

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.

**SUBMISSION OF NON-DISPUTING PARTIES
BLUEWATER NETWORK, COMMUNITIES FOR A BETTER ENVIRONMENT
AND CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**

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Introduction

1. In a series of actions beginning in 1997, the State of California banned the use of the gasoline additive MTBE, citing concerns that the additive had contaminated the state's freshwater resources and jeopardized human health. Pursuant to NAFTA's Chapter 11, the Methanex Corporation, a Canadian Corporation that manufactures a component of MTBE, has brought a number of claims against the United States demanding compensation for lost profits and other business injuries alleged to have resulted from California's actions. In August 2002, this Tribunal dismissed the majority of Methanex's claims, but allowed Methanex to amend its claim to attempt to support its allegations that the intent underlying California's measures violated provisions of Chapter 11.¹ Bluewater Network, Communities for a Better Environment and the Center for International Environmental Law (jointly "Amici") make this submission to assist the Tribunal in assessing Methanex's allegations of improper intent.

2. In evaluating Methanex's claims, the Tribunal must be guided by principles of international law.² This is particularly true because Methanex refers to international law repeatedly in support of its claim that the California measures were motivated by illegitimate intent. Amici agree with the arguments presented by the United States in its submissions in this

¹ See *Methanex Corporation v. United States*, First Partial Award (7 August 2002).

² See NAFTA, Art. 1131(1).

phase of the arbitration. In addition to those arguments, however, Amici here address a number of considerations based on principles of international law that the United States either did not address or did not elaborate.

3. Under international law, governments have both a right and an obligation to regulate to protect human health and the environment. The international legal principles discussed in this submission demonstrate that this Tribunal must give substantial deference to measures implemented to achieve these goals. The principles also apply to the evaluation of California's intent in implementing the MTBE measures.

I. This Tribunal Must Evaluate Evidence of California's Intent in Light of the Substantial Deference NAFTA and Principles of International Law Accord to Government Action to Protect Human Health and the Environment Against Legitimate Threats

4. This Tribunal has recognized that international law requires that it accord California's actions in regulating MTBE a presumption of legitimacy.³ Indeed, it has long been recognized that, in the case of arbitration seeking compensation for the impacts of government regulations, "if the reasons given [for the regulation] are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive."⁴

5. For a number of reasons described below, the presumption of legitimacy of government action applies with particular significance in this case because California has based its action on concern over risks to public health and the environment. This conclusion is generally supported by customary international law, which recognizes that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect

³ See First Partial Award, para. 45 (recognizing the applicability of "the legal doctrine of *omnia praesumuntur rite esse acta*").

⁴ G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 British Yearbook of Int'l Law 307, 338 (1962).

legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.”⁵ This Tribunal must thus take the following principles of international law into account in determining the legitimacy of California’s intent in implementing the MTBE measures at issue in this case.

A. The Context of NAFTA’s Investment Provisions Includes NAFTA’s Promotion of Environmental and Health Protections

6. Both NAFTA and the North American Agreement on Environmental Cooperation (NAAEC) explicitly preserve the right of each Party government to protect the environment, requiring that governments maintain, strengthen and enforce laws and regulations to protect the environment. The environmental provisions of both agreements are part of the context in which this Tribunal must interpret Methanex’s claim under Chapter 11.⁶

7. NAFTA’s preamble and Chapter 11 itself strengthen the presumption of the legitimacy of California’s environmental and health measures. NAFTA’s Preamble states the Parties’ intention to achieve NAFTA’s goals “in a manner consistent with environmental protection and conservation,” to “promote sustainable development,” and to “strengthen the development and enforcement of environmental laws and regulations.” Chapter 11 includes a provision on “Environmental Measures” that recognizes the need for governments to implement measures to

⁵ US-Chile Free Trade Agreement, Chapter 10, Annex 10-D, para. 1 (indicating that the expropriation provision reflects customary international law), para. 4(b) (recognizing the legitimacy of environmental and human health regulations), *available at* <http://www.ustr.gov/new/fta/Chile/final/>. Although this particular formulation of the presumption applies explicitly to expropriation, the presumption of legitimacy of government actions arises directly out of the principle of national sovereignty, and thus applies to government regulations no matter why they are challenged.

