

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

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**REJOINDER MEMORIAL OF RESPONDENT  
UNITED STATES OF AMERICA ON  
JURISDICTION, ADMISSIBILITY AND  
THE PROPOSED AMENDMENT**

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UNITED STATES DEPARTMENT OF STATE

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**REJOINDER EXPERT REPORT OF DETLEV F. VAGTS**

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AND THE UNCITRAL ARBITRATION RULES  
BETWEEN

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**REJOINDER MEMORIAL OF RESPONDENT  
UNITED STATES OF AMERICA ON  
JURISDICTION, ADMISSIBILITY AND  
THE PROPOSED AMENDMENT**

In accordance with the Tribunal's order of February 27, 2001, as amended, the United States respectfully submits this Rejoinder Memorial on jurisdiction, admissibility and the question of whether Methanex's proposed amendments may or should be allowed under Article 20 of the UNCITRAL Arbitration Rules.

**PRELIMINARY STATEMENT**

The United States began this phase of pleadings with the observation that "Methanex's claims do not remotely resemble the type of grievance that the NAFTA Parties consented to submit to arbitration pursuant to Chapter Eleven of that agreement." U.S. Memorial at 1. Many pages of new claims and legal argument have intervened since that observation. The intervening pages, however, have served only to underscore that

the terms of the NAFTA's investment chapter do not encompass claims such as these. Indeed, Methanex recognizes as much by urging the Tribunal to adopt, with respect to each of the principal points in dispute, a novel reading of Chapter Eleven that finds no support in the terms of the NAFTA or general principles of international law:

- Because its claims are too remote under established international law, Methanex argues for an extraordinarily broad causation standard never before applied by an international claims tribunal;
- Because the California measures accord Methanex and its investments precisely the same treatment as that accorded to U.S.-owned participants in the methanol industry, Methanex urges that the NAFTA's national-treatment provision requires that it be accorded *different* and *better* treatment than other methanol producers and marketers;
- Because it can identify no rule of general international law implicated by the measures at issue, Methanex contends that Article 1105(1)'s requirement of "treatment in accordance with international law" permits the Tribunal to base its decision not on rules of law but, rather, on whatever it may consider to be "fair" or "equitable" in an intuitive and subjective sense;
- Because it cannot credibly allege that any of its property in the United States has been taken, Methanex asks this Tribunal to break new ground by finding that some amorphous notion of "goodwill," by itself, is property capable of being expropriated.

As demonstrated below, Methanex's claims – whether as originally stated or as proposed to be amended – are neither within the Tribunal's jurisdiction nor admissible.

#### **I. THIS TRIBUNAL LACKS JURISDICTION ON PROXIMATE CAUSE GROUNDS**

In its Rejoinder, Methanex asserts for the first time that its allegations can meet the standard of proximate causation that international tribunals consistently apply.

Methanex Rejoinder at 11-13. Methanex also continues to argue that the NAFTA

incorporates an expansive notion of causation unknown to general international law. *Id.* at 13-16. Neither assertion has merit.

**A. Methanex's Claim Is Too Remote**

Although Methanex now argues that the MTBE ban proximately caused it and its investments to suffer damage, it nowhere disputes that the chain of causation at issue here is the attenuated one initially described in the United States' Memorial and repeated in its Reply. *See* Methanex Rejoinder at 11-13; U.S. Memorial at 21-23; U.S. Reply at 15.

Any impact on Methanex will result only from anticipated effects of the MTBE ban on gasoline suppliers, which will result in secondary effects on supply contracts with MTBE producers, which will result in tertiary effects on methanol producers. *See* U.S. Memorial at 21-23.

As demonstrated in the Memorial, however, international tribunals have consistently rejected as too remote claims, such as these, where the supposed injury flows solely from a measure's effect on parties with which the claimant has a contractual relationship. *See id.* at 21-29. These cases include (among others cited in the Memorial), insurers' claims for losses arising from unlawful military actions and creditors' claims for losses arising from a measure's effects on debtors. *Id.*

Methanex does not attempt to distinguish these cases or the numerous other authorities cited in the Memorial. *See* Methanex Rejoinder at 11-13. Like the claimant in *Hickson*, Methanex "contends that where one without sufficient justification interferes with a contract sanctioned by law to the injury of a third party to it, the wrongdoer must respond in damages to the injured party[,]" but Methanex "has pointed this . . . [Tribunal]

to no case, and it is safe to assert that none can be found, where any tribunal has awarded damages to one party to a contract claiming a loss as a result of . . . [an action affecting] the second party to such contract by a third party not privy to the contract without any *intention* of disturbing or destroying such contractual relations.” 7 R.I.A.A. 266, 268-69 (Germ.-U.S. Mixed Claims Comm'n 1926) (emphasis in original). Instead, Methanex contends that its claims should proceed merely because an indirect impact of the California measures on prospective contractual relations between MTBE producers and methanol producers might have been reasonably foreseen. *See* Methanex Rejoinder at 11-13.

Reasonable foreseeability alone, however, is not the test of proximate cause applied by international tribunals: for proximate cause, reasonable foreseeability may be a necessary element, but it is not sufficient in and of itself.<sup>1</sup> *See* Memorial at 20. In addition to the numerous international authorities cited in the Memorial, the municipal laws of common law countries illustrate this principle in contexts analogous to those alleged here. Under such municipal laws, a claimant can recover for remote and purely economic losses such as those at issue here – even if those losses were reasonably foreseeable – only if the respondent intended specifically to injure that particular

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<sup>1</sup> Contrary to Methanex’s assertion, the United States’ arguments in this case do not accept that the United States is liable for any and all damages that are reasonably foreseeable. *See* Methanex’s Rejoinder at 11. Methanex wrongly bases this assertion on a parenthetical in the U.S. Reply quoting *Behring Int’l, Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 238, 271 (June 21, 1985) (Award No. 52-382-3). However, the United States cited *Behring*, and several other decisions of the Iran-United States Claims Tribunal, to demonstrate that the term “arising out of” repeatedly has been interpreted to provide jurisdiction only over claims satisfying the customary international law standard of proximate cause. *See* U.S. Reply at 8-9, 9 n.9. Moreover, the *Behring* tribunal did not hold that the proper test of proximate cause is reasonable foreseeability, but that *in addition to* satisfying the proximate cause requirement, the damages must have been reasonably foreseeable for jurisdiction to attach: “If a breach occurred on or prior to 19 January 1981, the Tribunal has jurisdiction to adjudicate a counterclaim for all reasonably foreseeable damages occurring

claimant.<sup>2</sup> Alleged intent by the respondent to injure a third party with whom the claimant is contractually related, however, is not enough to overcome remoteness.<sup>3</sup> For

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thereafter, proximately caused by such breach, irrespective of when such damages began to accrue or whether such damages continued beyond 19 January 1981.” 8 Iran-U.S. Cl. Trib. Rep. at 271.

<sup>2</sup> See, e.g., *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 (Can.) (tortfeasor who injured key corporate employee not liable to corporation for damages resulting from employee's inability to perform employment contract); *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228 (Can.) (third party whose contract was terminated because of courier's negligent failure to deliver document cannot recover for resultant lost profits); *Gypsum Carrier, Inc. v. The Queen*, 1 F.C. 147 (1978) (Can.) (railroad companies cannot recover re-routing costs from defendant whose ship negligently damaged bridge); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927) (U.S.) (Holmes, J.) (plaintiff who chartered ship cannot recover for temporary loss of its use caused by defendant's negligence); *Ballard Shipping Co. v. Beach*, 32 F.3d 623, 628 (1<sup>st</sup> Cir. 1994) (U.S.) (The plaintiff whose fishing business was disrupted when the state closed waters to fishing following an oil spill negligently caused by the defendant could not recover for economic losses. The court noted that “courts have denied liability for purely economic harm in a variety of land-based contexts. Such cases rest on a concern about extending the scope of tort liability beyond the generally limited classes of individuals who suffer physical damage to person or property.”); *Ultramares Corp. v. Touche*, 255 N.Y. 170 (1930) (U.S.) (Cardozo, J.) (accountants not liable on negligent misrepresentation cause of action for creditor's losses stemming from their reliance on a negligently prepared and certified audit of accountants' client); *Caparo Indus. Plc. v. Dickman*, [1990] 2 A.C. 605 (Eng.) (accountants who negligently prepare audit reports not liable for shareholders' losses absent a “close and direct relationship”); *Weller & Co. v. Foot and Mouth Disease Research Institute*, [1965] 2 LR 414, [1966] 1 Q.B. 569 (Eng.) (Even assuming that the plaintiff cattle auctioneers' purely economic losses were the foreseeable result of the defendants' acts resulting in the outbreak of foot and mouth disease, “there is a great volume of authority . . . to the effect that a plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure, or at least threaten directly to injure, the plaintiff's person or property but merely caused consequential loss as, for example, by upsetting the plaintiff's business relations with a third party who was the direct victim of the act or omission.”); *Electrochrome, Ltd. v. Welsh Plastics, Ltd.*, [1968] 2 All E.R. 205 (Eng.) (loss of work at plaintiffs' factory was not actionable although defendant with “knowledge that the damage to this particular hydrant and damage to this particular water main might cause inconvenience or loss to other people on the industrial estate . . . nevertheless damaged the hydrant,” which was owned by a third party.); *McFarlane v. Tayside Health Board*, [1999] 2000 S.C.L.R. 105 (Scot.) (“But in the field of economic loss foreseeability is not the only criterion that must be satisfied. There must be a relationship of proximity between the negligence and the loss which is said to have been caused by it and the attachment of liability for the harm must be fair, just and reasonable. The mere fact that it was reasonably foreseeable that the pursuers would have to pay for the costs of rearing their child does not mean that they have incurred a loss of the kind which is recoverable.”); *Perre v. Apand Pty. Ltd.*, (1999) 164 A.L.R. 606, 611 (Austl.) (“It is clear that foreseeability does not, of itself, suffice to render a defendant liable for negligently inflicted economic loss . . .”); *Caltex Oil Pty. Ltd. v. The Dredge “Willemstad,”* (1997) 136 C.L.R. 529 (Austl.) (“[A]s a general rule, damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that loss is foreseeable is not enough to make it recoverable.”). See generally Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VANDERBILT L. REV. 43 (1972) (under prevailing rule in the United States and British Commonwealth, indirect economic consequences of negligence are not actionable).

<sup>3</sup> See, e.g., *Dickson Car Wheel Co.*, 4 R.I.A.A. 669, 681 (Mex.-U.S. Gen. Claims Comm'n 1931) (noting with approval that the U.S.-Germ. Mixed Claims Commission “appl[ie]d under international law the same standard as governs in municipal law,” the tribunal stated that “[t]his rule has been concisely stated . . . as follows: ‘Where the plaintiff is injured by the defendant's conduct to a third person it is too remote if he sustains no other than a contract relation to such third person, or is under contract obligation on his account,



example, international tribunals have held that insurers could not recover against a State that killed insureds unless the State's actions were intended to disturb the contractual relations between the insurers and their insureds.<sup>4</sup>

Methanex has not pleaded the necessary intent here because the sole foundation of its allegations is that – as alleged in the first sentence of the Draft Amended Claim (at 1) – California “intentionally discriminat[ed] . . . to favor and protect the U.S. ethanol industry, and to ban a product – methanol-based methyl tertiary-butyl ether (‘MTBE’) – that has been repeatedly and stridently identified in the United States as ‘foreign.’”<sup>5</sup> Even assuming, *arguendo*, an intent to injure MTBE producers could be inferred from a

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and the injury consists only in impairing the ability or inclination of such third person to perform his part, . . . unless the wrongful act is willful for that purpose.” (quoting 1 J. SUTHERLAND, LAW OF DAMAGES 55-56 (1882)); *Provident Mutual Life Ins.*, 7 R.I.A.A. 91, 114-15 (U.S.-Germ. Mixed Claims Comm’n 1924) (“The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any *intent* of disturbing or destroying such contractual relations.”); *Dix*, 9 R.I.A.A. 119, 121 (Am.-Venez. Comm’n, undated decision) (“International as well as municipal law denies compensation for remote consequences in the absence of deliberate intention to injure.”); *see also, e.g.*, A.H. FELLER, THE MEXICAN CLAIMS COMMISSION 124 (1935) (noting that “the element of intention may be summoned to assist in” understanding *Dickson Car Wheel*, 4 R.I.A.A. 669: “If the Mexican government had taken over the lines because it wanted to prevent fulfillment of this or other contracts, it would be easier to say that the damage was ‘direct’ and to hold Mexico responsible. But where an entirely different purpose was evidenced in the taking over of the lines, it is difficult to escape holding that this situation fits into the traditional legal pattern of ‘indirect’ or ‘remote’ damage.”); *Nautilus Marine, Inc. v. Niemela*, 170 F.3d 1195, 1197 (9<sup>th</sup> Cir. 1999) (denying recovery to charter party who was prevented from transporting fish to shore when defendant’s ship collided with chartered vessel, distinguishing cases where the rule “does not preclude recovery for intentional interference with contract relations. . . . The key to these cases . . . is not merely that the tort is intentional, but that the tortfeasor knew of the plaintiff’s contractual relation and intended to interfere with it.”).

<sup>4</sup> *See Provident Mutual Life Ins.*, 7 R.I.A.A. at 114-15.

