

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

-----x	:
METHANEX CORPORATION,	:
Claimant/Investor,	:
and	:
UNITED STATES OF AMERICA,	:
Respondent/Party.	:
-----x	:
	Volume 2

SECOND FINAL AMENDED TRANSCRIPT

Tuesday, June 8, 2004

The World Bank
1818 H Street, N. W.
MC Building
Conference Room 13-121
Washington, D. C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:35 a.m. before:

- V. V. VEEDER, Q. C., President
- PROF. W. MICHAEL REISMAN, Arbitrator
- J. WILLIAM ROWLEY, Q. C., Arbitrator

Also Present:

SAMUEL WORDSWORTH,
Tribunal Legal Secretary

MARGRETE STEVENS,
Senior ICSID Counsel
Tribunal Administrative Secretary

Court Reporter:

0608 Day 2

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256

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257

C O N T E N T S

	PAGE
OPENING STATEMENT	
For The United States: Mr. Taft	258
Mr. Clodfelter	270
Mr. Bettauer	300
Mr. Legum	303
Mr. Pawlak	353
Ms. Menaker	387
Mr. Bettauer	423
Mr. Legum	427
Mr. McNeill	439
Mr. Bettauer	474

1 P R O C E E D I N G S
2 PRESIDENT VEEDER: Good morning, ladies
3 and gentlemen. This is day two of the main
4 hearing, and under our schedule it's now for the
5 United States to make its oral submissions, and we
6 hand the floor over to you, Mr. Taft.
7 OPENING STATEMENTS BY COUNSEL FOR RESPONDENT/PARTY
8 MR. TAFT: Thank you, Mr. President.
9 Mr. President, members of the Tribunal,
10 it's my privilege to open the United States' s
11 presentation of its case-in-chief at this hearing,
12 and I speak on behalf of the entire U.S. team
13 arrayed to my right in saying that we are honored
14 to appear before you today.
15 This morning I will make some general
16 remarks and provide an overview of the U.S.
17 presentation and then summarize how we intend to
18 divide the presentation among the members of our
19 team. I regret that I will not be able to stay
20 with you during the course of the day. In fact, I
21 have to leave right after.

1 There seem to be two hearings this week in
2 Washington that have not been cancelled as a result
3 of President Reagan's ceremonies, and this is one,

4 and the other is the hearing of the Senate Select
5 Committee on Intelligence on the Law of the Sea
6 Treaty at which I'm scheduled to testify, so I will
7 have to go and attend to that, but I'm glad to be
8 able to start off here.

9 In its first pleading in this case, the
10 statement of defense of August 2000, the United
11 States stated that, and I quote, Methanex's claim
12 does not remotely resemble the type of grievance
13 for which the state parties to the NAFTA created
14 the investor-state dispute resolution mechanism of
15 Chapter 11, unquote.

16 Several years have passed, and many pages
17 of pleadings and evidentiary materials have been
18 prepared and filed since then, but the passage of
19 time has only served to underscore the fact that
20 Methanex's claims, no matter how cast or recast, do
21 not fit the NAFTA's investment chapter. They're

260

1 not the kind of claims that the parties
2 contemplated would be subject to the jurisdiction
3 of investor-state dispute resolution panels, and
4 they are not, on their merits, entitled to any of
5 the remedies of Chapter 11.

6 First, Methanex's claims do not fall
7 within the scope of Chapter 11. As a result, this
8 Tribunal does not have jurisdiction to resolve
9 them. Article 1101(1) of the Treaty provides that
10 Chapter 11 only applies to those of a party's
11 measures relating to, first, investors of another

12 party; or two, the investments of those investors
13 in the territory of the first party. I understand
14 that yesterday Methanex did not address this issue
15 directly, suggesting that it would come to
16 jurisdictional issues only in its closing. For the
17 moment, it only put forward its belief that the
18 challenged measures related to Methanex and
19 methanol. But the measures Methanex complains of
20 relate to a product, MTBE, that Methanex doesn't
21 manufacture and in the production of which it has

261

1 made no investment at any time.

2 As the First Partial Award in this case
3 held, this ban could not be said to relate to
4 Methanex or relate to its investments within the
5 meaning of Article 1101(1) under the facts alleged
6 in Methanex's written pleadings.

7 In our presentation, we will show that
8 Methanex's points have no merit. The Tribunal did,
9 in its First Partial Award, leave a narrow
10 jurisdictional window open to Methanex. It held
11 that if Methanex could prove that the measures it
12 challenges were intended to harm foreign methanol
13 producers, including Methanex and its investments
14 in this country, then it could make its case on the
15 merits. The First Partial Award thus declined to
16 dispose of the case on the pleadings based on
17 Methanex's representation that it could prove that
18 by banning MTBE, California secretly intended to

19 harm methanol producers. All of the evidence is
20 now in, however, and that evidence falls far short
21 of showing such an intent.

262

1 The evidence submitted by Methanex
2 consists, in major part, of opinion pieces
3 published in petrochemical industry newsletters,
4 uncorroborated double hearsay statements by
5 interested witnesses, sheer speculation about what
6 must have been discussed at a dinner meeting with
7 gubernatorial candidate Davis, and a series of
8 expert reports and witness statements that provide
9 unsupported post hoc criticisms of California's
10 policy decision to ban MTBE, reports and statements
11 that were not available to California decision
12 makers at the time that the measures in question
13 were adopted.

14 Far from establishing any secret intent to
15 harm methanol producers, the record shows that
16 California's intent in banning MTBE was precisely
17 what the measures said it was: To protect
18 California's public water resources from MTBE's
19 contaminating effects on the taste and the smell of
20 drinking water.

21 In light of this failure of proof, the

263

1 holdings of the First Partial Award, therefore,

2 dispose of Methanex's entire claim. The ban of
3 MTBE in California gasoline relates to producers of
4 California gasoline and producers of MTBE. It does
5 not relate to Methanex, which does not make or
6 market either gasoline or MTBE. Because Methanex
7 has failed to establish that the measures relate to
8 it within the meaning of Article 1101(1), its
9 claims must be dismissed.

10 Methanex's claims also fail on their
11 merits. Methanex has not established that it has
12 suffered any loss proximately caused by the
13 measures or, indeed, that it has suffered any loss
14 at all.

15 First, the claims are too remote. They
16 depend upon the effects of the MTBE ban on
17 suppliers of California gasoline, who will buy less
18 MTBE from MTBE producers, who, in turn, will
19 allegedly buy less methanol from methanol producers
20 like Methanex. It is well settled under customary
21 international law that claims premised on such

264

1 remote effects cannot stand.

2 In its first memorial in this case
3 submitted in November of 2000, the United States
4 collected numerous international case authorities.
5 Those authorities established that claims based on
6 the effects of state action upon the claimant's
7 contractual counterparty are too remote to satisfy
8 the international law principle of proximate
9 causation. Methanex has never identified any

10 international authority to dispute the holdings of
11 those cases which we put forward.

12 Secondly, Methanex has also failed to
13 prove that it suffered any loss at all as a result
14 of the ban of MTBE. As the President and now Chief
15 Executive Officer of Methanex advised Methanex
16 investors earlier this year, in only one of many
17 similar statements by Methanex officials, the MTBE
18 ban has--and I'm quoting him, really had no impact
19 on our industry, unquote. And he was referring to
20 the methanol industry.

21 To the contrary, the years since

265

1 California's ban on MTBE have been golden ones for
2 Methanex. Methanol prices have been high and
3 supplies tight in all markets, including in the
4 United States. Methanex's stock price has
5 increased by 425 percent over the last four years.
6 Methanex's failure to prove any loss on this record
7 is not surprising. It is, nonetheless, fatal to
8 every one of Methanex's claims.

9 Beyond these threshold problems posed to
10 its case under Article 1101, Methanex's specific
11 claims fare no better. The national treatment
12 claim under Article 1102 fails on the undisputed
13 facts in the record. It is not contested that
14 there is a substantial methanol industry in the
15 United States and that U.S. investors own methanol
16 marketing and production units just like Methanex.

17 It is also not disputed that California's
18 MBE ban, to the extent it constitutes treatment of
19 the methanol industry at all, accords Methanex's
20 investments precisely the same treatment as that
21 accorded to the U.S.-owned methanol industry.

266

1 California, therefore, accorded to Methanex
2 treatment no less favorable than that it accorded
3 in like circumstances to U.S. investors. Article
4 1102 requires no more than this.

5 Nor has Methanex made any serious effort
6 to support its claim under Article 1105(1). That
7 Article requires treatment in accordance with
8 international law. In its Amended Statement of
9 Defense, the United States comprehensively showed
10 how Methanex's claim that customary international
11 law prohibits discrimination against foreign goods,
12 has no support whatsoever. Methanex has made no
13 answer to that showing. Its Article 1105(1) claim
14 is baseless.

15 Methanex's claim of expropriation is
16 similarly without merit. The parties' pleadings
17 raise interesting issues with respect to the law of
18 expropriation, but these issues are really beside
19 the point, given the evidentiary record. Methanex
20 has not attempted to prove that anything at all was
21 taken away from it by California's measures. But

267

1 without a taking, a question of whether there has
2 been an expropriation does not arise. Because the
3 record here does not begin to show an
4 expropriation, Methanex's Article 1110 claim should
5 be dismissed.

6 Finally, I would to say just a word about
7 costs. First, as noted, Methanex avoided dismissal
8 of its claims based on its commitment that it would
9 provide evidence of California's secret intent, a
10 commitment that it has not kept. As the Tribunal
11 stated in its procedural order of June the 2nd,
12 2003, and I'm quoting it, the Tribunal is not
13 disempowered from making an order for costs against
14 Methanex if the Tribunal should decide that the
15 Tribunal had no jurisdiction over the disputing
16 parties' dispute.

17 We respectfully submit that given
18 Methanex's failure to produce evidence the Tribunal
19 deemed essential to its jurisdiction, in light of
20 Methanex's conduct in these proceedings, and
21 considering the stark inconsistencies between

268

1 Methanex's claims of loss and what it has
2 repeatedly told to its shareholders about its
3 prosperity, it is appropriate for the Tribunal to
4 award full costs to the United States.

5 Each of my colleagues will address the
6 points that I've just made in greater detail. The
7 U.S. presentation will proceed as follows: First,

8 Mark Clodfelter will summarize the principal facts
9 relevant to the Tribunal's decision, and in doing
10 so will show that the measures at issue here were
11 based upon genuine concern about the threat that
12 MTBE use poses to public water resources.

13 Bart Legum, David Pawlak and Andrea
14 Menaker will address Article 1101(1)'s requirement
15 that the measure complained of relate to the
16 investment or the investor. Bart Legum and Mark
17 McNeill will present the United States's case on
18 proximate causation.

19 That will conclude our presentation for
20 today. Tomorrow morning, we will turn to the
21 specific claims of breach made by Methanex. Mark

269

1 Clodfelter and Andrea Menaker will present the
2 United States's case on national treatment.
3 Carrielyn Guymon will examine Methanex's claim
4 under Article 1105(1), and Andrea Menaker will then
5 address the issue of Methanex's claiming of
6 expropriation under Article 1110. Jennifer Toole
7 will review Methanex's failure to prove its
8 ownership of investments in the United States.

9 Ron Bettauer, who will be our impresario
10 throughout and introduce these different
11 presentations separately, will then conclude the
12 U.S. presentation tomorrow.

13 I now invite the Tribunal to turn the
14 floor over to Mr. Clodfelter who will provide the

15 summary of the salient facts, and again, I
16 appreciate the opportunity to appear before you,
17 and I apologize that I'm not able to stay with you
18 longer.

19 Thank you.

20 PRESIDENT VEEDER: Thank you, Mr. Taft.

21 We apologize if by starting slightly late because

270

1 of our administrative meeting we've delayed you
2 from your other duties, but in accordance with your
3 request, we hand over the floor either to the
4 impresario or to Mr. Clodfelter.

5 (Pause.)

6 MR. CLODFELTER: Mr. President, members of
7 the Tribunal, yesterday you heard Methanex's
8 version of events: Convoluted, conspiratorial, and
9 largely speculative, a version based on overreading
10 of thin evidence, giant leaps of inference,
11 nonexistent and meaningless admissions, and calls
12 for adverse inferences on such meritless grounds as
13 our determination that none of their witness
14 testimony merited cross-examination; a version
15 based, in part, on documents of suspect origin, the
16 first explanation of which we received for the
17 first time in three years just last week, and a
18 firsthand account of which we still await.

19 Methanex's version of events ignores the
20 fundamental facts surrounding California's decision
21 to ban the use of MTBE in gasoline. Therefore,

1 before we present our case-in-chief in response to
2 Methanex's arguments, we want to provide an
3 overview of some of those fundamental facts, which
4 are, by and large, undisputed.

5 With the aim of restoring a measure of
6 perspective to the California measures, one more
7 formerly rooted in what actually happened, I'll
8 cover three basic topics. First, I'll briefly
9 review the history of the use of MTBE as an
10 oxygenate additive in California gasoline. Second,
11 I'll outline the background of the problem of MTBE
12 contamination of California water supplies. And
13 finally, I will describe in somewhat greater detail
14 the measures that California took in response to
15 that contamination problem. Of course, additional
16 details of the factual record will be discussed
17 during our presentations of the legal issues.

18 Let's begin with how MTBE came to be used
19 in California gasoline. MTBE is a manmade chemical
20 compound made from ethanol and isobutylene. MTBE
21 is not methanol. MTBE is an ether; methanol is an

1 alcohol. MTBE is not even a version of methanol,
2 no more than water is a version of hydrogen. The
3 two chemicals are distinct and separate products,
4 with distinct and separate properties and molecular
5 structures. The method of combining them is a

6 complex manufacturing process.

7 MTBE came into use in the United States in
8 the 1970s. First, it was used as a source of
9 octane in gasoline to replace lead, which was being
10 phased out under Federal Government regulations
11 aimed at reducing air pollution. MTBE's use as a
12 fuel additive increased in response to amendments
13 documented in 1990 to the U.S. Clean Air Act,
14 amendments that required a higher oxygen content in
15 gasoline.

16 The 1990 Clean Air Act amendments created
17 two programs: The winter Oxyfuel program, and the
18 year-round reformulated gasoline program, or RFG
19 program. Both of these programs require that in
20 certain metropolitan areas with severe ozone or
21 carbon monoxide levels, gasoline must contain a

273

1 minimum of 2 percent oxygen by weight. Several
2 areas of California are subject to this
3 requirement, including Los Angeles, San Diego, and
4 Sacramento.

5 The Clean Air Act amendments do not
6 mandate which oxygenate additives must be used to
7 achieve the new higher oxygen level, but the United
8 States Environmental Protection Agency, the EPA,
9 does impose requirements for fuel additives. The
10 EPA requires fuels and fuel additives to satisfy
11 certain specifications relating to vehicle emission
12 standards.

13 In addition, as of 1994, fuel additives
14 above a certain baseline level are required to
15 undergo testing for health effects before they can
16 be used commercially.

17 In practice, ethanol has been the
18 principal oxygenate additive used in the winter
19 Oxyfuel program. MTBE has been the principal
20 oxygenate additive used in the RFG program. Now,
21 the greater Los Angeles area is the exception. It

274

1 uses MTBE, or has, for both the winter Oxyfuel
2 program and the RFG program.

3 Other oxygenate additives, including
4 additives known as TAME, ETBE, DIPE and TBA, have
5 been used little, if at all.

6 So, this is how MTBE came to be used in
7 California gasoline. It can fairly be said that
8 MTBE owes its very market existence to government
9 measures aimed at limiting the harmful effects of
10 gasoline use. But what was the effect of using
11 MTBE as an additive in California gasoline? That's
12 the second topic I want to review.

13 MTBE had two effects: First, it helped
14 reduce air pollution, at least in the earlier years
15 of its use. But as sometimes happens with complex
16 public policy decisions, MTBE also had an
17 unintended consequence; namely, that minute amounts
18 of gasoline containing MTBE polluted large volumes
19 of water to the point where that water was no
20 longer drinkable.

21 Inevitably, because of its widespread use,

275

1 gasoline sometimes spills and leaks into the
2 environment. Spills of conventional gasoline
3 generally do not threaten drinking water supplies
4 because the chemical components of gasoline
5 biodegrade or break down before they have time to
6 migrate into water resources.

7 Spills of gasoline containing MTBE,
8 however, do threaten drinking water. MTBE is
9 highly soluble in water. It travels through soil
10 rapidly. Compared to other components of gasoline,
11 MTBE is highly resistant to biodegradation.
12 Therefore, MTBE can, and does, enter sources of
13 public water even when other components of a
14 gasoline leak or spill do not.

15 Once in drinking water, MTBE gives the
16 water a foul taste and odor. MTBE-contaminated
17 well water smells and tastes like turpentine,
18 making it undrinkable. Even at relatively low
19 concentrations, MTBE's taste and odor can be
20 detected.

21 As can you see in my first slide, in

276

1 controlled studies, MTBE's taste is detectible at
2 levels as low as two parts per billion. MTBE's
3 odor is detectible at levels as low as 2.5 parts

4 per billion.

5 California law prohibits state public
6 drinking water agencies from delivering drinking
7 water with an MTBE concentration of over five parts
8 per billion, twice the level at which some people
9 can taste and smell it.

10 So, as you can see on this screen, five
11 parts per billion is the legal limit of MTBE in
12 California water. And as was pointed out
13 yesterday, the health limit in California is 13
14 parts per billion.

15 Unfortunately, California has experienced
16 some of the worst and most widespread MTBE
17 contamination in the United States. Let me give
18 you a few examples. The City of Santa Monica, a
19 city with a population of over 80,000 people, lost
20 half its drinking water supply when it had to close
21 contaminated wells in 1996. Some of those wells

277

1 had concentrations as high as 610 parts per
2 billion. Compare that to the five parts per
3 billion legal limit. As shown on the slide, that's
4 over 100 times the California limit.

5 In Glennville, California, contaminated
6 residential drinking water wells had concentrations
7 of MTBE of up to 20,000 parts per billion, 20,000
8 parts per billion. This proportion is shown in the
9 slide. That is 4,000 times the California legal
10 limit. And since 1997, Glennville has had to rely

11 on alternative sources of drinking water.

12 Another example: In a study published in
13 July 1999, it was determined that in Santa Clara,
14 California, underground fuel tanks that had been
15 upgraded to comply with California's then new
16 regulations continued to leak, resulting in MTBE
17 contamination of groundwater. Levels found there
18 were as high as 200,000 parts per billion, or
19 40,000 times the legal limit.

20 Well, there are many other instances of
21 such contamination. In the south Lake Tahoe area,

278

1 for example, the public utility district shut down
2 35 of its public drinking water wells due to MTBE
3 contamination. In Santa Rosa, California, a fuel
4 distribution company contaminated nine residential
5 and business wells resulting in the detection in
6 1999 of MTBE at concentrations as high as 240 parts
7 per billion in one of those wells.

8 In Los Gatos, California, it was
9 determined that the Loma Prieta Elementary School
10 had been serving trace amounts of MTBE to 400
11 school children.

12 Being forced to shut down water supplies
13 has not been the only problem, of course. Cleaning
14 up contaminated wells has proven to be a very
15 expensive undertaking in California. For example,
16 a treatment facility for just five MTBE
17 contaminated wells in Santa Monica has been
18 estimated to cost up to \$520 million.

19 So, the notion that public and official
20 concern about MBE was nothing more than hysteria
21 whipped up by ethanol producers is a fiction. MBE

279

1 contamination was found in public water supplies
2 throughout California. Mr. Pawlak will have more
3 to say about the incidence of such contamination.

4 Not surprisingly, California's government
5 took action, and the action taken to address the
6 MBE problem was is the third topic I want to
7 address this morning. This topic will take a
8 little longer in light of Methanex's presentation
9 yesterday.

10 First, in October 1997, California enacted
11 Senate Bill 521. There's a lot about this bill
12 that is relevant to Methanex's allegations,
13 beginning with the process by which it became law.
14 Notably, it was adopted unanimously; that is to
15 say, every member voting on it in both chambers of
16 the California Legislature from both political
17 parties represented in those chambers voted in
18 favor of enacting it. Not a single legislator of
19 the 114 voting members dissented. That kind of
20 bipartisan unanimity on any public policy measure
21 is extremely rare these days, in California or any

280

1 other state.

2 Moreover, the bill was signed into law not
3 by Governor Gray Davis, but by his predecessor,
4 Governor Pete Wilson, the same Governor who
5 Mr. Dugan told us yesterday opposed ethanol. Davis
6 was not even elected Governor until more than a
7 year later and did not take office for another 15
8 months.

9 Now, these facts about how Senate Bill 521
10 became law are significant because of what that
11 bill did. First, as can you see on the screen,
12 Section 2 of the bill stated that its purpose was
13 to provide what it termed a, quote, thorough and
14 objective evaluation of the human health and
15 environmental risks and benefits, if any, of the
16 use of methyl tertiary-butyl ether, MTBE, unquote,
17 compared to other mentioned additives.

18 To accomplish this purpose, Section 3(a)
19 of the bill appropriated \$500,000 to be used by the
20 University of California to carry out this thorough
21 and objective evaluation.

281

1 Now, that is not an extraordinary sum, to
2 be sure, but the Legislature knew what it was doing
3 by designating a state institution like the
4 University of California, since much of the work
5 would be conducted on the University's time by
6 faculty experts. So, the Legislature was able to
7 leverage the \$500,000 into a much more valuable
8 product.

9 Section 3(d) of the bill required that the
10 evaluation be peer reviewed and subject to public
11 hearings. In a key provision, Section 3(e) of the
12 bill required whoever was Governor when the study
13 and hearings were completed to make a
14 determination. First, as you can see on the
15 screen, that determination was to be based solely
16 on the conclusions and recommendations of the study
17 and the testimony presented at the public hearings.
18 The Governor could not consider other sources of
19 information, only the study and the testimony.

20 And second, the determination had to be
21 one of two listed alternative possibilities. The

282

1 two alternatives specified, as can you see, one,
2 and I quote, that on balance, there is no
3 significant risk to human health or the environment
4 of using MTBE in gasoline in this state, unquote.
5 Or two, and I will quote again, that on balance,
6 there is a significant risk to human health or the
7 environment of using MTBE in gasoline in this
8 state, unquote.

9 There were no other options. In essence,
10 the bill provided the Governor with a binary
11 choice, if you will. Either MTBE did not pose a
12 significant risk or it did. And whoever was
13 Governor, 10 days after the public hearings were
14 completed, had to choose one or the other
15 determination. It wasn't a free choice, remember,
16 since it had to be based solely on the report and

17 the testimony.

18 There were consequences, depending on
19 which determination was made. As can you see on
20 the screen, Section 3(f) of the bill required that
21 if the Governor made the second determination, that

283

1 MTBE did pose a significant risk, then, and I
2 quote, notwithstanding any other provision of law,
3 the Governor shall take appropriate action to
4 protect public health and the environment, unquote.

5 Now, it's true, as Mr. Dugan stated in
6 reply to Professor Reisman's question yesterday,
7 that Section 3(f) did not specify exactly what
8 action the Governor had to take. Mr. Dugan
9 suggested that he could have gotten by by doing as
10 little as banning two-cycle engines on surface
11 water. But that option is not even mentioned in
12 the bill. The only specific possible course of
13 action mentioned in Senate Bill 521 was to ban the
14 use of MTBE in gasoline.

15 As can you see on the screen, the very
16 next section of the bill, Section 4, provided that,
17 quote, If the sale and use of MTBE in gasoline is
18 discontinued pursuant to subsection F of Section 3,
19 unquote, the state under subparagraph A was
20 prohibited from relaxing requirements of MTBE and
21 was required to notify the EPA under subsection B.

1 Thus, discontinuance of MTBE use was the only
2 action mentioned in the entire bill.

3 So, that's the first thing that the state
4 did in response to the MTBE contamination problem.
5 It passed Senate Bill 521. That bill essentially
6 prewired the public policy decision on how to
7 handle MTBE. First, an objective study and
8 hearing, and then if the study and hearing gave
9 MTBE a thumbs up, the Governor could certify no
10 significant risk. But, if the study and testimony
11 gave MTBE a thumbs down, the Governor had no real
12 choice. He had to certify that there was a
13 significant risk. And in that case, he also had to
14 take action. And the only action contemplated
15 anywhere in the bill was a ban on MTBE use.