⁶ According to the Vienna Convention on the Law of Treaties, Art. 31, the terms of a treaty are to be interpreted “in their context,” which includes “any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty.” The NAAEC thus constitutes part of the context in which NAFTA terms are to be interpreted.

address the environmental threats of investment activity, and discourages them from weakening such measures to attract investment.⁷

8. Similarly, in the NAAEC, the Parties to NAFTA recognized the need to conserve, protect and enhance the environment in their territories and reaffirmed the importance of “enhanced levels of environmental protection.”⁸ One of the NAAEC’s most important provisions concerning is Article 3:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party *shall ensure that its laws and regulations provide for high levels of environmental protections and shall strive to continue to improve those laws and regulations.*⁹

9. As these provisions demonstrate, any interpretation or application of NAFTA’s investment provisions must take into account the importance that the Parties placed on preventing the agreement from interfering with environmental protection. In the context of NAFTA, therefore, environmental and health measures are to be accorded a special presumption of legitimacy.

⁷ NAFTA, Art. 1114.

⁸ NAAEC, Preamble. The NAAEC preamble also reaffirms the Parties’ commitment to the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development, both of which recognize the role of environmental protection in government action. *See* Rio Declaration on Environment and Development, Principle 4, UN Doc. A/CONF.151/5/Rev.1 (1992),

<http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>,

(“environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”); Stockholm Declaration, Principle 6, 11 ILM 1416, <http://www.unesco.org/iau/sd/stockholm.html> (1972) (“To defend and improve the human environment for present and future generations has become an imperative goal for mankind....”).

⁹*Id.* art. 3 (emphasis added). The NAAEC also demonstrates the Parties’ intention to “foster the protection and improvement of the environment ... for the well-being of present and future generations”; to “conserve, protect and enhance the environment,” and develop and improve environmental laws and regulations; to “enhance compliance with, and enforcement of, environmental laws and regulations”; and to “promote pollution prevention policies and practices.” NAAEC, Article 1.

B. The Precautionary Principle and the Right to Choose an Appropriate Level of Protection

10. The presumption of the legitimacy of California's actions is strengthened by the precautionary principle and the right of all nations to set their appropriate level of protection against risks to human health or the environment. The precautionary principle is widely recognized as a principle of customary international law, and provides that countries have the right to regulate activities and substances that may be harmful to human health even if no conclusive or overwhelming evidence is available as to whether the activity actually causes that harm, the precise degree of harm or the process by which it occurs.¹⁰ Although there is some disagreement whether the precautionary principle *obligates* nations to act to prevent risks, there is no question that it protects their *right* to do so when they deem it important.

11. The NAAEC explicitly recognizes “the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities.”¹¹ This right is thus part of the context in which the Tribunal must interpret Methanex's arguments under Chapter 11.¹² The right is also part of customary international law, flowing directly from the principle of national sovereignty.¹³ The essentially political character of choosing a level of discussion, described below,¹⁴ makes deference to such a choice especially appropriate.

¹⁰ The precautionary principle has been included in numerous multilateral international treaties and declarations. *See, e.g.*, Rio Declaration, *supra* note 8, Principle 15 (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”); UN Framework Convention on Climate Change, Art. 3.3, 1771 UNTS 107, <http://unfccc.int/resource/docs/convkp/conveng.pdf>; Convention on Biological Diversity, Preamble, 1760 UNTS 79 (1992), <http://www.biodiv.org/convention/articles.asp>.

¹¹ NAAEC Art. 3.

¹² *See supra* note 6.