<sup>5</sup> *See also* Amended Notice of Intent to Submit a Complaint to Arbitration Under Chapter 11 of the North American Free Trade Agreement, dated December 22, 2000, at 4 (“California improperly discriminated against methanol and MTBE in order to foster the development of an ethanol manufacturing capability in the State of California, further to the injury of Methanex, and to the benefit of ADM and the domestic U.S. ethanol industry in general.”); Claimant Methanex Corporation’s Request to Extend or Suspend the Current Jurisdictional Schedule, dated December 22, 2000, at 3 (“In the late fall of 2000, Methanex discovered facts to support a further claim that the California measures at issue were designed to protect the domestic producers of ethanol, including the Archer Daniels Midland Corporation (“ADM”), by discriminating against foreign producers of methanol and MTBE. Indeed, Methanex discovered that ADM misled and improperly influenced the state of California to adopt the discriminatory measures.”).

supposed intent to benefit the ethanol industry, an intent to injure *suppliers* of products or services to MTBE producers could not reasonably be inferred.<sup>6</sup> Because ethanol and MTBE – not methanol – are competing oxygenates, any supposed objective of benefiting the ethanol industry would be accomplished simply by banning MTBE.<sup>7</sup> Thus, the specific intent required for an exception to the general rule barring indirect and purely economic damages is not present here.

In addition, for much the same reasons stated in the United States' Memorial, adopting Methanex's proposal of reasonable foreseeability by itself as the causation standard of Articles 1116(1) and 1117(1) would lead to unreasonable results. Specifically, holding the NAFTA Parties liable for foreseeable, but indirect, purely economic injuries caused by environmental regulations or similar measures of general application would expose them to an indeterminate number of claims potentially totaling an astronomical amount of liability, as demonstrated by Methanex's claim itself, which alone seeks \$1 billion. For example, many such measures, like those at issue here, could foreseeably result in an increase in the price of gasoline – thereby increasing costs for countless businesses. Measures of general application commonly also have foreseeable effects not only on the persons directly regulated, but also on expanding circles of persons in contractual relationships with the persons regulated and those who deal with them.

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<sup>6</sup> Accordingly, the United States notes that none of the facts or conjecture in Methanex's Statement of Claim, Draft Amended Claim or memorials could support a contention that the subject California measures were intended to discriminate against Methanex or its investments.

<sup>7</sup> Methanex asserts for the first time in its Rejoinder that methanol is an oxygenate. *See* Methanex Rejoinder at 2. Even if this were true, it would change nothing because Methanex concedes that methanol is not used as an oxygenate in gasoline – the only use of oxygenates at issue in this case. *Id.*

Reading Articles 1116(1) and 1117(1) to expose the NAFTA Parties to such remote claims would be unreasonable.

Moreover, the United States notes that the sole arbitral award cited by Methanex in support of its reasonable foreseeability argument did not purport to break from the mainstream of international jurisprudence on proximate causation.<sup>8</sup> To the contrary, the *Angola* award cited with approval the decisions of the U.S.-German Mixed Claims Tribunal relied upon in the United States' Memorial and the Reply.<sup>9</sup> In *Angola*, Germany's illegal military reprisal against a Portuguese colonial fortress had combined with missteps by the Portuguese military and insurrection by the indigenous population to produce a disaster in which over 150,000 people died, over 500,000 cattle perished and over 180,000 hectares of farmland were laid waste.<sup>10</sup> Under the unusual circumstances of that case, the arbitral tribunal found it appropriate to award an amount *ex aequo et bono* to reflect Germany's partial responsibility for the resulting disaster.<sup>11</sup>

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<sup>8</sup> Methanex Rejoinder at 12 (quoting *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique*, ("Angola I") (*Port. v. Germ.*), 2 R.I.A.A. 1011 (1928)).

<sup>9</sup> *Id.* at 1031 ("despite the text of the treaty of 25 August 1921, between the United States of America and Germany, which obliged Germany to provide compensation for damages caused to American citizens 'directly or indirectly,' the arbitrators charged with applying the treaty did not hesitate to deny any compensation for injuries that, although caused by acts committed by Germany, derived at the same time from other, more proximate causes.") ("malgré le texte du traité du 25 août 1921, entre les Etats-Unis d'Amérique et l'Allemagne, qui oblige l'Allemagne à réparer les dommages causés aux citoyens américains 'directement ou indirectement' (directly or indirectly), les arbitres chargés d'appliquer ce traité n'ont pas hésité à refuser toute indemnité du chef de préjudices qui, bien qu'en relation de causalité avec les actes commis par l'Allemagne, dérivait en même temps d'autres causes plus rapprochés.") (footnotes omitted; translation by counsel); *see also id.* (noting that "Portugal itself has declared that it expressly renounces any compensation for indirect damages that it has suffered.") ("le Portugal lui-même a-t-il déclaré expressément renoncer à la réparation des dommages indirects qu'il a soufferts.") (footnote omitted; translation by counsel).

<sup>10</sup> *See id.* at 1032; *Responsabilité de l'Allemagne à raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre* ("Angola II") (*Port. v. Germ.*), 2 R.I.A.A. 1035, 1075 n.2 (1930).

<sup>11</sup> *See Angola I*, 2 R.I.A.A. at 1032 ("It would therefore not be just to limit the responsibility of Germany strictly to the damages that the German troops themselves alone caused, and it is appropriate to award to Portugal, in addition to those damages, an amount that the arbitrators will equitably fix . . .") ("Il ne serait

The circumstances of the *Angola* case stand in sharp contrast to the situation here, where the alleged injuries are purely economic and stem only from the indirect impact of a State's regulations on a claimant's prospective contractual relations with third parties. As the numerous authorities collected in the Memorial illustrate, international tribunals consistently apply a standard of proximate cause based on concepts of immediate or direct consequences in such circumstances. *See* U.S. Memorial at 21-29.

In any event, even if this Tribunal were to apply a reasonable foreseeability test alone, Methanex's claims would not be actionable because they were not in the reasonable contemplation of California or the United States when the measures were adopted. For example, in *Gypsum Carrier Inc. v. The Queen*, [1978] 1 F.C. 147, 149, 175 (Can.), a Canadian court held that although the captain of a freighter that negligently collided with a bridge knew the bridge carried rail traffic, the freighter's owner was not liable to the plaintiff railway companies for losses incurred in re-routing their trains: "the railway companies were not persons so closely and directly affected that those having charge of the vessel ought reasonably to have had the railways in contemplation when the vessel was proceeding toward the bridge . . ." <sup>12</sup> Similarly, suppliers of products or services to MTBE producers, such as Methanex and its investments, are not so closely and directly affected by the MTBE ban that their losses resulting from the measures could

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donc pas juste de limiter la responsabilité de l'Allemagne strictement aux dommages que les troupes allemandes ont causés elles-mêmes et elles seules, et il y a lieu d'accorder au Portugal, en sus de la réparation de ces dommages, une indemnité dont les arbitres arrêteront équitablement le chiffre . . ." (translation by counsel); *see also Angola II*, 2 R.I.A.A. at 1074-75 (awarding *ex aequo et bono* 25 million marks, although total losses from the disaster amounted to, at a minimum, several hundred million marks).

<sup>12</sup> *See also, e.g., Nautilus Marine*, 170 F.3d at 1197, *supra* n.3.

be deemed, as a matter of law, to have been in the reasonable contemplation of California or the United States in adopting the subject measures.

Finally, Methanex erroneously relies on general language in an administrative decision of the German-United States Mixed Claims Commission for the proposition that “it matters not how many links there may be in the chain of causation . . . provided there is no break in the chain and the loss can be clearly, unmistakably, and definitively traced, link by link, to Germany’s act.”). Methanex Rejoinder at 12-13 (quoting *Administrative Decision No. II*, 7 R.I.A.A. 23, 29-30 (Germ.-U.S. Mixed Claims Comm’n 1923)).

Methanex ignores, however, that (as noted in the U.S. Reply at 10) the same administrative decision rejected the contention that Germany was liable for all losses, notwithstanding that the commission was expressly granted jurisdiction over claims for “loss, damage, or injury . . . *directly or indirectly . . . or in consequence of hostilities or of any operations of war, or otherwise.*” *Administrative Decision No. II*, 7 R.I.A.A. at 29. Moreover, the effect of the administrative decision, including the language upon which Methanex relies, is demonstrated by how it was actually applied by the German-United States Mixed Claims Commission in subsequent cases: as shown in the Memorial and the Reply, that tribunal repeatedly rejected claims where the damages were too remote even if those damages might have been reasonably foreseeable. *See* U.S. Memorial at 24, 27 n.41, 29, 29 n.43; U.S. Reply at 10-11.<sup>13</sup> Methanex has no answer to these decisions of that tribunal.

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<sup>13</sup> *See, e.g., M.A. Quina Export Co.*, 7 R.I.A.A. 363 (Germ.-U.S. Mixed Claims Comm’n 1926) (losses incurred after ship owner refused to transport claimant’s cargo through German blockade were too remote); *Standard Oil Co. of N.Y.*, 7 R.I.A.A. 301, 307 (Germ.-U.S. Mixed Claims Comm’n 1926) (same finding for losses resulting from Great Britain’s requisitioning of ships during the war); *Hickson*, 7 R.I.A.A. 266 (Germ.-U.S. Mixed Claims Comm’n 1924) (same finding for losses incurred after the termination of

**B. Articles 1116(1) and 1117(1) Do Not Incorporate A Relaxed Standard Of Causation Based On Municipal Insurance Law**

Methanex does not dispute that the principle of proximate cause is well-established in international law and cites no international legal authority adopting a lower standard of causation. *See* Methanex Rejoinder at 13-16. Nonetheless, on the basis of municipal court decisions for the most part interpreting provisions in insurance contracts, and of Methanex’s preferred meaning of the word “or,” Methanex continues to argue that the phrase “by reason of, or arising out of,” in Articles 1116(1) and 1117(1) establishes some undefined, lower standard of causation. *Id.* For the reasons set forth in the Memorial, the Reply and below, Methanex’s reading of this phrase is wrong.

Invoking the principle that, in general, a treaty should be interpreted in such a way that legal text is not rendered superfluous, Methanex argues that the language “by reason of, or arising out of,” must create two separate causation standards. *Id.* at 13. Methanex then asserts that the United States’ position – *i.e.*, that the phrase “by reason of, or arising out of,” as a whole incorporates the principle of proximate cause – would read “arising out of” out of the NAFTA. *Id.*

Methanex, however, ignores the fact that this is precisely what its proposed interpretation would do to the language “by reason of.” If, as Methanex urges, “arising out of” embodies a significantly more expansive standard of causation than “by reason of” – which Methanex concedes “is generally understood to refer to the proximate cause

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contracts caused by the deaths of the claimant’s employees as a result of the sinking of the *Lusitania*); *Provident Mutual Life Ins.*, 7 R.I.A.A. 91, 112-13 (Germ.-U.S. Mixed Claims Comm’n 1924) (same finding for losses incurred for insurance policy benefits prematurely paid as a result of the sinking of the *Lusitania*); *Eastern Steamship Lines, Inc.*, 7 R.I.A.A. 71 (Germ.-U.S. Mixed Claims Comm’n 1924) (same finding for payment of war-risk insurance premiums by policyholders); *United States Steel*, 7 R.I.A.A. 44 (Germ.-U.S. Mixed Claims Comm’n 1923) (same).

standard advocated by the United States,” *id.* at 15 – the more narrow standard would be read out of Chapter Eleven: the substantially more expansive causation standard would in all cases swallow the more restrictive one. Methanex’s proposed interpretation violates the very principle it invokes.

Methanex’s other arguments for applying its interpretation of “arising out of” are equally unpersuasive. *First*, in support of its argument that Articles 1116(1) and 1117(1) embody two separate causation standards, Methanex does not dispute that a common, accepted usage of the word “or” is to introduce synonyms. *See id.* at 14. Rather, Methanex asserts that the first referenced usage of the word “or” in certain English dictionaries is to separate alternatives and that this, therefore, is necessarily the single “ordinary” meaning of the word under Article 31(1) of the Vienna Convention. *Id.* Methanex provides no supporting authority for this restrictive and mechanical approach to treaty interpretation – which is based on the order in which definitions appear in dictionaries rather than the traditional guides of context and common sense – and the United States is aware of no such authority.<sup>14</sup>

*Second*, Methanex argues that its asserted “distinction” between “by reason of” and “arising out of” “is reflected in the decisions of municipal courts . . . in a variety of legal settings.” *Id.* In fact, thirteen of the fifteen municipal cases cited by Methanex

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<sup>14</sup> In addition, in at least some French dictionaries the first referenced usage of the word “ou” is to introduce synonyms. *Compare* NAFTA art. 1116(1) (“ . . . et que l’investisseur a subi des pertes ou des dommages en raison *ou* par suite de ce manquement.”) (emphasis supplied) (available at <<http://www.dfait-maeci.gc.ca/nafta-alena/accord/chap-11.asp>>) *with* 1 LE MICRO-ROBERT POCHE 882 (1992) (defining “ou” as “1.(Équivalence de formes désignant une même chose) Autrement dit. *La coccinelle, ou bête à bon Dieu.*”). Also, Spanish dictionaries similarly note that the word “o” is used to introduce synonyms. *Compare* NAFTA art. 1116(1) (“ . . . y que el inversionista ha sufrido pérdidas o daños en virtud de la violación *o* a consecuencia de ella.”) (emphasis supplied) (available at <<http://www.nafta-sec-alena.org/spanish/nafta/chap-111.htm>>) *with* EL PEQUEÑO LAROUSSE ILUSTRADO 722 (2000) (defining “o” as “[i]ndica equivalencia o identidad: *el protagonista o personaje principal.*”).

involved only one “setting,” namely the provisions of insurance or indemnity contracts. As explained in the Reply, at least with respect to the issue of causation, insurance and indemnity agreements are not analogous to Chapter Eleven: unlike Chapter Eleven, insurance and indemnities are cost-shifting mechanisms read in the context of a conscious public policy expressly favoring insureds. *See* U.S. Reply at 13-14. Moreover, in the two cases cited by Methanex that did not involve insurance or indemnity contracts, the issue was not, as here, whether one of the parties to the dispute was liable for damages, but whether certain legal proceedings arose out of other legal proceedings.<sup>15</sup> Thus, these municipal law decisions shed no light on the issues before this Tribunal.