16 And what is even more significant, this
17 preprogrammed, almost mechanical process
18 either--leading either to no action or to a ban on
19 MTBE was the unanimous public policy choice of the
20 California Legislature and that supposedly
21 antiethanol Governor, Pete Wilson.

1 Well, the study was conducted, and in
2 November 1998 the University of California issued
3 the report required by Senate Bill 521. The UC
4 report comprised 17 independently prepared papers,
5 filling five volumes and spanning more than 600
6 pages. More than 60 highly credentialed

7 researchers authored the report.

8 PRESIDENT VEEDER: Just before we move on
9 with the report, can I take you back to the passage
10 you read in Section D, that's Section 2(d) of the
11 Senate Bill. And if you have it before you, but I
12 can read out the relevant words. It was the
13 deadline of the 1st of January 1999, the university
14 shall submit a draft report, and then upon
15 receiving the draft report, the Governor shall take
16 all of the following actions. Under (d)(1) he
17 transmits the draft report, without any alteration,
18 to two institutions for comments, and then he
19 issues a notice of intent to hold two public
20 hearings.

21 And if you look at the end of that

286

1 paragraph two, the draft report apparently becomes
2 a report, and then in E the Governor has to act
3 solely upon the assessment and report submitted
4 pursuant to the previous provisions.

5 There's nothing in this particular bill to
6 explain how the draft report becomes a report; is
7 that right? Or am I missing something?

8 MR. CLODFELTER: I believe that you're
9 correct, that the bill is silent on that, but I
10 believe that this process is known, and I do not
11 believe that the report was changed after the
12 assessment.

13 PRESIDENT VEEDER: We could come back to
14 it later. I don't want to interrupt you.

15 MR. CLODFELTER: I will just note one
16 thing. It's actually in Section 3(d) as opposed to
17 Section 2(d).

18 MS. MENAKER will give an answer to your
19 question.

20 MS. MENAKER: Thank you. After the draft
21 report was issued, then it could be revised based

287

1 on the peer review comments received, and also
2 based on comments received during the public
3 testimony.

4 MR. CLODFELTER: To continue,
5 Mr. President, the conclusions of the 60 highly
6 credentialed researchers in the UC report were
7 firm. First, MTBE's pollution-reducing benefits
8 had pretty much run their course. Reports stated,
9 as you can see on the screen, MTBE and other
10 oxygenates were found to have no significant effect
11 on exhaust emissions from advanced technology
12 vehicles. So, as the technology of automobile
13 engines advanced, the additives had less and less
14 pollution-reducing benefits.

15 The report concluded that the use of MTBE
16 in gasoline poses significant risks and costs due
17 to water contamination, and found that continued
18 use of MTBE would increase the danger of water
19 contamination. It's worth considering this finding
20 in full, and so with your indulgence, I'm going to
21 take the time to read that entire significant

1 finding, which you can see on the screen as well.

2 There are significant risks and costs
3 associated with water contamination due to the use
4 of MTBE. MTBE is highly soluble in water and will
5 transfer readily to groundwater from gasoline
6 leaking from underground storage tanks, pipelines,
7 and other components of the gasoline distribution
8 system. In addition, the use of gasoline
9 containing MTBE in motor boats, in particular those
10 using older two-stroke engines, results in the
11 contamination of surface water reservoirs. The
12 extent of MTBE contamination is discussed in more
13 detail in Section 5, but it is clear that we are
14 placing our limited water resources at risk by
15 using MTBE.

16 MTBE has been detected in several water
17 supply systems, which have shut down the
18 contaminated sources, resorting to alternative
19 supplies or treatment. Since both groundwater
20 wells and surface water reservoirs have been
21 contaminated, alternative water supplies may not be

1 an option for many water utilities. If MTBE
2 continues to be used at current levels and more
3 sources become contaminated, the potential for
4 regional degradation of water resources, especially

5 groundwater basins, will increase. Severity of
6 water shortages during drought years will be
7 exacerbated.

8 The report also found that the cost of
9 treating MTBE-contaminated water resources would be
10 enormous. And again, I would like to read the
11 entire finding, which you can see on the screen.

12 The cost of treatment of MTBE-contaminated
13 drinking water sources in California could be
14 enormous. In addition, the cost of remediating
15 underground storage tank and pipeline leaks and
16 spills could be on the order of tens to hundreds of
17 millions of dollars per year. There are other
18 significant costs to the economy, which may be in
19 the tens of millions of dollars per year, in terms
20 of monitoring of surface water resources for MTBE
21 and potential losses in recreational income to

290

1 surface water reservoirs that ban or restrict the
2 use of gasoline-powered boats. We believe that the
3 use of either nonoxygenated reformulated gasoline,
4 or ethanol as an oxygenate in CaRFG2 would result
5 in much lower risk to water supplies, lower water
6 treatment costs in the event of a spill of either
7 of these alternative RFG formulations, and lower
8 monitoring costs.

9 These were the report's principal
10 findings. The recommendations of the report were
11 equally as straightforward. To remedy the problem,
12 the report recommended the phasing out of the use

13 of MTBE in gasoline over the course of several
14 years. As you can see on the screen, the report
15 recommended rather than an immediate ban on MTBE,
16 we recommend consideration of phasing out MTBE over
17 an interval of several years.

18 In other words, the, quote, thorough and
19 objective evaluation, end quote, required by Senate
20 Bill 521, on the basis of which the Governor was
21 required to act, stated unequivocally that the

291

1 answer to the real and threatened problem of MTBE
2 use was to end its use as an oxygenate additive in
3 California gasoline.

4 The report had something to say as well
5 about switching to ethanol in lieu of MTBE. As
6 Mr. Dugan pointed out yesterday, the report's ninth
7 recommendation, which we have put up on the screen,
8 urged caution and further study before substituting
9 ethanol for MTBE in California gasoline. It did
10 not recommend the substitution of ethanol for MTBE.
11 It did not call for the establishment of a
12 California ethanol industry.

13 In fact, the report's second
14 recommendation called for the state to obtain a
15 waiver of the Federal requirement that RFG gasoline
16 sold in California have an oxygen content, a waiver
17 that would allow the use of RFG gasoline without
18 ethanol or any other oxygenate additive.

19 Public hearings were held on the draft UC

20 report in 1999. At those hearings, the report's
21 authors made presentations and government officials

292

1 and public citizens had an opportunity to ask
2 questions. Members of public also testified at the
3 hearing, several of them relating their firsthand
4 experiences with the negative effects of MTBE
5 contamination. In all, a majority of those
6 testifying supported the report's conclusions and
7 recommendations.

8 It should also be noted that the report
9 was peer-reviewed, as required by the U. S.
10 Geological Survey and the Centers for Disease
11 Control. Both agencies reviewed the report
12 favorably.

13 Now, what happened next could not have
14 been a surprise. You didn't have to be a weather
15 man to know which way the wind was blowing, and
16 Senator Burton did not have to be a seer to have
17 foreseen the upcoming action to ban MTBE use. It
18 was essentially preordained. Senate Bill 521,
19 signed by ethanol opponent Pete Wilson, directed
20 the Governor to follow the lead of the report and
21 the hearings. And the ethanol averse report itself

293

1 required a determination of significant risk. And
2 the bill and the report together left no serious

3 alternative to banning MIBBE use.

4 So, in the face of the UC report and the
5 hearings, Governor Gray Davis took action as Senate
6 Bill 521 required. A few weeks after the hearings,
7 Governor Davis issued the 1999 Executive Order.
8 First, the Executive Order made the determination,
9 as it had no choice but to do based on the UC
10 report and public testimony, that there was on
11 balance a significant risk to the environment from
12 using MIBBE in California gasoline.

13 Second, it directed the responsible
14 California agencies to develop a timetable for the
15 removal of MIBBE from gasoline. The Executive Order
16 directed that MIBBE be discontinued as soon as it
17 was feasible, but no later than the end of 2002.

18 Third, as the UC report recommended should
19 be done, the Executive Order required state
20 agencies to seek a waiver from the EPA of the
21 Federal RFG oxygenate requirement so that

294

1 California could use gasoline that met air quality
2 standards without using any oxygenate, including
3 ethanol.

4 Finally, the order directed state agencies
5 to prepare reports on the effects of using ethanol
6 as an oxygenate additive in gasoline.

7 Subsequently, as shown on the screen, as
8 you know, the state did seek a waiver from the EPA,
9 as the UC report recommended and as Governor Davis
10 directed. The Legislature also took further action

11 after the UC report was issued.

12 In October 1999 the Legislature passed,
13 and Governor Gray Davis signed into law, Senate
14 Bill 989. That bill imposed new requirements to
15 prevent leaks from underground storage tanks that
16 were more stringent in many respects than Federal
17 regulations. And it also required the responsible
18 state agencies to develop a timetable for the
19 removal of MTBE from gasoline at, quote, the
20 earliest possible date, unquote.

21 In response to this legislation, in June

295

1 2000, the California Air Resources Board
2 promulgated the reformulated gasoline Phase III
3 regulations, prohibiting the use of MTBE in
4 gasoline after December 31st, 2002.

5 The regulations also required reductions
6 in sulfur and benzene levels in California
7 gasoline. And in 2001, EPA denied California's
8 request for the oxygenate waiver.

9 In response, Governor Davis brought an
10 action in U.S. Federal court to challenge that
11 denial. In March of 2002, he also issued another
12 Executive Order, this one postponing the MTBE ban
13 for one additional year. The order noted that
14 insufficient ethanol supplies would lead to a
15 gasoline shortage if the ban went forward as
16 scheduled at the end of 2002. The California
17 reformulated gasoline Phase III regulations were

18 amended accordingly to postpone the ban until the
19 end of 2003.

20 And then again, as can you see on the
21 screen, last year the Ninth Circuit Court of

296

1 Appeals overturned EPA's denial of California's
2 waiver request, ruling that it was an abuse of
3 discretion not to grant the waiver. And California
4 has since renewed that request, which is now
5 pending.

6 Finally, the ban on MTBE use in California
7 gasoline took effect at the beginning of this year.

8 These, in short, are the undisputed facts,
9 and the story they tell about the ban on MTBE use
10 is impossible to reconcile with the story Methanex
11 would have you believe. Methanex's theory of a
12 conspiracy to harm foreign methanol producers is
13 contradicted at every turn by these facts, by the
14 real and widespread and persistent contamination of
15 California water resources by MTBE, by the fact
16 that the California Legislature passed Senate Bill
17 521 unanimously, and by the fact that that bill
18 left whoever was serving as Governor with little
19 choice but to do exactly what the 1999 Executive
20 Order did, in fact, do.

21 Methanex's theory of a conspiracy to

297

1 advance the cause of ethanol is also contradicted
2 by these facts, by the fact it was Governor Davis's
3 antiethanol predecessor who signed that bill into
4 law, by the fact that in recommending an MTBE ban,
5 the UC report also cautioned again a switch to
6 ethanol, by California's request for a waiver of
7 the EPA's oxygenate requirement for RFG gasoline,
8 and by California's continued pursuit of that
9 waiver in court, and even now after the MTBE ban
10 has gone into effect.

11 The real story of the MTBE ban is really
12 quite simple. Just seven years after MTBE came
13 into widespread use, California found itself
14 suffering serious problems with public water
15 contamination. It commissioned a major study of
16 those problems and was told by objective and highly
17 respected experts that the way to solve them was to
18 end the use of MTBE in gasoline. California did
19 this. Even as it sought to be relieved of the
20 Federal requirement to use any oxygenate additive
21 at all, including ethanol, in RFG gasoline.

298

1 We will have a lot more to say about the
2 proven facts in the case as we present our
3 case-in-chief in greater detail, but unless you
4 have questions now, I propose to turn the chair
5 over to Mr. Bettauer, who will introduce our
6 presentation on the legal issues in the case.

7 PRESIDENT VEEDER: We just have one
8 question, and I wonder if you could help us about

9 the Executive Order D-5-99 of the 25th of March,
10 1999.

11 And if you look at the third preamble
12 which refers to the findings and recommendations of
13 the UC report and public testimony, it continues,
14 and regulatory agencies, while MTBE has provided
15 California with clean air benefits because of
16 leaking underground fuel storage tanks, MTBE poses
17 an environmental threat to groundwater and drinking
18 water.

19 Now, at a later stage, could you just help
20 us identify what are the findings and
21 recommendations of the regulatory agencies there

299

1 described.

2 And the other question, you heard
3 yesterday Mr. Dugan make a point that this was an
4 Executive Order based upon an environmental threat.
5 And indeed, if you look at the fourth paragraph,
6 the certification or the finding by the Governor,
7 and this is the passage in quotes, is a reference
8 to the significant risk to the environment from
9 using MTBE in gasoline in California, and not to
10 the other phrase we saw in the Senate Bill health.

11 First of all, as regards to the latter, do
12 you accept that there is this distinction?

13 MR. CLODFELTER: Mr. President, we doubt
14 that there is a mutually exclusive distinction, and
15 environmental concerns subsume many public health

16 concerns, so we would not read too much into the
17 certification for environmental purposes and all as
18 excluding concern for the health effects.

19 With respect to your first question, I
20 believe the reference to regulatory agencies is the
21 reference to the peer review agencies which were

300

1 required to review the draft report and make
2 comments. But I also know that state agencies
3 appeared at the public hearings and offered
4 testimony, so that could be merely redundant of the
5 reference to public testimony.

6 The content of those recommendations we
7 will summarize and get to you in response to your
8 question later, if that's okay.

9 PRESIDENT VEEDER: Thank you. It's been
10 suggested by my colleagues this would be a good
11 time to break for coffee, but you are the masters
12 of the situation. Will this be a good time or a
13 bad?

14 MR. CLODFELTER: It's a good time.
15 (Brief recess.)

16 PRESIDENT VEEDER: Let's resume.

17 MR. BETTAUER: Thank you. Mr. President,
18 members of the Tribunal, you've now heard
19 Mr. Taft's introduction and Mr. Clodfelter's
20 summary of the facts. Since the United States will
21 have a number of presenters on each of the major

1 topics, I will intervene from time to time to draw
2 this together and to give you a brief overview of
3 how the parts of our presentation fit together.
4 Tomorrow, I will do the same at the beginning of
5 our presentation, and then we'll conclude the U.S.
6 first round presentation.

7 We now turn to our presentation on
8 jurisdiction. Our presentation will first address
9 the issue under Article 1101(1) left open by the
10 First Partial Award, whether Methanex has met the
11 requirement of that award to show that the ban of
12 the sale of California gasoline containing MTBE
13 relates to methanol producers like Methanex.

14 We will divide our treatment of this issue
15 into three parts. First, Mr. Legum will take the
16 floor. He will show that there is no evidence to
17 suggest that California intended to harm methanol
18 producers by banning MTBE. He will also
19 demonstrate that methanol does not compete with
20 ethanol in any sense relevant here.

21 Second, Mr. Pawlak will address the

1 scientific evidence in this case. He will show
2 that contrary to Methanex's arguments, the
3 scientific evidence supports California's action.
4 The record cannot sustain Methanex's contention
5 that science was a pretext for harming methanol
6 producers.

7 At this point, it will likely be time for
8 the lunch break.

9 The third point, the third part of our
10 presentation on this issue will be given by
11 Ms. Menaker. She will show that contrary to
12 Methanex's contention, the record does not support
13 Methanex's suggestion that the ban was intended to
14 provide a gift to the ethanol industry. Instead,
15 California's intent was precisely what it said it
16 was, to protect the state's groundwater resources
17 from a contaminant that made water undrinkable.

18 At the end of those three parts, I will
19 return to provide a brief conclusion to this part
20 of the presentation.

21 Mr. President, I now request that you call

303

1 on Mr. Legum.

2 PRESIDENT VEEDER: Thank you very much,
3 and we do, indeed, call upon Mr. Legum.

4 MR. LEGUM: Mr. President, members of the
5 Tribunal, I will now begin the United States's
6 presentation on the jurisdictional issue left
7 unresolved by the First Partial Award in this case,
8 whether the ban of MTBE relates to Methanex and its
9 investments, as required by NAFTA Article 1101(1).
10 My remarks this morning will be divided into three
11 parts. First, I will briefly review the holdings
12 of the First Partial Award and the limited
13 jurisdictional issue that the Award left for

14 resolution in this phase of the proceedings. I
15 will demonstrate that under the First Partial
16 Award, only a showing that the ban of MTBE was
17 intended to harm or at least address methanol
18 producers like Methanex could establish the legally
19 significant connection between measure and
20 investment that the Tribunal found to be lacking.

21 Second, I will examine the evidence of

304

1 record presented by the disputing parties on this
2 subject. I will demonstrate that the evidence in
3 no way suggests, much less establishes, that
4 California intended to get at methanol producers by
5 banning MTBE.

6 Finally, I will address the latest version
7 of Methanex's argument that methanol competes with
8 ethanol in the market for oxygenate additives in
9 California. I will show that the Tribunal already
10 rejected that argument in its First Partial Award
11 and that in any event, Methanex has failed to prove
12 any such competition.

13 I turn now to my first topic, a review of
14 the jurisdictional issue that the First Partial
15 Award left unresolved. Article 1101(1) of the
16 NAFTA, and this is my first slide, although I
17 suspect that everyone in this room has memorized it
18 by now, that Article delineates the scope of the
19 investment Chapter as follows: Quote, This Chapter
20 applies to measures adopted or maintained by a
21 party relating to investors of another party and

305

1 investments of investors of another party in the
2 territory of the party.

3 The First Partial Award found that the
4 measures at issue on their face did not relate to
5 Methanex or to its investments. The measures
6 banned the sale of California gasoline containing
7 MTBE. Methanex does not produce or market
8 California gasoline. It does not even produce or
9 market MTBE. Instead, it makes methanol.

10 While, as the First Partial Award noted,
11 methanol is a feedstock for the production of MTBE,
12 this fact was not sufficient to establish that the
13 ban of MTBE related to methanol producers as
14 required by Article 1101(1). But, as the Tribunal
15 noted, Methanex also alleged that even though on
16 its face the measures related only to MTBE,
17 California, according to Methanex, secretly
18 intended to harm methanol producers and marketers
19 by banning MTBE. The Tribunal held that if
20 Methanex could establish that the ban of MTBE was
21 really intended to address methanol producers, even

306

1 though this was not apparent on the face of the
2 measures for the facts alleged, then Methanex could
3 establish that the ban related to it and its
4 investments.

5 I'll turn to my next slide. Only this
6 specific showing could establish jurisdiction in
7 this case, as the Tribunal unambiguously held in
8 the operative part in the First Partial Award.
9 Only, quote, certain allegations relating to the
10 intent underlying the U. S. measures could
11 potentially meet the requirements of Article
12 1101(1).

13 And as the Tribunal explained in its
14 September 25, 2002, letter to the disputing
15 parties, which is my next slide, the Tribunal, and
16 I quote, has already decided that its jurisdiction
17 can exist only in respect of that part of the claim
18 alleging an intent underlying the U. S. measures to
19 benefit the U. S. ethanol industry and to penalize
20 foreign methanol producers such as Methanex, closed
21 quote.

307

1 I wish to highlight--

2 PRESIDENT VEEDER: Just before you move
3 on, what paragraph of that is in our letter?

4 MR. LEGUM: It appears at the bottom of
5 the slide that you have. It looks like paragraph
6 seven, from here.

7 PRESIDENT VEEDER: Proceed.

8 MR. LEGUM: I wish to highlight that in
9 rendering this ruling, the First Partial Award made
10 clear that the showing required was one concerning
11 intent to address methanol producers. The Award

12 made clear in its discussion at paragraphs 153 to
13 157 that a showing of intent to address or harm
14 MTBE producers and benefit ethanol producers would
15 not be sufficient. The proof required under the
16 Award, therefore, is proof that the intent
17 underlying the ban of MTBE was to address methanol
18 producers.

19 Mr. President, members of the Tribunal,
20 Methanex has not remotely come close to the
21 required showing. Reviewing the evidentiary

308

1 materials offered by Methanex on the measure's
2 supposed intent to harm methanol producers does not
3 take long, for there is little of it. Methanex
4 offers five pieces of evidence that, according to
5 it, show a link between the measures and Methanex
6 or methanol producers as opposed to MTBE or
7 ethanol. This is, under the First Partial Award,
8 the evidence on which Methanex's case hinges.

9 To review the materials highlighted by
10 Methanex as supporting this point is to confirm
11 that there is no substance to this allegation, and
12 it is to that task that I now turn.

13 The first material that Methanex offers to
14 show a specific intent to address methanol
15 producers is the testimony of Robert Wright.
16 Mr. Wright is a governmental affairs officer for
17 Methanex. In his November 2002 statement, he
18 recounts a conversation that he says took place in
19 January 1999. In that conversation, almost four

20 years before the date of Mr. Wright's statement,
21 unidentified persons recounted to him a

309

1 conversation they allegedly had with Senator John
2 Burton of the California Senate.

3 In that conversation, Mr. Wright says they
4 said Senator Burton said that he recommended
5 shorting Methanex's stock. The Senator also
6 supposedly gave his views on how likely it was that
7 the Governor would not find MIBE to be a risk to
8 drinking water, but that statement on MIBE could
9 not show an intent to address methanol producers in
10 any event.

11 Mr. Wright's testimony is entitled to no
12 weight for several reasons. First, it is hearsay
13 upon hearsay. International tribunals have
14 repeatedly declined to rely upon such statements,
15 as the United States demonstrated in paragraph 127
16 of the Amended Statement of Defense.

17 Second, although Methanex in its reply at
18 paragraph 37 attempted to shore up Mr. Wright's
19 testimony by offering two unauthenticated memoranda
20 written by unidentified persons to unidentified
21 persons a few days after the supposed conversation,

310

1 neither memo contains any reference to Senator
2 Burton's supposed remark about shorting Methanex

3 stock.

4 Far from confirming the reliability of
5 Mr. Wright's recollection of this conversation
6 about a conversation four years before, the
7 memoranda raised more questions about it.

8 Now, yesterday during the course of
9 Methanex's presentation, the President asked the
10 question about the word "your" in the two-word
11 phrase allegedly uttered by the Senator. The
12 President asked whether the use of that word in
13 that phrase could suggest a focus on Methanex or
14 methanol, and Mr. Dugan essentially replied yes.
15 Well, that does not appear to be the way that the
16 people who were there perceived that supposed
17 remark, at least according to the memoranda from
18 unidentified persons that Methanex has supplied.

19 This is my next slide from the first
20 memoranda, the one that Methanex referenced
21 yesterday in its presentation. That person in that

311

1 memorandum said, quote, Burton was perhaps the most
2 candid legislator to date, suggesting in only two
3 words that a phaseout was inevitable, closed quote.
4 This statement suggests that the Senator provided a
5 view on the likelihood of a ban, not on its impact
6 on MIBE producers, much less on methanol producers.

7 My next slide is the conclusion of the
8 second memorandum that Methanex supplied. Quote, I
9 think John Burton's comments accurately reflected

10 the general belief in the Legislature that MTBE
11 will be phased out within a fairly quick time
12 frame, closed quote.

13 Again, nothing in this statement suggests
14 that the impact of the ban on producers of MTBE or
15 methanol was the thrust of the Senator's remarks.
16 The supposed contemporaneous notes do not
17 corroborate Mr. Wright's statement.

18 My third point about Mr. Wright's
19 statement is that it supplies no context or
20 foundation for Senators' supposed statement about
21 shorting stock. Notably, it does not suggest that

312

1 the Senator understood what Methanex was, or,
2 notably, that it produced methanol rather than
3 MTBE.

4 Fourth, even taken at face value, Senator
5 Burton's supposed remark about shorting does not
6 show an intent to address methanol producers. At
7 best, the statement would suggest an understanding
8 that a ban of MTBE might have an impact on methanol
9 producers like Methanex. As the First Partial
10 Award makes clear, however, there is a world of
11 difference between a measure that affects a person
12 and a measure intended to harm or address a person.

13 Finally, and in any event, Senator Burton
14 was but a single government actor in a very large
15 government. He was one of 35 members of the
16 California Senate. As the Tribunal observed in its
17 First Partial Award, and this is my next slide,

18 it--

19 PRESIDENT VEEDER: I'm just querying
20 whether Senator Burton was an actor at all. If you
21 go to page 28 of Mr. Clodfelter's charts, where he

313

1 has the time line running from SB521 in 1997, to
2 the date when the ban went into effect, I think
3 Senator Burton was in the Senate and presumably
4 voted on SB521 with his colleagues. But after that
5 did he take any further part in the events that
6 followed, as a legislator?