¹³ Although the provisions of the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) do not apply to this case, it is noteworthy that that

12. The precautionary principle and the right to set a level of protection are directly relevant to Methanex's challenge to the legitimacy of California's MTBE ban. California's ban was based on two broad concerns, each of which is supported by these principles. The first concern was the potential degradation of the State's sources of potable water by MTBE contamination. Methanex has made no argument in this arbitration against California's finding that water contaminated with MTBE is undrinkable and there can be no question that measures to preserve this important resource are legitimate.

13. Methanex has questioned California's concern over the health effects of consuming MTBE contaminated water. A number of entities, including the World Health Organization, have found MTBE to cause harm, including cancer and reproductive and developmental problems, in laboratory animals.¹⁵ Methanex does not challenge the studies upon which these findings are based, but rather presents other studies suggesting there is little or no risk from MTBE exposure.

14. The precautionary principle reflects a recognition that scientific certainty is rare and that advancements in scientific knowledge – including knowledge of previously unknown risks – nearly always begin as theories that conflict with the opinions of other members (frequently the majority) of the scientific community. If governments cannot act in the face of conflicting

agreement explicitly recognizes the right of each government to establish its own level of protection against risk. *See, e.g.*, Preamble (expressing desire to further harmonization of SPS standards “without requiring Members to change their appropriate level of protection”), Art. 3.3 (permitting measures resulting in higher level of protection than would be achieved through international standards “as a consequence of the level of the level of sanitary or phytosanitary protection a Member determines to be appropriate”).

¹⁴ *See infra* paras. 26-27.

¹⁵ *See, e.g.*, “Environmental Health Criteria 206: Methyl Tertiary-Butyl Ether,” pp. 159-60 (World Health Organization, 1998); Arturo Keller, Ph.D., *et al.*, “Health & Environmental Assessment of MTBE: Report to the Governor and Legislature of the State of California As Sponsored by SB 521,” p. 23, (November 1998).

science, or must base precautionary measures on the “best” or “most accepted” science, they will be unable to take precautionary measures to protect against risks suggested by new or controversial evidence.¹⁶

15. The unequivocal right of countries to choose their own levels of protection also emphasizes the deference this Tribunal must give California’s assessment of the scientific evidence. The choice of a very high level of protection is likely to necessitate measures to protect against risks revealed by new, and frequently controversial, scientific evidence. It must thus be up to the government, not an international tribunal, to make any judgments required by the existence of conflicting evidence or different scientific principles. If dispute panels were permitted to judge what they believe to be the “correct” or “best” or “most accepted” science, they would unavoidably interfere with the freedom of countries to choose their own levels of protection.

C. California’s Obligation to Protect Human Rights, Including the Right to Potable Water

16. One of the most fundamental obligations of governments is to protect human rights. In the words of the International Covenant on Civil and Political Rights, “recognition of the

¹⁶ The WTO’s Appellate Body has recognized these principles in addressing the relevance of conflicting scientific evidence to a determination of the legitimacy of measures to protect human health:

[R]esponsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources. In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the “preponderant” weight of the evidence.

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, AB-2000-11, Report of the Appellate Body (12 March 2001), ¶ 178 (quotation omitted).

inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁷

17. UN Secretary-General Kofi Annan has stated: “Access to safe water is a fundamental human need and, therefore, a basic human right. Contaminated water jeopardizes both the physical and social health of all people. It is an affront to human dignity.”¹⁸ Several human rights organs of the United Nations have concluded that “[w]ater is fundamental for life and health. The human right to water is indispensable for leading a healthy life in human dignity,”¹⁹ as has the World Health Organization.²⁰ In addition to being a fundamental right on its own, the right to water “is a prerequisite to the realization of all other human rights,”²¹ including the non-derogable rights of all peoples to their own means of subsistence²² and to life.²³ Access to water is also crucial to the realization of other rights, such as the right to health.²⁴

¹⁷ International Covenant on Civil and Political Rights (ICCPR), http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, Preamble.