*Finally*, it is inconsequential that there happens to be no international authority interpreting the precise phrase “by reason of, or arising out of.”<sup>16</sup> Rather, the significant factors are the following:

- that an ordinary usage of the word “or” is to identify synonyms;
- that the context in which a term is used – not the order of meanings of the term in a dictionary – establishes the ordinary meaning of the term for purposes of treaty interpretation;
- that, as Methanex concedes, international authorities interpret the term “by reason of” as referring “to the proximate cause standard advocated by the United States”;<sup>17</sup>

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<sup>15</sup> *See Re Hamilton-Irvine and the Companies Act 1985*, 94 A.L.R. 428, 433 (S. Ct. Norfolk Island May 1, 1990) (pending proceedings did not arise out of other proceedings given that the latter were “in no sense dependent upon, or linked or associated with,” the former.); *United States v. Friedland*, 1998 A.C.W.S.J. 140040, at \*53-\*60 (Ont. Ct.) (counterclaim arose out of subject matter of proceedings initiated by plaintiff).

<sup>16</sup> The United States is also unaware of any municipal authority – and Methanex identifies none – where the phrase is used in a context that is analogous to Articles 1116(1) and 1117(1) – *i.e.*, a context identifying liability for legal obligations, as opposed to defining the scope of insurance coverage or an indemnity.

<sup>17</sup> Methanex’s Rejoinder at 15.



- that there are, as Methanex also concedes, international authorities interpreting the terms “arising out of” and “arising from” “as equivalent to proximate cause,” and no international tribunal has held to the contrary;<sup>18</sup> and
- that in the context of Articles 1116(1) and 1117(1) the word “or” in fact introduces synonymous phrases.<sup>19</sup>

## II. METHANEX HAS IDENTIFIED NO RIGHT AT ISSUE

### A. Methanex’s Article 1102 Claim Is Inadmissible

Methanex concedes, as it must, that the California measures it challenges accord it and its investments precisely the same treatment that they accord U.S. investors and U.S.-owned investments that manufacture and market methanol.<sup>20</sup> This concession is fatal to Methanex’s Article 1102 claim. Because U.S. investors and U.S.-owned investments in exactly the same circumstances are accorded precisely the same treatment as Methanex

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<sup>18</sup> *Id.* at 16.

<sup>19</sup>Contrary to Methanex’s assertion, the United States identifies considerably more than two decisions of international tribunals (as well as the opinions of commentators) construing language equivalent to – and even broader than – “arising out of” as embodying the principle of proximate cause. *See* U.S. Reply at 8-13. Methanex takes issue with only two of these numerous authorities: *Hoffland Honey Co. v. Nat’l Iranian Oil Co.*, 2 Iran-U.S. Cl. Trib. Rep. 41 (Jan. 26, 1983) (Award No. 22-495-2), and *H.G. Venable*, 4 R.I.A.A. 219 (Mex.-U.S. Mixed Claims Comm’n 1927). *See* Methanex Rejoinder at 16. With respect to *Hoffland Honey*, Methanex simply repeats the argument in its Counter-Memorial, ignoring the response to that argument in the Reply. *See* Counter-Mem. at 34 n.12; U.S. Reply at 9. With respect to *H.G. Venable*, Methanex asserts, without explanation, that “arising out of” and “originating from” are substantively different and notes that Mexico was held “indirectly liable” for certain damages. *See* Methanex Rejoinder at 16. There is no substantive difference, however, between “arising out of” and “originating from.” Also, the tribunal’s holding that Mexico was “indirectly liable” for damages caused by “an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize the insufficiency,” 4 R.I.A.A. at 225, 229 ¶ 23, did not address the issue of the appropriate standard of causation, but whether the acts of third parties were attributable to Mexico on the facts of the case. Thus, the tribunal’s holding did not negate that the damages had to be proximately caused by – or the “immediate and direct results of,” *id.* at 225 ¶ 10 – the insufficiency of governmental action: “The Court at Monterrey can not plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred.” *Id.* at 229 ¶ 23.

<sup>20</sup> *See* Methanex Rejoinder at 29 (“domestic methanol producers are equally damaged by the MTBE ban”).

and its U.S. affiliates, there can be, as a matter of law, no national-treatment violation. Indeed, Methanex's contention, in effect, is that Article 1102 entitles it to *different and better* treatment than that accorded to its domestically-owned counterparts in the U.S. methanol industry: Methanex asserts that it – unlike its U.S. counterparts in the methanol industry – is entitled to be treated as if it produced and marketed ethanol, a different product. That is not what the national-treatment obligation requires.

Evaluating compliance with Article 1102 requires a two-step analysis. The first step is to identify domestic investors or domestically-owned investments that are in like circumstances with the foreign investor or foreign-owned investment. The second step, having now identified the domestic group that is in like circumstances with the foreign investor or investment, is to determine whether the foreign investor or its investment has been accorded different treatment, on the basis of its nationality, in comparison to that domestic group with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

There is no doubt here as to the domestic entities appropriate for the comparison. Methanex relies, for purposes of its claims here, exclusively on its and its investments' status as producers and marketers of methanol. There is also no doubt that the United States is home to one of the largest methanol industries in the world and that many of the producers and marketers in that industry, which supplies 75 percent of U.S. domestic demand for the product, are owned or controlled by U.S. investors. *See* U.S. Reply at 19-20. Methanex does not, and cannot, suggest that its circumstances differ in any respect from those of domestically owned methanol producers or marketers.

As Methanex concedes, the measures at issue treat all participants in the U.S. methanol industry alike with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments, consistent with Article 1102. The measures in no way preclude investors and investments, whether domestically or foreign-owned, from continuing to manufacture and sell methanol. U.S. investors and their investments will be just as affected as Canadian investors and their investments if methanol sales and prices decline as a result of the ban of MTBE in California's gasoline.

That ends the analysis. Once it has been established that a foreign investor and its investments have received treatment no less favorable than that accorded to their domestic counterparts, there can be no national-treatment violation. The national treatment obligation does not entitle a foreign investor to demand *better* treatment than its domestically-owned counterparts by asserting that it should be accorded the treatment accorded to investors and investments that are in *less similar circumstances* with it. That is what Methanex is doing when it asks this Tribunal to compare the treatment it and its U.S. investments are accorded with that accorded to U.S. ethanol manufacturers.<sup>21</sup>

Methanex cites Professor Jackson for the supposed proposition that apples and oranges can be "like products" for national treatment purposes. *See* Methanex Rejoinder

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<sup>21</sup> The *S.D. Myers* decision, on which Methanex relies, does not support Methanex's suggestion that ethanol producers are the appropriate comparison group. In that case, the sole difference between the companies at issue was *where* they remediated PCB waste: the claimant sought to export PCB waste to the United States for remediation, while the companies found by the tribunal to be in like circumstances with the claimant remediated PCB waste in Canada. Here, the distinction between Methanex and its affiliates, on the one hand, and ADM and other ethanol producers and marketers, on the other, lies not in *where* certain activities are performed but, rather, in the nature of the activities themselves. Similarly, in *In re Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01 (Final Report of the Panel Feb. 6, 2001), it was not disputed that both the U.S. and Mexican companies were engaged in the same business, *i.e.*, providing trucking services.

at 20 n.5. Apart from the fact that Professor Jackson was not discussing NAFTA Article 1102 but rather a specific provision in GATT Article III:2, Methanex fundamentally misunderstands Professor Jackson's point.

GATT Article III:2 consists of two sentences, each of which imposes a separate discipline. The first sentence prohibits a WTO Member from subjecting another WTO Member's products to internal taxes or other internal charges in excess of those applied to "like" domestic products. The second sentence of GATT Article III:2 addresses a separate trade policy problem, and does so in terms based not on "like" products, but on the separate concept of "directly competitive" products. As Professor Jackson acknowledges in the sentence following the passage quoted by Methanex: "[A] broader relationship than that of 'like products' is contemplated by competitive products . . . ."<sup>22</sup> This GATT concept has no analogue whatsoever in the language of Article 1102 and is therefore inapposite. Indeed, not only does Article 1102 apply to investment and not to goods, it expressly provides that the standard to be applied is "in like circumstances."

Moreover, even if a "like products" test were to be applied here – which it should not be – Methanex ignores a crucial assumption made by Professor Jackson: in his example, the country granting preferential treatment to apples vis-à-vis oranges *does not produce oranges*. Thus, the country granting preferential treatment would be able to protect its domestic industry through its actions and adversely impact only foreign products. Professor Jackson does not suggest, however, that there could be a GATT Article III:2 violation – and indeed the trade policy problem he was discussing would not

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<sup>22</sup> JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 282 (1969).

arise – if the country granting preferential treatment to apples (and unfavorable treatment to oranges) had a thriving domestic orange industry.<sup>23</sup>

But that is exactly the case here. It is undisputed that U.S. investors and U.S.-owned investments produce and market methanol in the United States. Given that indisputable fact, there is no basis to ignore the most obvious comparison between Methanex and its U.S. affiliates and those U.S. investors and U.S.-owned investments that are *in precisely the same circumstances* with it and instead compare Methanex and its U.S. affiliates to those investors and investments that produce and market ethanol. And, because the treatment granted to Methanex and its U.S. affiliates is precisely the same as that granted to U.S. investors and their investments that are in like circumstances with it, Methanex’s Article 1102 claim fails as a matter of law and should be dismissed.<sup>24</sup>

#### **B. Methanex’s Article 1105(1) Claim Is Patently Without Merit**

In its Rejoinder, Methanex advances a number of unsupportable assertions for the proposition that Article 1105(1)’s requirement of “treatment in accordance with

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<sup>23</sup> Methanex’s reliance throughout its Rejoinder on the panel’s decision in *European Communities – Measures Affecting Asbestos-Containing Prods.* (panel report), WT/DS135/R, ¶¶ 8.154-8.157 (Sept. 18, 2000) is equally unavailing. See Methanex Rejoinder at 22 (“The WTO Panel’s decision in the *Asbestos* case is especially instructive. . . . After finding that all of these fibers were substitutable and therefore ‘like’ products, the tribunal concluded that the asbestos ban constituted *de jure* discrimination.”). Methanex glosses over the fact that the WTO Appellate Body overturned the panel’s ultimate conclusion and found that asbestos and asbestos substitutes were *not* like products – notwithstanding the fact that they were substitutable and companies producing the two products were in a position to take away business from one another – primarily because one had adverse health consequences not present in the other product. See *Asbestos*, WT/DS135/AB/R (Mar. 12, 2001).

<sup>24</sup> Methanex devotes much of its Rejoinder to the contention that methanol and ethanol are like products, despite their many obvious chemical and other differences. As explained above, this contention need not be resolved on an inquiry as to admissibility since there are U.S. investors and U.S.-owned investments engaged in the methanol industry with which to compare the treatment accorded Methanex. Nevertheless, the United States notes that Methanex’s contention is without merit: its bald assertion that ethanol and methanol “compete in the same business sector – the gasoline oxygenate market” – is groundless. See Methanex Rejoinder at 19. Even if methanol and ethanol are both oxygenates, Methanex concedes that

international law” does not require arbitrators to decide a case based on rules of customary international law, but instead permits them to decide it based on whatever they deem to be fair or equitable. As demonstrated in the United States’ Reply (at pages 21-36) and below, Methanex’s assertions are without legal merit.

### **1. Methanex’s Interpretation Of Article 1105(1) Is Incorrect**

Methanex’s Rejoinder acknowledges, as it must, that the three NAFTA Parties unanimously reject its interpretation of Article 1105(1).<sup>25</sup> It further acknowledges that the only court to review a Chapter Eleven award to date set aside the relevant portion of the award on the ground that the arbitral tribunal exceeded its authority by adopting a reading of the provision similar to that Methanex proposes. *Id.* at 53-54 n.21. Methanex nonetheless invites this Tribunal to follow the error of that partly vacated award, and urges that the agreement among the three NAFTA Parties is of no consequence. Its contentions are erroneous.

*First*, Methanex’s textual arguments as to the proper interpretation of Article 1105(1) are incorrect. Article 1105 is entitled “Minimum Standard of Treatment” and mandates “treatment in accordance with international law.” Methanex’s assertion that “the ‘international minimum standard’ has nothing to do with Article 1105” cannot be

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methanol does not compete with ethanol for use as a gasoline additive – the only use at issue here. *Id.* at 2. It is MTBE and ethanol that compete, and Methanex does not produce or market MTBE.

<sup>25</sup> Methanex Rejoinder at 42; *see* Second Submission of Canada Pursuant to Article 1128 (“Canada’s Second 1128 Submission”), ¶ 26 (“Article 1105 incorporates the international minimum standard of treatment recognized by customary international law.”); *id.* ¶ 33 (“‘fair and equitable treatment’ is subsumed in the international minimum standard recognized by customary international law.”); *id.* ¶ 39 (“‘full protection and security’ is subsumed in the international minimum standard recognized by customary international law.”); Letter of Mexico Pursuant to Article 1128 (“Mexico’s May 15, 2001 1128 Submission”), ¶ 9, (“Article 1105 establishes only an international minimum standard of customary international law in which ‘fair and equitable treatment’ is subsumed.”); *id.* ¶ 12 (“Article 1105 . . . clearly indicates that both ‘fair and equitable treatment’ and ‘full protection and security’ are included as examples of the customary minimum standard, subsumed therein, and in no way add to it.”).

squared with the text of the treaty. Methanex Rejoinder at 33. Similarly, Articles 1116(1) and 1117(1) evidence an unmistakable intent to limit the subject of NAFTA investor-State arbitration to specified articles of the NAFTA (a point Methanex does not dispute). Methanex nonetheless urges an interpretation of Article 1105(1) that would extend NAFTA investor-State arbitration to alleged breaches of any and all provisions of the NAFTA and any other treaty. Methanex's contentions take little account of either the text of Article 1105(1) or its context.

