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

METHANEX CORPORATION,

Claimant/Investor,

and

UNITED STATES OF AMERICA,

Respondent.

CLAIMANT METHANEX CORPORATION'S REPLY TO THE AMICUS CURIAE SUBMISSIONS OF EARTHJUSTICE AND THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT

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I. INTRODUCTION.

1. Methanex acknowledges receipt of the *amicus curiae* submissions of Earthjustice[1] and IISD (collectively, "the *Amici*"). Methanex recognizes that *amicus curiae* submissions can play an important role in judicial and arbitral proceedings.[2] However, any benefits gained through the participation of the *Amici* must be balanced against the litigants', and Methanex', right to respond in kind and the inherent responsibility of the *Amici* to discharge their duties with the required impartiality and care.[3]

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[1] Earthjustice filed its *amicus curiae* submission on behalf of the Bluewater Network, Communities for a Better Environment, and the Center for International Environmental Law. *See* Earthjustice Application to File a Written Submission, at 1 (Mar. 9, 2004) ("On behalf of Bluewater Network, Communities for a Better Environment, and the Center for International Environmental Law, Earthjustice hereby applies for leave to file a non-disputing party submission in the arbitration between Methanex Corp. and the United States of America under NAFTA's Chapter 11 and the UNCITRAL arbitration rules.").

[2] One law review article summarized the benefits of *amicus curiae* submissions in international judicial proceedings as follows: "*Amicus* briefs add to the workload of courts, but they are accepted because of the benefits they bring. First, they often supplement or provide detailed analysis of points of law, including discussion and citation of authority not contained in the parties' arguments. Second, they can supply detailed legislative or jurisprudential history, a scholarly exposition of the law. *Amici* may present arguments the parties are unable or unwilling to make because of political pressure or other tactical considerations. *Amici* frequently discuss the broader implications of decisions that the main parties have either purposefully or inadvertently failed to address. Finally, they assist when courts are expanding into areas of novel and complex litigation. They may assemble expert knowledge and expertise. In such cases, *amici* may help to explain complex issues and perhaps deal with the broader implications of a decision, beyond the particular interests of the parties." Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 Am. J. Int'l L. 611, 618 (1994) (I Methanex Amici Reply tab 1). (Two volumes of exhibits are being submitted in connection with this reply; the citation format is volume, title, and tab).

[3] After an *amicus curiae* "made public comments published in various…newspapers that were unfavorable to the defense," one international tribunal disqualified the *amicus curiae*, "reason[ing] that '[i]mplicit in the concept of an *amicus curiae* is the trust that the court reposes in 'the friend' to act fairly in the performance of his duties. In the circumstances, the Chamber cannot be confident that the *amicus curiae* will discharge his duties…with the required impartiality.'" Maury D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 37 Int'l Lawyer 551, 554 (2000) (quoting Press Release, *Trial Chamber III Orders the Registrar of the ICTY to*

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2. Here, the *amicus curiae* submissions contain numerous mischaracterizations, disingenuous arguments, and misleading statements. In their submissions, the *Amici* ignore bedrock principles of international trade law, including the principle of national treatment and the applicability of international treaties to subnational governments, and offer no evidence in support of certain arguments—for example, that purported environmental measures are entitled to substantial deference or a presumption of legitimacy. The *Amici* also overstep their role as *amicus curiae* to assume the role of litigants and request that costs be awarded to the United States. For these reasons, Methanex urges the Tribunal to disregard those portions of the *amicus curiae* submissions that are founded on misstatements of law and fact or on mischaracterizations of Methanex' claim and arguments.

3. It is important to note that Methanex has attempted to limit its reply to the *amicus curiae* submissions to those issues where the *Amici* were mistaken or misleading, or where their submissions made novel arguments. To the extent that the *Amici* have raised points already addressed in prior pleadings, Methanex has not sought to repeat its arguments here. Although Methanex does not specifically refute these points, it does not concede any point raised by the *Amici* unless specifically conceded in this submission.