7 MR. LEGUM: The next legislative action
8 was Senate Bill 989, which was enacted, my
9 recollection is, in November of 1989, but I could
10 be off by a few months.

11 PRESIDENT VEEDER: I see. So, he would
12 have taken part in--

13 MR. LEGUM: Did I say '89? '99.

14 PRESIDENT VEEDER: '99, November 1999,
15 Senate Bill 989.

16 MR. LEGUM: Yes, and I must say that we
17 have not gone back to looked at the records to see
18 whether he voted for or against that bill. There
19 were a few dissenting votes for that bill.

20 PRESIDENT VEEDER: We can take it he was a
21 still a member of the California Senate in November

314

1 1989?

2 MR. LEGUM: That is my understanding.

3 PRESIDENT VEEDER: I'm sorry, I'll get it
4 right one day. 1999. Thank you.

5 MR. LEGUM: Stuck in the eighties.

6 As the Tribunal observed in the First
7 Partial Award, it does not necessarily follow that
8 the views of a single governmental actor can be
9 attributed to the entire government. The evidence
10 must, as the Tribunal noted, prove such a thing.
11 Even if Senator Burton did think it wise to short
12 Methanex stock in early 1999, nothing suggests that
13 he influenced any relevant government body or
14 officer to act in accordance with that view.

15 In sum, Mr. Wright's statement does
16 nothing to advance Methanex's case.

17 The second piece of evidence that Methanex
18 relies upon is a single sentence published by the
19 U. S. Federal Environmental Protection Agency on
20 page 68,350 of the 1993 volume of the Federal
21 Register. The text in question is my next slide.

315

1 The publication proposed a rule that would
2 have required that 30 percent of reformulated
3 gasoline contain oxygenate additives produced from
4 renewable resources--renewable sources. U. S. EPA
5 predicted in 1993 that this proposed regulation
6 would have an impact on methanol producers, and
7 there is the statement that Methanex relies on.

8 Revenues and net incomes of domestic methanol
9 producers and overseas producers of both methanol
10 and MTBE would likely decrease due to reduced
11 demand in prices.

12 This piece of evidence does nothing to
13 show California's intent in banning MTBE over half
14 a decade later. First, nothing suggests that
15 California officials were even aware of this
16 sentence in this Federal notice from years before
17 the decision to ban MTBE. This Federal statement
18 says nothing about California's intent.

19 Now, in its motion on evidentiary matters,
20 Methanex argues that this is a conclusive admission
21 irrevocably binding on the United States. It is

316

1 nothing of the kind, and the authorities Methanex
2 cites to support the proposition do not support it.

3 Under U. S. law, which Methanex references
4 in its motion, a statement of a party opponent is
5 admissible evidence under an exception to the
6 hearsay rule. All this means is that it may be
7 considered by the trier of fact. It does not mean
8 that the statement has any special significance
9 beyond its ordinary context.

10 The two international authorities
11 referenced by Methanex address very different kinds
12 of statements, statements made in the realm of
13 foreign relations by the President or the Foreign
14 Minister of a country. That is not what we are
15 talking about here.

16 Putting it a slightly different way, the
17 United States, as a state in international law, may
18 be responsible for the acts of its subnational
19 government units, but that does not make the intent
20 or knowledge of one governmental unit attributable
21 to another unit. The issue here is California's

317

1 intent. This U.S. EPA statement sheds no light on
2 California's intent.

3 Second, as with the supposed Burton
4 statement, all this statement does is show an
5 understanding that the proposed regulation might
6 have an impact on methanol producers. It does not
7 even suggest that the Federal Government's purpose
8 was to address methanol producers, much less that
9 the California government had such a purpose.
10 Indeed, Methanex's reliance on this sentence
11 highlights a fundamental defect in Methanex's
12 approach. It's equating foreseeability with
13 intent. It may well be foreseeable, for example,
14 if I have a large dinner party at a restaurant
15 owned by a friend, that that will have a beneficial
16 impact on my friend's restaurant and a detrimental
17 impact on other restaurants of its class in the
18 city. That does not mean, however, that I intend
19 to act to the detriment of other restaurants in the
20 city by having dinner at my friend's restaurant.
21 Foreseeability may be necessary to a finding of

1 intent, but it is certainly not sufficient.

2 Moreover, as both of the submissions
3 amicus curiae here have pointed out, it is good
4 public policy for governments issuing regulations
5 to try to assess all possible consequences before
6 adopting a measure. Equating foreseeability and
7 intent, as Methanex suggests, could chill this
8 useful practice. Methanex's approach fails on
9 policy grounds as well.

10 The fourth--the third and fourth pieces of
11 evidence Methanex offers is a transcript of a 1992
12 interview that Dwayne Andreas gave on television
13 and a copy of a 1998 letter by Doug Vind. I note
14 that the Doug Vind letter is one of the pieces of
15 evidence admitted by the Tribunal de bene esse
16 subject to further order by this Tribunal.

17 Each of these materials briefly refers to
18 foreign methanol production, albeit in different
19 contexts. Dwayne Andreas was the Chairman of
20 Archer Daniels Midland, ADM, and is a relative of
21 Alan Andreas and Marty Andreas. Those two people

1 were present at the August 1998 dinner with
2 gubernatorial candidate Davis. Doug Vind is the
3 son of Richard Vind, who was also present at that
4 dinner.

5 Here is what Methanex's argument is.

6 Methanex argues based on these two statements,
7 that, quote, it is overwhelmingly likely, closed
8 quote, that at the August 1998 dinner with Gray
9 Davis, Dwayne Andreas and Richard Vind talked about
10 methanol and inevitably described it as a foreign
11 product. This argument is ill conceived for
12 several reasons.

13 First of all, neither of the speakers
14 whose prior statements Methanex references were
15 even present at the dinner. Dwayne Andreas was not
16 there. Doug Vind wasn't there, either.

17 Methanex is asking the Tribunal to
18 speculate that because these relatives of the
19 people who were there at the dinner had made
20 certain statements on two isolated occasions before
21 those people who were at the dinner must have said

320

1 something similar. This case, however, must be
2 decided on the basis of the evidence, not on
3 speculation.

4 The evidence that is of record, three
5 witness statements by people who were there,
6 unanimously confirmed that there was no discussion
7 of Methanex or methanol at that dinner.

8 Now, yesterday Methanex also showed slides
9 of statements concerning imported methanol by
10 various persons or organizations who also were not
11 at the August 1998 dinner. Citizen Action, which
12 was Tab 53 of the presentation yesterday, they
13 weren't at the dinner. Representative Jim Nussle

14 of Iowa--that's Tab 50--he wasn't there. Senator
15 Tom Daschle of South Dakota, Tab 51, he wasn't at
16 that dinner either. The record shows no connection
17 between any of these people and the California
18 measures at all. These additional statements add
19 nothing.

20 My second point is that in any event,
21 Methanex's whole premise concerning the August 1998

321

1 dinner is misconceived. Methanex's premise seems
2 to be that if constituents or supporters tell an
3 elected official their views on a subject, the
4 official necessarily becomes hypnotized and is
5 compelled to act in accordance with the views
6 expressed. This premise is supported neither by
7 the record nor by common sense. Elected officials
8 are constantly exposed to a wide range of views on
9 a variety of subjects. The mere fact that an
10 official hears any particular point of view says
11 nothing about whether the official will act in
12 reliance on those views.

13 Thus, the record does not support
14 Methanex's allegations that methanol was discussed
15 at the dinner, but in any event, the record does
16 not support the underlying notion that a candidate
17 like Mr. Davis is necessarily brainwashed by views
18 expressed by a supporter or constituent. I would
19 note that Andrea Menaker will have more to say on
20 the subject of the 1998 dinner when she addresses

21 Methanex's allegations of an intent to benefit

322

1 ethanol.

2 I'd now like to turn to the final piece of
3 evidence that Methanex relies upon, to support its
4 claim that California decision makers had methanol
5 in mind in banning MTBE. This is the conditional
6 prohibition of about a dozen listed compounds
7 subject to thorough testing for their impact on the
8 environment. One of the compounds listed was
9 methanol. Methanex argues that this separate
10 conditional prohibition shows that the absolute ban
11 of MTBE was intended to address methanol. The
12 record does not support this argument.

13 The Tribunal will recall that California's
14 actions here had essentially four components.
15 First, California thoroughly tested MTBE and found
16 it to pose a serious threat to the state's drinking
17 water resources. It, therefore, banned MTBE. That
18 ban is the measure alleged here to breach the
19 NAFTA.

20 Second, in order to ensure that it did not
21 repeat the mistake made by using MTBE without

323

1 sufficient testing in advance, California mandated
2 that no other oxygenate could be added to its
3 gasoline without the same thorough testing and

4 evaluation that MTBE had undergone.

5 Third, California thoroughly tested
6 ethanol and found that ethanol did not pose the
7 threat that MTBE did. It, therefore, did not ban
8 ethanol.

9 And finally, California sought a waiver of
10 the Federal oxygenate requirement so that
11 clean-burning gasoline not containing either MTBE
12 or ethanol could be used. It is California's
13 second action, the conditional prohibition of other
14 oxygenates, that Methanex points to as evidence
15 that California banned MTBE in order to get at
16 methanol producers.

17 I will make two points concerning this
18 prohibition. First, contrary to what Methanex
19 asserted for the first time yesterday, this
20 prohibition does not establish the legally
21 significant connection between measure and

324

1 investment that is otherwise lacking here. Second,
2 the prohibition does not show that California
3 intended to harm methanol producers by banning
4 MTBE.

5 My first point, the conditional
6 prohibition is not the measure that is at issue in
7 this case. The prohibition did not exist when
8 Methanex submitted its claim to arbitration. It
9 did exist in general form; that is, without the
10 definition that specifically listed 11 compounds.
11 It did exist in general form at the time when

12 Methanex submitted its amended statement of claim,
13 but Methanex made no reference to it.

14 The amendment, that's the one that
15 provided the definition that specifically listed
16 the 11 compounds, that was not in force when
17 Methanex submitted its second amended statement of
18 claim. Methanex has asserted no claim in this case
19 based on the conditional prohibition, and in its
20 reply Methanex made clear that the only measure at
21 issue for purposes of Article 1101(1) is the ban of

325

1 MTBE, and I would refer the Tribunal to the
2 discussion on this subject in paragraphs 199 to 202
3 of our rejoinder.

4 If Methanex had asserted a claim based on
5 the conditional prohibition, that claim would be
6 barred for the reasons set forth in our Amended
7 Statement of Defense at part six, which deals with
8 the new jurisdictional objection, which the
9 Tribunal will recall we withdrew in the rejoinder
10 on the understanding that Methanex was no longer
11 asserting that it had a claim to assert based on
12 the conditional prohibition.

13 In sum, the question of whether the
14 conditional prohibition relates to Methanex is not
15 before the Tribunal since there is no claim
16 asserted based on that prohibition. The only
17 question presented is whether the conditional
18 prohibition of these 11 compounds suggests that

19 California's purpose in banning MTBE was other than
20 what it said it was, and this is my second point:
21 The record supports no such suggestion.

326

1 The record clearly establishes that the
2 purposes of the MTBE ban and the conditional
3 prohibition were distinct. California banned MTBE
4 because scientific research showed that it was a
5 serious threat to drinking water resources. It
6 conditionally prohibited the use of these other
7 compounds because it did not know whether they
8 posed a risk to public health or the environment,
9 and did not wish to take the chance of using them
10 without testing them first. The purpose of the
11 conditional prohibition in no way suggests that
12 California banned MTBE to get at methanol
13 producers.

14 Second, the record is clear, and indeed
15 uncontradicted, as to California's reasons making
16 those 11 compounds subject to the conditional
17 prohibition.

18 This is my next slide. The reason was
19 simple. Those are the compounds listed in the
20 industry standard testing method that California
21 relied upon to detect the presence of relevant

327

1 compounds in gasoline. Methanol is included among

2 the compounds listed, as is ETBE, an ether made
3 from ethanol, and a number of other ethers and
4 alcohols that had not been thoroughly tested by
5 California.

6 My next slide shows that--

7 MR. DUGAN: Is there any evidence in the
8 record that supports that last statement? I know
9 you cited to this list of compounds, but the stuff
10 about the previous stuff, is there any evidence in
11 the record? If there is, I would just like the
12 citation to it, please.

13 MR. LEGUM: The citation to the record for
14 what proposition?

15 MR. DUGAN: The standard that this was an
16 industry standard for detection.

17 MR. LEGUM: Yes, Amended Statement of
18 Defense, paragraph 149, note 267, which quotes 14
19 JS Tab 19 at 540.

20 MR. DUGAN: I'm sorry, could you say that
21 one more time, because it's not on this slide.

328

1 MR. LEGUM: Amended Statement of Defense,
2 paragraph 149, note 267, quoting 14 JS, Tab 19, at
3 540.

4 MR. DUGAN: Thank you.

5 MR. LEGUM: Of the compounds listed, and
6 what we have on the screen is the list of 11
7 compounds that were included in the California
8 conditional prohibitions definition, of those
9 compounds, only four could legally be added to

10 gasoline under Federal law to satisfy the oxygenate
11 requirement. Those compounds are the three ethers
12 and TBA, which is tertiary butanol.

13 Again, nothing in this background suggests
14 that the intent behind the MTBE ban was to harm
15 methanol producers.

16 And finally, the inclusion of methanol in
17 that list of conditionally prohibited compounds had
18 no impact on methanol producers. This is because
19 methanol cannot legally be used as an oxygenate
20 additive to gasoline under Federal law, as Jim
21 Caldwell established in his undisputed witness

329

1 statement. Nor can methanol practically be so used
2 in today's automobile fleet.

3 Intent to harm methanol producers by a
4 different ban can hardly be inferred from a
5 conditional prohibition that had no impact on
6 methanol producers whatsoever.

7 Mr. President, members of the Tribunal,
8 that is it. We have just reviewed all of the
9 evidence offered by Methanex specifically to show
10 that California intended for the MTBE ban to harm
11 methanol producers. Just to recap, we reviewed
12 Robert Wright's uncorroborated double hearsay
13 statement that California Senator John Burton told
14 unidentified persons to short Methanex's stock. We
15 examined the single line in a 1993 U.S. EPA
16 publication that predicted an impact on methanol

17 producers from a different regulation proposed by
18 U.S. EPA at that time.

19 We considered Methanex's suggestion that
20 it was inevitable that methanol was discussed at
21 the August 1998 dinner because two relatives of

330

1 some of the persons at the dinner had once made
2 statements about methanol in the past. And we
3 reviewed the conditional prohibition of the use of
4 untested oxygenates as evidence of a secret intent
5 behind the MTBE ban.

6 All of the rest of Methanex's evidence
7 either deals with ethanol or with MTBE. My
8 colleague, Andrea Menaker, will address that
9 evidence in a little while, but my point here is
10 that none of that evidence addresses either
11 methanol or Methanex. It therefore cannot, by
12 definition, supply the showing of intent to address
13 methanol producers or Methanex required by the
14 First Partial Award. The United States
15 respectfully submits that the evidence we have just
16 reviewed does not even begin to overcome the
17 presumption of regularity of governmental acts that
18 attaches to the California measures as a matter of
19 international law. This failure of proof alone is
20 sufficient to compel dismissal of Methanex's claims
21 in their entirety.

331

1 Unless the Tribunal has any questions, I
2 would now like to turn to my second main point:
3 Methanex errs in suggesting that even though it has
4 no direct evidence that California intended to harm
5 methanol producers, the Tribunal should consider
6 its evidence on ethanol relevant because ethanol
7 and methanol compete as products in some sense
8 relevant here. I will show that this suggestion by
9 Methanex fails on legal and factual grounds.
10 First, I will show that this assertion of
11 competition is no different from that originally
12 pleaded by Methanex and rejected by the Tribunal in
13 the First Partial Award. I will also demonstrate
14 under this head of argument that the holdings of
15 the First Partial Award are final and binding and
16 not subject to reconsideration.
17 Second, I will demonstrate that the record
18 does not show the competition Methanex alleges in
19 any event.
20 Before starting, however, it's useful
21 briefly to recall the evolution of Methanex's

332

1 allegations of competition in these proceedings.
2 This is my first slide on this subject. A Keystone
3 of both Methanex's original Statement of Claim and
4 its Amended Statement of Claim was that methanol
5 was sold for use as a feedstock in the production
6 of MTBE.

7 As my next slide shows, similarly

8 important to its allegations in the amended
9 statement of claim was that those methanol sales
10 would be replaced by sales from allegedly competing
11 ethanol producers after the MTBE ban went into
12 effect.

13 Methanex's allegations of competition,
14 however, were based entirely on methanol's status
15 as a feedstock for MTBE production. It did not
16 dispute that MTBE and ethanol were the products
17 that directly competed with each other in the
18 market for additives to California gasoline.

19 My next slide shows the Tribunal
20 recognized these undisputed facts in the First
21 Partial Award. It recognized that, quote, Ethanol

333

1 is an oxygenate that competes directly with MTBE,
2 closed quote, whereas methanol is a feedstock for
3 MTBE, closed quote. These were among the
4 allegations that the Tribunal assumed to be correct
5 for purposes of its jurisdictional analysis. Yet
6 the Tribunal, and this would be my next slide, in
7 the First Partial Award found these allegations to
8 be insufficient to establish the legally
9 significant connection required by Article 1101(1)
10 between the MTBE ban, Methanex, and its
11 investments. Instead, the Tribunal found that only
12 part of Methanex's case could fall within its
13 jurisdiction, that part relating to the intent
14 underlying the MTBE ban.

15 Methanex's allegations concerning methanol
16 and ethanol sales did not comprise part of the case
17 that provisionally survived the First Partial
18 Award. The Award thus necessarily rejected the
19 notion that mere cross-elasticity of demand between
20 a feedstock, like methanol, and a downstream
21 product, like ethanol, could supply the legally

334

1 significant connection that was otherwise lacking
2 here.

3 Methanex, then in its fresh pleading for
4 the first time asserted that methanol directly
5 competed with ethanol. It asserted that methanol,
6 like MTBE and ethanol, could be added to gasoline
7 by itself to satisfy the oxygenate requirements of
8 the Clean Air Act. We have on the screen a sample
9 of one of Methanex's assertions to this effect. It
10 suggested that methanol therefore competed directly
11 with methanol and MTBE in the market for oxygenate
12 additives to gasoline. The United States
13 demonstrated in its Amended Statement of Defense
14 and accompanying witness statements and expert
15 reports that Methanex's new assertion was novel.
16 The witness statement of Jim Caldwell in Volume 13
17 of the joint submission of evidence showed that
18 methanol could not be legally used as an oxygenate
19 additive in the United States under Federal law.

20 The expert report of Bruce Burke in that
21 same volume showed that because of its particular

1 properties, methanol could be not practically be
2 added to gasoline to satisfy the oxygenate
3 requirement in today's conditions. Messrs. Burke
4 and Caldwell demonstrated that there was, and could
5 be, no competition between ethanol and methanol in
6 the United States.

7 In the face of this showing, Methanex, in
8 its reply, effectively withdrew its assertion of
9 direct competition between ethanol and methanol.
10 The reply no longer contends that methanol can be,
11 quote, splash-blended or otherwise mixed into
12 gasoline as an oxygenate additive in the United
13 States.

14 The reply narrowed its contention on
15 competition to one subcategory of the market, those
16 integrated refiners in California that own gasoline
17 refining, MTBE production, and gasoline
18 distribution facilities. It posited that because
19 such refiners would have previously bought some
20 methanol as a feedstock for MTBE production and
21 will now buy ethanol to add to gasoline, methanol

1 and ethanol therefore compete.

2 Now, Methanex's reply attempts to blur
3 this reality by arguing that methanol and ethanol
4 are both just ingredients used in the manufacture
5 of gasoline, but that is not what the record shows.

6 The record shows that there are two very different
7 kinds of oxygenated gasoline in use in the United
8 States today. One is gasoline containing MTBE.
9 The other is gasoline containing ethanol.

10 To put it in simple terms, methanol may
11 be, as a technical matter, part of the large class
12 of chemicals classified as oxygenates, but you
13 can't add it to gasoline. If you do at the levels
14 required to satisfy the Federal oxygenate
15 requirement, you will violate Federal law as shown
16 by the witness statement of Jim Caldwell, and you
17 will void the warranty of most cars on the market
18 in the United States, as shown by the expert report
19 of Bruce Burke.

20 The measures at issue here address
21 gasoline containing a specific oxygenate. That

337

1 oxygenate is MTBE. It is not methanol. Methanol's
2 only role is as a feedstock for MTBE.

3 We thus find ourselves having gone full
4 circle on Methanex's theory of competition. The
5 theory of competition advanced in Methanex's reply
6 is precisely the same as that advanced during the
7 jurisdictional phase. It is also, as I have shown,
8 precisely the same as that rejected by the Tribunal
9 in its First Partial Award.

10 Given this state of affairs, it is perhaps
11 not surprising that Methanex has requested the
12 Tribunal to reconsider the First Partial Award for

13 the terms of that award squarely disallow
14 Methanex's current argument on competition. I will
15 now, therefore, briefly address Methanex's request
16 for reconsideration.

17 PRESIDENT VEEDER: Just before you do
18 that, can we raise a question as to how you see the
19 nature of the exercise you've just gone through.
20 If this were a jurisdictional phase, we would be
21 looking at the Amended Statement of Claim for

338

1 Methanex, the so-called fresh pleading, and
2 adopting the approach that we outlined in the First
3 Partial Award based upon the ICJ's decision in the
4 oil platforms case. We would be making certain
5 factual assumptions in favor of Methanex, and on
6 the basis of those assumptions we might or might
7 not assume and exercise jurisdiction in regard to
8 the merits.

9 If we did assume jurisdiction on the basis
10 of assumed facts on the basis of a pleading only,
11 and we then got to the merits, we wouldn't then
12 make a decision to unmake our decision on
13 jurisdiction. The Tribunals tend, when they get to
14 the merits, decide the cases on the merits.

15 Now, in the procedure we've had to follow
16 in this case, what's the test on Article 1101? Do
17 we look at the fresh pleading and make certain
18 factual assumptions, or do we deal with it
19 essentially on findings of fact, on evidence that
20 we now have before us?

21 MR. LEGUM: I will give a provisional

339

1 answer at this time because I'd like to get the
2 views of my colleagues on this question, but my
3 understanding of where we are is that the Tribunal
4 has joined the jurisdictional issue to the merits,
5 and the Tribunal's decision will be based on
6 evidence of record on this issue as it is on other
7 issues; but I would like to visit that issue with
8 my colleagues, and perhaps we will have a more
9 educated answer after the lunch break.

10 On the subject of reconsideration, the
11 United States's position on this subject is set
12 forth in its letter of March 30, 2004. Under
13 Article 32(2) of the UNCITRAL Rules, the Tribunal's
14 award is final and binding and not subject to
15 reconsideration, as the first slide shows.

16 Methanex's first argument in response is
17 that Article 32(2) of the UNCITRAL Rules applies
18 only to final awards, not to interim or partial
19 awards. The United States demonstrated the error
20 of that view at some length in its March 30 letter.
21 I will only briefly recap our points here.

340

1 My next slide: Although paragraph one of
2 Article 32 separately references the final award
3 and interim interlocutory or partial awards, the

4 rest of the UNCITRAL Rules do not. By using the
5 generic term "the Award," Article 32(2) makes clear
6 that its terms encompass each of the species of
7 award referred to in Article 32(1).

8 Indeed, Methanex recognized that the First
9 Partial Award was an award within the meaning of
10 the UNCITRAL Rules by requesting interpretation of
11 it under Article 35(1). The text of Article 35(1)
12 is now displayed on the screen below that of
13 Article 32(2). Methanex's current position would
14 ascribe a different meaning to the same words, "the
15 Award," in different articles of the same rules.
16 Elemental principles of textual interpretation do
17 not support such an approach.

18 Moreover, the travaux preparatoires and
19 arbitral jurisprudence confirm that the UNCITRAL
20 Rules' reference to "the Award" includes partial
21 awards. Displayed on the screen is commentary on

341

1 the travaux for Article 32, which states that
2 paragraph one of that Article was included
3 precisely to make clear that the term "award" does
4 encompass partial awards, and the Iran-U.S. claims
5 Tribunal in the Ford Aerospace case expressly
6 addressed whether interim awards on jurisdiction
7 were final and binding within the meaning of
8 Article 32(2).