Methanex's invocation of the meaning of the words "international law" in other treaties, such as the Statute of the International Court of Justice, is therefore misplaced.

As Professor Vagts observes:

The question before the Tribunal, however, is not what "international law" means in the abstract, but rather what that term means in the specific context of Article 1105(1). As a preliminary matter, it is not apparent to me that it would be reasonable to read "international law" in the context of a provision such as Article 1105(1) as referring to any source other than customary international law. It is difficult to reconcile the notion that "international law" includes other provisions of the NAFTA or other conventional obligations with the carefully limited scope of arbitral jurisdiction provided in NAFTA Articles 1116(1) and 1117(1).

Vagts Rejoinder Report ¶ 11.

*Second*, Methanex's assertion that the NAFTA Parties' unanimous rejection of its interpretation is without consequence stands international law on its head. On the international plane, only States can create rules of law and, while they may sometimes empower a tribunal to resolve disputes concerning a treaty between them, only the State Parties can provide an authentic interpretation of the treaty's terms.<sup>26</sup> The State Parties'

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<sup>26</sup> See NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 251 (6<sup>th</sup> ed. 1999) ("The expression 'authentic interpretation' designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.") ("On désigne par

interpretation of the terms of the NAFTA is, therefore, authoritative; interpretations that the State Parties have unanimously disavowed – such as the interpretations of Article 1105(1) expressed in *Metalclad, S.D. Myers* and *Pope & Talbot* – are not.

Methanex's contentions to the contrary are without merit. *First*, Methanex's assertion that the NAFTA Parties' views are expressed in "mere litigating positions" is wrong. Methanex Rejoinder at 42. Mexico's and Canada's submissions to this Tribunal are not, as Methanex asserts, "self-serving arguments proffered . . . after a dispute has arisen." *Id.* Neither Canada nor Mexico has any stake in this arbitration – other than ensuring that the NAFTA is properly interpreted. Indeed, if anything, Canada's submission here – like that of the United States in *Pope & Talbot* – is one made *against* the interests of its national and, therefore, against some of the State's own interests in the dispute.

*Second*, Methanex's suggestion that State practice in the course of a dispute resolution proceeding cannot be deemed to reflect the NAFTA Parties' agreement on interpretation is similarly without merit. Each of the authorities Methanex cites on this point addresses *unilateral* statements by a State in a dispute. None addresses the situation

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l'expression 'interprétation authentique', celle qui est fournie directement par les parties, par opposition à l'interprétation non authentique, donnée par un tiers.") (translation by counsel); IAN SINCLAIR, *THE VIENNA CONVENTION AND THE LAW OF TREATIES* 136 (2d ed. 1984) ("It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it. In its advisory opinion in the *Jaworzina* case, the Permanent Court of International Justice ruled as early as 1923 that: ' . . . it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.'") (quoting *Jaworzina*, 1923 P.C.I.J. (ser. B) No. 8, at 17 (Dec. 6)); Mustafa Kamil Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, 151 R.C.A.D.I. 1, 47 (1976) ("More than anyone, the parties to the treaty are best situated to understand the sense of the treaty that they concluded, what they truly intended.") ("Or, plus que personne, les parties au traité sont à même de comprendre le sens du traité qu'elles ont conclu, ce qu'elles ont vraiment voulu.") (translation by counsel; footnote omitted); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. OF INT'L LAW 203, 225



present here, where *all* State Parties to a treaty express unequivocal agreement as to the meaning of a provision of that treaty. International tribunals give effect to such agreements on interpretation, even where those agreements are expressed in a dispute resolution proceeding.<sup>27</sup> Methanex, significantly, cites no instance in which an international tribunal has refused to give effect to such an agreement.<sup>28</sup>

*Third*, Methanex's assertion that the NAFTA Parties' submissions to this Tribunal are inconsistent with their early interpretations of Article 1105(1) is wrong. Canada's Statement of Implementation, published on the day that the NAFTA went into force in 1994, stated that "Article 1105 . . . provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law*."<sup>29</sup> The United States' statements, made contemporaneously with the NAFTA's negotiation and entry into force concerning other agreements with comparable language, similarly recognized that provisions addressing "fair and equitable treatment" and "full protection and security" "set[] out a minimum standard of treatment based on *customary*

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(1958) ("a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted.").

<sup>27</sup> See *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, 1960 I.C.J. 192, 206-07 (Nov. 18) (agreement of State Parties to appointment of king of Spain as arbitrator in dispute resolution proceeding provided for under treaty evidenced agreement of parties that treaty should be interpreted to permit such appointment at that stage of dispute between them); see also *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1 ¶ 31 (Dec. 13) (giving effect to disputing parties' agreement, expressed in the course of the litigation, as to criterion relevant to interpreting treaty between parties); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1992 I.C.J. 351, 478-79, 481, 553-54 ¶¶ 189, 194, 323 (Sept. 11) (same).

<sup>28</sup> See Vagts Rejoinder Report ¶ 13 ("I am aware of no instance in which an international tribunal has declined to give effect to an interpretation agreed by all parties to the treaty in formal submissions.").

<sup>29</sup> Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in Canada Gazette 68, 149 (1994) (emphasis supplied).

international law.”<sup>30</sup> The NAFTA Parties’ submissions here are fully consistent with the views they expressed at the NAFTA’s origins.

The Parties’ submissions here also are not inconsistent with their submissions to other Chapter Eleven tribunals. In both the *Azinian* and *Metalclad* cases, Mexico took the position that both “fair and equitable treatment” and “full protection and security” are “*express components*” of the minimum standard of treatment required by international law, rather than different requirements *in addition to* that standard, as Methanex contends here. *Metalclad*, Mex. Counter-Mem. ¶ 833 (emphasis supplied); *accord Azinian*, Mex. Counter-Mem. ¶ 247. Furthermore, in each of those submissions, Mexico explicitly argued that the “drafters’ intention was to incorporate the *public international law meaning*” of “fair and equitable treatment” and “full protection and security” into Article 1105. *Metalclad*, Mex. Counter-Mem. ¶¶ 837, 872 (emphasis supplied); *accord Azinian*, Mex. Counter-Mem. ¶¶ 251, 258. As any competently represented litigant would do at a merits phase, Mexico noted that varying interpretations of “fair and equitable treatment” had been advanced and argued that its acts were proper under any interpretation of the provision. *See Metalclad*, Mex. Counter-Mem. ¶¶ 837 *et seq.*; *Azinian*, Mex. Counter-

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<sup>30</sup> Dep’t of State, Letter of Submittal for U.S.-Armenia Treaty Concerning the Reciprocal Encouragement and Protection of Investment, *reprinted in* S. Treaty Doc. 103-11 at viii (Aug. 27, 1993) (emphasis supplied); *accord* Dep’t of State, Letter of Submittal for U.S.-Moldova Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. Treaty Doc. 103-14 at ix (Aug. 25, 1993) (“Paragraph 3 guarantees that investment shall be granted ‘fair and equitable’ treatment in accordance with international law. . . . This paragraph sets out a minimum standard of treatment based on customary international law.”); Dep’t of State, Letter of Submittal for U.S.-Ukraine Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. Treaty Doc. 103-37 at ix (Sept. 7, 1994) (same). The United States’ Statement of Administrative Action accompanying the NAFTA states only that “Article 1105 provides that each country must also accord NAFTA investors treatment in accordance with international law.” *See* U.S. Statement of Administrative Action at 141, *in* Message from President of the United States Transmitting North American Free Trade Agreement, Text of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, Vol. 1 (1993).

Mem. ¶¶ 251 *et seq.* Taken as a whole, these submissions comport with Mexico’s submission here to the effect that “both ‘fair and equitable treatment’ and ‘full protection and security’ are included examples of the customary minimum standard, subsumed therein . . . .” Mexico’s May 15, 2001 Article 1128 Submission ¶ 12.<sup>31</sup>

In short, the issue before the Tribunal is whether it can conclude that the evidence of State practice before it, as a whole, “establishes the agreement of the parties regarding [the NAFTA’s] interpretation.” Vienna Convention on the Law of Treaties, art. 31(3)(b). There is no real dispute that it does. *See Methanex Rejoinder* at 42 (acknowledging that the United States’ interpretation of Article 1105(1) “is now joined by Canada and Mexico”). Under established principles of international law, the NAFTA Parties’ agreement as to the interpretation of Article 1105(1) is authoritative. The Tribunal should give effect to the Parties’ intent.

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<sup>31</sup> Methanex also makes much of Canada’s Statement of Defense in *S.D. Myers*, which, it observes, refers to “treatment in accordance with *international law*” and makes no reference to “customary international law.” *Methanex Rejoinder* at 44. But Canada’s pleading in that case merely quoted *verbatim* the language of Article 1105 itself; it can hardly be viewed as an attempt to interpret the provision. *See S.D. Myers*, Can. Statement of Def. ¶ 44. In its Statement of Defense in *Pope & Talbot*, Canada similarly observed that “Article 1105 refers to the ‘minimum’ standard of treatment at international law.” Can. Statement of Def. ¶ 137. Again, no reference is made to the “fair and equitable treatment” or “full protection and security” clauses as exceeding, in any way, this general standard.

Moreover, Methanex errs in any event in suggesting that an inconsistent earlier practice by some parties would forever vitiate a clear agreement as to a treaty’s interpretation later evidenced by the practice of all parties to the treaty. The International Court of Justice’s advisory opinion in *Certain Expenses of the United Nations* illustrates this point. 1962 I.C.J. 151 (July 20). In that case, a number of Members of the United Nations expressed “uncertainties and . . . conflicting views” at the outset as to whether the costs of the United Nations Emergency Force constituted “expenses of the Organisation” within the meaning of the United Nations Charter. *Id.* at 174; *see also id.* (noting “differences of opinion” recorded in report of committee studying subject). After this initial period of debate, the Member States nonetheless authorized financing the Force’s costs as “expenses of the Organization.” The Court found this conduct of the Members to constitute a subsequent practice establishing the agreement of the parties as to the interpretation of Article 17(2) of the Charter. *See id.* at 175; *see also Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1 ¶ 50 (Dec. 13) (citing the portion of *Certain Expenses* just addressed as an instance in which the Court reviewed “the subsequent practice of the parties in the application of that treaty” pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties). Similarly, here, even if Canada’s and Mexico’s earlier submissions could be seen to express “uncertainties and . . . conflicting views” as to the

## 2. Methanex's Reliance On The Principle Of "Good Faith" Is Misplaced

Methanex continues to maintain – based in substantial part on an isolated statement in the *Nuclear Tests* decision – that customary international law imposes a general obligation of “good faith” in all things that relieves arbitrators of the burden of identifying a rule of law governing the conduct at issue. The International Court of Justice, however, has squarely rejected this contention, holding that:

The principle of good faith is, as the Court has observed, “one of the basic principles governing the creation and performance of legal obligations” (*Nuclear Tests*, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); *it is not in itself a source of obligation where none would otherwise exist.*

*Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20) (emphasis supplied). The *Border and Transborder Armed Actions* decision, notably, was a unanimous decision of all fifteen judges on the Court – including Sir Robert Jennings, who was sitting as an impartial judge on the Court at that time. It is curious that Sir Robert has now taken a different view in his capacity as an expert witness for Methanex; it is clear, however, that the unanimous decision that Sir Robert joined as a member of the Court is far more persuasive evidence of international law than the different views he expresses for purposes of this case.

A decade later, the International Court of Justice reaffirmed the proper role of the principle of good faith in its decision on competence in *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275 (June 11). Nigeria argued that Cameroon violated the principle of good faith by secretly preparing to invoke the Court's compulsory

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interpretation of Article 1105(1) (which they cannot), the plain and unequivocal accord now expressed before this Tribunal would control.

jurisdiction even while it maintained bilateral contact with Nigeria on border issues. *Id.* at 296 ¶ 31. The Court rejected Nigeria’s position, noting that “although the principle of good faith is ‘one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist.’” *Id.* at 297 ¶ 39 (quoting *Border and Transborder Armed Actions*). The Court further noted that there was “no specific obligation in international law” applicable to the conduct at issue, and concluded: “In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions.” *Id.*<sup>32</sup>

As demonstrated in the United States’ Memorial, its Reply, the accompanying Vagts Report and below, Methanex has failed to identify any “specific obligation in international law” implicated by the measures at issue. Like Nigeria, Methanex “may not justifiably rely” on a general notion of good faith to support claims not based on any specific obligation.

Finally, in its Rejoinder, Methanex supplements its earlier, inapposite citations for the existence of good faith as a general obligation with new references to WTO dispute resolution reports, and adds an assertion that “fair and equitable treatment” – in the subjective and intuitive sense Methanex urges – has passed into customary international law. Methanex Rejoinder at 46-48. Methanex’s new assertions are without merit.

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<sup>32</sup> The United States notes that the Court rejected Nigeria’s argument on good faith in part at the urging of Sir Ian Sinclair (Methanex’s other expert witness here), who was acting as counsel for Cameroon with respect to the preliminary objection addressed in the text. *See* Verbatim Record of Public Sitting of March 11, 1998, CR 98/6, *Land and Maritime Boundary (Cameroon v. Nig.)* (available at <<http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm>>).