¹⁸ World Health Organization, *The Right to Water* (2003), available at http://www.who.int/water_sanitation_health/rightwater/en/print.html.

¹⁹ UN Committee on Economic, Social and Cultural Rights, General Comment 15, E/C.12/2002/11, (20 January 2003). *See also Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth Session*, Resolution 2003/1, U.N. Doc. E/CN.4/Sub.2/2003/43 (2003) (reaffirming “the right to drinking water supply and sanitation for every woman, man and child”); Preliminary report of Special Rapporteur El Hadji Guissé, E/CN.4/Sub.2/2002/10 (25 June 2002) (finding the right to drinking water to be a human right).

²⁰ *See* WHO report, *supra* note 18.

²¹ UN Committee on Economic, Social and Cultural Rights, General Comment 15, E/C.12/2002/11, (20 January 2003).

²² ICCPR, *supra* note 16, Art. 1 (“In no case may a people be deprived of its own means of subsistence.”); International Covenant on Economic, Social and Cultural Rights (ICESCR), http://www.unhchr.ch/html/menu3/b/a_ceschr.htm, Art. 1 (same).

²³ ICCPR, *supra* note 16, Art. 6.

²⁴ ICESCR, *supra* note 22, Art. 12.

18. Under international law, States not only have a right, but an obligation to ensure that activities under their jurisdiction and control do not violate human rights.²⁵ California's measures to protect the integrity of its limited sources of fresh water are thus mandated by international law and these actions are entitled to particular deference.

D. The Principles of Public Participation and Subsidiarity

19. The principle of public participation is expressed in the Rio Declaration on Environment and Development, signed by over 178 nations: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level."²⁶ The principle of subsidiarity arises out of general principles of democracy and national sovereignty. This principle of international environmental law provides that environmental issues are usually best addressed at the lowest level of government. For example, Agenda 21, which was adopted by over 178 nations in 1992²⁷ and reaffirmed in 2002 by 191 nations in the Johannesburg Declaration on Sustainable Development,²⁸ explicitly applies the principle with respect to the management of water resources, noting that local and national governments should be responsible for regulating,

²⁵ See, e.g., UN Charter, Article 55 (states have an obligation Charter "promote ... universal respect for, and observance of, human rights and freedoms."). The European Court of Human Rights, in two decisions involving corporate environmental pollution negatively affecting human rights has found states liable for not adopting regulations and pursuing inspections to prevent the corporate misconduct. See, e.g., *Guerra and Others v. Italy*, 1998-I Eur. Ct. H.R. 2101, <http://www.eel.nl/cases/ECHR/guerra.htm>; *López Ostra v. Spain*, 303-C Eur. Ct. H.R. (Ser. A) (1994), <http://www.eel.nl/cases/ECHR/lopez%20ostra.htm>.

²⁶ Rio Declaration, *supra* note 8, Principle 10. 190 nations have explicitly "[r]eaffirm[ed] the Rio Declaration" by ratifying the UN Convention To Combat Desertification In Countries Experiencing Serious Drought And/Or Desertification, Particularly In Africa. See U.N. Doc. A/AC.241/15/Rev.7, Preamble.

²⁷ <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>.

²⁸

http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.doc.

managing and monitoring freshwater resources.²⁹ These principles ensure the legitimacy of governmental actions by ensuring accountability and due process.

20. California adopted the MTBE measures after a public, peer-reviewed university study that was debated in public hearings. The measures were adopted by the California governor and legislature, both of which are democratically elected and thus represent of California citizens. Because the MTBE measures are the result of processes of public participation at levels of government responsive to those likely to be directly affected by MTBE contamination, the principles of public participation and subsidiarity entitle California's actions concerning MTBE to deference from this Tribunal.

II. The Foreseeability of Impacts on Foreign Investors Does Not Create a Presumption of “Less Favorable” Treatment for Purposes of Chapter 11

21. Methanex makes much of the fact that California should have known that banning the use of MTBE would affect it differently from ethanol producers. The United States has made a number of strong points in response to this argument. It is important to note, however, that foreseeably different impacts cannot create any presumption of illegitimate intent for purposes of Article 1102.