9 As shown in my next slide, the Tribunal
10 concluded that an interim award on jurisdiction,

11 quote, must be respected as binding law, closed
12 quote.

13 Now, Methanex had an opportunity in its
14 April 14th letter to address the points I have just
15 restated from our March 30 letter. It did not. It
16 made no response because there is no response.
17 Partial awards are clearly final and binding under
18 the UNCITRAL Rules.

19 The argument that does get considerable
20 attention in Methanex's April 14 letter is a
21 different one, that the Tribunal has the authority

342

1 to sit in judgment of a two-year-old challenge to
2 one of its own members and reconsider the Award on
3 the basis of Methanex's challenge. That argument
4 fails, as a matter of law and fact.

5 First, the law. Methanex points to no
6 provision in the UNCITRAL Rules authorizing other
7 members of a Tribunal to address a challenge made
8 to one member. The UNCITRAL Rules, in fact,
9 provide precisely to the contrary. Rules grant in
10 Article 12 the appointing authority an exclusive
11 role in deciding such challenges.

12 And my next slide shows that, as Jacomijn
13 van Hof notes in her discussion of the travaux
14 preparatoires to Article 12 in her commentary,
15 quote, The underlying principle of this Article is
16 that a neutral third party should decide a
17 challenge, closed quote. In fact, the drafters
18 specifically considered and rejected the notion

19 that challenges should be decided by the other
20 members of the Tribunal. Methanex's attempt to
21 ascribe such a role to the members of this Tribunal

343

1 is without support in the governing rules.

2 Second, contrary to Methanex's argument,
3 the UNCITRAL Rules expressly provide that no
4 negative inference may be drawn by the fact that an
5 Arbitrator withdraws after a challenge.

6 My next slide shows Article 11(3) of the
7 UNCITRAL Rules. That Article, as is clear from the
8 text, provides that no implication of acceptance of
9 the grounds for the challenge may be entertained.

10 Third, Methanex's claim that
11 Mr. Christopher was biased is without support in
12 any--in fact. My next slide shows Methanex's
13 argument. Quote, Mr. Christopher personally
14 pitched a case to Governor Davis after this case
15 had commenced, and Governor Davis personally
16 decided, over the objection of his Attorney
17 General, to award a lucrative representation to
18 Mr. Christopher's firm, closed quote.

19 My next slide shows what the record shows
20 in the form of Mr. Christopher's signed statement.
21 Quote, I did not make a personal appeal to the

344

1 Governor to obtain that representation for

2 O' Melveny over the opposition of the Attorney
3 General, and, indeed, I have never spoken to
4 Governor Davis about the case, closed quote. The
5 competent evidence of record provides no support
6 here, as elsewhere, for the charges Methanex
7 advances.

8 Methanex makes two other arguments on
9 consideration that I will address briefly. The
10 first is based on a single paragraph in its fresh
11 pleading of November 2002; that paragraph
12 complained about the reasoning of the First Partial
13 Award. It is now displayed on the screen in my
14 next slide.

15 Note that the statement--note the
16 statement which we have underlined that, quote,
17 Methanex does not seek to relitigate that decision,
18 closed quote. Methanex now contends that this
19 paragraph was an objection, to use their words,
20 that amounted to a request for reconsideration,
21 even though no reconsideration was requested

345

1 anywhere in that pleading.

2 My next slide shows Methanex's argument
3 quoted from their April 14 letter. I will pause
4 for a moment to allow the Tribunal to digest it.

5 Here is what they are arguing. Even
6 though Methanex did not ask for reconsideration,
7 even though the UNCITRAL Rules do not provide for
8 reconsideration, and even though the very paragraph

9 that they rely upon expressly says they don't want
10 to relitigate the First Partial Award, the Tribunal
11 should have, sua sponte, divined that this single
12 paragraph in their fresh pleading nonetheless was,
13 in fact, an attempt to relitigate the Award and
14 ruled upon it. And, they assert, the United States
15 waived any objection by similarly failing to
16 recognize that this single paragraph was a request
17 for reconsideration.

18 Merely to state this argument is to reveal
19 its lack of merit. It has become a familiar tactic
20 for Methanex to blame the Tribunal or the United
21 States for its own failure to press its case within

346

1 the limits set by the governing Arbitration Rules
2 and the Tribunal's order. The tactic is as
3 regettable as it is unmeritorious.

4 The final argument by Methanex in support
5 of the Tribunal's authority to reconsider the First
6 Partial Award is that neither disputing party
7 supports the legal standard adopted by the Tribunal
8 in that award. As the United States's rejoinder
9 makes abundantly clear, however, it is the United
10 States's view that the First Partial Award
11 correctly states the law on Article 1101(1). We
12 fully support the standard that was adopted.

13 There is, in sum, no support for
14 Methanex's assertion that the Tribunal has
15 authority to reconsider the First Partial Award.
16 That award is final and binding. Its reasoning

17 disposes of Methanex's claim that methanol as a
18 feedstock for MTBE competes with ethanol as an
19 additive to gasoline. That claim, therefore, is
20 without merit, as a matter of law.

21 Unless the Tribunal has any questions on

347

1 the subject of reconsideration or the finality of
2 the First Partial Award, I will move to my final
3 point.

4 Methanex has, in any event, made no
5 serious attempt to prove the competition it asserts
6 between methanol or ethanol in a market for
7 integrated refiners in California. The record
8 notably is silent on a number of points essential
9 to this assertion. First, the record does not
10 establish that there are refiners in California
11 that are integrated in the sense that the same
12 company owns refineries, MTBE production
13 facilities, and distribution terminals. What the
14 record does show is that those--that both the
15 physical structure of the California gasoline
16 distribution system and its ownership structure are
17 highly complex. There is no basis for assuming
18 here what the record does not show.

19 Second, the record does not establish that
20 there is a market with respect to any such
21 integrated refiners in which methanol and ethanol

1 can be considered to compete in an economic sense.
2 Notably absent here is the kind of comprehensive
3 economic testimony that is familiar in those
4 contexts, such as some competition law
5 applications, where it may be appropriate to
6 consider an upstream input for a product to compete
7 with downstream finished products. It is difficult
8 to take seriously Methanex's desire to engraft a
9 competition law approach onto the investment
10 chapter when that attempt is not accompanied by any
11 supporting economic evidence.

12 Third, what evidence there is merely
13 confirms that participants in the market view
14 methanol as no more than a feedstock with gasoline
15 containing MTBE and gasoline containing ethanol.

16 The single unsigned, undated contract with
17 one refiner that Methanex offers makes clear that
18 the methanol to be sold was for use in Valero's,
19 and I'm quoting the contract, production of or
20 demand for MTBE in California, close quote. And
21 the chart that Methanex offered yesterday at Tab 7

1 of its hearing book, the Tribunal will recall that
2 it was the one with lines for methanol and ethanol
3 that crisscrossed each other, that chart was based
4 solely on data for MTBE and ethanol, on data for
5 use of those two substances in California.

6 It is telling that Methanex--

7 ARBITRATOR REISMAN: Would you tell us
8 that again.

9 MR. LEGUM: It was at Tab 7 of Methanex's
10 hearing book yesterday.

11 The chart relied on data from a California
12 governmental study of ethanol, which is in the
13 record, and it also relied on a February 2004
14 document that is not in the record that is a
15 California government document addressing MTBE use
16 in California.

17 PRESIDENT VEEDER: Could you take your
18 criticisms of this a little bit more slowly.

19 MR. LEGUM: Oh, sorry.

20 PRESIDENT VEEDER: No, no, it's helpful,
21 but let's just look at Tab 7 that we had yesterday.

350

1 MR. LEGUM: I remember it fairly well.

2 PRESIDENT VEEDER: And it's entitled
3 Binary Choice, and the red line is marked ethanol,
4 but the blue line is marked methanol, not MTBE.

5 MR. LEGUM: That's correct. And if you
6 look at the source for that information, the source
7 is a study of ethanol, which is in the record,
8 there is a record cite for that, and then there is
9 a quarterly report on MTBE that is not in the
10 record, but there are earlier versions of that same
11 report that are in the record.

12 What Methanex did, as I understand it, is
13 they said, well, methanol is used as a feedstock
14 for MTBE, and there is roughly .34 units of

15 methanol for every unit of MTBE, so they've backed
16 out from the figures for MTBE how much methanol
17 would have been used as a feedstock to produce that
18 MTBE.

19 As I was saying, Methanex relied on data
20 for MTBE to arrive at this conclusion because it
21 couldn't find the document, it seems, that shows

351

1 comparative data for methanol and ethanol use in
2 the California gasoline market. That is because
3 methanol and ethanol are not seen by participants
4 to compete in that market.

5 Mr. President, members of the Tribunal,
6 the U.S. rejoinder details a number of other ways
7 in which the evidentiary record fails to support
8 Methanex's claim of competition in the market for
9 integrated refiners, but unless the Tribunal has
10 any further questions, I would propose now to turn
11 the floor over to Mr. Pawlak, who will address the
12 scientific evidence and its relevance to the issues
13 here.

14 PRESIDENT VEEDER: We have no questions at
15 this stage, Mr. Legum. It's now 12:20, and if
16 Mr. Pawlak wants to start now, he can start now, or
17 we can break and try to resume earlier.

18 MR. LEGUM: Time flew, and I think that we
19 should break now. So, we'll resume at what time?

20 PRESIDENT VEEDER: Let's break now and
21 resume, then, at 20 past two, but we may want to

1 bring our meeting forward by a few minutes if we
2 could meet at 10 to two on the tenth floor for the
3 matter which concerns us.

4 MR. LEGUM Thank you very much.

5 (Whereupon, at 12:22 p.m., the hearing
6 was adjourned until 2:20 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT VEEDER: Let's resume.

3 MR. BETTAUER: It is now Mr. Pawlak's
4 turn to continue on the relating to argument.

5 PRESIDENT VEEDER: Mr. Pawlak.

6 MR. PAWLAK: Thank you.

7 Good afternoon, Mr. President, members of
8 the Tribunal. As Mr. Bettauer mentioned this
9 morning, I will address the scientific evidence in
10 the record before you. As I will demonstrate,
11 there is no basis to question the soundness of the
12 science before the California officials that form
13 the basis for their decision to ban MTBE.

14 Before I begin, it is important that I put
15 my review of the science in its proper context.
16 The time that will be devoted to the science
17 underlying the MTBE ban during this hearing is
18 disproportionate to its relevance to the issues in
19 this case. In addition to my presentation today,
20 later in these proceedings, the Tribunal will hear
21 from four U. S. witnesses who have addressed the

354

1 science underlying California's decision. On
2 Friday, Drs. Anne Happel and Graham Fogg will be
3 present to respond to questions regarding their
4 respective expert reports on MTBE's contamination
5 of groundwater.

6 Also on Friday, the Tribunal is scheduled
7 to hear from Dean Simeroth of California's Air
8 Resources Board regarding air quality issues. On
9 Monday, economist Dr. Ed Whitelaw will testify
10 regarding the economics of the MTBE ban.

11 Despite the substantial time devoted to a
12 review of the science supporting the ban, the

13 United States reiterates its view that the
14 scientific record regarding the ban is, at best, of
15 very limited relevance to the issues before this
16 Tribunal.

17 Allow me to explain.

18 There is no dispute between the parties
19 that the UC report did, in fact, support the 1989
20 Executive Order's finding that MTBE posed a
21 significant risk to the environment. The

355

1 Governor's decision to request a timetable for the
2 phaseout of MTBE, therefore, was in full accord
3 with the scientific conclusions in the record
4 before the Governor's office.

5 We address here today the scientific basis
6 for the California measures only because Methanex
7 has alleged that California officials were secretly
8 out to get methanol producers, even though those
9 officials said they adopted the measures out of
10 concern over the MTBE contamination of California's
11 groundwater.

12 To maintain its theory, Methanex would
13 have to prove two theses: First, that the science
14 regarding MTBE before the decision makers was a
15 sham, a sham that merely covered up the secret
16 intent of the ban. And, second, that the Governor,
17 and other California officials knew that the
18 science was lacking foundation, but proceeded with
19 the decision to eliminate MTBE anyway. Methanex

20 has proven neither thesis.

21 As I will demonstrate, Methanex has not

356

1 established any basis to question the science of
2 the scientific conclusions. Similarly, Methanex
3 has not established any basis to question the
4 California decision makers' good-faith reliance on
5 those scientific conclusions in taking action to
6 protect California's groundwater.

7 During the next several minutes, I will
8 highlight the record on the scientific evidence.
9 In the first part of my presentation, I will
10 establish the bona fides of the UC report which
11 amply supported the decision to ban MTBE.

12 To conclude the first part of my
13 presentation, I will rebut the claim advanced by
14 Methanex that California improperly singled out
15 MTBE for regulation. In the second part of my
16 presentation, I will consider the reports offered
17 by the scientific experts. Those reports support
18 the conclusion that the MTBE ban was intended to
19 address water contamination.

20 Allow me to begin by considering the UC
21 report. Mr. Clodfelter, as you'll recall from this

357

1 morning, reviewed some of the findings and
2 recommendations of that report. I will revisit the

3 report explaining that there is no basis to
4 question its conclusions or findings.

5 I will also highlight in somewhat greater
6 detail some of the key findings in the UC report.
7 As we have heard, Methanex has not disputed that a
8 highly credentialed, multi-disciplinary team of
9 more than 60 tenured researchers authored the UC
10 report.

11 Nor does Methanex dispute that the UC
12 reports' authors worked independently and in good
13 faith in preparing 17 distinct papers that were
14 compiled in five volumes. Each of those papers
15 covered distinct issues relevant to the
16 determination of the severity of the threat posed
17 by MTBE to California's water resources. Methanex
18 nevertheless complains that the report was
19 underfunded, incomplete, and wrong on many critical
20 points. These complaints, none of which Methanex
21 has begun to prove, could not establish a finding

358

1 that the science underlying the MTBE ban was a
2 sham, much less that Governor Davis and many other
3 California officials knew of but ignored that fact.

4 In any event, for the reasons that I now
5 will explain, there is no support for Methanex's
6 assertions. First, several other highly respected
7 sources contemporaneously issued similar research
8 results and thus confirmed the good-faith nature of
9 the UC report. For example, if you will look to
10 the screen or turn to the slide numbered number

11 five in your packets, by July 1999, the United
12 States Environmental Protection Agency's Blue
13 Ribbon Panel on Oxygenates and Gasoline had issued
14 conclusions and recommendations similar to those of
15 the UC report. As you see on the next slide, so
16 too did the Northeast States for Coordinated Air
17 Use Management, also in 1999.

18 And in April 2000, Denmark's Environmental
19 Protection Agency added MTBE to its list of
20 undesirable substances, indicating its view that,
21 quote, Use of the substance should be limited as

359

1 much as possible, end quote.

2 The fact that these other esteemed
3 scientific research groups reached similar
4 conclusions confirms that the UC report was no
5 pretextual exercise.

6 Second, despite Methanex's assertions to
7 the contrary, other government agencies in the
8 United States widely praised the UC report. The
9 California Senate bill calling for the study of
10 MTBE, that is, Senate Bill 521, explicitly required
11 that appropriate federal agencies have an
12 opportunity to review and comment on the UC report.
13 Those agencies' comments became part of the public
14 record. Let me highlight a few of those comments
15 for you.

16 As you will see on slides eight and nine,
17 as well as on the screen at your right, the U. S.

18 Geological Survey, for example, congratulated the
19 University of California faculty on the UC report,
20 noting that it contains an impressive amount of
21 information and research that will prove useful in

360

1 addressing the complex issues associated with MTBE
2 use.

3 On the next pair of slides, we see that
4 the U. S. Department of Health and Human Services
5 stated that the UC report was very well written and
6 very thoughtful in its presentation of the most
7 currently available information. And on the next
8 slide we see that the Oak Ridge National Laboratory
9 reported that, quote, It is clear that the salient
10 references are cited and that detailed analyses
11 have been performed.

12 The reviews of the UC report, such as
13 those that I have highlighted here, make it clear
14 that its scientific conclusions were no sham.

15 Finally, Methanex's complaints that the UC
16 report was underfunded and incomplete provide no
17 basis for finding any violation of international
18 law.

19 International law does not set minimum
20 amounts that states must spend on scientific
21 research before science-based regulatory measures

361

1 may be adopted. Indeed, given the limited
2 resources available to many states, the approach
3 suggested by Methanex would effectively bar many
4 developing states from adopting measures to protect
5 the environment.

6 That is not, however, the law. In any
7 event, the amount appropriated for the UC report,
8 \$500,000, was far from insubstantial. Methanex
9 itself has not disputed that the funding for the UC
10 report was sufficient to address two principal
11 areas of inquiry, one, the human health impacts of
12 MTBE, and two, the environmental impacts and
13 benefits of MTBE.

14 More importantly, the report addressed the
15 problem of MTBE contamination in a systematic
16 manner. Substantively the UC report provided ample
17 scientific evidence supporting the ban of MTBE.
18 California officials were well aware that gasoline
19 containing MTBE was stored in volume underground,
20 in close proximity to water resources at tens of
21 thousands of locations throughout the state.

362

1 Allow me to highlight on the projection
2 screen at your right the record on these points.
3 If you would like to refer to your packet, page 14
4 of the packet is the first slide.

5 First, in 1998 and '99, the California
6 fuel supply consumed each day on average over 4.3
7 million gallons of MTBE. That daily volume of
8 consumption would fill more than five Olympic-size

9 swimming pools or about half of an oceangoing
10 supertanker.

11 Next, on slide 15, you see as of 1999,
12 California was home to more than 45,000 operating
13 underground storage tank systems, and by that I
14 mean tanks used as a source for refueling.

15 On the next slide, slide 16, it is clear,
16 that in addition, as of early 1999, just seven
17 years after widespread use of MTBE had begun in
18 California, MTBE had been shown to have polluted
19 groundwater and more than 4,000 underground fuel
20 tank sites. Allow me to take a minute to explain
21 what this slide represents. The dots on the map

363

1 reflect leaking underground fuel tank sites.
2 Leaking underground fuel tank sites are those that
3 were identified to have released gasoline into the
4 subsurface environment and thus became subject to
5 regulation and monitoring. The color coding of
6 these dots reflects the status of testing for MTBE
7 in groundwater at those leaking fuel tank sites.
8 And as you will see, the red dots represent the
9 4,000-plus tank sites where MTBE had been shown to
10 have polluted groundwater. These are actual
11 detections. As of 1999, nearly 10,000 leaking tank
12 sites had not yet even been analyzed for MTBE, and
13 that is reflected in the yellow dots.

14 Now, as you will see on the next slide,
15 more than 50 percent of those 4,000-plus leaking

16 tank sites were located within one-half mile of a
17 public drinking water well. Again, allow me to
18 explain this slide. The dots here, on slide 17,
19 reflect something different than they do on the
20 previous screen. Here, the dots represent public
21 drinking water supply wells. There are about

364

1 22,000 such public wells in California. The darker
2 red dots reflect a well that is within just
3 one-half mile of ten or more tank sites that leaked
4 MTBE into groundwater. Similarly, the lighter red
5 dots reflect a public drinking well within one-half
6 mile of four to nine tank sites that leaked MTBE
7 into groundwater.

8 In short, the point here on this slide is
9 a vulnerability analysis, as Dr. Fogg explains in
10 his expert reports. The arrival of just a fraction
11 of the known thousands of instances of MTBE
12 contamination to nearby water supply wells would
13 result in a serious drinking water contamination
14 problem for affected communities.

15 Finally, as Dr. Happel has explained in
16 her written testimony, despite California's strict
17 requirements for underground storage tanks,
18 upgraded underground storage tank systems were
19 continuing to leak. Additionally, again, as
20 reflected on the projection screen to your right,
21 or slide 18 in the packet, the UC report made it

1 clear to California officials what effect MTBE had
2 on the state's water resources and consumers. The
3 UC report stated: The taste of MTBE has been
4 described as objectionable, bitter, solvent-like,
5 and nauseating.

6 And in the next slide, the taste and odor
7 properties of fuel oxygenates in drinking water is
8 of primary importance to the consumers as well as
9 suppliers of drinking water. The report further
10 informed California officials that members of the
11 public may become worried or stressful over the
12 safety of contaminated water. For example, a
13 parent may be hesitant to use water with a strong
14 taste and odor for children because of safety
15 concerns. Subjective acute effects may result from
16 public reaction to the unpleasant taste and odor of
17 MTBE-containing drinking water.

18 As the United States has demonstrated in
19 its written submissions, as of January 1999,
20 California law prohibited its public water agencies
21 from delivering to consumers drinking water that

1 contains MTBE in excess of five parts per billion.
2 Five parts per billion is the equivalent of merely
3 one and one-half tablespoons in an Olympic-size
4 swimming pool. As the United States has also set
5 out in its written submissions, California
6 officials were aware that concentrations of MTBE

7 much greater than five parts per billion had been
8 detected in several areas of California.

9 For example, in a 1999 study, as we heard
10 briefly from Mr. Clodfelter this morning, the Santa
11 Clara Valley Water District detected MTBE at levels
12 as high as 200,000 parts per billion, and that
13 detection was in groundwater underneath gasoline
14 service stations that had already upgraded their
15 underground storage tanks to comply with
16 California's strict 1998 tank regulations.

17 Contrary to Methanex's suggestion
18 yesterday, a focus on upgrading underground storage
19 tanks would not have solved the MTBE problem. For
20 the record, I note that the Tribunal may find a
21 discussion of the Santa Clara study in Dr. Happel's

367

1 rejoinder expert report, 24 JS tab C at pages 10
2 and 11.

3 As U.S. experts Dr. Fogg and Happel
4 explain, California has seen only the beginning of
5 MTBE's impacts to groundwater. Recall that it was
6 only in 1992 that MTBE became widely used as an
7 oxygenate additive in California. As those impacts
8 are fully realized, increasing numbers of Santa
9 Clara and others throughout California risk finding
10 that water runs putrid every time that they take a
11 glass of water, wash their clothes, water their
12 lawns, boil their vegetables or bathe their
13 children. California's ban on the use of MTBE in

14 gasoline merely eliminated a source of future
15 additional MTBE contamination of California's water
16 resources.

17 Given the findings of the UC report, and
18 the consistent results from several other research
19 efforts that I highlighted a moment ago, the
20 Tribunal should reject Methanex's claim that
21 California singled out one contaminant among many

368

1 in its decision to ban MTBE.

2 To support its assertion, you'll note a
3 familiar slide from yesterday on the screen and at
4 pages 21 and 22 of your packet. This appears at
5 page 39 of Methanex's reply brief. Methanex relies
6 on this single table listing contaminants in
7 California groundwater to claim essentially that
8 California's adopting an MTBE ban without first
9 enacting a ban of other contaminants somehow
10 evidences that California improperly targeted MTBE.

11 Methanex is mistaken for several reasons.
12 First, California has acted to protect its
13 groundwater from benzene by imposing restrictions
14 on the benzene content of gasoline that are more
15 severe than those imposed by the Federal
16 Government. In addition, benzene is a fundamental
17 component of gasoline, whereas MTBE is not. As
18 expert witness Bruce Burke testified in his
19 rejoinder report, the complete removal of benzene
20 from gasoline would be cost-prohibitive.

21 Additionally, consider, for example, the

369

1 testimony on the screen at your right that was
2 presented to the California Senate in December
3 1997. This is at page number 23 of your packet.
4 Santa Monica's Director of Environmental and Public
5 Works Management testified to the California
6 Senate, quote, It is important to note that
7 benzene, which has been a constituent in gasoline
8 for several decades, is rarely detected in wells,
9 yet MTBE in a few short years of use has already
10 managed to knock out 71 percent of Santa Monica's
11 wells.

12 Dr. Anne Happel's expert report confirms
13 the findings now presented on the screen. As
14 Dr. Happel also confirmed, quote, Data from many
15 sources demonstrate that MTBE poses a risk of
16 contaminating groundwater, a higher risk of
17 contaminating groundwater than other gasoline
18 constituents, end quote. As a result, Methanex is
19 wrong to suggest that California somehow was
20 obligated to address other groundwater contaminants
21 in the same manner as it addressed MTBE.