Review of the WTO jurisprudence Methanex relies upon shows that the panels in those cases did nothing more than interpret the particular treaty language at issue in each case in accordance with the rules set out in the Vienna Convention on the Law of Treaties.<sup>33</sup> Nothing in those decisions contradicts the established jurisprudence of the International Court of Justice, noted above, that good faith “is not in itself a source of obligations where none would otherwise exist.”

Nor is there merit to Methanex’s suggestion that “fair and equitable treatment” in the subjective sense has passed into customary international law. As Professor Vagts observes:

It is of course true that international agreements “may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.” *Restatement (Third) of Foreign Relations Law of the United States* § 102(3) (1987). Bilateral investment treaties are not “intended for adherence by states generally,” however. The one recent effort at a multilateral agreement that was intended for general adherence – the proposed Multilateral Agreement on Investment prepared under the auspices of the Organisation on Economic Co-operation and Development – was abandoned without ever being opened for signature. The predicate for the formation of customary international law based on conventional investment obligations does not appear to be present here.

Vagts Rejoinder Report ¶ 15. Moreover, Methanex’s argument erroneously presumes that “fair and equitable treatment” as used in the bilateral treaties it references has a content different from that of the international minimum standard of treatment at

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<sup>33</sup> See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Report of Appellate Body) WT/DS58/AB/R, ¶ 158 (Oct. 12, 1998) (“our task here is to interpret the language of the chapeau [to GATT Article XX], seeking additional interpretative guidance, as appropriate, from the general principles of international law”); *United States – Tax Treatment for “Foreign Sales Corporations”* (Report of the Appellate Body), WT/DS108/AB/R, ¶ 166 (Feb. 24, 2000) (interpreting the phrase “in good faith in an effort to resolve the dispute” in article 3.10 of the WTO Dispute Settlement Understanding); *Korea – Measures Affecting Government Procurement* (Dispute Panel Report), WT/DS163/R, ¶ 7.95 (May 1, 2000) (expressing the view that the so-called “non-violation” provisions of GATT Article XXIII:1(b) are to be read in light of the principle of *pacta sunt servanda*).

customary international law. Methanex cites no instance of State practice to support its presumption. As the United States has demonstrated, the evidence of State practice on this point consistently considers “fair and equitable treatment” to be based on long-standing principles of customary international law.<sup>34</sup>

**3. Nationality-Based Discrimination Is Actionable Under Other Provisions Of Chapter Eleven To The Exclusion Of Article 1105(1)**

As demonstrated in the Reply, the structure of Chapter Eleven evidences that nationality-based discrimination is actionable, if at all, only under the numerous provisions of Chapter Eleven that specifically address when such discrimination is and is not permissible. Specifically, the United States showed that if a general, customary international law prohibition against discrimination were read into Article 1105(1), then provisions of Article 1108 exempting certain measures, sectors of the economy and economic activities from the prohibitions against discrimination that are contained in other NAFTA articles, such as Articles 1102, 1103 and 1107, would be rendered ineffective. *See* U.S. Reply at 33-35.

In response, Methanex does not dispute that the NAFTA comprehensively regulates the subject of nationality-based discrimination. It does not contest that such comprehensive regulation in a treaty usually displaces general principles of customary international law on the same subject. Nor does it dispute that reading a notion of non-discrimination based on general international law into Article 1105(1) would be inconsistent with Article 1108, which exempts certain measures from Article 1102, but

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<sup>34</sup> *See supra* notes 29-30 and accompanying text; U.S. Memorial at 39-41 (collecting authorities); Vagts Rejoinder Report ¶ 16.

does not exempt those same measures from Article 1105. Instead, Methanex suggests that the solution to this inconsistency is to invent a new exception to Article 1105 nowhere provided in the treaty, asserting that “[i]t may be that discrimination authorized by Article 1108 is immune from review under either Article 1102 or Article 1105.” Methanex Rejoinder at 50.

Methanex’s proposal for a new exception in Article 1108 in order to accommodate its reading of Article 1105(1) proves the United States’ point: a prohibition of nationality-based discrimination cannot be read into Article 1105(1) without doing violence to the terms of the treaty as drafted. The treaty as drafted contains no such exception (in Article 1108 or elsewhere) for the simple reason that the Parties addressed nationality-based discrimination in other provisions of Chapter Eleven, rather than in Article 1105(1).<sup>35</sup>

In any event, Methanex does not suggest that a violation of the customary international law standard of non-discrimination on the basis of nationality could be established in circumstances where there has been no violation of Article 1102’s national-treatment obligation. Because, for the reasons already explained, Methanex has no claim under Article 1102, its assertions as to discrimination under customary international law are beside the point.<sup>36</sup>

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<sup>35</sup> Methanex wrongly states that “[t]he United States does not dispute that discrimination against foreign investors and their investments is inherently unfair and inequitable.” Methanex Rejoinder at 50. As evidenced by the inclusion of Article 1108 in the NAFTA, the United States does not agree that such discrimination is “inherently unfair and inequitable.”

<sup>36</sup> Also, contrary to Methanex’s assertion, Mexico has not “in past proceedings accepted that Article 1105 prohibits discrimination.” Methanex Rejoinder at 50. Although Mexico quoted Professor Peter Muchlinski in support of its application to set aside the Chapter Eleven arbitral award in *Metalclad Corp. v. Mexico*, ICSID Case No. ARB (AF)/97/1, Mexico was not endorsing the view that Article 1105(1) prohibits discriminatory conduct. See *United Mexican States v. Metalclad Corp.*, Vancouver Registry No. L002904 (Brit. Colum. S. Ct.), Petitioner’s Outline of Argument (Feb. 5, 2001) at 152 ¶ 526 (quoting PETER



**4. Article 1105(1) Does Not Prohibit Elected Officials From Making Decisions That Benefit Campaign Contributors**

In its Rejoinder, Methanex does not take issue with the central premise of the United States' argument on this point: *i.e.*, there is no support in international or municipal law for a rule prohibiting elected officials from making decisions that benefit campaign contributors, and State practice is sufficiently diverse that no general principle common to all developed legal systems can be established on this point. *See* Methanex Rejoinder at 51-52; *see also* Vagts Rejoinder Report ¶ 28. Instead, in yet another reformulation of its claim, Methanex now asserts that its supposed “principle of neutral decisionmaking” “applies to a public official receiving substantial private financial remuneration for a governmental act disadvantaging a competitor.” Methanex Rejoinder at 51.

Whether such a principle prohibits public officials from so acting is not relevant here, however: Methanex expressly disavows any allegation that Governor Davis violated any law, which would have been the case had he requested or received remuneration in exchange for official action.<sup>37</sup> Given this, the Draft Amended Claim can be construed to allege only that Governor Davis, without any understanding that his actions would be influenced by campaign contributions, later made a decision that

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MUHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 625 (1995)). Rather, Mexico included the quoted paragraph to support the distinct point that the Article 1105(1) analysis in that case “is fact driven.” *Id.*

<sup>37</sup> *See* Draft Amended Claim at 2 n.2 (“Methanex is not alleging that Governor Davis or ADM in any way violated U.S. or California campaign contribution statutes or other relevant laws.”); *id.* at 51 (“It must be emphasized again that Methanex is not asserting that the acts of Governor Davis or ADM in any way violated U.S. law.”); *see also* CAL. PENAL CODE § 68 (Deering 2001) (“Every executive or ministerial officer . . . who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment . . .”).

benefited a significant campaign contributor. Only a principle of customary international law addressing this situation could serve as the basis for the claims under Article 1105(1) at issue here.

As demonstrated in the Reply, however, there is no principle that requires elected officials to recuse themselves from decisions that affect contributors to their campaigns for office. Methanex's Rejoinder offers no support for the existence of such a proposition. Thus, Methanex's allegation that the subject measures violate a principle prohibiting public officials from making decisions that may implicate an alleged personal or other pecuniary interests does not establish an admissible claim under Article 1105(1).<sup>38</sup>

#### **5. Article 1105(1) Does Not Impose Transparency Or Other Procedural Requirements**

In its Rejoinder, Methanex alleges for the first time that the subject measures violate principles of "transparency," which it does not define but nonetheless asserts "are fundamental principles of international law." Methanex Rejoinder at 52. Methanex's new assertion is without merit.

*First*, although Methanex is correct that NAFTA Chapter Eighteen imposes certain treaty-based obligations of transparency and that GATT Article X has been interpreted to impose certain minimum standards of treatment, neither NAFTA Chapter

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<sup>38</sup> Methanex erroneously asserts that the "United States contends that the principle of neutral government decisionmaking applies only to judicial officials." Methanex Rejoinder at 51. The United States never made this contention. The United States noted that none of the authorities Methanex cited to support its argument involved elected officials who made decisions benefiting their campaign contributors. *See* U.S. Reply at 35 n.49. The United States further noted that all of Methanex's authorities involve persons sitting in a judicial or quasi-judicial capacity. *Id.* Methanex's continued reliance on two decisions addressing quasi-judicial decisionmaking in its Rejoinder does not demonstrate that the contrary is true. *See* Methanex Rejoinder at 51.

Eighteen nor GATT Article X may serve as the basis for an investor-State arbitration under Chapter Eleven – because neither is included in the list of actionable obligations in Articles 1116(1) and 1117(1). There is no longer any room for doubt on this point: all three NAFTA Parties have in formal pleadings agreed that any principles of transparency and procedural fairness, including those embodied in NAFTA Chapter Eighteen and GATT Article X, that are not part of customary international law are not incorporated into Article 1105(1).<sup>39</sup> As the Supreme Court of British Columbia explained in holding that the *Metalclad* tribunal, by making “its decision on the basis of transparency,” went “beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11”:

In addition to specifically quoting from Article 1802 in the section of the Award outlining the applicable law, the Tribunal incorrectly stated that transparency was one of the objectives of the NAFTA. In that regard, the Tribunal was referring to Article 102(1), which sets out the objectives of the NAFTA in clauses (a) through (f). Transparency is mentioned in Article 102(1) but it is listed as one of the principles and rules contained in the NAFTA through which the objectives are elaborated. The other two principles and rules mentioned in Article 102, national treatment and most-favored nation treatment, are contained in Chapter 11. The principle of transparency is implemented through the provisions of Chapter 18, not Chapter 11. Article 102(2) provides that the NAFTA is to be interpreted and applied in light of the objectives set out in Article 102(1), but it does not require that all of the provisions of the NAFTA are to be interpreted in light of the principles and rules mentioned in Article 102(1).

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<sup>39</sup> See Canada’s Second 1128 Submission at 6 ¶ 26 (Canada agrees “that NAFTA Article 1105 incorporates the international minimum standard of treatment recognized by customary international law.”); Mexico’s May 15, 2001 1128 Submission at 3 ¶ 9 (“Mexico concurs with the United States that Article 1105 establishes only an international minimum standard of customary international law in which ‘fair and equitable treatment’ is subsumed. All three NAFTA Parties have clearly so stated in their respective submissions in other Chapter Eleven cases in which the matter has arisen.”); U.S. Memorial at 44-45; U.S. Reply at 24 n.28 and accompanying text (agreement among three NAFTA Parties as to interpretation is authoritative); see also *supra* at 19 *et seq.*

*United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, 2001 BCSC 664 (May 2, 2001) at 27 ¶ 71.<sup>40</sup>

*Second*, there is no general requirement of “transparency” in customary international law. As demonstrated in the Memorial and confirmed by Professor Vagts, customary international law imposes no constraints on the process by which executive and legislative measures of general applicability, such as the subject measures, are adopted. *Id.* at 45; Vagts Rep. ¶ 15. Methanex in its Rejoinder offers no persuasive authority to the contrary.<sup>41</sup>

*Finally*, Methanex’s claim of a lack of “transparency” is nonsense in any event. Before issuing the Executive Order or adopting the CaRFG3 Regulations, California held

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<sup>40</sup> Methanex wrongly asserts that the opinion of the Supreme Court of British Columbia lacks “persuasive” value because that court “is not an international tribunal at all, and it plainly overstepped its authority in substituting its judgment on issues of international law for that of the international arbitral tribunal assigned express adjudicatory authority pursuant to NAFTA.” *See* Methanex Rejoinder at 53 n.21. The NAFTA, however, leaves to municipal courts the authority to determine (in proceedings to set aside Chapter Eleven arbitral awards) whether a Chapter Eleven arbitral tribunal’s actions were consistent with its jurisdiction, and, unlike the decisions of Chapter Eleven tribunals, which “can set no legal precedent, in general at all” (*Methanex*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae,’ dated Jan. 15, 2001, at 22 ¶ 51), municipal court decisions can set legal precedent within a domestic legal system. Therefore, decisions of municipal courts reviewing Chapter Eleven awards have no less “persuasive” value than do decisions of Chapter Eleven tribunals.