22. As noted above, NAFTA (including Chapter 11) and general principles of international law recognize the right of governments to act to protect health and the environment. Indeed, an emerging principle of international environmental law requires prior assessment of the environmental and health impacts of government projects and policies.³⁰ The knowledge

²⁹ Agenda 21, Article 18.12(o), available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter18.htm>.

³⁰ See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context, 30 ILM 800 (1991), <http://www.unece.org/env/eia/eia.htm>, (entered into force 1997); Convention on Biological Diversity, *supra* note 10, Article 14.

obtained in complying with this principle, as responsible governments will strive to do, cannot form the basis for international liability.

23. Governments must therefore be free, to address legitimate threats, even when circumstances – such as the fact that a majority of investors in a given field are foreign – give them reason to know that their actions will fall disproportionately on foreign investors. A presumption of illegitimacy when such knowledge exists would undermine the right of governments to regulate. Furthermore, equating foreseeable knowledge with discriminatory intent would be inconsistent with the full context of Article 1102, as well as the principles of international law described above.

24. For these reasons, the determination of “less favorable” treatment must focus on finding proof of protectionist intent, rather than on evidence of advance knowledge of discriminatory impact. The principles discussed in this submission are all important considerations in making this determination.

III. California’s Treatment of Other Substances Is Irrelevant in Determining Illegitimate Intent Regarding Health and Environmental Measures.

25. Methanex asserts that California has regulated other harmful components of gasoline differently than MTBE, and argues that this different treatment demonstrates illegitimate intent. To accept this argument would undermine the sovereign right of governments to choose appropriate levels of protection against risks, as well as the principles of public participation in environmental decision-making and subsidiarity.

26. When a government identifies a potential risk to human health or the environment, it must decide whether and to what extent to take steps to protect against that risk. While science plays an important role in identifying the existence of a risk, the decision concerning the appropriate response to that risk is fundamentally political. Among other things, a representative

government will need to weigh how much its citizens fear the particular risk and how much, if at all, they value the benefits provided by the activity or substance that presents the risk. Also relevant is the cost of addressing any harm actually caused and other demands on government resources. On the basis of these factors, the government determines what amount of that risk is acceptable to its citizens and set its appropriate level of protection.

27. Because risks and benefits depend on the particular activity or substance at issue, the determination of a level of protection cannot be made with respect to an entire category of risk (such as carcinogenicity) or substances (such as gasoline additives). It may be, for example, that the societal benefit from one potentially carcinogenic activity (such as the use of x-rays) is considered to be greater, and thus to justify a greater risk, than the benefit from another potentially carcinogenic activity (such as using a carcinogenic pesticide like DDT). Likewise, the environmental or performance value of one gasoline additive – or the cost of its removal – will differ from those of another. To require governments to regulate the risks posed by different substances in the same manner effectively removes their right to set national priorities and establish meaningful levels of protection from risk.

28. Moreover, such a rule would make it impossible for many nations to take action against risk at all (violating the precautionary principle), because it would prevent a government from regulating any risk until it has evaluated every related risk, set a level of protection, and implemented regulations to address all activities that pose that risk. Under such a system, regulating risky activities or substances one at a time would make the government vulnerable to

challenges by affected foreign investors who could argue that the government had acted with inappropriately discriminatory intent.³¹

IV. The Determination of “Like Circumstances” Must Account for Environmental and Health Concerns

29. Methanex’s claim depends on showing that California illegitimately discriminated against US investors in “like circumstances” to Methanex.³² Methanex ignores a number of factors relevant to the determination of like circumstances, including factors related to environmental and health concerns.

30. Much of Methanex’s argument is based on jurisprudence interpreting the phrase “like products” as used in GATT. As the United States has rightly noted, that phrase has a different meaning from “like circumstances.”³³ NAFTA’s use of “like circumstances” must be interpreted in the context of the entire agreement in which it is contained.