370

1 Finally, even assuming Methanex had
2 established its assertion that California acted
3 against MTBE to the exclusion of other
4 contaminants--and, of course, it has

5 not--California could not be faulted. To do so
6 would preclude governments from responding to any
7 problem without responding to all problems of a
8 similar type. Methanex does not offer any
9 international law support for such a proposition.

10 In summary, there is no basis for
11 Methanex's claims that California officials somehow
12 improperly singled out MTBE. California officials
13 had ample reason to accept the soundness of the
14 scientific conclusions regarding MTBE that were
15 before them. No evidence even remotely suggests
16 that the science underlying the ban was a sham.

17 Allow me now to turn to the disputing
18 parties' scientific expert testimony. As I
19 mentioned, the Tribunal will hear from experts
20 Dr. Anne Happel and Graham Fogg, as well as Dean
21 Simeroth of the California Air Resources Board on

371

1 Friday and Dr. Ed Whitelaw next Monday. However,
2 as I mentioned at the outset of the presentation,
3 the disputing parties' scientific expert reports
4 are irrelevant to the question of intent before
5 this Tribunal. None of the California decision
6 makers had access to the expert reports when the
7 measures were adopted.

8 As was pointed out in a question put to
9 Methanex yesterday, even assuming Dr. Williams's
10 analyses are correct--and we submit that they are
11 seriously flawed--California was not acting on

12 Dr. Williams's analyses. It was acting on the
13 conclusions of the UC report and its related public
14 testimony.

15 The criticisms of the UC report, in the
16 report submitted by Methanex, shed no light,
17 therefore, on the motivations behind the challenged
18 measures. The reports of U.S. experts Dr. Fogg,
19 Happel and Whitelaw, as well as the statement of
20 Dean Simeroth, each demonstrate that the central
21 conclusions contained in the UC report were valid

372

1 and provided an appropriate basis for California's
2 action. Each responds in detail to the contrary
3 assertions and conclusions asserted by Methanex's
4 experts.

5 Dr. Fogg, our first witness, who I believe
6 will testify in the afternoon on Friday, is
7 Professor of Hydrogeology at the University of
8 California at Davis. He is one of the world's
9 leading authorities on the fate and transport of
10 contaminants in groundwater. Among his many
11 accomplishments, Dr. Fogg was the geological
12 Society of America's 2002 Birdsall-Dreiss
13 distinguished lecturer, which is awarded to one
14 hydrologist each year. Just a few years before
15 receiving that distinguished award, Dr. Fogg
16 completed his work as co-author of the UC report.

17 As Dr. Fogg stated in his December 2003
18 expert report, his, quote, general opinions and
19 conclusions regarding past, present, and potential

20 MTBE impacts on groundwater remain unchanged from
21 those that I presented in the UC report, end quote.

373

1 In this case Dr. Fogg's expert reports
2 make clear that Methanex's critique of the UC
3 report ignores the unique demands placed on
4 groundwater in California, with its desert climate
5 and exploding population. Dr. Fogg demonstrates
6 that thousands of public drinking water wells are
7 vulnerable to MTBE contamination. He also explains
8 that Methanex's experts ignore entirely the more
9 than 450,000--that is 450,000 private water wells
10 located in California. The UC report made clear
11 that private wells are even more vulnerable to MTBE
12 contamination than public wells, and those private
13 wells are generally not monitored in the California
14 Department of Health Services database, which is
15 analyzed by Dr. Williams.

16 It is Dr. Fogg's view that Methanex's
17 expert reports underestimate the MTBE problem.

18 Regarding MTBE remediation from
19 groundwater, Dr. Fogg's written testimony
20 concludes, quote, Cleanup of groundwater
21 contamination is difficult, costly, and sometimes

374

1 impossible, end quote.

2 Dr. Happel's written testimony concurs as

3 to the gravity of the MTBE problem. Dr. Happel
4 earned her doctorate from Harvard University, and
5 she will be here to testify on Friday. Prior to
6 her service, as just one of 14 members of the U.S.
7 EPA's Blue Ribbon Panel on Oxygenates, Dr. Happel
8 produced a ground-breaking study of MTBE while
9 serving as a tenured scientist at the Lawrence
10 Livermore National Laboratory. It is on account of
11 that study that Dr. Happel became a nationally
12 recognized expert on MTBE in California
13 groundwater.

14 Dr. Happel's Lawrence Livermore National
15 Lab research on MTBE was broadly supported. That
16 research was funded by, among others, the Western
17 States Petroleum Association and the American
18 Petroleum Institute. As Dr. Happel points out in
19 her expert report, her 1998 Lawrence Livermore
20 research served in part to inform California EPA,
21 and, in turn, Governor Davis's office regarding the

375

1 MTBE issue prior to the ban.

2 In this case, Dr. Happel's expert reports
3 detail California's role in leading the nation in
4 the regulation and testing of underground storage
5 tanks. Like Dr. Fogg, she confirms that even
6 upgraded, strictly monitored tanks could and do
7 continue to leak. Dr. Happel also addresses
8 Methanex's claims that MTBE contamination of
9 California groundwater is not widespread.

10 As you see up on your right, as well as on
11 slide 24 in your packet, by reviewing actual
12 California data, Dr. Happel finds that there are
13 nearly 10,000 sites reporting MTBE pollution in
14 groundwater. Based on that data, Dr. Happel
15 estimates that 10,000 to 15,000 leaking underground
16 storage tank sites have polluted groundwater
17 throughout California. Dr. Happel thus concludes
18 the extent and magnitude of MTBE pollution in
19 California's groundwater is indeed significant,
20 widespread, and worse than predicted by the UC
21 report.

376

1 The United States third witness is Dean
2 Simeroth of California's Air Resources Board.
3 Mr. Simeroth's written testimony rebutted
4 Methanex's claim that the ban of MTBE is suspect
5 because it will negatively impact air quality in
6 California. As Mr. Simeroth explained,
7 California's regulations required that the use of
8 ethanol-oxygenated gasoline not result in any
9 backsliding in California's emissions standards.
10 In its reply, Methanex did not dispute that its
11 earlier allegations of increased air pollution
12 associated with ethanol were erroneously based on
13 an analysis of gasoline that did not meet
14 California's specifications.

15 Dr. Williams's reply report stated, quote,
16 California's stringent air quality standards may,
17 in fact, prevent ethanol fuel blends from producing

18 negative air quality impacts. Methanex's
19 assessment yesterday of the increased air pollution
20 associated with ethanol use is not borne out by the
21 record.

377

1 The United States's fourth expert witness
2 is economist Dr. Ed Whitelaw. Dr. Whitelaw rebuts
3 Methanex's claims that the MTBE ban was not
4 cost-beneficial and, therefore, must reflect a
5 nefarious intent. He will testify on Monday of
6 next week. Dr. Whitelaw, Professor of Economics,
7 at the University of Oregon, earned his Ph.D. from
8 MIT in 1968. His reports in this case establish
9 that California's decision to ban MTBE is
10 consistent with the information available on costs
11 and benefits in 1999 and 2000. Dr. Whitelaw also
12 establishes the limitations of cost-benefit
13 analysis as a policy-making tool where policy
14 choices based on substantial unquantified or
15 non-monetized factors must be made.

16 In Dr. Whitelaw's rejoinder report he
17 reviews the substantial downside risks of the
18 continued use of MTBE that were recognized by
19 California decision makers prior to the ban.
20 Dr. Whitelaw then frames the question presented to
21 California officials this way, and you can look at

378

1 slide 26 or at the screen to your right, for the
2 excerpt from Dr. Whitelaw's rejoinder report: He
3 writes: Is the benefit of eliminating once and for
4 all the considerable uncertainty surrounding MTBE's
5 future ability to contaminate California's
6 groundwater assets worth the risk of increasing
7 gasoline prices by about three cents per U.S.
8 gallon. California, Dr. Whitelaw explains,
9 answered, yes, it is beneficial to eliminate the
10 risk posed by MTBE at a cost of a mere three cents
11 per gallon of gasoline. Dr. Whitelaw's reports
12 detail that California's decision was economically
13 wise and rational.

14 In summary, substantively there is no
15 question that the reports offered by the United
16 States's experts have rebutted those offered by
17 Methanex. The MTBE problem was no illusion.

18 Further, contrast Methanex's expert
19 submissions to those offered by the United States.
20 By its order of June 1, 2004, the Tribunal admitted
21 into evidence Methanex's reports that were the

379

1 subject of the United States's motion to exclude.
2 However, the many defects in Methanex's reports
3 remain, and those defects substantially diminish
4 their weight. Consider, for example, that
5 Dr. Williams's firm has been retained by Methanex
6 since at least 1989. Consider, also, that it is
7 principally Dr. Williams on whom Methanex has

8 relied, essentially, to claim that more than 60
9 professors who authored the UC report engaged in a
10 vast conspiracy.

11 The United States respectfully submits
12 that the Tribunal should take into account
13 Dr. Williams's failures of disclosure in assessing
14 the weight that is due the several reports authored
15 in whole or in part by Dr. Williams.

16 The submissions of Methanex's cost-benefit
17 analyst, Dr. Gordon Rausser, also are suspect. His
18 report in this case is virtually the same as one he
19 prepared for an MTBE producer in 2001. As you will
20 see on the screen, or on slide 28 in your packet,
21 Dr. Rausser, quote, accidentally included in the

380

1 Methanex report information based largely on the
2 earlier estimate of the costs of an MTBE ban in
3 California. He had prepared that estimate for the
4 MTBE producer.

5 A Federal Court recently held that
6 Dr. Rausser's testimony in support of other MTBE
7 interests on the economic impacts of a New York law
8 banning MTBE was, quote, speculative and has
9 insufficient evidentiary support, end quote.
10 Although the slide is not particularly clear there,
11 the one in your packet should make clear the
12 excerpt from Dr. Rausser's reply report.

13 PRESIDENT VEEDER: Just help us with the
14 reference there.

15 MR. PAWLAK: Certainly. That is from 20

16 JS--

17 PRESIDENT VEEDER: No, the one, the--

18 MR. PAWLAK: That is from 20 JS. That's
19 Dr. Rausser's report.

20 PRESIDENT VEEDER: If you could put the
21 slide up again.

381

1 MR. PAWLAK: Oh, certainly. There it is.

2 PRESIDENT VEEDER: Thank you very much.

3 MR. PAWLAK: There have been several other
4 courts that have rejected Dr. Rausser's testimony
5 as unreliable, speculative, and unsubstantiated by
6 the evidence. Similarly, Dr. Rausser's reports in
7 this case are due little, if any, weight.

8 In summary then, to the extent the
9 scientific expert reports have any relevance to the
10 question of California's intent in adopting the
11 MIBE ban, they support a finding that California's
12 intention was just what California officials said
13 it was, to protect Californians from a significant
14 threat to their water resources. Methanex's
15 competing reports do not begin to establish a
16 record on which this Tribunal could conclude that
17 California adopted the ban to target methanol
18 producers.

19 Before I conclude, I will address briefly
20 two additional points that Methanex raised
21 yesterday. First, I'll explain that Methanex's

1 reliance to the European Union's approach to the
2 MTBE issue is misplaced. Second, I will address
3 Methanex's statements of yesterday that there is no
4 credible evidence that MTBE poses a health concern.

5 First, the European Union. Contrary to
6 Methanex's suggestion, the European commission did,
7 in fact, find that, quote, There is a need for
8 specific measures to limit the risks, end quote, of
9 MTBE contamination of groundwater. Thus far, the
10 EU has taken a different approach to the recognized
11 threat of MTBE, based on that region's topography,
12 climate, population, and other factors. Europe's
13 approach says nothing about the appropriateness of
14 California's ban. The evidence of record
15 identifies the unique circumstances confronted by
16 California decision makers. For example, in dry
17 years, Californians can rely on groundwater for up
18 to two-thirds of their total water consumption.
19 With California's population expected to grow by
20 more than 30 percent by the year 2020, the state's
21 reliance on groundwater resources will increase

1 dramatically.

2 Moreover, Methanex is wrong in its claims
3 that, in some places in Europe, MTBE is used more
4 widely than in the U.S. Unlike U.S. legislation,
5 EU legislation does not mandate the use of

6 oxygenates in gasoline. In Europe, MTBE is used
7 primarily as an octane booster and at substantially
8 lower concentrations than it was used in
9 California.

10 Consider the graphic up at your right or
11 at page 29 of your packet. California's
12 consumption of MTBE amounted to almost double the
13 volume consumed by 16 European countries combined.
14 Further, Methanex's claim yesterday that Finland
15 uses MTBE, quote, at substantially higher
16 concentrations than the United States, end quote,
17 is not accurate.

18 Slide 30 in the packet as well as the
19 slide up at your right, makes this fact plain.
20 This figure is found in Dr. Fogg's expert rejoinder
21 report at 24 JS tab B, page 84. As you will see,

384

1 its average MTBE content of gasoline in Finland in
2 1997 was only 8.5 percent by weight. Finland's
3 range concentration is much greater than the 1.9
4 percent by weight, European Union average. In
5 contrast, the MTBE content in California gasoline
6 was about 11 percent by weight. So, clearly
7 Methanex's assertions yesterday are not correct.

8 Methanex has offered no basis to conclude
9 that California was required to address MTBE's
10 recognized risks to groundwater in the same manner
11 that European Union policy makers have decided to
12 address those risks.

13 Finally, allow me to turn now to address

14 briefly Methanex's claims that MTBE is neither
15 toxic nor carcinogenic.

16 Of course, it bears emphasis that
17 California banned MTBE principally because of its
18 threat to the potability of drinking water, not
19 because of findings that MTBE was toxic or
20 carcinogenic. However, yesterday Methanex was
21 asked to explain how California's primary maximum

385

1 contaminate level for MTBE of 13 parts per billion
2 squares with its statements that MTBE is not a
3 health threat.

4 In response, Methanex stated, among other
5 things, I would be willing to say, this is quoted,
6 I would be willing to say, there is no credible
7 evidence that anybody has gotten sick or adversely
8 affected by MTBE in the water, end quote. Methanex
9 reiterated. But, again, I don't think there is any
10 credible evidence that anyone has been adversely
11 affected by drinking water at this level, end
12 quote.

13 Contrast Methanex's assertions to the
14 views of the Board of Scientific Counselors to the
15 United States National Toxicology Program. For the
16 record, the Tribunal may find a set of the meeting
17 minutes of the Board that I will refer to at 25 JS
18 Tab 19 at page 3124. At the Board's meeting held
19 in December 1998, five out of 12 scientists with
20 one abstention on the National Toxicology Program's

21 Board of Scientific Counselors Voted to list MTBE

386

1 in their report on carcinogens as, quote,
2 reasonably anticipated to be a human carcinogen.

3 Similarly, a review committee for that
4 report at the National Institute of Environmental
5 Health Sciences voted four to three to recommend
6 listing MTBE in the report as reasonably
7 anticipated to be a human carcinogen. The Tribunal
8 may find this document in the record at 25 JS tab
9 19 at 3123.

10 Thus, contrary to Methanex's assertions
11 yesterday that there is no credible evidence that
12 MTBE has adverse health effects, recognized experts
13 in the field are divided as to whether MTBE may be
14 carcinogenic. In any event, there is no
15 requirement that a state deem a chemical to be
16 carcinogenic or even toxic before banning it. To
17 the contrary, California has every right to protect
18 itself by regulating chemicals that render water
19 undrinkable, even assuming their presence in water
20 do not result in other adverse health effects.

21 In short, Methanex's contentions on

387

1 toxicity are wrong, but they are also beside the
2 point. California's basis for the ban of MTBE was
3 its capacity to render water unpotable.

4 That concludes my presentation, and I
5 would now like to turn the floor over to
6 Ms. Menaker, who will address Methanex's assertion
7 that the purpose of the MIBE ban was to benefit
8 ethanol.

9 PRESIDENT VEEDER: Thank you very much
10 indeed. Ms. Menaker.

11 MS. MENAKER: Thank you.

12 Mr. President, members of the Tribunal, I
13 will now address the final portion of the United
14 States's arguments under Article 1101.

15 My colleagues have already demonstrated
16 that California did not intend to harm Methanex or
17 methanol producers when it banned MIBE in gasoline.
18 I will now show that California did not intend to
19 benefit ethanol producers when it adopted the ban.

20 As we have shown, it would be legally
21 irrelevant even if California did have this

388

1 purported intent. Methanol and ethanol do not
2 compete with each other in the gasoline oxygenate
3 market. Therefore, even if California had intended
4 to benefit ethanol producers, this Tribunal could
5 not draw the inference that it intended to harm
6 methanol producers like Methanex.

7 In any event, Methanex's assertion is
8 baseless. California did not enact the ban in
9 order to benefit ethanol producers. To the
10 contrary, the inference that Methanex asks you to
11 draw is belied by the undisputed facts in the

12 record.

13 I will first show how California's own
14 actions are inconsistent with an intent to benefit
15 ethanol. I will then address Methanex's suggestion
16 that this Tribunal should infer such an intent
17 based on the fact that Governor Davis attended a
18 dinner with certain persons involved in the ethanol
19 industry and accepted campaign donations from ADM
20 I will demonstrate that such an inference is
21 unwarranted. The purpose of the 1989 Executive

389

1 Order is clear on its face. I have placed the
2 pertinent language with which you are undoubtedly
3 very familiar by now on the screen, and this is
4 also slide one in the packet you have received.

5 The Executive Order states that the
6 Governor's decision was based on his determination
7 that, and I quote, MIBE poses an environmental
8 threat to groundwater and drinking water, end
9 quote.

10 Yesterday, Methanex argued that, and I
11 quote, It is the tendency of governments to use
12 environmental regulations as a pretense to dress up
13 what are actually other reasons for doing it, end
14 quote.

15 Methanex may have indicated one or two
16 examples where a Tribunal found that that was the
17 case. There is, however, no presumption that
18 governments tend to adopt pretextual regulations.

19 Methanex has it precisely backwards. The
20 presumption is that measures are not pretextual.
21 The Tribunal in its First Partial Award

390

1 recognized this when it stated that governmental
2 acts are entitled to a presumption of regularity.
3 The statement of purpose in the 1999 Executive
4 Order, along with the rest of the Executive Order,
5 therefore, is entitled to a presumption of
6 regularity. Methanex has offered no evidence to
7 overcome that presumption.

8 Methanex's argument that California's true
9 intent was to benefit ethanol finds no support in
10 the record. Contrary to Methanex's argument,
11 California did not rush to embrace ethanol. In
12 fact, rather than accept that ethanol would replace
13 MTBE in California gasoline, the Executive Order,
14 in accordance with the recommendation made in the
15 UC report, announced that California would seek a
16 waiver from the Federal oxygenate requirement.

17 I have placed the pertinent language from
18 the Executive Order on the screen, and that is also
19 slide two in your packet.

20 If granted, the use of ethanol in
21 California gasoline would substantially decrease.

391

1 The waiver request is inconsistent with any effort

2 to increase the use of ethanol in California. This
3 provision of the Executive Order demonstrates that
4 benefiting ethanol producers was not California's
5 intent in banning MTBE.

6 California has vigorously pursued this
7 waiver. Governor Davis wrote letters to the
8 Administrator of the United States Environmental
9 Protection Agency and to the President of the
10 United States urging that California's request be
11 granted.

12 When California's request was denied,
13 California filed suit against the U.S. EPA in
14 Federal Court. California's request is now under
15 consideration once again and is being pursued by
16 California with continued vigor.

17 Methanex has argued that even if the
18 waiver were granted, California gasoline would
19 likely still contain some ethanol. There is no
20 question, however, that a far smaller amount of
21 ethanol will be used than if the waiver were not

392

1 granted. That is why, as Methanex itself concedes,
2 and I quote from its Second Amended Statement of
3 Claim at paragraph 131, the U.S. ethanol industry
4 bitterly opposed the waiver, end quote.

5 If California's intent was to provide a
6 gift to the ethanol industry, it would not have
7 sought this waiver. And if California's intent was
8 to provide a gift to the ethanol industry, it would
9 not have continued to pursue this waiver after it

10 was initially denied. California's actions are
11 fundamentally at odds with Methanex's proposition
12 that California was motivated by an intent to
13 benefit ethanol producers.

14 California has done more than just seek a
15 waiver from the Federal oxygenate requirement. In
16 March of 2002, Governor Davis issued an Executive
17 Order directing the Air Resources Board to adopt
18 regulations postponing the ban on MTBE for one
19 year.

20 The Governor issued this order after the
21 United States Environmental Protection Agency had

393

1 initially denied California's waiver request. If
2 the ban were to have gone into effect as planned,
3 ethanol would have had to have been added to almost
4 all gasoline sold in California in order to comply
5 with the Federal regulations.

6 The Governor determined that mandating
7 such a large increase in ethanol supply in such a
8 short period of time would cause substantial price
9 increases, severe shortages in gasoline, and
10 economic havoc.

11 As you can see on the slide that I have
12 placed on the screen, in his press release
13 announcing the postponement, the Governor explained
14 his decisions as follows: He said, and I quote, I
15 am not going to allow Californians to be held
16 hostage by another out-of-state energy cartel, end

17 quote.

18 He was referring, of course, to the
19 ethanol industry. This statement dispels any
20 notion that Governor Davis was motivated by an
21 intent to benefit the ethanol industry.

394

1 Not surprisingly, ethanol proponents
2 soundly criticized the Governor's action postponing
3 the ban. The Renewable Fuels Association is a
4 national trade association for the ethanol
5 industry. It issued a press release denouncing the
6 decision. The RFA accused Governor Davis of
7 making, quote, a horrible decision for California,
8 end quote.

9 It characterized the postponement as--and
10 again, I have placed this quote on the screen and
11 also in your package--a callous breach of faith
12 with California consumers that want MTBE out of
13 their drinking water now. Gasoline refiners and
14 marketers that have invested to meet the original
15 deadline, and farmers across the country that have
16 added more than a billion gallons of ethanol
17 capacity to enable the timely transition away from
18 MTBE.

19 In fact, according to documents submitted
20 by Methanex, the Governor's action postponing the
21 MTBE ban resulted in an oversupply of ethanol that

395

1 consequently dragged down ethanol prices to
2 historic lows. While the ethanol industry
3 criticized the Governor's actions, the MTBE
4 industry, on the other hand, had lobbied for the
5 postponement and applauded the Governor's move.

6 Today, the MTBE ban is in effect in
7 California, and there is an adequate supply of
8 ethanol, and, yet, California is still seeking the
9 waiver. Methanex's proposition that Governor Davis
10 requested the waiver for political expediency is
11 not borne out by the undisputed facts in the
12 record.

13 Thus, contrary to Methanex's contention,
14 California did not rush to embrace ethanol. Before
15 accepting that ethanol would be accepted for use in
16 even larger amounts of California gasoline, the
17 1999 Executive Order directed the California Air
18 Resources Board, the State Water Resources Control
19 Board, and the Office of Environmental Health
20 Hazard Assessment to conduct studies on ethanol.
21 Those studies were peer-reviewed and presented to

396

1 the California Environmental Policy Council at the
2 end of 1999, before the regulation banning MTBE
3 went into effect. After public hearings, the
4 California Environmental Policy Council unanimously
5 approved of the report and passed a resolution. I
6 have placed language from that resolution on the
7 screen.

8 That resolution stated, and I quote, There
9 will not be a significant adverse environmental
10 impact on public health or the environment
11 including any impact on air, water, or soil that is
12 likely to result from the change in gasoline that
13 is expected to be implemented to meet the
14 California RFG3 regulations approved by the ARB,
15 end quote.

16 Nor were the amendments made to the Phase
17 III California reformulated gasoline regulations
18 that Methanex mentioned yesterday intended to
19 benefit ethanol. Mr. Dean Simeroth, who, as my
20 colleague, Mr. David Pawlak, mentioned, will be
21 testifying on Friday, and who is the Chief of the

397

1 Criteria Pollutants Branch of the California Air
2 Resources Board for the California Environmental
3 Protection Agency, explained in his first witness
4 statement that those amendments were intended to
5 provide refiners with maximum flexibility in
6 producing gasoline while subjecting that gasoline
7 to the same stringent emission requirements which
8 ensures that air quality benefits are maintained.
9 Mr. Simeroth's testimony refutes any alleged intent
10 on behalf of California to benefit ethanol
11 producers.