<sup>41</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Report of Appellate Body) WT/DS58/AB/R (Oct. 12, 1998), concluded not that transparency and procedural fairness are customary international law requirements, but that they are expressly required under the GATT: “It is clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations . . . .” *Id.* at 75 ¶ 183. Methanex also cites *Maffezini v. Kingdom of Spain*, Case No. ARB/97/7 ¶ 83 (Nov. 13, 2000), which stated that “the lack of transparency with which this loan transaction was conducted is incompatible with Spain’s commitment to ensure the investor fair and equitable treatment in accordance with Article 4(1)” of the Argentine-Spain Bilateral Investment Treaty, and an article by Daniel M. Price, *17<sup>th</sup> Annual Symposium Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven: Some Observations on Chapter Eleven of NAFTA*, HASTINGS INT’L & COMPARATIVE L. REV. 421, 424 (2000). The *Maffezini* tribunal (at 25 ¶¶ 74-75), however, was not referring to a violation of a principle of transparency embodied in customary international law, but to the State’s transfer of the claimant’s funds in the absence of a legally binding contract formalizing the transaction: in this context, the tribunal found a violation of the fair and equitable treatment requirement. Also, *Maffezini* and the Price article provide no citations or rationale for their conclusions. For the reasons explained here, they, like the *Metalclad* award and Dr. Schwartz’s concurring opinion in *S.D. Myers* (at 82 (¶ 249)), provide no basis to find that a transparency obligation is part of customary international law.

extensive public hearings after notice and comment procedures that were amply transparent – facts of public record that Methanex has never disputed. *See* Statement of Defense ¶¶ 76-82, 92-99. There is no issue of “transparency” here.

**6. No Supposed “Least-Restrictive Measure Principle” Is Incorporated Into Article 1105(1)**

The Reply demonstrated that Article 1105(1) does not incorporate requirements embodied in WTO agreements, including any alleged “least-restrictive measure principle.” *See* U.S. Reply at 30-33. Specifically, the United States demonstrated the following: (1) all three NAFTA Parties have confirmed that Article 1105(1) incorporates only the customary international law minimum standard of treatment; (2) although Methanex bears the burden of proving that requirements of WTO agreements are part of customary international law, it offers no support for this contention; (3) inferring that breaches of such requirements are actionable under Chapter Eleven conflicts with the text of the NAFTA; and (4) such an inference would unreasonably create a new, private cause of action by which investors could challenge an alleged breach of any treaty obligation using the mechanism of Chapter Eleven. *Id.*

In its Rejoinder, Methanex does not dispute that the NAFTA Parties’ interpretation of Article 1105(1) unanimously rejects Methanex’s position. Nor does it attempt to reconcile its position with the clear intent of Articles 1116(1) and 1117(1) *not* to extend investor-State arbitration to the NAFTA’s own analogues to the WTO agreements. Instead, it asserts – based only on the number of WTO Member States – that a “least-restrictive measure principle” supposedly reflected in WTO agreements has become part of customary international law. Methanex Rejoinder at 56-57.

In *North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.)*, the International Court of Justice held that, in order for a provision to become part of customary international law, it must be “a norm-creating provision,” one which “is now accepted as [a norm of the general corpus of international law] by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.” 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20). The Court cautioned that, although this process “does from time to time occur,” the incorporation of a treaty provision into customary international law “is not lightly to be regarded as having been attained.” *Id.* The Court further noted that there are “other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law.” *Id.* at 42 ¶ 73. As demonstrated below, none of these elements support Methanex’s claim that a “least-restrictive measure principle” is now part of customary international law.<sup>42</sup>

*First*, the treaty provisions on which Methanex relies are not “norm-creating provision[s]” in the sense indicated by the *North Sea* Court. Methanex never explains what this “least restrictive measure principle” is which it claims has become a part of customary international law. Methanex relies on GATT Article XX and the WTO

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<sup>42</sup> Apparently, Methanex does not assert that the WTO Agreements “embody or crystallize any pre-existing or emergent rule of customary international law . . .” See *North Sea Continental Shelf* (F.R.G. v. Den; F.R.G. v. Neth.), 1969 I.C.J. 3, 41 ¶ 69; Methanex Rejoinder at 56-57. Nor could Methanex make such an assertion. See Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements (Sept. 27, 1994) at 780 (“The obligation in Article 2.2 [of the TBT Agreement] that technical regulations are not to be more trade-restrictive than necessary would create, is new and is similar to the obligation in Articles 5.6 of the S&P Agreement [*i.e.*, the SPS Agreement]. This Agreement’s negotiators intended this obligation to operate in a manner similar to Article 5.6 of the S&P Agreement.”); SPS Agreement, Preamble (agreement is intended “to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of

Agreements on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) and Technical Barriers to Trade (“TBT Agreement”) as sources for this principle, but there is no common “least restrictive measure” concept embodied in all three texts.<sup>43</sup> Methanex offers no international tribunal decisions or other authorities that have found the so-called principle to be a part of customary international law.

Nor is there any shared understanding within the WTO membership that some type of less or least restrictive principle is to be read into these agreements.<sup>44</sup> Such a principle, therefore, cannot possibly be said to have become a principle of customary international law.

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Article XX(b)”; thus, the SPS negotiators were of the view that they were elaborating on a very specific aspect of prior GATT obligations, not codifying customary international law.).

<sup>43</sup> The TBT Agreement language to which Methanex refers – “shall not be more trade-restrictive than necessary to fulfill a legitimate objective,” TBT Agreement, art. 2.2 – is different from the SPS Agreement language to which Methanex refers – “not more trade-restrictive than required to achieve their appropriate level” of protection. SPS Agreement, art 5.6. GATT Article XX is also fundamentally different in referring to measures “necessary” for certain purposes. See GATT Article XX(a), (b), (d). Any discussion regarding “restrictions” derives directly from the language of these provisions, not from any so-called “least restrictive measure” concept.

Significantly, the SPS Agreement undermines Methanex’s contention that there is a “least restrictive measure” concept. That Agreement contains a footnote explaining that a measure is inconsistent with the Agreement if there exists an alternative measure that would be “*significantly* less restrictive to trade.” SPS Agreement, art. 5.6 n.3 (emphasis added). That an alternative measure is simply less trade restrictive – which is all that would be required under Methanex’s “least restrictive measure” principle – is insufficient to establish a violation of the SPS Agreement.

<sup>44</sup> The United States, for example, has consistently taken the position that Article XX’s reference to “necessary” does not mean “least trade restrictive” or include a requirement that there not be an alternative measure that is “less inconsistent” with WTO obligations. Indeed, in the 1989 GATT case, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345 (Nov. 7, 1989), on which Methanex relies (see Methanex Rejoinder at 57 n.24), the parties disputed “whether [‘necessary’] requires the use of the least trade-restrictive measure available.” See *Section 337*, BISD 36S/345, ¶ 5.25. The United States’ latest submission in this regard – its third party submission in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* – makes clear the United States’ long-standing position that Article XX(b) does not incorporate a least or less restrictive test. See *European Communities – Measures Affecting Asbestos-Containing Prods.* (AB-2000-11) (Third Party Submission of United States) (Dec. 1, 2000). Clearly, this issue is not settled for WTO Members.

*Second*, Methanex has made no showing whatsoever of “State practice, including that of States whose interests are specifically affected,” that has been “extensive and virtually uniform in the sense of the provision invoked” and has “occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.” 1969 I.C.J. at 43 ¶ 74. As the *North Sea* Court noted, the only State practice relevant in such an inquiry is that of States that are *not* parties to the convention at issue – for only the practice of such States can clearly evidence a belief that the principle at issue is binding as a rule of *customary*, rather than conventional, international law. *See id.* at 43 ¶ 76. Methanex points to not a single instance of any practice by a State that is not a Member of the WTO, much less an instance evidencing a belief that the supposed “least-restrictive measure principle” is binding on such a State.

*Third*, although Methanex is correct that over one hundred States are WTO Members, that by itself does not fulfil the *North Sea* Court’s requirement of “a very widespread and representative participation in the convention . . . *provided it included that of States whose interests were specifically affected.*” *Id.* at 42 ¶¶ 72-73 (emphasis supplied). Among others, neither Russia, China nor Saudi Arabia are WTO Members. Thus, the WTO’s membership cannot be viewed as functionally universal.

*Fourth*, a “considerable period of time” has not passed since the WTO agreements came into force six years ago. In the *North Sea* case, the ICJ expressly found that five years since a treaty was signed was not a “considerable amount of time.” *See North Sea*, 1969 I.C.J. at 42-43 ¶¶ 73-74.

*Finally*, provisions in trade agreements such as those Methanex invokes here are not generally in the nature of “norm-creating provisions” intended to articulate a rule of



customary international law binding on States not party to the agreement. Obligations in trade agreements are typically assumed by States in exchange for a complex package of trade-related benefits – as part of the overall balance of concessions that the trade agreement achieves. States that enter into trade agreements generally would not agree to any specific obligation except as part of a broader balance of obligations and benefits. Agreements such as these, therefore, do not generally provide the kind of “norm-creating provision” suitable for transformation into a rule of customary international law.

Moreover, even assuming, *arguendo*, that a “least restrictive measure principle” has become part of customary international law with respect to matters relating to trade – which it has not – this would not evidence that such a principle has become part of customary international law with respect to matters relating to the treatment of foreign-owned investments. No treaty or international tribunal decision recognizes a “least restrictive measure principle” in the investment context.<sup>45</sup>

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<sup>45</sup> Methanex’s reliance on *Cross-Border Trucking* and *S.D. Myers* as contrary authorities is misplaced. See Methanex’s Rejoinder at 57-58. Methanex is correct that the panel in *Cross-Border Trucking* examined whether the United States in that case “failed to demonstrate that there are no alternative means of achieving U.S. safety goals that are more consistent with NAFTA requirements . . . .” *In re Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01 (Final Report of the Panel Feb. 6, 2001), at 72 ¶ 270. The *Cross-Border Trucking* panel did so, however, based not on any notion that such a “principle” was part of customary international law, but in applying the express terms of NAFTA Article 2101(2). Based on those terms, the panel concluded that “safety measures adopted by a Party . . . may be justified only to the extent they are ‘necessary to secure compliance’ with laws or regulations that are otherwise consistent with NAFTA.” *Id.* at 70 ¶ 262. By its terms, however, Article 2102(2) does not apply to Chapter Eleven cases.

Also, contrary to Methanex’s suggestion, the *S.D. Myers* majority did not apply a “least-restrictive measure principle.” Methanex Rejoinder at 57-58 (quoting *S.D. Myers* (Partial Award at 64 ¶ 255)). The *S.D. Myers* tribunal simply noted the availability of alternative measures, such as subsidizing the relevant Canadian industry, that would not have violated Article 1102. *Id.* Methanex is correct that the concurring *S.D. Myers* arbitrator did opine – though the majority did not – that “Article 1102 of NAFTA *may* require an examination of whether a government treated non-nationals differently in order to achieve a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade.” *S.D. Myers*, Separate Opinion of Dr. Bryan Schwartz at 40 ¶ 129 (emphasis added). Dr. Schwartz offered no support for reading the possibility of such a requirement into Article 1102, however, and did not attempt to reconcile his suggestion with NAFTA Article 2101’s express provisions on the applicability of GATT Article XX.

For all these reasons, and for those elaborated in the Reply, Methanex's suggestion that an Article 1105(1) claim may be based on provisions of the WTO agreements is without merit.<sup>46</sup>

**7. The Full Protection And Security Requirement Is Not Implicated By The Subject Measures**

The Reply demonstrated that the customary international law requirement of full protection and security does not, contrary to Methanex's assertion, protect foreign-owned investments from all forms of economic harm inflicted by third parties and, therefore, is not implicated by the measures at issue in this case. *See* U.S. Reply at 37-39.

Specifically, the United States demonstrated that Methanex's claims do not remotely resemble those cases where that requirement was held to have been breached: *i.e.*, there is no allegation that the United States failed to provide reasonable police protection against acts of a criminal nature that physically invaded an alien's person or property. *Id.* at 37.

In response, Methanex identified no case where a State was held to breach an obligation of full protection and security in the absence of such allegations. *See* Methanex Rejoinder at 58-61. Nor does Methanex suggest that it makes such allegations here. Instead, it advances erroneous arguments on the breadth of the standard.

Contrary to Methanex's assertions, however, the ordinary meaning of the word "full" does not expand the range of contexts in which the NAFTA Parties obligated

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<sup>46</sup> Methanex also erroneously contends that "it is eminently reasonable that Article 1105 would incorporate principles of international law already recognized in other treaties" because doing so is "necessary to ensure most-favored-nation treatment for the parties, as expressly required by the NAFTA itself." Methanex Rejoinder at 56. None of the trade agreements Methanex relies upon provide for protection of investments and none provide for investor-State arbitration. No most-favored-nation treatment obligation is implicated

themselves to provide “protection and security” beyond those established under customary international law. International tribunals have rejected a similar argument that the word “full” imposes a heightened standard of responsibility, and the United States is aware of no decision of an international tribunal in any way differentiating among the terms “full protection and security,” “constant protection and security” and “protection and security.”<sup>47</sup>

Although the tribunal in *Loewen Group, Inc. v. United States*, Case No. ARB(AF)/98/3 at 16 ¶ 58 (Decision on Jurisdiction), assumed that the full protection and security requirement “must extend to the protection for foreign investors from private parties when they act through the judicial organs of the State,” the tribunal did not state that the requirement extends beyond physical invasion of a criminal nature. In any event, the *Loewen* tribunal’s supposition, which is not supported by citation to any authorities, was arrived at without the benefit of briefing on this issue by either party.<sup>48</sup>

Nor does Methanex correctly assert that, in interpreting the requirement of full protection and security contained in bilateral investment treaties, international tribunals have held that the obligation applies outside the context of acts of a criminal nature. In fact, the only case on which Methanex relies to support this assertion, *American Manufacturing & Trading, Inc. v. Republic of Zaire* (“AMT”), 36 I.L.M.1531, 1539,

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here and, as noted in the Reply, permitting investor-State dispute resolution to address the obligations imposed by those agreements would upset the expectations of the treaty parties.