31. The phrase’s location in NAFTA’s investment chapter demonstrates why it is different from the phrase “like products.” While the trade disciplines that apply a “like products” test operate in respect to regulations affecting a product’s sale, distribution, or use,³⁴ the investment

³¹ Although Article 5.5 of the SPS Agreement explicitly requires each government to “avoid arbitrary or unjustifiable distinctions in the levels [of protection] it considers to be appropriate in different situations,” that requirement applies only “if such distinctions result in discrimination or a disguised restriction on international trade.” Moreover, the SPS Agreement could not apply to this case, *see* SPS Annex A, para. 1 (limiting the definition of an SPS measure), and NAFTA contains no similar requirement.

³² NAFTA, Article 1102(1).

³³ The United States also notes that even applying the factors used by WTO panels to determine whether products are “like” does not support Methanex’s claim. The United States does not mention, however, that the WTO’s Appellate Body has held that the factors are “[not] a closed list of criteria that will determine the legal characterization of products.” *European Communities – Measures Affecting Asbestos*, *supra* note 16, para. 102.

³⁴ GATT Article III:4 reads, “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and

disciplines that apply a “like circumstances” test operate with respect to most – if not all – phases of an investment, including establishment conduct, operation and sale.³⁵ Clearly, investment disciplines implicate a much broader range of government regulation and thus require a broad focus in identifying the criteria relevant to determine illegitimate discrimination. A narrow analysis that looks only at economic competition would ignore circumstances that explain the need for health and environmental measures and that are therefore relevant to determining legitimate intent. In the instant case, the relevant circumstances of the measures adopted to protect the environment and health in California will not be understood by reference to the market structure of gasoline additives in California, but by reference to the need to protect freshwater resources from MTBE contamination.

32. In addition, as noted above, the context of Article 1102 includes a strong recognition of the importance of measures to protect the environment and human health, and particularly of the need to ensure that investments do not interfere with such protection. It is thus necessary to recognize that an investor whose investment poses a threat to health or the environment is, for purposes of NAFTA, in a different circumstance from an investor whose investment poses no such threat. Moreover, in light of the right of each government to set its own level of protection based on the priorities and concerns of its constituents, different types of threats must be considered as creating different circumstances. The Tribunal must therefore consider the threat posed by MTBE to California’s potable water supply in determining whether Methanex is in like circumstances as other investors.

requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

³⁵ NAFTA Article 1102(1) reads, “Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

V. Methanex's Assertion that Less Trade Restrictive Alternatives to California's MTBE Ban Exist Does Not Support a Finding of Illegitimate Intent to Discriminate

33. Methanex has also taken issue with the method California has employed to achieve its chosen level of protection. Methanex argues that there exist less trade-restrictive means of protecting human health and the environment from the risks presented by MTBE. Methanex argues further that California's failure to employ these methods is evidence of illegitimate intent to discriminate against foreign investors. Methanex is wrong on both accounts.

34. By banning MTBE from gasoline, California has made clear its intention to adopt a high level of protection against risks and proven harms posed by the substance. As noted above, international law explicitly gives California the right to set a high level of protection. The precautionary principle also supports setting a high level of protection, as well as implementing protective measures with a broad scope. These rights become obligations to take precautionary action when there is clear evidence of a threat to the human right to access to potable water, as in the present case. Precautionary measures that achieve a high level of protection will often require governments to use measures that restrict trade more than other measures that might address the problem.