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Revoke Appointment of Amicus Curiae (Oct. 11, 2002) *available at* http://www.un.org/icty/pressreal/p702-e.htm) (I Methanex Amici Reply tab 2).

II. EARTHJUSTICE AND IISD MISCHARACTERIZE METHANEX' CLAIM.

A. Methanex Is Not Challenging California's Right To Regulate.

4. As a preliminary matter, the *Amici* repeatedly mischaracterize Methanex' claim against the United States as a challenge to California's right to regulate. Earthjustice asserts that "[g]overnments must…be free to address legitimate threats" and that Methanex' claim threatens to "undermine the right of governments to regulate."[4] Similarly, IISD contends that "[w]hat Methanex is effectively challenging in this case is the ability of California to" regulate by setting "a zero risk level for MTBE."[5] Nothing could be further from the truth.

5. Methanex has **never** challenged California's right to regulate. Nor has Methanex challenged California's right to address the groundwater contamination problem. The *Amici* effectively concede this point by failing to cite a single instance in which Methanex has directly challenged California's right to regulate.

6. Instead of supporting their bald assertion with evidence, the *Amici* offer further mischaracterizations of Methanex' position and the decision-making process that culminated in the decision to ban MTBE. The *Amici* begin by establishing a false dichotomy between action and inaction in California's decision-making process. The *Amici* imply that California had only one policy option—banning MTBE—and that the regulatory process boiled down to one question: whether or not MTBE should be banned.

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[4] *See* Earthjustice Submission at ¶ 23.

[5] *See* IISD Submission at ¶ 42; *see also id.* at ¶ 9 ("International trade and investment agreements do not make the right to regulate any less a feature of sovereignty.").

In other words, the choice was between action (ban) and inaction (no ban). The *Amici* further contend that there was only one possible course of action: California *had* to ban MTBE.[6] According to the *Amici*, if California had failed to ban MTBE, it would have violated international law and effectively denied its citizens access to safe drinking water.[7] In sum, the *Amici* reduce California's decision-making process to a deterministic equation wherein there was only one question and only one possible answer.

7. By falsely portraying California's decision-making process in this manner, the *Amici* are able to misconstrue Methanex' position. If, as the *Amici* theorize, there is only one possible answer to the groundwater contamination problem, then Methanex' opposition to that particular answer—*i.e.*, the ban on MTBE—must signify that Methanex favors maintaining the status quo and thus denying Californians access to safe drinking water. Again, nothing could be further from the truth.

8. As the *Amici* know, California had a range of options for dealing with its groundwater contamination problem, just as, for example, Europe did. Banning MTBE was just one of many options available. Thus, the choice was not between action (ban) and inaction (no ban), but instead between various possible courses of action. For example, California could have required the immediate repair of the leaking underground storage tanks ("USTs") that were identified by California Governor Gray Davis' Executive Order as being the direct cause of the groundwater contamination. California

[6] *See* Earthjustice Submission at ¶ 18 ("Under international law, States not only have a right, but an **obligation** to ensure that activities under their jurisdiction and control do not violate human rights. California's measures….are thus **mandated by international law**.") (emphasis added).

[7] *See id.*

could also have banned the use of all potentially harmful chemicals leaking from USTs—including ethanol and benzene—and not just MTBE. Instead, it singled out one component of gasoline, one that is not the most serious contaminant but is the only component that competes directly with ethanol.

9. Methanex does not seek to hold California liable because it acted or because it exercised its right to regulate; instead, Methanex seeks to hold California liable because the specific measures it adopted violated its obligations under NAFTA and favored a domestic investment over a competitive foreign investment.[8] Methanex has argued consistently that California had the right to regulate, but in regulating, it had to comply with the restrictions placed upon it by NAFTA. Specifically, California could not favor domestic investments over foreign ones, and California could not adopt the most foreign-investment-restrictive measure possible when there were less foreign-investment-restrictive, and indeed more environmentally effective, measures available for resolving the core problem of groundwater contamination. Because there were alternatives that could achieve the stated objective without discriminating against methanol, California's decision to adopt the most radical, extreme, and foreign-investment-restrictive option—a complete ban on MTBE—must be viewed with suspicion, especially because the ban was perhaps the least effective solution to the groundwater contamination problem.[9]

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[8] As IISD implicitly concedes, California's role as a "global leader…on environmental regulation making" compounds the harm to Methanex because California's ban on MTBE will inevitably influence the policies of other states and countries. *See* IISD Submission at ¶ 5.