<sup>47</sup> See *Elettronica Sicula S.P.A. (U.S. v. Italy) (ELSI)*, 1989 I.C.J. 15 (July 20) (by obligating themselves to provide “full” protection and security, the State Parties had not intended to require a level of protection and security in excess of the international minimum standard.); *Asian Agricultural Products Ltd. v. Sri Lanka*, 30 I.L.M. 577, 599-601 (1991) (looking at “the oldest reported arbitral precedent and the latest I.C.J. ruling [*i.e.*, the *ELSI* case],” the tribunal held that “the nature of both the obligation and the ensuing responsibility remain unchanged, since the added words ‘constant’ or ‘full’ are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a ‘strict liability.’”).

1553-54 ¶¶ 3.18, 7.16, 7.19 (1997), involved physical invasions of a criminal nature: destruction of property and looting. Methanex’s observation that the “*AMT* tribunal noted that a state’s domestic law is irrelevant to whether a BIT was violated” (Methanex Rejoinder at 60), misses the point. The authorities in the Reply based their decisions on the nature of the alleged conduct – and in each case the conduct was of a criminal nature – rather than on the domestic legal regimes in which the conduct took place. *See* U.S. Reply at 37 & n.51.

Similarly without merit is Methanex’s assertion that “there is no reason to suspect that the ‘full protection and security’ language in BITs was limited to criminal acts, as those treaties generally contained a more specific provision with regard to war or riots.” *Id.* (citing Article IV(1) of the U.S.-Zaire bilateral investment treaty, entered into force on July 28, 1989 (quoted in *AMT*, 36 I.L.M. at 1557 (¶ 4(iv))). The NAFTA analogue of the referenced bilateral investment treaty provision is Article 1105(2), which requires nondiscriminatory treatment with respect to measures “relating to losses suffered by investments . . . owing to armed conflict or civil strife.” Thus, Article 1105(2) is aimed only at a specific subset of conduct (not at criminal conduct in general) and obligates the NAFTA Parties only to provide nondiscriminatory treatment with respect to compensation (not to provide a minimum standard of treatment). Accordingly, contrary to Methanex’s suggestion, the customary international law meaning of “full protection and security” is not inconsistent with Article 1105(2).

Finally, Methanex’s assertion (*see* Methanex’s Rejoinder at 60) that the NAFTA Parties intended the full protection and security requirement to extend to non-physical

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<sup>48</sup> That briefing is occurring concurrently with the briefing in this case.

intrusions does not follow from the NAFTA Parties' intent to protect intangible as well as tangible investments. Article 1139's mere inclusion of intangible property in the definition of investments does not evidence that NAFTA Parties intended the obligations embodied in Article 1105(1) to extend beyond customary international law.

**C. Methanex Has Not Identified An Investment That Has Been Expropriated**

As the United States demonstrated in its Memorial and Reply, Methanex has not identified any investment that has allegedly been expropriated. Insofar as Methanex claims that the MTBE ban expropriated the goodwill, market share and customer base of itself and its U.S. enterprises, its claim is inadmissible because none of those items is an investment as that term is defined in the NAFTA. Moreover, Methanex cannot credibly allege that the United States has expropriated Methanex U.S. or Methanex Fortier.

**1. Methanex's And Its U.S. Affiliates' Goodwill, Market Share and Customer Base Are Not Investments That, By Themselves, May Be Expropriated**

Article 1110 provides that *investments* of investors of NAFTA Parties may not be expropriated except under certain conditions. All three NAFTA Parties agree that Article 1139 provides an exhaustive, and not an illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.<sup>49</sup> As demonstrated above, the NAFTA Parties' interpretation of Article 1139 is authoritative.<sup>50</sup> Methanex's suggestion to the contrary has been rejected by the NAFTA Parties and, thus, should not be endorsed by this Tribunal.

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<sup>49</sup> See U.S. Memorial at 32; Canada's Second 1128 Submission, ¶ 59; Mexico's May 15, 2001 1128 Submission, ¶ 19.

There is no mistaking that goodwill, market share and customer base are not among the items listed in Article 1139. Nor are those items subsumed within subparagraph (g) of Article 1139. *See* U.S. Memorial at 33-36. In addition, there is ample support for the United States' view that, under customary international law, although goodwill, market share and customer base may all be taken into account when valuing a business, those items, by themselves, are not capable of being expropriated.

[T]he notion of goodwill is too vague to be regarded as a separate property right apart from the enterprise to which it is attached. This assumption gains support from the complete absence of any reference to goodwill or business reputation in any of the post-war decrees or compensation agreements examined by the writer. The most that can be said is that goodwill constitutes an element of the value of an enterprise and as such may have been covered by some of the compensation payments.

GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961).<sup>51</sup>

Methanex is correct that each of the authorities cited here and in the Memorial and Reply addresses the issue of property rights or interests capable of being expropriated under customary international law. Methanex Rejoinder at 64-65. Contrary to Methanex's suggestion, however, it is immaterial that none addresses this issue in the context of interpreting the NAFTA or a bilateral investment treaty. Although the NAFTA and bilateral investment treaties do indeed grant investors some rights beyond those provided by customary international law (*see* Vagts Rejoinder Report ¶¶ 22, 25), both the NAFTA and the U.S. bilateral investment treaties incorporate the rule of customary

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<sup>50</sup> *See supra* at 19 *et seq.*; *see also* U.S. Memorial at 13; U.S. Reply at 23-24.

<sup>51</sup> *See also* ASIL, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 196-97 n.33 (Richard Lillich & Daniel Magraw eds., 1998) (although goodwill may be considered an element in the calculation of compensation, that does not mean that it can be the object of expropriation) (citing, among others, MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 58-60 (1994)); U.S. Memorial at 34-38 (citing authorities).

international law with respect to what constitutes an expropriation.<sup>52</sup> Thus, the authorities cited by the United States are directly on point.

In sum, goodwill, market share and customer base are not investments as defined by the NAFTA. Nor are they property interests that, by themselves, may be the subject of an expropriation under customary international law. For the reasons stated here, in the United States' Memorial and Reply, and in the Article 1128 submissions by Canada and Mexico, Methanex's Article 1110 claim – based solely on its contention that its and its U.S. affiliates' goodwill, customer base and market share have been expropriated – should be ruled inadmissible and dismissed.<sup>53</sup>

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<sup>52</sup> See U.S. Statement of Administrative Action at 140, in Message from The President of the United States Transmitting North American Free Trade Agreement, Text of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, Vol. I (1993) (“Part A [of Chapter Eleven] provides four basic protections to ‘investors of other Parties’ . . . [including] expropriation only in conformity with international law.”); Dep’t of State, Letter of Submittal for U.S.-Armenia Treaty Concerning the Reciprocal Encouragement and Protection of Investment, *reprinted in* S. Treaty Doc. 103-11 at ix (Aug. 27, 1993) (“Article III incorporates into the Treaty the international law standards for expropriation and compensation.”); Dep’t of State, Letter of Submittal for U.S.-Moldova Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. Treaty Doc. 103-14 at x (Aug. 25, 1993) (same); Dep’t of State, Letter of Submittal for U.S.-Ukraine Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* S. Treaty Doc. 103-37 at x (Sept. 7, 1994) (same). DOLZER & STEVENS, *BILATERAL INVESTMENT TREATIES* 17 (1995), relied on by Methanex, does not suggest otherwise. In the excerpt quoted by Methanex, the authors merely suggest that bilateral investment treaties grant protection for investors beyond those provided by customary international law. The authors nowhere suggest that the NAFTA intended to broaden the concept of expropriation beyond the confines of customary international law.

<sup>53</sup> Grasping at language in the *Pope & Talbot* decision, Methanex continues its attempt to recast its claim as one for loss of market access. In addition to misinterpreting that award (*see* U.S. Reply at 41 n.54), Methanex misstates the United States' position. The United States has not – and does not – concede that “the MTBE ban only partially precludes market access in the U.S.” Methanex Rejoinder at 65. To the contrary, the undisputed facts are that the California measures do not preclude any methanol producer or marketer from accessing any market in the United States. Methanex's claim implicates not loss of market access but, rather, its fear that the *size* of the market for methanol will be reduced when gasoline suppliers to the California market reduce their purchases from MTBE suppliers, who will in turn reduce their purchases of methanol. As noted in the Reply, this Tribunal need not address the correctness of the *Pope & Talbot* decision precisely because market access is not at issue in this case. *See* U.S. Reply at 41 n.54.

**2. Methanex’s Claim That Methanex U.S. And Methanex Fortier Have Themselves Been Expropriated Is Not Credible**

Methanex in its Rejoinder (at 66), in a rather conclusory fashion, asserts that its U.S. affiliates themselves have actually been expropriated. This assertion finds no support in the allegations of the Draft Amended Claim, which merely alleged that the measures “severely” interfered with its affiliates’ ability to conduct business in the state of California. Draft Amended Claim at 69. Methanex’s Rejoinder does not attempt to suggest how the supposed interference in that one state could translate into a “taking” of either of its U.S. affiliates. Methanex does not attempt to specify an alleged constructive taking here for the simple reason that it cannot in good faith do so. *See, e.g.*, U.S. Reply at 39-40 & n.53. Its unsupported and unexplained assertion in its Rejoinder does not credibly allege an expropriation of its U.S. affiliates.

**III. THE SUBJECT MEASURES DO NOT “RELATE TO” METHANEX OR ITS INVESTMENTS**

The Memorial established that this Tribunal lacks jurisdiction over Methanex’s claims under Article 1101(1). *See* U.S. Memorial at 48-50. Specifically, the United States demonstrated that the requirement that the measures at issue “relate to” the claimant investor or its investments cannot be satisfied in the absence of a legally significant connection. It showed that where, as here, the subject measures do not regulate the claimant or its investments or affect them in any other legally significant way, no such connection exists. *Id.* The United States further demonstrated that Methanex’s response – that a measure “relates to” an investor or its investments simply if it “affects” them – is without merit. *See* U.S. Reply at 43-46.



In its Rejoinder, Methanex asserts that interpreting “relating to” to reflect the requirement of a legally significant connection is inconsistent with the “natural breadth” and “normal” meaning of the term. *See* Methanex Rejoinder at 66-67. This assertion is without merit.

Contrary to Methanex’s assertion, the United States’ position does not “contradict the Treaty’s plain terms.” *Id.* at 66. As all three NAFTA Parties have observed, the term “relating to” in Article 1101(1) may not properly be interpreted to mean merely “affecting.”<sup>54</sup> For the reasons explained in the United States’ submissions, interpreting “relating to” otherwise would make no sense given that it would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration even in the absence of a legally significant connection between the measure at issue and the investor or its investments. Thus, the normal and natural meaning of the term “relating to” as used in the context of Article 1101(1) is not “affecting,” but embodies the requirement of a legally significant connection between the measures at issue and the claimant investor or its investment.<sup>55</sup>

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<sup>54</sup> *See* Mexico’s May 15, 2001 1128 Submission at 3 ¶ 7 (“Mexico agrees with the position of the United States, and disagrees with Methanex’s contention that measures that merely ‘affect’ investors or investments are covered by Chapter Eleven.”); Canada’s Second Submission at 5 ¶¶ 22-23 (“The NAFTA Parties clearly did not intend that every regulatory measure of general application which merely affects or has an incidental, minimal, or inadvertent effect on an investor, or its investments, would give rise to a claim under NAFTA Chapter Eleven. Furthermore, Canada agrees with the United States that the term ‘relating to’ requires a ‘significant connection[?]’ between the measure at issue and the essential nature of investment.”).

<sup>55</sup> In *United States – Standards for Reformulated and Conventional Gasoline*, Submission of the U.S. to the WTO Appellate Body, 1996 WL 112677 (March 4, 1996) at \* 8 ¶ 32 (emphasis added), the United States argued that “[i]n a normal context, ‘relating to’ merely suggests any connection or association existing between two things.” Thus, contrary to Methanex’s assertion, the United States’ position in that case is consistent with its position here because Article 1101(1) and Chapter Eleven are not a “normal” (*i.e.*, typical) context. *See* Methanex Rejoinder at 67. Contrary to Methanex’s suggestion, the United States does not only argue that “relating to” must be read narrowly under the restrictive interpretation doctrine; the requirement that treaty provisions be read to avoid unreasonable results also compels rejecting Methanex’s interpretation. *See* U.S. Memorial at 12. Methanex’s argument in its Rejoinder regarding the restrictive interpretation doctrine merely repeats its argument in the Counter-Memorial. *See* Methanex Rejoinder at

Trying to show the existence of a legally significant connection between the subject California measures and it or its investments, Methanex contends that “the California measures ‘relate to’ it and its investments because they are ‘primarily aimed at’ eliminating methanol and MTBE from the market and at favoring the domestic ethanol industry.” Methanex Rejoinder at 69. But this contention fails because on their face the measures at issue are aimed at the content and sale of gasoline.<sup>56</sup>

In sum, the measures do not “relate to” Methanex and its investments, just as they would merely affect (and therefore do not “relate to”) foreign-owned investors and investments that incur economic losses because of increased costs, if any, of California gasoline. Therefore, this Tribunal lacks jurisdiction under Article 1101(1) over Methanex’s claims.

#### **IV. METHANEX HAS ALLEGED NO COGNIZABLE LOSS OR DAMAGE**

Methanex cannot now file a claim for prospective damages that it and its affiliates expect they may incur as a result of the ban of MTBE in California’s gasoline as of December 31, 2002. *See* Canada’s Second 1128 Submission, ¶ 45 (concurring with the United States’ position that “an investor cannot submit a claim based on a loss or damage

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67; Counter-Memorial at 2-6. The Reply demonstrated that this argument is wrong. *See* U.S. Reply at 6 n.5.