35. Methanex notes that the tribunal in *SD Myers v. Canada* stated that "where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade."³⁶ As support for this statement, the *SD Myers* tribunal relied in part on the language and case law arising out of the WTO family of agreements. However, the WTO rules and decisions concerning a "least trade-restrictive" requirement are irrelevant to the question of intent to discriminate under NAFTA's Article 1102. These WTO decisions all arise out of rules that

³⁶ *SD Myers, Inc. v. Canada*, Partial Award, Nov. 13, 2000, paras. 220-21.

explicitly include language requiring some comparison of the trade effects of different possible measures.³⁷ Article 1102 includes no such language. This fact is particularly significant because the NAFTA Parties clearly included such a requirement when they intended it to apply, as they did in Article 1106(6) concerning performance requirements.³⁸

36. Furthermore, even the WTO decisions to which the SD Myers tribunal referred do not support Methanex's position. For example, in the *Korea-Beef* dispute, the WTO Appellate Body addressed the meaning of the term "necessary" in GATT's Article XX, which was the original source of a "least trade-restrictive" analysis in WTO jurisprudence. The Appellate Body noted that "[i]n appraising the 'necessity' of a measure..., it is useful to bear in mind the context in which" the textual basis for the necessity requirement is found.³⁹ Taking that context into account,

a treaty interpreter assessing a measure claimed to be necessary ... may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.⁴⁰

³⁷ See, e.g., General Agreement on Tariffs and Trade, Article XX(b) (exception for measures "necessary to protect human, animal or plant life or health" (emphasis added)); General Agreement on Trade in Services, Art. VI:4(b) (measures not to be "more burdensome than necessary to ensure the quality of the service" (emphasis added)); Agreement on Technical Barriers to Trade, Art. 2.2 ("technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create").

³⁸ Even though GATT Article XX(g) reflects an intention to harmonize environmental protection measures with economic development through the application of GATT's trade rules, WTO tribunals have not applied a least trade-restrictive analysis under Article XX(g) because, unlike Article XX(b), it contains no specific language to that effect. See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB-2000-8, para. 161, fn.104 (WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000).

³⁹ *Id.*, para. 162.

⁴⁰ *Id.*

37. As noted above, the context of Chapter 11 includes the Parties' intention to promote environmental protection. Therefore, even if NAFTA's Chapter 11 required a least trade-restrictive-type analysis (which the previous paragraph demonstrates it does not), this context requires a tribunal to give greater leeway to a government's choice of methods to protect a vital public concern, such as the human right to potable water.

38. Finally, the SD Myers tribunal's conclusion that a strict least trade-restrictive analysis is a "logical corollary" of NAFTA's and NAAEC's environmental provisions⁴¹ is flawed. Inferring a least trade-restrictive analysis effectively would make economic considerations trump environmental ones in a system that, even the SD Myers tribunal recognized, intends the two to be "mutually supportive." If any sort of comparison of available measures was implied by Chapter 11 (which, again, it is not), it would have to be consistent with the WTO Appellate Body's recognition that greater trade restrictions must be acceptable where crucial public concerns are at issue. Furthermore, making trade and the environment mutually supportive requires that tribunals apply international environmental principles, including the precautionary principle, the principle of subsidiarity and the principle of public participation.

39. For all these reasons, therefore, with the exception of certain explicit rules concerning performance requirements, NAFTA does not require that measures applicable to foreign investors be the least trade-restrictive alternative. Nor do Methanex's assertions concerning the possible availability of less trade-restrictive measures support a finding of illegitimate intent in violation of Article 1102.

⁴¹ See *SD Myers*, *supra* note 36, para. 221 ("where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is *obliged* to adopt the alternative that is most consistent with open trade" (emphasis added)).

40. Methanex is also incorrect that there exist less trade-restrictive means of achieving California's level of protection from MTBE risks. The State of Maine suspects that gasoline spilled in automobile accidents and leaked from parked vehicles has been responsible for MTBE contamination of groundwater.⁴² Furthermore, in addition to preserving freshwater resources, California's MTBE measures were intended to protect against contamination of the air,⁴³ and there is evidence that byproducts of burning MTBE, such as formaldehyde, may contribute to risks to human health from air exposure,⁴⁴ as well as to groundwater contamination.⁴⁵ Implementing and enforcing stricter regulations on underground storage tanks and the other measures suggested by Methanex cannot protect against MTBE contamination resulting from spills or exposure to MTBE byproducts in the air. Methanex has thus proposed no less trade-restrictive means of achieving California's chosen level of protection against the risks of MTBE.