12 What does Methanex ask this panel to rely
13 on to reach a conclusion at odds with all of this
14 evidence and assume that California intended to

15 benefit ethanol producers? Two events. One is a
16 dinner that occurred in August 1998, and the other
17 is ADM's campaign contributions to Governor Davis's
18 election campaign. From these two quite ordinary
19 events, Methanex asks the Tribunal to draw the
20 following extraordinary inferences: First, that as
21 a result of certain remarks made at the dinner,

398

1 Governor Davis was persuaded to ban MTBE in order
2 to benefit ethanol producers. And second, that in
3 exchange for campaign contributions from ADM,
4 Governor Davis signed the Executive Order. There
5 is no basis to support such speculation.

6 I will first discuss the dinner and then
7 the campaign contributions.

8 My colleague, Mr. Legum, has already
9 discussed the August dinner and shown how it
10 provides no evidence to support Methanex's claim
11 that California's ban was intended to harm Methanex
12 or methanol producers. I will now discuss that
13 dinner again in light of Methanex's claim that the
14 dinner is evidence that Governor Davis intended to
15 benefit ethanol producers.

16 Methanex attempts to cast the August 1998
17 dinner in a sinister light by repeatedly referring
18 to it as the secret meeting. There was, however,
19 nothing secret about it. Yesterday Methanex
20 focused on the campaign form that I have placed on
21 the screen. As the Tribunal can see, this form is

1 a disclosure form for campaign expenditures. When
2 candidates spend funds that they have raised for
3 their campaigns, they have an obligation to
4 disclose how they are spending those funds. The
5 public can then confirm that campaign donations are
6 indeed being spent for campaign-related purposes
7 and not for private purposes. That is what this
8 form is. It discloses that Governor Davis used
9 some of his campaign funds to purchase an airplane
10 ticket to attend a meeting in Chicago to meet with
11 labor representatives.

12 PRESIDENT VEEDER: Before you move on, do
13 we know what the code name "T" means in the middle
14 column? It's my way of saying I don't know, but I
15 wondered whether you do.

16 MS. MENAKER: I don't know offhand,
17 although I can attempt to find out.

18 PRESIDENT VEEDER: Thank you very much.
19 My colleague says it may mean "T" for travel.

20 MS. MENAKER: That would be, I think, a
21 very good guess.

1 Methanex argued that while Governor Davis
2 disclosed his trip to Chicago to meet with labor
3 leaders, he did not disclose his trip to Decatur,
4 Illinois. This is simply untrue.

5 I have placed on the screen another slide.

6 Because this image was taken from a PDF image, it
7 may be difficult to read, although certainly the
8 one in your JS files is clear. This is a form for
9 reporting campaign donations received by the
10 candidate. Both monetary and in-kind donations
11 must be disclosed. In accordance with that law,
12 Governor Davis reported that he flew on ADM's
13 private plane, free of cost, from Chicago to ADM's
14 headquarters in Decatur, Illinois, on the evening
15 of the dinner. That is public information, and as
16 the Tribunal correctly noted yesterday, there is
17 absolutely no evidence that ADM denied meeting with
18 Governor Davis, nor is there any evidence that
19 anybody else denied the fact that the meeting had
20 occurred. There was nothing secret about this
21 dinner.

401

1 PRESIDENT VEEDER: Just pausing there, is
2 it right to go as far as you go? If you look at
3 the entry for Archer Daniels Midland and the
4 Decatur address, that relates to the full name and
5 address of the contributor. Where would you get
6 from this entry that this covered a flight from
7 Chicago to Decatur?

8 MS. MENAKER: Well, it took place on the
9 same day, it's on August 4, 1998, which is the same
10 day he was in Chicago, where he put in his expense
11 form for the meeting that he flew to, to attend
12 with labor representatives.

13 PRESIDENT VEEDER: You say reading them
14 together you'd be able to work out that he hadn't
15 taken a private plane to Chicago, he'd taken a
16 United Airways flight, and therefore, he must have
17 used the flight to go from Chicago to somewhere
18 else?

19 MS. MENAKER: Well, he would not--if he
20 had not taken a United Airlines flight or a public
21 carrier, he would not have had to have disclosed it

402

1 on his expenditures form, which is what he did for
2 the Chicago meeting. On this, this form indicates
3 that he received something by a contributor, and
4 what he received here was the use of a plane. So I
5 think that is a fair inference to draw, that he was
6 using ADM's private plane on the same day where he
7 was scheduled to be in Chicago, but nevertheless,
8 there is no requirement that candidates disclose
9 meetings that they hold with potential supporters.
10 All they need to disclose is contributions that
11 they receive, whether those contributions be
12 monetary contributions or in-kind contributions.
13 And here, the value that ADM gave him was the use
14 of the plane, which its fair market value was
15 considered to be \$2,400, which is why he needed to
16 make that disclosure, and I certainly think there
17 is nothing surprising about the fact that if he is
18 in Chicago, and ADM's headquarters are in Decatur,
19 and he is using that private plane, that he
20 traveled to Decatur on their private plane.

21 This was nothing more than a routine

403

1 dinner attended by a candidate with potential
2 supporters. As I said, Governor Davis was in
3 Chicago meeting with labor union representatives on
4 the date the dinner occurred. After his meetings
5 in Chicago, he flew to Decatur.

6 This was just one of innumerable meals
7 that the Governor attended while campaigning.
8 Press conferences are not held announcing events
9 like these, and no inference of wrongdoing can be
10 made on the basis that they occurred. Nor does the
11 discussion, the content of the discussion at that
12 dinner support the inferences that Methanex seeks
13 to draw.

14 First, no evidence supports the inference
15 that the focus of the dinner discussion was the
16 MBE problem, and that the Governor's decision was
17 influenced by anything said at that dinner. All of
18 the evidence in the record supports the opposite
19 conclusion. We have in the record the witness
20 statements of three persons who attended that
21 dinner. First, there is the witness statement of

404

1 Roger Listenberger, who was an ADM employee and who
2 will be cross-examined on Thursday.
3 Mr. Listenberger stated that ADM discussed its

4 presence in California, and that ADM's ethanol
5 business was only briefly discussed.

6 Mr. Listenberger testified that neither methanol
7 nor Methanex was discussed, and he recalled the
8 issue of MTBE arising only once, when he asked the
9 Governor whether he thought the issue might arise
10 in his campaign. Mr. Listenberger testified that
11 the Governor said no.

12 Second, Richard Vind, who was with Regent
13 International, an ethanol company, and who will
14 also be cross-examined on Thursday, also submitted
15 a witness statement. Mr. Vind testified that the
16 dinner conversation focused on Governor Davis's
17 campaign. He recalled that ADM's business was
18 discussed, but that neither methanol nor Methanex
19 was discussed. He had no recollection of MTBE
20 having been discussed.

21 Finally, Daniel Weinstein, who will also

405

1 be cross-examined on Thursday, submitted a witness
2 statement. Mr. Weinstein is with Weatherly Capital
3 Investments Group. He similarly recollected that
4 the conversation at dinner was a general one. He
5 recalled that ADM representatives talked about
6 their company and their business in California. He
7 did not recall any discussion of methanol,
8 Methanex, or MTBE.

9 Methanex has introduced no evidence to
10 call into doubt this testimony. It nevertheless

11 asks you to draw an inference at odds with this
12 evidence. According to Methanex, you should assume
13 that the conversation at dinner focused on ethanol
14 and how the Governor could support ethanol because
15 a majority of the attendees at dinner were involved
16 in the ethanol industry. This inference is not
17 only contrary to all of the evidence in the record,
18 it is based on an erroneous assumption.

19 In his statement, Mr. Vind identifies the
20 persons who he recalled being at the dinner. From
21 the list of attendees, it is apparent that despite

406

1 Methanex's repeated allegations, the majority of
2 the attendees were not primarily responsible for
3 ethanol-related matters. Mr. Vind, of course,
4 himself was involved in the ethanol industry at the
5 time.

6 As far as the ADM attendees were
7 concerned, however, only one attendee, Mr. Roger
8 Listenberger, could be described as someone whose
9 job focused on ethanol. The other attendees from
10 ADM were all senior officers whose responsibilities
11 spanned a wide range of ADM's business. These
12 people included ADM's Chief Executive Officer and
13 an ADM Senior Vice President.

14 In addition, the other attendee mentioned
15 by Mr. Vind, and that is Mr. Daniel Weinstein, has
16 no connection with the ethanol industry. At the
17 end of the day, that makes two persons, only one of
18 whom is from ADM, out of a total of six attendees

19 who could be said to be primarily in the ethanol
20 business. That is not by any count a majority of
21 participants.

407

1 It is not at all unreasonable that the
2 senior ADM executives who are responsible for many
3 aspects of ADM's business would speak generally
4 about ADM's business, and particularly about ADM's
5 presence in California when meeting with a
6 candidate for Governor of California. That accords
7 with the evidence in the record and is entirely
8 reasonable.

9 In any event, even if the dinner
10 conversation had focused on ethanol, or even if
11 MTBE, methanol, or Methanex had been discussed,
12 that would in no way establish the illicit intent
13 asserted. There is no requirement that politicians
14 be hermetically sealed off from the public. To the
15 contrary, politicians routinely interact with
16 members of the public and listen to what the public
17 has to say.

18 In fact, the record contains evidence that
19 just days before the Governor signed the Executive
20 Order, one of the Governor's top aides went on a
21 tour of Arco's refinery in California. Arco's

408

1 Chief Executive Officer also phoned the Governor to

2 defend the use of MTBE in California gasoline.
3 When asked to explain Arco's behavior, its lobbying
4 and public affairs manager was quoted as saying,
5 and I quote, The most important thing is we want to
6 be able to discuss these issues and get our views
7 on the table, end quote.

8 We all know that politicians are likely to
9 be exposed to various viewpoints. Arco's
10 interaction with the Governor's office demonstrates
11 this reality. The mere fact that an interested
12 party has expressed its views to a politician does
13 not give rise to any inference of impermissible
14 conduct.

15 I will now examine Methanex's hypothesis
16 that ADM contributed to Governor Davis's campaign
17 with the expectation that the Governor would take
18 action to benefit ethanol producers and that in
19 exchange for these campaign contributions, the
20 Governor directed that MTBE be banned from
21 California gasoline.

409

1 Of course, if Governor Davis had signed
2 the Executive Order explicitly or implicitly in
3 exchange for ADM's campaign contributions, that
4 would constitute a crime under U.S. law. Methanex
5 does not dispute this. Yet, Methanex has
6 repeatedly disavowed any claim that Governor Davis
7 committed a crime.

8 Herein lies an insurmountable

9 contradiction in Methanex's case. It is asking
10 this Tribunal to draw an inference that it can only
11 draw if it assumes facts that Methanex has conceded
12 are not existent. By conceding that Governor Davis
13 did nothing illegal, Methanex has conceded that the
14 Governor did not take any action in exchange for
15 donations or the promise of donations. If Governor
16 Davis was not influenced to sign the Executive
17 Order because of ADM's campaign contributions,
18 those contributions are completely irrelevant, and
19 indeed, that is the case. Even if Methanex were to
20 back away from its earlier concession, however,
21 there is no evidence in the record to support an

410

1 inference that Governor Davis was improperly
2 influenced by campaign contributions made by ADM
3 Methanex has relied principally on a
4 recent U.S. Supreme Court case, *McConnell versus*
5 *Federal Elections Commission*, to support the
6 inference it asks you to draw, and Methanex's
7 reliance is misplaced. As we explained in our
8 rejoinder, there are laws in the United States
9 regulating political contributions. The
10 legislative history of those laws show that
11 Congress found that political contributions created
12 a sufficient danger of corruption, as well as an
13 appearance of corruption, that regulation of such
14 contributions was justified.

15 The Supreme Court upheld the regulation at
16 issue in the *McConnell* case, finding that they did

17 not run afoul of U. S. constitutional protections
18 for free speech. Congress did not determine that
19 all campaign contributions were corrupting. It did
20 not outlaw all such campaign contributions. That
21 the possibility or appearance of corruption

411

1 justified regulation does not and cannot support a
2 finding that by virtue of making or receiving a
3 lawful contribution there is corruption.

4 Let me provide an analogy. Like campaign
5 finance, the field of securities is also highly
6 regulated in the United States. It would however,
7 be unreasonable to suggest that the mere fact that
8 the securities field is highly regulated is cause
9 for inferring wrongdoing with respect to any
10 particular sale of securities, especially where
11 there is agreement that all such regulations were
12 respected in relation to that sale. And that is
13 the case here. It is uncontested that the ADM
14 contributions in question complied with all
15 applicable U. S. laws.

16 Assume for the moment that Methanex's
17 premise were accepted. Under Methanex's theory, if
18 Governor Davis had reached a different
19 determination in the Executive Order, this Tribunal
20 would be justified and, in fact, compelled to find
21 that the Governor was improperly influenced by

1 Arco. After all, the record contains evidence
2 showing that Arco contributed approximately the
3 same amount as did Methanex to the Governor Davis's
4 gubernatorial campaign.

5 Excuse me, I'm sorry. The record contains
6 evidence--let me correct that--the record contains
7 evidence showing that Arco contributed
8 approximately the same amount as did Methanex--as
9 did ADM, excuse me, to Governor Davis's campaign.

10 Arco's CEO apparently called the Governor
11 just days before the Governor signed the Executive
12 Order to defend the use of MTBE, and one of the
13 governor's top aides took a tour of Arco's refinery
14 days before the Executive Order was signed. Under
15 Methanex's theory, this would mean that the
16 Governor had been improperly influenced by Arco.
17 Of course, such an inference would be unwarranted.
18 Equally unwarranted is the inference that Methanex
19 asks you to draw regarding ADM's influence over
20 Governor Davis.

21 The only so-called evidence of corruption

1 on Governor Davis's part that Methanex has
2 submitted are newspaper articles. All but one of
3 these articles are opinion pieces. No
4 international Tribunal nor competent domestic
5 court, for that matter, would or could base an
6 inference of wrongdoing solely on reports in

7 newspapers without any documentary evidence or
8 witnesses to corroborate any of the allegations
9 that might have been repeated in those reports.

10 All of the remaining evidence proffered by
11 Methanex relates not to Governor Davis, but to the
12 ethanol industry. This evidence is irrelevant.
13 Neither ADM, Regent, Richard Vind, nor the ethanol
14 industry in general is on trial here. Nor can the
15 United States be held responsible for ADM's,
16 Regent's, or Richard Vind's conduct.

17 In any event, Methanex's own arguments
18 only confirm California's good faith. Yesterday
19 Methanex repeated arguments previously made in
20 Mr. Wright's supplemental affidavit. Methanex
21 claimed that the ethanol industry was, and I quote,

414

1 involved with the manipulation of the public
2 opinion and the whipping up of the degree of
3 concern about MTBE that simply wasn't merited by
4 the facts, end quote. The fact that public opinion
5 supported the ban only confirms California's good
6 faith. As the United States noted in its Amended
7 Statement of Defense, it is legitimate and
8 unremarkable that elected officials take action in
9 response to public opinion. If the public believed
10 that its drinking water was endangered because of
11 MTBE contamination, and the Governor acted in
12 response to those concerns, that dispels any
13 illicit intent on Governor Davis's part.

14 Finally, even assuming for the sake of

15 argument that ADM did intend to improperly
16 influence Governor Davis, and there is no such
17 evidence here, that cannot bear on Governor Davis's
18 motivation absent evidence that, as I have just
19 demonstrated, is wholly lacking here. It is ironic
20 that Methanex's claim centers on the lobbying
21 activities and campaign contributions made by

415

1 Regent and ADM Methanex does not deny that it too
2 engages in lobbying. After all, it was Methanex's
3 lobbyists who were purportedly at the meeting with
4 Senator Burton on which Methanex relies.

5 Yesterday, Methanex also conceded that
6 after the UC report was issued, the methanol lobby,
7 and I quote, launched a vigorous lobbying campaign
8 to try to convince Governor Davis that the report
9 was wrong and that the ban on MIBE was the wrong
10 solution, end quote.

11 Methanol (sic) has issued memoranda
12 showing that its lobbyists held over 20 meetings
13 with California legislators, and it bears noting
14 that there is no indication that Methanex or the
15 methanol lobby or anyone else felt it was necessary
16 to publicly announce that those meetings were held.
17 Those meetings are no more or less secret than the
18 meeting ADM held with Governor Davis, and in
19 addition to its lobbying activities, the evidence
20 shows that Methanex has also made donations to U. S.
21 political parties. Yet--

416

1 PRESIDENT VEEDER: I thought it was an
2 offer to make? Did they actually make them? I
3 thought they had to repay the money?

4 MS. MENAKER: There is--they did have to
5 repay one of the contributions that was listed in
6 the article, but nevertheless they did make the
7 contribution. It was later deemed to be an illegal
8 contribution and was returned to them.

9 Yet, while attacking ADM's and Regent
10 International's legitimate activities and accusing
11 ADM of spying on its competitors, Methanex, at
12 best, hired individuals to sift through the garbage
13 dumpster behind Mr. Vind's office and salvage his
14 personal files, and it appears this was not done in
15 connection with any litigation, but rather was a
16 systemic effort to dig up dirt for use for
17 political advantage. I understand that the
18 Tribunal is going to schedule argument on whether
19 these documents should be excluded from evidence,
20 so I will defer making those arguments until that
21 time. I pause here only to note the tension

417

1 between Methanex's attacks on the U.S. political
2 system and the ethanol lobby's legitimate
3 activities and its own behavior.

4 Finally, it's important to keep in mind

5 that almost all of Methanex's allegations relate
6 solely to influence that ADM or the ethanol lobby
7 supposedly had over Governor Davis. As
8 Mr. Clodfelter noted this morning in his
9 presentation of the facts, Governor Davis did not
10 have a lot of discretion insofar as the MTBE ban
11 was concerned. Senate Bill 521 had been
12 unanimously passed by the California Legislature
13 and signed by the previous Governor in office.
14 That bill required the Governor to make one of two
15 determinations. Once again I have put this
16 language on the screen for you to look at. He
17 could decide, one, that on balance, there is no
18 significant risk to human health or the environment
19 of using MTBE in gasoline in the state, or, two,
20 that on balance, there is a significant risk to
21 human health or the environment of using MTBE in

418

1 gasoline in the state.

2 The bill required the Governor to make
3 this determination within ten days after the
4 completion of public hearings on the UC report.
5 Senate Bill 521, as you've heard, also required
6 that the Governor's determination be based on the
7 UC report, its assessment, and the public hearings.
8 You've just heard my colleague, Mr. Pawlak,
9 describe the recommendations of the UC report, as
10 well as the peer-reviewed comments and some of the
11 testimony that was offered at the public hearings.
12 It is undisputed that the UC report concluded that

13 there was a significant risk to human health or the
14 environment from using MTBE. Taking this
15 information into account, what would have been
16 surprising would have been if the Governor had come
17 to an opposite conclusion, at odds with the
18 recommendation proposed by the UC report.

19 Governor Davis's subsequent actions also
20 conformed with the expectations in Senate Bill 521
21 and the recommendations in the UC report. Methanex

419

1 argued yesterday that even if the Governor was
2 justified in making his determination, his action
3 banning MTBE was somehow unjustified. But again,
4 the facts are to the contrary. Senate Bill 521
5 directed the Governor to take appropriate action to
6 protect public health and the environment to the
7 extent he made the determination that MTBE did pose
8 a significant risk.

9 Immediately following Section 3, which
10 directs the Governor to take appropriate action,
11 the next two provisions evidence that the only
12 action envisioned by the Legislature that had
13 unanimously passed Senate Bill 521 was banning
14 MTBE. Those provisions state that if the sale and
15 use of MTBE in gasoline is discontinued pursuant to
16 subdivision (f), then the State shall not
17 thereafter adopt or implement any rule or
18 regulation that permits or requires the use of MTBE
19 in gasoline. The following provision similarly

20 states that if the sale and use of MTBE is to be
21 discontinued pursuant to subdivision (f), then the

420

1 Air Resources Board shall notify the Environmental
2 Protection Agency that MTBE will be discontinued in
3 the state.

4 In addition, the UC report concluded the
5 following, and I've also placed the language on the
6 screen, quote, We recommend consideration of
7 phasing out MTBE over an interval of several years,
8 end quote.

9 As you can see, insofar as his
10 determination was concerned, the Governor's
11 discretion was quite limited. He was required to
12 take action based on the UC report, its assessment,
13 and the public hearings. The determination he made
14 was consistent with the UC report's recommendation.
15 The action he took in response also accorded with
16 the expectations set forth in Senate Bill 521, as
17 well as with the recommendation of the UC report.
18 For this reason alone, the emphasis that Methanex
19 places on ADM's supposed influence over Governor
20 Davis is misplaced.

21 In conclusion, there is no evidence that

421

1 even suggests, never mind proves, that Governor
2 Davis intended to benefit the ethanol industry when

3 he made his determination that MTBE posed a risk to
4 California's drinking water. The Governor's
5 actions in seeking a waiver of the oxygenate
6 requirement and postponing the effective date of
7 the ban belie any supposed intent to benefit the
8 ethanol industry. Those actions were taken at the
9 same time by the same individual in relation to the
10 same problem and were harshly criticized by ethanol
11 proponents. In light of this evidence, and the
12 absence of any other evidence, it is not plausible
13 to conclude that the Governor intended to benefit
14 the ethanol industry.

15 Unless the Tribunal has any questions, I
16 would ask to turn the floor over to Mr. Bettauer.

17 PRESIDENT VEEDER: Just before we take a
18 break, Ms. Menaker, there is one thing we would
19 like to raise, and if you want to come back to this
20 question later, please do. But Governor Davis is
21 no longer an officer in the government of

422

1 California, he is a private citizen, and some very
2 harsh things are being said about him in these
3 proceedings to which he is not a party, and where
4 he is not legally represented. We understand that
5 he is not a witness being called by the United
6 States Government, but has he been approached or
7 advised that there is an opportunity for him to
8 give evidence if he were to be called by the United
9 States?

10 MS. MENAKER: If I may take a moment?

11 (Pause.)

12 MS. MENAKER: I can tell you that when the
13 Governor was Governor, we had spoken to the
14 Governor's office, not to the Governor personally,
15 but to individuals who worked in his office, and he
16 was not interested in participating. Since he has
17 left the governorship, we have not contacted him.

18 PRESIDENT VEEDER: Let's take a ten-minute
19 break, and then we will come back here at quarter
20 past four. But before that, we'll hear Mr. Legum.

21 MR. LEGUM: Would it be convenient for

423

1 Mr. Bettauer to give a short, a very short
2 conclusion--I retract that. Thank you.

3 PRESIDENT VEEDER: Having retracted that,
4 we will have a ten-minute break and come back at
5 quarter past four. Thank you very much.

6 (Brief recess.)

7 PRESIDENT VEEDER: Let's proceed.

8 MR. BETTAUER: Thank you, Mr. President
9 and members of the Tribunal.

10 I would like to briefly pull together a
11 few of the key points that have been made in the
12 last three presentations dealing with Article 1101.

13 First, you have seen that there is very
14 little evidence before the Tribunal concerning
15 methanol as opposed to ethanol and MIBE. None of
16 the evidence supports Methanex's assertion that
17 California intended to harm methanol producers by

18 banning MTBE. As Mr. Legum demonstrated, this
19 failure of proof by itself is fatal to all of
20 Methanex's claims.

21 Second, methanol and ethanol do not

424

1 compete with each other, in any sense, relevant for
2 the purposes of any ban of MTBE in California
3 gasoline. Methanol is, as this Tribunal observed
4 in the First Partial Award, a feedstock for MTBE.
5 Ethanol is a gasoline additive that directly
6 competes with MTBE. Methanol, unlike MTBE or
7 ethanol, cannot be added to gasoline to meet the
8 oxygenate requirements of the Clean Air Act. Under
9 the reasoning of the First Partial Award, and on
10 the evidence in this case, there is no relevant
11 competition between methanol and ethanol, period.

12 Third, Mr. Pawlak demonstrated that the
13 science on which the MTBE ban was based is, at
14 best, of tangential relevance to this case. There
15 is no dispute that the conclusions of the UC report
16 supported Governor Davis's finding, that MTBE posed
17 a significant threat to the state's drinking water
18 resources. The only way in which the science could
19 be relevant here is that if Methanex had
20 established that the science was a sham or a
21 pretext, and that the decision makers in fact knew

425

1 this. But the record does not remotely show any
2 such thing.