[9] *See* Section VI *infra.*

10. The *Amici* would excuse the ban on MTBE as environmentally necessary, but that is simply not supported by the evidence, as Europe concluded. As organizations concerned with protecting the environment, the *Amici* should be well aware of how ineffective the ban on MTBE was in solving the groundwater contamination problem. Banning MTBE did nothing to end groundwater contamination by leaking USTs. The only way to reduce groundwater contamination was to repair the leaking USTs and to strictly enforce laws governing the maintenance of USTs.[10] California's failure to do so only resulted in further contamination of groundwater by ethanol and other contaminants.[11] Indeed, the *Amici* neglect to mention any of these facts as they

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[10] Exponent Report, Executive Summary, at xiii (Second Amended Claim Ex. E) ("[T]he primary issue in ameliorating the effects of MTBE on groundwater and surface water is the adequacy of the UST standards and other regulations geared toward preventing gasoline releases (and the rigor with which they are enforced).").

[11] *See* A. Bourelle, *Ethanol — the Solution to MTBE or Another Problem?*, Tahoe Daily Tribune, (Mar. 24, 2000) (reporting that ethanol was detected in groundwater in Tahoe, California) (2 JS tab 80); *MTBE - The Lawsuits Begin*, Nitrogen & Methanol, at 13 (Sept. 1, 2000) ("MTBE producers have been enjoying a little schadenfreude, as wells around California's Lake Tahoe--where the whole saga began--have been found to be contaminated with ethanol as well as MTBE. Concentrations of ethanol as high as 130ppm have been found in water tests--10,000 times the level of MTBE.") (I Methanex Amici Reply tab 3); *see also* Natural Resources Defense Council, *California's Contaminated Groundwater: Is the State Minding the Store?*, Table 4, at 18 (Apr. 2001) (citing data collected by the California Department of Health Services for October 1999 to October 2000 indicating that MTBE is not among the twenty-three contaminants found most frequently in California's groundwater) (2 JS tab 30); Exponent Report, Executive Summary, at xv (Second Amended Claim Ex. E) (stating that many chemical contaminants — including known carcinogens such as benzene, arsenic, and chloride — were and continue to be "found more often and at greater concentrations in drinking water than MTBE"); California State Auditor, *California's Drinking Water: State and Local Agencies Need to Provide Leadership to Address Contamination of Groundwater by Gasoline Components and Additives*, Summary of Report No. 98112 (Dec. 1998) (2 JS tab 12) ("Health Services and the state and regional boards are not making certain that public water system operators, storage tank owners or operators, and regulatory agencies responsible for detecting and cleaning up chemical contamination are doing their jobs. **Not only does the State regulate underground storage tanks ineffectively, it has failed in some instances to aggressively enforce the State's Safe Drinking Water Act and the laws governing underground storage tanks.** Specifically, Health Services, the regional boards, and local agencies have not adequately enforced laws that require prompt follow-up monitoring

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defend California's right to impose foreign-investment-restrictive measures without regard for the United States' obligations under NAFTA, the science underlying the ban on MTBE, the effectiveness of the measures in resolving the perceived problems, or the risks and dangers associated with ethanol usage.

III. THE AMICI MAKE SEVERAL MISTAKES OF FACT AND LAW.

A. The California Ban On MTBE Was Not A Public Health Measure.

11. The *Amici* falsely portray the ban on MTBE as a health measure even though California did not justify the ban on public health grounds. Earthjustice asserts that California "banned the use of the gasoline additive MTBE, citing concerns that the additive had contaminated the state's freshwater resources and *jeopardized human health*."[12] Similarly, IISD repeatedly characterizes the ban as a public health measure.[13] In fact, as the U.S. has recognized, California officials repeatedly described

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for chemical findings and contaminated sites, notified the public about chemicals found in drinking water, and managed the complete cleanup of chemical contamination of groundwater.").