VI. A History of Regulation of the Type at Issue Is Relevant to the Question of Legitimate Intent

41. Arbitration panels have long considered that a consistent practice of regulating in a certain field supports a finding that impacts of further regulation on foreign investments does not

⁴² See "MTBE in Maine, Summary of Five Point Plan" (Oct. 13, 1998), <http://www.state.me.us/dep/rwm/publications/fivept.htm>; W. David McCaskill, LUSTLine Bulletin 31 (New England Interstate Water Pollution Control Commission), <http://www.maine.gov/dep/rwm/usts/pdf/usts31.pdf>.

⁴³ See 1997 Cal. Stat. 816, § 2 (goal of the state law is "to ensure that the *air*, water quality, and soil impacts of the use of MTBE are fully mitigated" (emphasis added)).

⁴⁴ See Catherine P. Koshland, *et al.*, "Evaluation of Automotive MTBE Combustion Byproducts: Report to California State Legislature under SB 521; Arturo Keller, Ph.D., *et al.*, "Health & Environmental Assessment of MTBE: Report to the Governor and Legislature of the State of California As Sponsored by SB 521," November 1998, p. 22.

⁴⁵ See *US Geological Survey*, "The Atmosphere – A Potential Source of MTBE to Ground Water," <http://toxics.usgs.gov/highlights/mtbe.html>.

give rise to an expropriation claim. Indeed, this principle has been recognized as part of the customary international law of expropriation.⁴⁶

42. The same principle logically applies to determining intent. Where a challenged regulation is one of a long series addressing the same issue, that regulation should be considered to be motivated by a legitimate intention. This is certainly true with respect to California's MTBE regulation, which is only part of a long and complex history of state and federal regulation to address the environmental and health implications of gasoline.

VII. This Tribunal Should Grant the United States' Request for an Award of Costs

43. As organizations whose members and staff are US taxpayers, Amici support the United States' request for an award of costs. Methanex has brought a frivolous claim apparently intended either to create opportunities to gain publicity, to insulate itself from the normal business risks of doing business in a highly regulated industry, or both. Requiring the United States (and the State of California) to bear the costs of defending Methanex's claims would penalize US and California citizens and have a chilling effect on governments' ability to implement legitimate health and environmental regulations in the future. The chilling effect of such a decision would be particularly strong in the case of certain developing nations for whom the costs of defending an investment challenge may be prohibitive. In such circumstances, the fear of facing even a frivolous claim could weigh strongly against regulating to protect even the most important interests.

⁴⁶ See US-Chile Free Trade Agreement, *supra* note 5, Chapter 10, Annex 10-D, para. 1 (indicating that the expropriation provision reflects customary international law), para. 4(a) (extent to which regulation interferes with "reasonable investment-backed expectations" is a factor in identifying indirect expropriation).

Conclusion

44. This Tribunal has recognized that the subject matter of this arbitration raises issues of public importance.⁴⁷ Because the Tribunal's decision in this case will be considered by tribunals in future investment arbitrations, its decision will help determine the rights and obligations of governments in implementing future health and environmental measures. Thus, a decision requiring the United States to compensate Methanex will not only pressure California to rescind important environmental and health measures, but will also compromise the legitimate powers of governments to protect the health, safety, and the environment of their citizens."

45. Amici have submitted analysis and arguments based on principles of international law that are not only relevant as applicable law, but that will provide material aid to the Tribunal in approaching and deciding the legal issues before it. Moreover, applying these principles is particularly important because of the broad public significance of this arbitration. Doing so will help ensure that the Tribunal's award does not undermine the system of public international law intended to facilitate governments' ability to safeguard the public interest.

Respectfully submitted,



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⁴⁷ Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 January 2001), ¶ 49.