3 Fourth, Ms. Menaker showed that the record
4 does not support Methanex's assertion that
5 California intended to provide a gift to the
6 ethanol industry by banning MTBE. To the contrary,
7 the record shows that California took numerous
8 actions that were detrimental to ethanol interests,
9 including seeking a waiver of the oxygenate
10 requirement from the U.S. EPA, and postponing the
11 ban by one year. The evidence Methanex relies on,
12 the August 1998 dinner and campaign contributions,
13 do not show what Methanex says they show. Again,
14 the record establishes that the purpose of the ban
15 was exactly what California said it was, to protect
16 California's groundwater resources from a
17 contaminant that made water undrinkable.

18 In sum, the record simply does not sustain
19 Methanex's allegation that the MTBE ban was
20 intended to hurt foreign methanol and benefit
21 domestic ethanol. The measures did not relate to

426

1 Methanex or its investments. Methanex's claims do
2 not fall within the scope of Chapter 11, and they
3 do not fall within the scope of the U.S. consent to
4 arbitrate set forth in that Chapter. It is clear
5 there is no jurisdiction over this case.

6 We now turn to a different reason why all
7 of Methanex's claims should be dismissed. Methanex
8 has not demonstrated that it suffered any loss

9 proximately caused by the measure at issue. Again,
10 we will divide our presentation on this subject,
11 this time into two parts. First, Mr. Legum will
12 focus on the chain of causation in this case. He
13 will show that any effect on Methanex from the
14 measures at issue, if there was any effect at all,
15 is too remote to give rise to a cognizable claim.

16 Any impact on Methanex could only occur as
17 the result of the measures' effects on Methanex's
18 contractual counterparties under settled
19 international law, incorporated into the NAFTA.
20 This kind of remote effect through third parties
21 does not establish loss that can sustain a NAFTA

427

1 claim.

2 Second, Mr. McNeil will discuss the
3 allegations of loss that Methanex makes. He will
4 demonstrate that Methanex has failed to establish
5 any loss or damage at all within the meaning of
6 Articles 1116 or 1117 of the NAFTA. This lack of
7 evidence of any loss or damage is fatal to all of
8 Methanex's claims.

9 Mr. President, I now ask you to call on
10 Mr. Legum to begin our discussion of this part of
11 our presentation.

12 PRESIDENT VEEDER: Thank you,
13 Mr. Bettauer.

14 Mr. Legum.

15 MR. LEGUM: Thank you, Mr. President.

16 I will now address the chain of causation
17 in this case. I will demonstrate that the loss
18 alleged by Methanex is far too remote to be
19 recognized under applicable principles of
20 international law.

21 Methanex has at no point in the past four

428

1 years disputed the nature of the causal chain in
2 this case. The measure at issue regulates the sale
3 of California gasoline containing MTBE. There is
4 no dispute--and I have a little graphic going on
5 the screen there--there is no dispute that the
6 first link in this causal chain is the impact of
7 the measure on sellers of California gasoline, the
8 persons who are directly regulated by the measure
9 at issue.

10 Methanex's allegation is that these
11 sellers will, as a result of the ban, buy less MTBE
12 to use in the California gasoline that they
13 produce. Methanex alleges, and this is the second
14 link in the chain, that these decreased purchases
15 will create an adverse impact on producers of MTBE,
16 the second link, as I said before, in the causal
17 chain.

18 According to Methanex, the producers of
19 MTBE will manufacture less MTBE as a result of the
20 ban, and therefore, need to buy less methanol to
21 produce MTBE. This will, assuming that the supply

1 of methanol remains constant, according to them,
2 result in lower worldwide methanol prices. This is
3 the third link.

4 And finally, if worldwide methanol prices
5 did in fact decrease, that would have an adverse
6 impact on Methanex and its investments.

7 It is, therefore, apparent that the causal
8 chain in this case depends upon the impact of the
9 measures on suppliers, Methanex, to suppliers, MTBE
10 producers, to the persons directly regulated by the
11 ban, sellers of California gasoline. It is equally
12 undisputed that under established principles of
13 international law, a remote chain of causation
14 cannot give rise to state responsibility. The
15 United States collected numerous authorities to
16 support this proposition. At pages 16 to 30 of its
17 November 2000 memorial on jurisdiction and
18 admissibility.

19 Methanex has at no point in the
20 intervening four years, attempted to disprove the
21 principle of proximate causation recognized by

1 these international law authorities. If these
2 authorities apply to this case, then Methanex's
3 claims must be dismissed in their entirety under
4 the holding of these cases.

5 Now, while Methanex does not dispute the
6 principle, it does dispute the application of the

7 principle. It advances two arguments for the
8 non-application of the principle of proximate
9 causation. I will, with my remaining time today,
10 show that each of these arguments is without merit.

11 Methanex's main argument for
12 non-application of the principle is that NAFTA
13 Articles 1116(1) and 1117(1) dispensed with the
14 normal requirement of proximate cause by using the
15 word "by reason of," and the words that Methanex
16 highlights, "or arising out of a breach." The text
17 of Article 1117(1) is on the screen. The text of
18 Article 1116(1) is, for these purposes, identical.

19 Methanex concedes that the words "by
20 reason of" signify proximate causation, but it
21 argues based on municipal law cases in the

431

1 insurance context that the words "arising out of"
2 embody a different, more expansive approach to
3 causation, never before seen in international law.
4 This argument is without substance for several
5 reasons. First of all, it is international law,
6 not municipal insurance law, that governs this
7 case. Under international law, the phrase "arising
8 out of," or similar formulations, have repeatedly
9 been held to reflect a proximate cause standard.
10 The United States demonstrated this at pages 9 to
11 13 of its reply on jurisdiction three years ago.

12 The Algiers Accords provide one example.
13 As the Iran-U. S. Claims Tribunal has repeatedly and

14 unambiguously held, those accords use the words
15 "arising out of" to signal proximate cause.

16 Another example is the Mexico-U. S. General
17 Claims Convention of 1923, which use the words
18 "originating from" to the same effect as the claims
19 commission established by that treaty found.
20 Methanex has never offered a response to the United
21 States showing concerning these accords. This is,

432

1 we submit, because there is no response.
2 Now, Methanex does complain that under
3 this interpretation, "by reason of" means pretty
4 much the same thing as "arising out of." This
5 complaint, however, is without merit. Treaty
6 negotiators, particularly in the context of
7 negotiations among parties with different languages
8 and different legal traditions, treaty negotiators
9 often use equivalent phrases as "belts and
10 suspenders" to ensure that the desired concept gets
11 across. Articles 1116 and 1117 themselves provide
12 another example of such an approach. We have the
13 text on the screen in slide six. They use the
14 words "loss" or "damage." Now, if there is a
15 difference between "loss" or "damage"--loss and
16 damage for purposes of this provision, it is too
17 subtle for us to be able to perceive. "Loss" or
18 "damage," both words are used there in order to
19 signal in a clear way the same concept. There is
20 nothing incongruous about the NAFTA parties' use of
21 two equivalent expressions for proximate causation.

1 My second point is if ever there were any
2 doubt as to the NAFTA parties' intent to
3 incorporate the traditional standard of proximate
4 causation by the clause "by reason of" or "arising
5 out of," that doubt has been dispelled by the NAFTA
6 parties' submissions to this Tribunal in this case.

7 As Mexico notes in its fourth
8 submission--and we have the text on the screen
9 now--Mexico has expressly agreed that those
10 articles incorporate the standard of proximate
11 causation. And Canada, as demonstrated in slide
12 eight, has similarly stated its view that, quote,
13 The ordinary meaning of the words "by reason of" or
14 "arising out of," establishes that there must be a
15 clear and direct nexus between the breach and the
16 loss for damage incurred, close quote.

17 Under Article 31(3)(a) of the Vienna
18 Convention on the Law of Treaties, or to be more
19 precise, the rule of customary international law
20 reflected in that provision, such a subsequent
21 agreement on the interpretation of a treaty by its

1 parties shall be taken into account.

2 Finally, the only other NAFTA Tribunal to
3 address the question to date also reads Article
4 1116 and 1117 as reflecting a standard of proximate

5 causation. Slide nine shows a quote from the
6 Tribunal in the S. D. Myers versus Canada case which
7 in its award on damages concluded that, quote, The
8 breach of the specific NAFTA provision, must be the
9 proximate cause of the harm.

10 In sum, nothing supports Methanex's
11 assertion that NAFTA adopted a previously unknown
12 standard of causation. The overwhelming weight of
13 international claims authority, the unanimous views
14 of the NAFTA parties, and the only other NAFTA
15 Tribunal to address the question all agree.
16 Articles 1116 and 1117 incorporate the familiar
17 principle of proximate causation. That principle
18 compels dismissal of Methanex's case.

19 Methanex's second argument for
20 non-application of the principle of proximate
21 causation in no way changes this result.

435

1 Methanex's second argument is that its allegations
2 that California acted intentionally change the
3 equation. This argument fails on several levels.

4 First, as we demonstrated in our
5 presentation earlier today, the record in no way
6 supports Methanex's allegations that California
7 intended to harm or even address methanol producers
8 by banning MIBE. Methanex has failed to prove the
9 intent upon which this argument is premised.

10 Second, Methanex's own authority, the Dix
11 case, suggests that intentional harm is relevant to

12 the causation analysis only where it is directed
13 both at the claimant and at the specific harm
14 alleged. There is no evidence in the record
15 showing that California had Methanex in mind when
16 it adopted the ban, let alone that it specifically
17 intended harm to Methanex's goodwill or any of the
18 other losses alleged by Methanex. The lack of
19 proof of specific intent further defeats this
20 argument by Methanex.

21 Finally, even if Methanex could support

436

1 its intent allegations, which it has not, and it
2 cannot, that would not relieve it of the burden of
3 showing losses proximately caused by the breach. A
4 showing that a tortfeasor specifically intends an
5 indirect injury may allow a Tribunal to overlook
6 the indirect nature of the injury, but such a
7 showing in no way abolishes the rule that a loss
8 caused by the breach must be shown.

9 The NAFTA itself confirms that a showing
10 of loss caused by the breach is required. Slide
11 ten shows again the text of Article 1117. It
12 unequivocally requires a showing of, quote, loss or
13 damage and requires that that be, "by reason of" or
14 "arising out of" the breach. The text of the
15 treaty in no way supports Methanex's suggestion
16 that the universal requirement of proof of loss and
17 causation is suspended when a claimant alleges an
18 intentional breach.

19 Now, as I already noted, the record here

20 doesn't show intent to harm Methanex or to cause
21 the specific harm that's alleged. Under classic

437

1 principles of proximate causation, therefore, the
2 chain of causation is too indirect to impose state
3 responsibility, but, as my colleague, Mr. McNeil,
4 will demonstrate in a few moments, even if
5 Methanex's claims were not remote, they would still
6 fail for lack of evidence of any loss at all caused
7 by the breach.

8 I would like to conclude my presentation
9 by addressing Methanex's contention that the
10 undated, unsigned contract with Valero that I
11 referenced this morning establishes proximate
12 causation. It establishes precisely the opposite.
13 It is clear from that contract that the party
14 directly affected by a ban of the use of MTBE in
15 California gasoline would be Valero, the party that
16 produced California gasoline containing MTBE. It,
17 that is, Valero, would have a lesser demand for
18 MTBE as a results of the ban. Because it would
19 need less MTBE, it would buy less methanol as a
20 feedstock for MTBE production. Methanex, a
21 supplier of methanol, would be impacted by the ban

438

1 only as a result of its impact on its contractual
2 counterparty. This is precisely the scenario that

3 the international case law authorities collected in
4 our briefs have held not to satisfy the requirement
5 of proximate causation.

6 I have a quote from the Tribunal in the
7 Dickson Car Wheel case on the screen now which
8 summarizes the holding of these cases. Quote, A
9 state does not incur international responsibility
10 from the fact that an individual or company of the
11 nationality of another state suffers a primary
12 injury as the corollary or result of an injury
13 which the defendant's state has inflicted upon an
14 individual or company, irrespective of nationality,
15 when the relations between the former and the
16 latter are of a contractual nature.

17 I would note that paragraph 225 of the
18 Amended Statement of Defense provides a number of
19 other examples of cases directly supporting this
20 point.

21 The Valero contract is, if it were ever

439

1 signed, evidence of a contractual relation with
2 Methanex. The primary impact of the measure would
3 fall on Valero. Any impact on Methanex would only
4 be a corollary or result of the impact on Valero.
5 There is, under established international law
6 recognized by these cases, no international
7 responsibility here.

8 Unless, the Tribunal has any questions on
9 the causal chain or the principle of proximate

10 causation, I would turn the floor over to

11 Mr. McNeil.

12 PRESIDENT VEEDER: Thank you very much,

13 Mr. Legum. We have no questions at this stage. We

14 hand the floor to Mr. McNeil.

15 MR. MCNEILL: Thank you.

16 Mr. President, members of the Tribunal, as

17 Mr. Legum mentioned, I will be addressing

18 Methanex's failure to prove any loss or damage in

19 this case. I will demonstrate the record in this

20 arbitration lacks any evidence of any loss to

21 Methanex or its U.S. investments as a result of the

440

1 California ban.

2 This lack of evidence is easy to explain.

3 There is no loss. In fact, Methanex has repeatedly

4 told its investors and the public that it has not

5 been affected by the California ban. As recently

6 as February of this year, Methanex's CEO told

7 investors that the ban has, and I quote, really had

8 no impact on our industry. That is at 25 JS tab 2,

9 and I will return to that later.

10 Even without these admissions of no loss,

11 it is clear from the factual record in this case

12 that Methanex and its U.S. investments have not

13 been adversely affected by the ban. The record

14 shows that Methanex's methanol plant in Fortier,

15 Louisiana, was closed before the ban was even

16 announced and was kept idle for economic reasons

17 having nothing to do with the ban. The record also

18 shows that Methanex's marketing operation in
19 Dallas, Texas, Methanex-U.S. suffered no loss of
20 goodwill or market share as a result of the ban,
21 and was, in fact, a thriving and profitable

441

1 operation during the relevant period.

2 The record showing an alleged decline in
3 Methanex's exports from Canada to California
4 occurred years before and was unrelated to the
5 California ban, and in any event, is not a claim
6 that can be submitted under the investment chapter
7 of the NAFTA.

8 And finally, the record shows that a
9 temporary decline in Methanex's stock price, long
10 prior to the ban taking effect, is not attributable
11 to the ban, but more importantly, cannot be a legal
12 matter--cannot as a legal matter serve as the basis
13 for a claim of loss to the corporation. Methanex's
14 failure to prove any loss or damage caused by the
15 measures requires dismissal of all of its claims.

16 I will briefly review the requirements
17 under the NAFTA. I will then review Methanex's
18 admissions that it has no loss. Finally I will
19 demonstrate that each of Methanex's damage claims
20 with respect to its investments, with respect to
21 Methanex-Fortier, Methanex-U.S., and also with

442

1 respect to its stock price, fail for lack of
2 evidence.

3 First, let's look at the requirements
4 under the NAFTA. Kindly draw your attention to the
5 first slide. NAFTA Articles 1116 and 1117 require
6 as an element of a claim that an investor
7 demonstrate that it, quote, has incurred loss or
8 damage by reason of or arising out of an alleged
9 breach. The text, you will notice, is phrased in
10 the past tense. It requires that a claimant
11 produce evidence of an existing loss. As one NAFTA
12 Tribunal has held the failure to produce evidence
13 that an actual loss has been incurred is fatal to a
14 claim of liability. In ADF versus United States,
15 the Tribunal dismissed certain of ADF's claims
16 because the claimant failed to produce any evidence
17 that it had incurred an actual loss.

18 As here, the quantum of damages was
19 reserved for a later phase in the proceedings. And
20 that case is at Tab 2 in the U.S. Amended Statement
21 of Defense. As I will demonstrate, the same result

443

1 is called for here.

2 I will now address Methanex's statements
3 to its shareholders and to the public that it has
4 suffered no loss from the California ban. The
5 first example is from Methanex's earnings
6 conference call for the second quarter 2002.
7 Kindly draw your attention to the screen.

8 As you can see in that call, Methanex's
9 CEO, Pierre Choquette, stated that, quote, We don't
10 expect the impact of this change--referring to
11 California refiners no longer purchasing
12 methanol--to have much of an impact on pricing, if
13 any at all--and by "pricing," Mr. Choquette was
14 referring to methanol pricing.

15 In the next slide, there is a quotation
16 from the same conference call. As you can see
17 Mr. Choquette likewise stated that, quote, It,
18 referring to the loss of California MTBE market,
19 just happens to be coming at a time--

20 MR. DUGAN: Can I register an objection?
21 He is reading into what Mr. Choquette is saying.

444

1 Mr. Choquette's not a witness here, and he has
2 never put anything into the record.

3 PRESIDENT VEEDER: I think it is a
4 function of counsel in making submissions to a
5 Tribunal on the existing material before the
6 Tribunal.

7 MR. DUGAN: We don't know what that
8 Mr. Choquette actually intended what they say he's
9 intended.

10 PRESIDENT VEEDER: Are you objecting to
11 the previous interpolation?

12 MR. DUGAN: Yes, I'm objecting to the
13 interpolations. I think he has to have the
14 language up just as it was said.

15 PRESIDENT VEEDER: Well, I think we can

16 take the interpolations on board. You have a
17 reply, and you can make comments that you're minded
18 to make. But we understand, I think, what is
19 happening is that counsel is going to primary
20 material and adding something to it, which I think
21 is the function of counsel.

445

1 MR. MCNEILL: To return to this quote, as
2 Methanex's CEO Pierre Choquette stated, clearly in
3 the market we are in today, if the conversion in
4 California took place overnight, it would be fully
5 absorbed.

6 Methanex's earnings conference call for
7 the first quarter of 2003, as you can see on the
8 screen, Methanex's CEO stated, and I quote, The
9 reduction in consumption--referring to MTBE
10 consumption--in the United States, is taking place,
11 but, of course, it is overshadowed by supply
12 constraints, so it is hard to see the impact of the
13 reduction, close quote.

14 And here is a statement made by
15 Mr. Choquette, Methanex's CEO, at an investor
16 conference in Canada in June 2003. At that
17 conference Mr. Choquette stated that, quote, I
18 always like to say that I wish they would eliminate
19 it--referring to MTBE--from the U.S. market
20 tomorrow morning, so we can get on with life,
21 because it is not that big a deal, close quote.

1 Finally, as you can see on the screen, at
2 an investor conference in February of this year,
3 Bruce Aitken, Methanex's President and now CEO,
4 stated that, quote, We have already had big
5 reductions in MTBE demand in the U.S., and it's
6 really has had no impact on our industry, close
7 quote.

8 We don't expect an impact on pricing if at
9 all. It is unlikely to have any significant
10 impact. It would be fully absorbed. It is hard to
11 see the impact of the reduction. It is not that
12 big a deal. And it has really had no impact on our
13 industry.

14 The timing of this latter statement in
15 February of 2004--February of this year, is
16 particularly significant. MTBE, as Mr. Aitken
17 notes, had already declined significantly across
18 the United States. As you can see from Methanex's
19 Exhibit 7, which we have up on the projection
20 screen, it is not in your packets, we discussed
21 this slide this morning, you can see from the blue

1 line that demand for methanol, for MTBE in the
2 California market, had been fully--had completely
3 disappeared by 2004. You can see by the beginning
4 of 2003, it was almost completely out of the
5 market, but by 2004, it had been completely phased

6 out.

7 Thus, if there is to be any effect on
8 Methanex from the California ban, it would
9 certainly have been felt by the time Methanex's
10 President made this statement in February of this
11 year.

12 Methanex has no explanation for the
13 discrepancy between these statements that it has no
14 loss, and its damage claims in this case. Methanex
15 has nearly a \$1 billion damage claim, which is
16 approximately the value of the entire company,
17 suggests not just a severe loss but a catastrophic
18 loss. Methanex offers no explanation because it is
19 impossible to reconcile these two things.

20 Methanex's response to these admissions of
21 no loss is to claim that they must have been taken

448

1 out of context. The citation in the record for
2 each statement is at the lower right-hand corner of
3 the handouts. We invite the Tribunal members to
4 see for themselves that in their full context,
5 these statements mean exactly what they say, and I
6 include the statement that Mr. Dugan referred to
7 earlier about methanol pricing.

8 The only statement that Methanex actually
9 addresses in substance, and that Methanex mentioned
10 yesterday, is the one from mid-2003, that the
11 elimination of MTBE across the entire United States
12 would not be that big a deal. Notably Methanex
13 does not refute that Methanex had no loss as of

14 that date. Rather, in the third Macdonald
15 affidavit Methanex expressly confirms that it had
16 no loss. The statement is on the screen.
17 Mr. Macdonald stated, paragraph 35, quote, By
18 mid-2003, the methanol market had changed for the
19 better, and supply and demand were in a balance to
20 tight situation. Because of the strong price, the
21 immediate damage of the MTBE ban was not felt,

449

1 close quote.

2 This is a remarkable admission. Methanex
3 concedes that four years after commencing this
4 arbitration, it still had not felt a loss from the
5 MTBE ban. Methanex's damage claim thus boils down
6 to this. It argues that it is only because of the
7 tight market situation and high methanol prices
8 that it has no injury. If market conditions were
9 different, or if they change sometime in the
10 future, Methanex suggests, perhaps it might have a
11 loss.

12 Mere hypothetical losses or mere
13 speculation about possible future losses cannot be
14 the basis for a claim under Articles 1116 and 1117
15 of the NAFTA. Those articles require that a
16 claimant demonstrate an actual, existing loss.
17 Methanex's admissions that it had no existing loss
18 by themselves are fatal to Methanex's claims.

19 In the remainder of my presentation, I
20 will address the factual record in this case with

21 respect to each of Methanex's damage claims. I

450

1 noted moments ago that it was not possible to
2 reconcile Methanex's admissions of no loss with its
3 damage claims. Those admissions are, however, easy
4 to reconcile with one thing in this case, the
5 evidentiary record, for that record shows exactly
6 what Methanex's CEO, President, and now its Senior
7 Officer, Michael Macdonald, have all said: The ban
8 has had no impact on Methanex.

9 I will first address Methanex's claim with
10 respect to its plant in Fortier, Louisiana. I'll
11 then discuss its claims with respect to
12 Methanex-U.S., its marketing in Dallas, Texas, and
13 finally I'll address Methanex's claim based on its
14 stock price and its debt rating.

15 As you heard yesterday, Methanex alleges
16 in this case the ban injured its methanol plant in
17 Fortier, Louisiana. Methanex converted that plant
18 from an idle ammonia factory in 1994. It ran that
19 plant for only four and a half years, and it closed
20 it down in March 1999, before the California ban
21 was even announced.

451

1 In assessing the Fortier claim, it is
2 helpful to bear in mind some important facts about
3 the U.S. methanol industry. Methanol is made

4 primarily from natural gas, which in the North
5 American market constitutes up to 90 percent of the
6 production cost of methanol. The Fortier plant's
7 natural gas costs were significantly higher than
8 those in Chile or Trinidad where Methanex has
9 several methanol plants.

10 If I may draw your attention again to the
11 screen, as you see from this chart, in 1999, for
12 example, natural gas costs at the Henry Hub in
13 Louisiana, where Fortier obtained its natural gas,
14 were around \$2.25 for a million BTUs, for a million
15 units, more than four times the 50 cents for a
16 million units in Chile. The Fortier plant's
17 natural gas costs were also higher than those for
18 Methanex's Canadian plants, all of which,
19 incidentally, closed due to their high natural gas
20 costs.

21 The chart on the screen now is from

452

1 Methanex's 1997 annual report. As you can see on
2 the far right of this chart, natural gas costs at
3 the Henry Hub where Fortier was located were \$2.47
4 for 1996. It's more than two and a half than the
5 price for Methanex's plants in Medicine Hat. For
6 1997, it is the same story. You see the natural
7 gas costs were \$2.45 in 1997, almost double the
8 costs at Medicine Hat and significantly higher than
9 the natural gas costs from Methanex's plant in
10 Kitimat, British Columbia.

11 The Fortier plant could not operate

12 profitably with such high input costs. Methanex
13 ran its plant well below its capacity, as low as 50
14 percent in 1998, and by comparison, Methanex ran
15 its methanol plants worldwide at an average rate of
16 between 96 and 98 percent over the last several
17 years. Methanex shut the plant down in 1999
18 because it was losing money. As Methanex stated in
19 its 1999 annual report, you can see on the screen,
20 Methanex estimated that it saved approximately \$9
21 million per year while the Fortier plant remained

453

1 idle.