[12] Earthjustice Submission at ¶ 1 (emphasis added); *see also id.* at ¶ 3 ("Under international law, governments have both a right and an obligation **to protect human health** and the environment.") (emphasis added); *id.* at ¶ 5 ("[T]he presumption of legitimacy of government action applies with particular significance in this case because *California had based its on concern over risks to public health and the environment*.").

[13] IISD Submission at ¶ 5 ("[I]nvestment agreements cannot become shields against first movers in the areas of environmental and human health protection."); *id.* at ¶ 48 ("Methanex, relying upon Prof. Ehlermann and the cases he raises, seeks to establish that trade law does not permit the potential negative impacts of a product on the environment or on human safety and health to be accounted for under the "like products" definition."); *id.* at ¶ 54 ("IISD submits that Methanex' overall reliance on the trade tests as focusing only on competitive relationships to the exclusion of the impacts of a product on human health or the environment are incorrect statements of the relevant law"); *id.* at ¶ 84 ("Whether one cites this as a health measure or an environmental measure is irrelevant, the result would be the same as a *bona fide* public protection measure.") (italics in original); *id.* at ¶ 86 ("The initial formulation of the United States, which IISD submits is correct, leaves *bona fide* public health and welfare measures. . . *outside* the concept of an

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the groundwater contamination as a threat to the environment, *not* as a threat to human health:

> On March 25, 1999, Governor Gray Davis issued Executive Order D-5-99...The basis for the order was stated as follows: "[T]he findings and recommendations of the U.C. report, public testimony, and regulatory agencies are that, **while MTBE has provided California with clean air benefits, because of leaking underground fuel storage tanks MTBE poses an environmental threat** to groundwater and drinking water." In accordance with those findings and recommendations, Governor Davis certified that, "on balance, **there is significant risk to the environment** from using MTBE in gasoline in California."[14]

12. Similarly, when California legislators enacted Senate Bill 989 in 1999, they stated that it was "intended to place into statute Executive Order D-5-99 issued by Governor Davis on March 26, 1999, and to enact several other provisions of law **designed to protect groundwater and drinking water from MTBE contamination**."[15] Importantly, neither Executive Order D-5-99 nor Senate Bill 989—the two key measures implementing the ban on MTBE—justified the ban on the grounds that MTBE posed a threat to human health, because they could not. Therefore, the ban of MTBE was not, by its own terms, a public health measure.

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expropriation: they are not expropriations of any kind. That is why they are not subject to compensation.") (italics in original).

[14] Amended Statement of Defense at ¶¶ 60-61 (quoting 1999 Executive Order pmbl.) (emphasis added) (21 JS tab 5).

[15] Amended Statement of Defense at ¶ 70 (quoting S.B. 989 Senate Bill – History (Comments: (1) Purpose of Bill) (18 JS tab 129 at 2512, 2516)) (emphasis added).

13. Furthermore, if California had been concerned about a threat to human health, surely it would not have replaced a non-carcinogen, MTBE,[16] with a known carcinogen—ethanol[17]—or phased in the ban over several years rather than banning the offending substance immediately.[18] California subsequently further extended the phase-out period, thus re-emphasizing the absence of a threat to public health. California itself recognized that banning MTBE would have an **adverse**, not a beneficial, effect on human health because it would end the "clean air benefits" California obtained

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[16] *See* Press Release, Cal. EPA, *Prop. 65 Scientific Review Panels Conclude MTBE is Neither a Reproductive or Developmental Toxicant nor a Carcinogen* (Dec. 10, 1998), *available at* http://www.calepa.ca.gov/PressRoom/Releases/1998/C2898.htm (last visited Nov. 1, 2002) (finding insufficient support for the proposition that MTBE is a carcinogen) (7 JS tab 83 at 1); *see also* J. McCarthy & M. Tiemann, *MTBE in Gasoline: Clean Air and Drinking Water Issues*, CRS Report, Order Code 98-920, at CRS-6 (updated May 3, 2002) (stating that IARC, NTP, and California's Carcinogen Identification Commission have "all determined not to list MTBE as a human carcinogen") (3 JS tab 27 at CRS-6).

