill.

The "Global Market For Methanol"

6. Methanex's assertions concerning the California measures' impact on the "global market for methanol" highlight the extraordinarily remote nature of its claims. Reply at 1 ¶ 1. Methanex's claim, as crystallized in its Reply, is that the California measures may decrease the global price of methanol in the future and therefore lower the profits Methanex realizes on methanol it sells from its Chilean and New Zealand plants to MTBE producers principally located outside of the United States. *See id.* at 3 ¶ 10 ("foreign MTBE producers are the principal suppliers for the California market"). Methanex leaves to the imagination of the reader the question of how such measures could even colorably be viewed as an expropriation of any Methanex investment in the United States. Nor can Methanex explain how an expropriation could ever result from measures whose alleged effect on an enterprise is a change in the *global price* of a commodity.

Damages

7. Methanex's elaboration of its claimed damages in its Reply underscores the speculative nature of its claims. Methanex surmises that other states will follow California's example and move to ban MTBE, and it seeks "the present value of anticipated losses to be suffered . . . from a loss of the national MTBE market for methanol." Reply at 16 ¶ 89. Nothing in Chapter 11 of the NAFTA contemplates holding States responsible in damages for measures that have not yet been – and may never be – adopted. Any "anticipated" losses arising out of measures that may be adopted by other states or the federal government in the future are beyond the scope of this arbitration and cannot serve as the basis for Methanex's damages claim.

**CONCLUSION**

8. For the foregoing reasons, and for those set forth in the Statement of Defense, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against Methanex, rejecting Methanex's claims in their entirety and with prejudice; and (b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL

Arbitration Rules, ordering that Methanex bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

*Respectfully submitted,*

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