<sup>56</sup> Methanex also attempts to dismiss the United States’ interpretation of “relating to” on the ground that supporting authorities are not cited. *See* Methanex Rejoinder at 66. Methanex, which bears the burden of establishing jurisdiction, however, fails to identify any authority to support its contention that “relating to” as used in the context of Article 1101(1) means merely affecting and does not incorporate a legally significant connection requirement. *See* U.S. Reply at 44-45. Contrary to Methanex’s suggestion, how the term “affecting” is read in the context of GATT provisions does not evidence how the term “relating to” should be read in the context of Article 1101(1). *See* Methanex Rejoinder at 68-69. As the United States demonstrated, the terms “relating to” and “affecting” are not synonymous, and Chapter Eleven not only identifies obligations, but also (unlike the provisions at issue in the cases Methanex cites) incorporates an investor-State dispute settlement provision waiving sovereign immunity. *See* U.S. Reply at 45.

that it will incur for the first time at some point after the date it submitted its claim.”).

Any losses allegedly sustained by Methanex prior to the date that the MTBE ban in California goes into effect are not legally cognizable.<sup>57</sup>

**A. Methanex And Its Affiliates Cannot Have Sustained Cognizable Damages As A Result Of A Ban That Is Not Yet In Effect**

As noted in the United States’ Reply, interpreting Articles 1116 and 1117 to permit an investor to make a claim challenging a measure that is not in effect at the time the claim is filed will lead to results that none of the NAFTA Parties could have intended. *See* U.S. Reply at 48 n.62. To so interpret the NAFTA would enable a tribunal to find a State liable for violations of Chapter Eleven for a law that is not effective at the time it was challenged and which, in fact, may never go into effect. Not only is such an interpretation contrary to customary international law, the NAFTA Parties could not have intended such an absurd result. *See* U.S. Memorial at 57-62.<sup>58</sup>

In this respect, Methanex’s continued reliance on the I.C.J.’s opinion in *Applicability of the Obligation to Arbitrate Under Section 21 of the UN Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12 (Apr. 26), is misplaced. As the United States

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<sup>57</sup> Methanex errs in contending that the United States’ objection on this point is limited to its Article 1110 claim. *See* Methanex Rejoinder at 72 n.32. As noted in the United States’ Reply, Methanex has not suggested how its proposed addition of a national treatment claim would change the analysis that applies to its Article 1110 claim. *See* U.S. Reply at 46 n.61. Just as an expropriation cannot occur before property is actually taken, an investor cannot be denied national treatment where the measure that allegedly discriminates against it is not yet effective. Methanex has cited no authority to the contrary.

<sup>58</sup> The possibility that a law may never take effect is particularly relevant in this case. The denial of California’s request for a waiver from the federal oxygenate requirement has already generated discussion that the ban of MTBE in California’s gasoline might be eliminated or altered in some manner. *See, e.g.,* Jane Kay, *EPA Rejects State Waiver On Fuel Additive: Refusal Could Cost 50 Cents A Gallon At Pump*, *Davis Says*, SAN FRAN. CHRONICLE, June 13, 2001 (reporting that Secretary of California EPA said that “the planned [MTBE] ban might be delayed if the state Energy Commission decided there were unsurmountable problems with converting to ethanol”). Furthermore, as previously discussed, the

explained in its Reply, the *Headquarters Agreement* case is inapposite because there, for jurisdiction to attach, the Court only needed to find that a dispute existed. Here, however, this Tribunal must find that Methanex has sustained cognizable loss or damage, as required by Article 1116, to have jurisdiction over Methanex's claim. No similar requirement existed under the *Headquarters Agreement*.

**B. Methanex's Claims That It And Its U.S. Affiliates Have Already Suffered Damages Fails As A Matter Of Law**

Methanex's claim that it and its U.S. affiliates have already suffered damages is groundless. In support of its claim, Methanex relies solely on a decrease in its share price on a regional exchange. *See* Methanex Rejoinder at 6-7, 70; Draft Amended Claim at 36-37. However, any decline in Methanex's share price, rather than evidencing a loss to the company, at best, reflects some shareholders' fleeting speculation that Methanex's future profitability might be adversely affected. Such action is inherently unreliable as it is based on predictions about future performance and does not, therefore, establish the existence of any current loss or damage to the company. Indeed, a decrease in the market value of corporate shares following issuance – *i.e.*, after the corporation has received the funds raised by the offering – cannot give rise to a cognizable claim for the corporation issuing the shares since a corporation does not own stock in itself. Thus, even assuming that Methanex's share value has decreased as a result of the challenged measures, this does not constitute a cognizable loss to Methanex.

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Oxygenated Fuels Association has challenged California's ban of MTBE in gasoline and is seeking to have the ban invalidated. *See* U.S. Reply at 48 n.62.

Moreover, Methanex's assertions of immediate injury before this Tribunal stand in sharp contrast to the information that it has disclosed, as required by law, to its shareholders on the same subject:

During the summer of 2000, MTBE use in California was at record levels. . . . The methanol supply and demand fundamentals point to a balanced market for the next two years, and *any impact on the methanol market of a reduction in MTBE use in the United States is unlikely to be felt until 2003*. Some industry commentators are now suggesting that it will take longer than expected to see a reduction of MTBE use in the United States.

Methanex 2000 Annual Report at 18 (released Apr. 2001) (emphasis supplied).

Methanex's statements in its annual report are made under penalty of laws prohibiting false or misleading statements in securities filings. Its unsupported contrary allegations here are simply not credible.<sup>59</sup>

**V. ARTICLE 1116 GRANTS NO JURISDICTION OVER CLAIMS FOR INJURIES ALLEGEDLY SUFFERED BY AN ENTERPRISE**

As the United States explained in its Memorial and Reply, Article 1116 does not grant jurisdiction over claims for injuries allegedly suffered by an enterprise. In its Rejoinder, Methanex erroneously contends that Article 1121 compels a different result and that it has suffered loss independent of that suffered by its U.S. affiliates. Neither argument has merit.

*First*, Methanex's argument based on Article 1121 overlooks that Article's function of protecting a NAFTA Party from having to defend itself in more than one

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<sup>59</sup> Methanex also reported that "[i]n July 2000, [it] obtained the exclusive rights to the output from the Sterling Chemical's 450,000 tonne per year methanol plant in Texas City to the end of 2003." Methanex 2000 Annual Report at 42. Again, it strains credulity to accept Methanex's contention that it has already sustained damage as a result of the future ban of MTBE in California's gasoline when it purchased in July

forum against claims relating to a measure that impacts both an investor and an enterprise. *See* U.S. Memorial at 75. Methanex is correct that when an investor asserts a claim for loss or damage to its interest in an enterprise, both the investor and the enterprise must waive their rights pursuant to Article 1121. *See* NAFTA art. 1121(1)(b). Such a waiver is necessary because, in some instances, both an investor and an enterprise controlled by the investor could sustain loss or damage as a result of a single measure.

For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party . . . be made freely and without delay," the investor might be able to claim an injury to its right to be paid corporate dividends and the enterprise might be able to claim an injury resulting from its inability to make payments necessary for the day-to-day conduct of its operations. In that scenario, if the investor were to file an Article 1116 claim, it would be obligated to obtain a waiver from the enterprise. Without that waiver, the enterprise would be free to bring a claim in the domestic courts of the host State, which would defeat the purpose of Article 1121.

Article 1121 thus encourages claimants to bring claims under both Article 1116 and 1117 where both an investor and an enterprise have suffered direct losses relating to the identical measure. This result is entirely consistent with the United States' contention that Articles 1116 and 1117 serve distinct purposes and an investor cannot make a claim under Article 1116 for losses that are merely derivative of losses suffered by an enterprise it controls.

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2000 – approximately 15 months after the Executive Order was issued and merely two months before the final CaRFG3 regulations were adopted – a methanol plant in the United States.

Second, as explained by the United States in its previous submissions, Methanex itself has not alleged any direct injury that is independent of any alleged loss sustained by its U.S. affiliates; to the extent that Methanex claims direct losses, that claim is inadmissible because such losses are not claimed by Methanex to have been sustained by it in its capacity as an investor. *See* U.S. Memorial at 65; U.S. Reply at 52-53. For the foregoing reasons and those set forth in the Memorial and the Reply, this Tribunal lacks jurisdiction to hear Methanex's claim under Article 1116.

**VI. METHANEX'S CLAIM SHOULD BE DEEMED SUBMITTED AS OF MAY 25, 2001, AND ITS CLAIM CHALLENGING THE BILL SHOULD BE DISMISSED AS TIME-BARRED**

Methanex and its U.S. affiliates have now filed waivers in accordance with the jurisdictional prerequisites set forth in Article 1121. *See* Exh. 5 to Methanex's Rejoinder. The United States therefore reiterates its offer not to seek dismissal of Methanex's claim on jurisdictional grounds so long as the Tribunal issues an order recognizing that Methanex's claim has been duly submitted as of May 25, 2001 – the date Methanex filed its complying waivers. *See* U.S. Memorial at 74-75, 77-78; U.S. Reply at 54-55; *see also* Canada's Second 1128 Submission, ¶ 49 ("Canada agrees with the interpretation [of Article 1121] submitted by the United States."). The United States also consents to the reconstitution of this Tribunal as of that date. *See* U.S. Memorial at 77-78; U.S. Reply at 53.

As a result of deeming Methanex's claim to be submitted as of May 25, 2001, that portion of Methanex's original Statement of Claim that identified the Bill as a measure that violated NAFTA Chapter Eleven should be dismissed by this Tribunal since the Bill

was passed more than three years before the submission of Methanex's claim to arbitration. *See* NAFTA art. 1116(2); U.S. Memorial at 78. Methanex apparently anticipated this result, as its Draft Amended Claim does not rely on the Bill as a measure under the NAFTA in any event.

**VII. THERE IS NO BASIS FOR THIS TRIBUNAL TO ORDER THE PRODUCTION OF DOCUMENTS PROTECTED UNDER THE TREATY OR TO STRIKE THE UNITED STATES' ARGUMENTS ON STATE PRACTICE**

As Methanex acknowledges, the United States voluntarily provided it with numerous submissions made by the NAFTA Parties to Chapter Eleven arbitral tribunals on the interpretation of Articles 1101 and 1105. Nevertheless, Methanex continues to assert that it has an absolute right to receive all such submissions and asks this Tribunal to order that the United States produce them or, in the alternative, to disregard the arguments made by the United States regarding the NAFTA Parties' interpretations of Articles 1101 and 1105. Methanex's request should be denied.

As the United States has explained several times to Methanex, it receives copies of submissions in Chapter Eleven arbitrations in which Canada and Mexico are respondents pursuant to Article 1129. In accordance with that Article's express provisions, the United States is required to treat such documents "as if it were a disputing Party" in those arbitrations. NAFTA art. 1129(2). Consequently, when there is a confidentiality agreement between the parties or a confidentiality order issued by the tribunal in such cases, the United States may not release or rely upon such documents.<sup>60</sup>

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<sup>60</sup> As indicated in prior correspondence with Methanex, the United States has produced all responsive documents to Methanex except for those that fall within this protected category and those documents filed



In submitting its claims to arbitration under Chapter Eleven, Methanex expressly consented “to arbitration in accordance with the procedures set out in this Agreement.” NAFTA art. 1121(1)(a); *accord* Statement of Claim sch. 1; *see also* NAFTA art. 1122(1). Those procedures thus form part of the disputing parties’ agreement to submit these claims to arbitration and encompass the United States’ obligations under Article 1129 with respect to information provided it concerning arbitrations against Canada and Mexico. There is no occasion to revisit the terms of that agreement here.

For similar reasons, there is no basis to disregard the United States’ arguments relying on positions taken by Canada and Mexico in their submissions under Article 1128. Article 1128 was the mechanism that the NAFTA provided to enable each Party to express its views on the correct interpretation of the NAFTA before any Chapter Eleven tribunal. Article 1128, too, forms part of the “procedures set out in” the NAFTA that each of the disputing parties agreed to respect. Canada and Mexico have made submissions in accordance with these procedures and those submissions are entitled to consideration by this Tribunal. Methanex’s assertion that these submissions and the United States’ arguments regarding those submissions should be disregarded is without foundation.

#### **VIII. METHANEX SHOULD BE DENIED PERMISSION TO AMEND ITS CLAIM**

While Methanex takes issue with the United States’ characterization of its amendment as incorporating “new claims,” it does not dispute that its “amendment”

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in cases in which Methanex’s counsel represents a party. *See* Letter from Andrea J. Menaker to Christopher F. Dugan & James A. Wilderotter (May 14, 2001).

identifies an entirely new measure (the CaRFG3 regulations), is based on new facts not pled in the Statement of Claim (ADM's business practices and contributions to candidate Davis's campaign for Governor, among others) and adds new legal theories for recovery (a national treatment claim and a substantially different Article 1105 claim). This amounts to a new claim.

Furthermore, Methanex's repeated assertion that its "amendment" is based on newly discovered evidence has not borne fruit. Nowhere has Methanex explained when and how it discovered the allegedly "secret" meeting that occurred almost three years ago. The fact that then-candidate Davis disclosed on his campaign finance disclosure forms the use of an ADM plane renders Methanex's assertion that this fact was only recently discoverable difficult to credit. Finally, permission to amend should be denied as the United States would be prejudiced were Methanex allowed to amend its claim under these circumstances. *See* U.S. Reply at 57-58.

**CONCLUSION**

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against Methanex, dismissing Methanex's claims in their entirety and with prejudice; (b) pursuant to Article 20 of the UNCITRAL Arbitration Rules, disallowing Methanex's proposed amended claims; and (c) 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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