[17] California's own expert acknowledged ethanol to be a known carcinogen. *See* Deposition Transcript of Dr. Bernard Goldstein, at 66-67 (*South Tahoe Pub. Util. Dist. v. Atlantic Richfield Co.* (Cal. Super. Ct. Dec. 13, 2000) (confirming that "[e]thanol is recognized as a human carcinogen") (6 JS tab 150).

[18] The following news articles indicate that governments act swiftly and enact effective measures when confronted with true threats to public health. *See, e.g.*, Jim Yardley, *WHO Urges China to Use Caution in Killing Civet Cats*, N.Y. Times, at A8 (Jan. 6, 2004) (discussing China's plan to immediately exterminate civet cats in response to their perceived role in communicating the SARS virus) (I Methanex Amici Reply tab 4); Warren Hoge, *As the Disease Marches On, Britain Dooms More Animals*, N.Y. Times, at A12 (Mar. 15, 2001) (discussing the slaughter of 180,000 pigs, sheep, and cows by the British government and its plans to kill 100,000 more) (I Methanex Amici Reply tab 5); Associated Press, *Disease Detectives Track Rare Malaysian Virus*, N.Y. Times, at F2 (May 4, 1999) (noting that Malaysia killed almost one million pigs in order to stem the spread of the Nipah virus) (I Methanex Amici Reply tab 6); Elisabeth Rosenthal, *Chickens Killed in Hong Kong to Combat Flu*, N.Y. Times, at A1 (Dec. 29, 1997) (describing Hong Kong's "drastic" plan to immediately kill every chicken in the territory, more than 1.2 million chickens, in order to combat a "new and sometimes deadly strain of flu") (I Methanex Amici Reply tab 31); Sarah Lyall, *Britain's Daunting Prospect: Killing 15,000 Cows a Week*, N.Y. Times, at A1 (Apr. 3, 1996) (describing Britain's plan to kill about 4.7 million cows in order to combat mad cow disease) (I Methanex Amici Reply tab 7).

through the use of MTBE and thus result in increased air pollution.[19] This evidence clearly indicates that California did not consider MTBE to pose a risk to public health.

B. Methanex Is Not An Upstream Supplier.

14. In its submission, IISD characterizes Methanex as an upstream supplier in an attempt to make it appear as if Methanex and the ethanol industry are not in like circumstances. Methanex has demonstrated that it is not an upstream supplier of methanol.[20] Here are the facts: integrated refiners have a binary choice between methanol and ethanol. They can either buy methanol to oxygenate their gasoline by combining it with isobutylene, or they can buy ethanol to oxygenate their gasoline by splash blending it at their distribution terminals. The fact that integrated refiners use the two substances at slightly different points in the production process is irrelevant. The key is that only methanol and ethanol are competing for the business of integrated refiners in California.[21] Indeed, ChevronTexaco, ExxonMobil, and other integrated refiners – many of which were Methanex U.S. customers – were compelled to switch their purchases from methanol to ethanol because of the ban.

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[19] Amended Statement of Defense at ¶¶ 60-61 (quoting 1999 Executive Order preamble, citing the "clean air benefits" California received through the use of MTBE and recognizing those benefits would be lost through the enactment of the MTBE ban) (21 JS tab 5).

[20] Methanex Reply at ¶¶ 18-25.

[21] Integrated refiners do not buy MTBE to oxygenate their gasoline so, for these buyers, ethanol competes with methanol, not MTBE.

IV. NEITHER NAFTA NOR INTERNATIONAL LAW REQUIRE THE PANEL TO ACCORD SUBSTANTIAL DEFERENCE OR A PRESUMPTION OF LEGITIMACY TO THE CALIFORNIA MEASURES.