2 On this next slide, there is a quote from
3 Methanex's Senior Officer, Michael Macdonald. At
4 the time of the Fortier closing Mr. Macdonald
5 explained, referring to Fortier, quote, We are not
6 making money there. In fact, we are hurting. If
7 it were within our control, we would have had the
8 plant down earlier, close quote.

9 To be clear, Methanex's claim is not that
10 it closed the Fortier plant because of the
11 California measures; rather, it claims that the
12 measures contributed to its decision to keep the
13 plant closed. In other words, Methanex suggests
14 that it might have reopened the plant and run it
15 profitably but for the ban. Methanex, however,
16 provides no documentary evidence for this
17 speculative claim. This is a remarkable omission,
18 given that such a major corporate decision would

19 surely be reflected in Methanex's corporate
20 documents.

21 Rather, as we saw yesterday, Methanex

454

1 relies exclusively on a single line in its 2002
2 annual report warning, in boilerplate language,
3 that an MTBE ban across the entire United States
4 could affect its North American operations,
5 including its Fortier plant. Methanex's evidence
6 is at 19 JS tab 2.

7 Mere speculation as to possible future
8 events, as I noted, does not establish that
9 Methanex has incurred a loss as required by Chapter
10 11. Furthermore, It is hard to see how
11 Methanex--excuse me--furthermore, it hard to see
12 how the California ban could have had any material
13 effect on the Fortier plant, let alone the decisive
14 effect alleged by Methanex.

15 First, there is no evidence of record that
16 Fortier ever supplied methanol used to produce MTBE
17 for California gasoline. On this next slide, there
18 is a map from Methanex's 1999 annual report. You
19 can see the Fortier plant located in Louisiana near
20 the Gulf of Mexico. The Fortier plant served
21 customers in the southeastern United States and

455

1 along the Mississippi River, that predominantly

2 produced chemical derivatives, not MIBE. If you
3 look at the small arrow just to the left of center
4 of this map, you can see that the California market
5 was served instead by Methanex's plant in Kitimat,
6 British Columbia in Canada. It is difficult to see
7 how an MIBE ban in California could impact a plant
8 in Louisiana that never served the California
9 market.

10 Second, there is no evidence that the
11 measures indirectly injured the Fortier plant by
12 lowering the global price of methanol, as Methanex
13 contends. In fact, let's be clear: Methanex has
14 admitted that there was no such effect on the
15 global price of methanol. I showed you this slide
16 previously. Methanex's CEO stated in 2002,
17 earnings conference call, quote, We don't expect
18 the impact of this change, referring again to
19 California refiners, no longer purchasing ethanol,
20 to have much of an impact on pricing, if any at
21 all. And again, by pricing Mr. Choquette was

456

1 referring to methanol pricing.

2 Furthermore, there is no evidence that the
3 ban caused any depression in the global price of
4 methanol. To the contrary, methanol prices have
5 increased substantially since 1999. If I may draw
6 your attention again to the screen, as you can see
7 from this chart, based on data from Methanex's 2003
8 annual report, Methanex's average realized methanol
9 price in 1999 was about \$105 per metric ton. By

10 2003, that had more than doubled to about \$220 per
11 metric ton, and it remains at about that level
12 today. So it is hard to see how Fortier was
13 supposedly injured by low methanol pricing as
14 Methanex contends.

15 Finally, as a factual matter, Methanex's
16 claim that it would have reopened Fortier is
17 implausible as well as speculative. Methanex has
18 for years been telling its investors of its
19 relentless drive to lower production costs by
20 withdrawing its production from the North American
21 market. In fact, this is what Methanex said when

457

1 it took a write-off on the Fortier plant in 2002.
2 I draw your attention to the screen. Quote, The
3 Fortier plant has been mothballed since March 1999.
4 The write-off of the Fortier facility reflects our
5 low-cost strategy of reducing our reliance on North
6 American production by expanding our production
7 capacity in Trinidad and Chile. No mention is made
8 of the California ban as a factor in the decision
9 to write off the Fortier plant.

10 More importantly, Fortier's natural gas
11 prices, which as I noted were already high in 1999,
12 only increased substantially thereafter. As you
13 can see from this chart from Methanex's 2002 annual
14 report, natural gas prices at the Henry Hub near
15 Fortier more than doubled around \$2.25 for a
16 million units to around \$6. Today that price is

17 nearly triple the 1999 price at around \$6.50. And
18 I will draw your attention to the yellow line at
19 the bottom of this chart. That represents
20 Methanex's average natural gas costs at around \$1.
21 In other words, as of 2002, Methanex had

458

1 the option of producing methanol based on natural
2 gas at a dollar or less in Trinidad or Chile, or it
3 could have reopened the Fortier plant at a
4 substantial cost, and produced methanol from
5 natural gas at \$6 or more.

6 U.S. natural gas prices not only increased
7 after 1999, they also became increasingly volatile,
8 making it in the words of one industry leader,
9 quote, virtual impossible, end quote, to produce
10 methanol in North America, and that is at 16 JS tab
11 48 at 1420.

12 If in 1999 the Fortier plant was, to use
13 Methanex's words, hurting economically. It appears
14 highly doubtful it would have fared any better
15 thereafter had it been reopened. As we saw
16 methanol prices increased after 1999, the increase
17 was not nearly enough to offset the far greater
18 increases in the cost of natural gas.

19 In sum, Methanex has failed to produce any
20 evidence showing that the measures caused any loss
21 or damage to its closed Fortier plant. Its

459

1 unsupported and speculative contention that it
2 might have reopened that plant and somehow run it
3 profitably falls far short of its evidentiary
4 burden under Chapter 11.

5 Next, I will address Methanex's claim with
6 respect to Methanex-U.S.'s goodwill, customer base,
7 and market share.

8 The record in this arbitration lacks any
9 competent evidence of Methanex-U.S.'s goodwill.
10 Methanex told us yesterday that it purchased two
11 customer lists in 2002, one for \$25 million, and
12 one for \$10 million. That is at page 202 of the
13 transcript. That is not evidence of Methanex's
14 goodwill. And the lists allegedly purchased in
15 2002, well after the ban was announced. Any effect
16 on those customer lists from the California ban,
17 and there is no such evidence, would have been
18 anticipated at the time of purchase. Methanex, in
19 fact, does not demonstrate at all how
20 Methanex-U.S.'s goodwill was supposedly affected by
21 the California measures. This failure of proof by

460

1 itself is fatal to Methanex's goodwill claim

2 Furthermore, Methanex's testimony shows
3 that Methanex-U.S.'s business was thriving after
4 the ban was announced. For example, according to
5 the third Macdonald affidavit, Methanex's revenues
6 increased from \$228 million in 1999, to over \$300
7 million in 2002. That is at the third Macdonald

8 affidavit paragraph 14, 19 JS at eight.

9 And Methanex-U. S. 's profitability remained
10 basically unchanged during that period. It is thus
11 difficult to understand as a factual matter how
12 Methanex-U. S. 's intangible assets were supposedly
13 severely impaired. Methanex sheds no light on this
14 mystery.

15 Next, I will address Methanex's claims
16 concerning a loss of the California MTBE market.
17 On the screen you can see a chart we created based
18 on Methanex's export figures for the California
19 market. I will ask you to focus for now just on
20 the dotted line. I will return to this chart a
21 little later and describe the other information in

461

1 the chart. The dotted line is a graphical
2 representation of evidence provided by Methanex in
3 the second Macdonald affidavit. The line
4 represents Methanex's exports from Kitimat, British
5 Columbia in Canada, to California, and it shows
6 exports declining from around 132,000 metric tons
7 in 1998, to a little more than 50,000 metric tons
8 by 2001. This is Methanex's evidence that it lost
9 a valuable market as a result of the ban. This
10 evidence fails to establish any loss to Methanex
11 for several reasons.

12 First, as a matter of law, such a claim
13 cannot establish a breach under Chapter 11 of the
14 NAFTA, which pertains solely to investments in the

15 territory of the respondent party, not to trade in
16 goods. These sales figures given by Methanex
17 represent cross border trade in goods. Trade in
18 goods is expressly excluded from ambit of Chapter
19 11 and is covered in other chapters of the NAFTA.
20 This reason alone is sufficient to dismiss
21 Methanex's claims.

462

1 Second, there is a critical distinction
2 between revenues and profits. Looking at the
3 dotted line, the decrease in Methanex's exports as
4 shown here only tells us what happened to
5 Methanex's revenues with respect to the California
6 market. The record is silent as to any lost
7 profits as a result of the ban. And, in fact, it
8 is highly doubtful that the California market was
9 profitable for Methanex. As I pointed out on the
10 map I showed you earlier, Methanex exported
11 methanol to California from its plant in Kitimat,
12 British Columbia. Methanex closed that plant in
13 mid-2000 because it was losing money. Let me draw
14 your attention again to the screen. This is what
15 Methanex stated in its May 2000 press release. The
16 Kitimat methanol plant has been losing substantial
17 sums of money for some time primarily due--there's
18 a typo there--primarily due to very high natural
19 gas costs.

20 Furthermore, Methanex has not even alleged
21 that it had a net decrease in revenues. Rather,

1 Methanex concedes that it simply sold any methanol
2 it would have sold in California elsewhere. As you
3 can see from this quote on the screen, from the
4 third Macdonald affidavit, Mr. Macdonald states
5 that, quote, After the California ban was
6 announced, Methanex largely moved its sales out of
7 the California MTBE sector and restructured its
8 sales to other U. S. MTBE producers.

9 Furthermore, in the very tight market
10 conditions prevailing in 2002 and 2003, Methanex
11 was running its plants at very close to full
12 capacity. In fact, Methanex was struggling to meet
13 its existing contractual commitments and could only
14 do so by purchasing additional methanol on the spot
15 market at a considerable loss. As Methanex's CEO
16 described the situation to the company shareholders
17 in early 2003, quote, and I have the quote up on
18 the screen, We currently are on order control. In
19 other words, Methanex wasn't able to accommodate
20 more orders for methanol. Thus, while Methanex's
21 sales may have shifted from one market to another,

1 there was no net decrease in revenues and no
2 production capacity that went unused as a result of
3 the California ban.

4 Finally, the record belies Methanex's
5 contention that it exported less methanol to

6 California because of the California ban.

7 Let's return for a moment to the chart
8 with Methanex's export figures. That is slide 22
9 in your packets.

10 You can see that the alleged decrease in
11 exports, represented again by the dotted line,
12 occurred years before the California measures took
13 effect. In providing these numbers, Methanex
14 presumably was suggesting that the California MTBE
15 market was shrinking during those years due to the
16 ban. The United States' expert, Dexter Miller, a
17 leading expert in analyzing gasoline and MTBE
18 markets, analyzed what was in fact happening with
19 MTBE banned in California during those years. His
20 conclusion is represented by the green bars on this
21 chart.

465

1 Mr. Miller's data shows that demand was,
2 in fact, increasing in those years. There is,
3 thus, no causal relationship between what was
4 happening in the California MTBE market and
5 Methanex's decision to export less methanol to that
6 market.

7 Methanex has not disputed Mr. Miller's
8 data. As a matter of fact, Methanex has not
9 referenced Mr. Miller at all. Instead, Methanex
10 alleges, again, without any evidence, that it
11 simply was mitigating its damages by withdrawing
12 from the California market. We submit that

13 Methanex's contention that it was mitigating
14 damages by withdrawing from a growing market years
15 before the ban is simply implausible.

16 The far more likely explanation is that
17 Methanex exported less methanol to California
18 because it was losing money on every gallon of
19 methanol it produced at its money-losing plant in
20 Kitimat, British Columbia, and sold into that
21 market.

466

1 As a final note, while we have this chart
2 in front of us, I would just like to give you a
3 sense of the size of the methanol market at issue.
4 Methanex has labored to create the impression in
5 this case that it lost an enormous and valuable
6 market. For instance, Methanex yesterday stated
7 that, quote, California, in and of itself, is a
8 very big market. It is one of the biggest markets
9 for methanol in the world because it is a huge
10 economy, and the market for MTBE in California
11 itself is a very big market. So, the loss of the
12 market, in and of itself, is a big loss for a
13 company like Methanex, and that is at pages 204 and
14 205 of the transcript. Methanex also noted at page
15 140 of the transcript that the California ethanol
16 market was about \$1.8 billion. The impression that
17 Methanex seeks to create is false.

18 As you see from this chart, Methanex
19 alleges that it sold 50,000 metric tons of methanol
20 in 2001. Methanex did not provide any data after

21 2001, so these are the most recent figures we have.

467

1 How much is that market worth to Methanex? Well,
2 Methanex sold approximately 7.4 million metric tons
3 of methanol that year, so the California market at
4 issue was less than one percent of Methanex's
5 global sales. It was around 0.7 percent. In
6 dollar terms, that market was less than \$9 million
7 in revenue, and more importantly, the market was
8 not profitable. From this perspective, it is easy
9 to see why Methanex has been telling its investors,
10 it's been telling its shareholders, for years, that
11 it has not felt any impact from the loss of the
12 California MBE market, and the California ban is
13 no big deal.

14 Finally, I will address Methanex's stock
15 price and credit rating claims. As you heard
16 yesterday, Methanex alleges that its average stock
17 price declined about 20 percent in early 1999.
18 Methanex also alleges injury based on the downgrade
19 of its long-term credit rating, also in early 1999.
20 These claims are without merit for the following
21 reasons: First, with respect to the stock price

468

1 claim, Methanex points to no case in which an
2 international Tribunal has awarded damages based on
3 its radical theory that states are responsible to

4 corporations for fleeting changes in the price of
5 their shares. Such an event on its face is not a
6 loss to the corporation. The corporation does not
7 own stock in itself.

8 In fact, Methanex has previously stated
9 that it does not base any claim on its share price.
10 Let me draw your attention again to the screen. In
11 paragraph 86, to its reply to the statement of
12 defense from August of 2000, Methanex states,
13 quote, Methanex's damage claim is not based on a
14 loss of share value. Because Methanex has
15 expressly disavowed any stock price claim in this
16 case, it is unclear why Methanex continues to
17 discuss it here.

18 Even if the Tribunal were to consider this
19 allegation, however, it is without merit for
20 several other reasons. First, there is a
21 significant causation problem. The stock price

469

1 change alleged by Methanex occurred years before
2 the ban. Methanex said yesterday they didn't think
3 that was a problem. We think that presents a big
4 problem to Methanex's claim. At best, a minor
5 price movement years before the ban reflects
6 investors' mere concern about the possible future
7 effects on the company, an effect that Methanex has
8 later confirmed time and time again to its
9 shareholders did not occur.

10 In fact, nothing demonstrates the

11 impossibility of attributing a temporary stock
12 price movement to the ban more clearly than the
13 fact that throughout this arbitration Methanex has
14 been unable to settle on which stock price
15 movements it seeks to use.

16 I have on the screen a chart showing
17 Methanex's stock price from mid-1998 to the end of
18 2000. In Methanex's reply to the U.S. Statement of
19 Defense at paragraph six, Methanex alleged a
20 one-day drop, on March 26, 1999, the day after the
21 announcement of the ban. That is represented by

470

1 the yellow line. That was the first iteration of
2 Methanex's claim. In its Second Amended Statement
3 of Claim, Methanex decided, without explanation, to
4 expand its claim to the ten-day period following
5 the March 25 announcement. And that is represented
6 by the red bar. That was Methanex's second
7 iteration of its claim. Incredibly, yesterday,
8 Methanex showed you a slide suggesting that they
9 now base their claim on a seven-day period in
10 January 1999, even before the ban was announced.
11 That was Methanex's third iteration of its claim.

12 PRESIDENT VEEDER: Do you have a
13 transcript reference?

14 MR. MCNEILL: It was Exhibit 73, and I
15 don't have a transcript reference, but I can
16 provide that.

17 It is clear that Methanex has no idea what
18 price movements it thinks were actually caused by

19 the ban. Methanex's stock price claim has other
20 serious problems as well. Methanex showed us
21 yesterday a number of analysts' reports suggesting

471

1 concern over a nationwide MBE ban that allegedly
2 put downward pressure on Methanex's stock price.
3 Professor Reisman asked Methanex how it accounted
4 for the contribution from California, and the
5 contribution from the rest of the United States.
6 Methanex's response, incredibly, was that it was
7 claiming for all bans across the United States.
8 California, says Methanex, is an, quote,
9 environmental front runner and other U. S. state
10 legislatures mindlessly follow California on
11 environment matters. All the bans, says Methanex,
12 should be laid at California's doorstep. And that
13 is at page 206 of the transcript.

14 That proposition is, of course, absurd.
15 The fact is, Methanex cannot separate out concern
16 over California versus concern over what might
17 happen in the rest of the country.

18 Furthermore, as you can see, the alleged
19 periods of decline occurred during a significant
20 downtrend in Methanex's stock price caused by the
21 cyclical decline in methanol prices. In early

472

1 1999, methanol prices were, in fact, at their

2 lowest level in more than ten years. Methanex
3 offers no explanation of how it could possibly
4 separate out any effects from concern over MTBE in
5 California, from effects due to the historically
6 low methanol prices.

7 Finally, as you can see, Methanex's stock
8 price recovered fairly quickly to about \$12. This
9 is \$12 Canadian, by the end of 2000. That price,
10 as you can see, is higher than the stock price
11 before the ban was announced.

12 Yesterday, Methanex's stock price was
13 trading around \$17 on the Toronto exchange. The 20
14 percent drop has thus been recovered many times
15 over. Methanex does not explain how an alleged
16 minor and temporary decline in 1999 could possibly
17 be quantified today.

18 Finally, Methanex's claims with respect to
19 the temporary downgrade in its long-term debt
20 rating fail for many of the same reasons. First,
21 Methanex points to no case in which an

473

1 international Tribunal has awarded damages based on
2 a temporary downgrade. Second, there is no basis
3 for attributing the downgrade solely or even
4 primarily to the California measures.

5 Let's take a look at the 1999 Fitch IBCA
6 report that Methanex showed you yesterday. That
7 report directly refutes that the ban was the
8 primary reason for the rating action. As you can

9 see on the screen, that report states, quote, This
10 rating action is primarily due to deterioration of
11 methanol price caused by oversupply. In fact, this
12 was the first line of the report. Methanex skipped
13 over that first line and showed you a few snippets
14 that dealt with MTBE.

15 Finally, Methanex is unable to produce any
16 evidence that the corporation was actually injured
17 by the downgrade. Rather, by Methanex's own
18 admission, it is merely a hypothetical loss. This
19 is what the third Macdonald affidavit says: The
20 practical impact of the downgrades was to increase
21 the cost of any new debt the company might have

474

1 raised.

2 Notably Methanex offers no evidence to
3 suggest that it did, in fact, raise new debt at any
4 relevant time, or that the downgrade had any
5 adverse effect on the terms of that debt. Methanex
6 cannot state a claim under Articles 1116 and 1117,
7 based on hypothetical or speculative losses.

8 Those articles require actual existing
9 losses. Because Methanex has not produced any
10 evidence of actual existing losses and it has
11 admitted that no losses exist, its claims, we
12 submit, should be dismissed in their entirety.

13 If the Tribunal has any questions, I would
14 be pleased to answer them. Otherwise, I will turn
15 the matter over to Mr. Bettauer.

16 PRESIDENT VEEDER: Thank you very much.

17 We have no questions at this stage.

18 MR. MCNEILL: Okay. May I just add that
19 the citation you requested was page 213, lines nine
20 through 19. That is related to tab 73 or Exhibit
21 73, which I noted.

475

1 PRESIDENT VEEDER: Thank you very much.

2 MR. BETTAUER: Since it is late, I will
3 take two minutes and wrap up our presentation for
4 today. The presentation on proximate cause has not
5 been lengthy, and I don't intend to repeat it.
6 Suffice it to say, in this part of our presentation
7 we have established two additional grounds for
8 dismissal of the case before us. First, Mr. Legum
9 showed that the chain of causation in this case is
10 an extraordinarily weak one. Methanex's claim
11 depends upon the impact of the ban upon suppliers,
12 to suppliers, to persons directly affected. The
13 impact alleged here is far too remote to stand
14 under established principles of international law.
15 Second, Mr. McNeil demonstrated that the
16 record shows no loss to Methanex caused by the
17 measures in any event. The Fortier plant was idle
18 before the 1999 Executive Order and did not even
19 serve the California market before it was idled.
20 There is no evidence of record to support
21 Methanex's implausible contention that it might

1 have reopened the plant and run it profitably but
2 for the ban.

3 With respect to Methanex-U.S., Methanex
4 has provided no evidence of any loss of goodwill or
5 market share. In fact, Methanex's own testimony
6 demonstrates that Methanex-U.S.'s revenues have
7 only increased since the ban was announced.
8 Methanex's inability to demonstrate any loss or
9 damage resulting from the California ban should
10 come as no surprise. As Mr. McNeil pointed out,
11 Methanex's senior officers have repeatedly
12 represented to its investors and the public that
13 the MTBE ban had no impact on the company.
14 Methanex's failure to prove any loss caused by the
15 measures by itself requires dismissal of all its
16 claims.

17 Mr. President, this concludes our
18 presentation for today. We will resume tomorrow
19 morning by addressing each of Methanex's claims
20 under Articles 1102, 1105(1), and 1110, as well as
21 Methanex's failure to provide appropriate proof of

1 ownership of investments in the United States.

2 Thank you for your attention.

3 PRESIDENT VEEDER: Thank you. My
4 colleague has, I think, one question to raise.

5 ARBITRATOR ROWLEY: Mr. Legum, this
6 morning the President asked you with respect to the

7 jurisdictional issue, which we have joined to the
8 merits, whether we were to decide that on the basis
9 of assuming the pleading to be true, and I believe
10 you gave a provisional answer which I understood to
11 be, no, we were to decide it on the evidence, not
12 on the pleadings and you said you were going to
13 consult further. First, have I understood your
14 answer correctly, and secondly, have you consulted
15 further, and are you in a position to speak to that
16 point?

17 MR. LEGUM: I have, and the answer that I
18 gave earlier stands. At least our understanding is
19 that the procedure is that the jurisdictional issue
20 has been joined to the merits; and therefore, as
21 part of the merits, the Tribunal will address it

478

1 based on the evidence that the parties have
2 compiled, rather than based on assumptions and
3 inferences from lines in the pleadings. Of course,
4 to the extent that the First Partial Award assumed
5 facts that are consistent with the facts that have
6 been demonstrated in the record, such as the
7 competition between methanol as a feedstock and
8 ethanol as a finished product, to the extent the
9 Tribunal assumed facts and decided based on those
10 assumed facts in a certain way, our view is that
11 that is the binding law to the extent that the
12 facts that have been proven turn out to be, as we
13 believe they are, fully consistent with the facts
14 that the Tribunal has assumed.

15 I hope that didn't add more confusion than
16 enlightenment to the question.

17 ARBITRATOR ROWLEY: Thank you very much.

18 PRESIDENT VEEDER: We come to the end of
19 day two, and as Mr. Bettauer has indicated, we will
20 start again with the further oral submissions for
21 the United States tomorrow morning.

479

1 Unfortunately, as you all know, we have
2 another matter to deal with and we break now for
3 ten minutes and we will resume on the tenth floor
4 for a further meeting in regard to this other
5 matter. Thank you.

6 (Whereupon, at 5:41 p. m. , the hearing was
7 adjourned until 9:30 a. m. the following day.)

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1 CERTIFICATE OF REPORTER

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3 I, David A. Kasdan, RDR-CRR, Court
4 Reporter, do hereby testify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by
7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true record and accurate record of the
10 proceedings.

11 I further certify that I am neither
12 counsel for, related to, nor employed by any of the
13 parties to this action in this proceeding, nor
14 financially or otherwise interested in the outcome
15 of this litigation.

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17 DAVID A. KASDAN, RDR-CRR

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21

1 CERTIFICATE OF REPORTER

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3 I, Cathy Jardim, RPR, Court Reporter, do
4 hereby testify that the foregoing proceedings were

5 stenographically recorded by me and thereafter
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7 transcription under my direction and supervision;
8 and that the foregoing transcript is a true record
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10 I further certify that I am neither
11 counsel for, related to, nor employed by any of the
12 parties to this action in this proceeding, nor
13 financially or otherwise interested in the outcome
14 of this litigation.

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CATHY JARDIM, RPR

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