15. Earthjustice claims that NAFTA and principles of international law require the Panel to accord "substantial deference" to **all** governmental actions.[22] Yet Earthjustice offers **no factual or legal support** for this assertion, and for good reason: neither NAFTA nor international law require the Panel to accord "substantial deference" to governmental actions like California's ban on MTBE. If the United States, Canada, and Mexico had wanted to mandate such deference, they could have included a provision to that effect in NAFTA. Their refusal to do so reflects their intent to establish a level playing field in investor-state arbitrations and to not tilt the playing field in favor of defendant states.

16. Similarly, Earthjustice claims that California's measure is entitled to a "presumption of legitimacy."[23] California's measure is not entitled to this type of presumption. There is no evidence that this type of presumption has ever been applied in the NAFTA context or in the international trade and investment context more generally. Indeed, one 1998 law review article proposed that the WTO adopt the doctrine of *omnia*

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[22] *See* Earthjustice Submission at § I ("This Tribunal Must Evaluate Evidence of California's Intent in Light of the *Substantial Deference* NAFTA and Principles of International Environmental Law Accord to Government Action to Protect Human Health and the Environment Against Legitimate Threats") (emphasis added).

[23] *See* Earthjustice Submission at ¶ 4 ("This Tribunal has recognized that international law requires that it accord California's actions in regulating MTBE a presumption of legitimacy.") (citing First Partial Award ¶ 45).

praesumuntur rite esse acta[24] for cases involving environmental trade measures, thus recognizing that the doctrine is not currently applicable in this setting.[25] If the United States, Canada, and Mexico had wanted panels to accord a presumption of legitimacy to their measures, then they would have included language to that effect in NAFTA. They did not; therefore, the Panel is not required to accord any presumption of legitimacy to the California measure.

17. In arguing that the Tribunal must accord the MTBE ban a presumption of legitimacy or substantial deference, the *Amici* have assumed that any regulatory measure which is purportedly adopted for environmental reasons must be legitimate and should be respected. This blanket assumption has led them into error.

18. International law clearly establishes that treaties like NAFTA establish presumptions that favor trade and investment, not protectionism. As a result, it is not for the Tribunal to judge whether the treaty obligations are consistent with the environmental measure, but instead whether the environmental measure is consistent with the treaty obligations. The clearest example of a presumption favoring trade lies in the exception provisions of the GATT 1994. Under Article XX(b), WTO Members may adopt measures necessary to protect human, animal or plant life or health, and under Article XX(g), Members may adopt measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on

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[24] The full Latin phrase is *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*, which translates as "All things are presumed to be done legitimately, until the contrary is proved."

[25] Mark Edward Foster, *Trade and Environment: Making Room for Environmental Trade Measures within the GATT*, 71 S. Cal. L. Rev. 393, 439 (1998) (I Methanex Amici Reply tab 8).

domestic production and consumption. These provisions allow WTO Members to maintain measures that would otherwise violate their obligations under the GATT 1994. But in order to employ these provisions, Members must prove that the relevant measures: (i) are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions apply; (ii) are not disguised restrictions on international trade; and (iii) are necessary to achieve the stated legitimate objective. Necessary, in this case, means that no other less trade-restrictive alternative is available that could achieve the same result. Therefore, rather than according "substantial deference" or a "presumption of legitimacy" to governmental measures, the GATT (and the WTO and NAFTA) does just the opposite by presuming in favor of trade and only allowing an environmental measure to take precedence if the Member adopting the measure can overcome all of the treaty hurdles.

19. If there is a presumption to be accorded, then it favors Methanex rather than the United States. The WTO Appellate Body correctly summarized international law in this regard:

> [I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[26]

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[26] WTO Appellate Body, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 14 (adopted May 27, 1997) (I Methanex Amici Reply tab 9). Importantly, the WTO Appellate Body was discussing "a generally-accepted canon of evidence in civil law, common law and…most jurisdictions," thus this analytical framework is

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Here, Methanex has adduced substantial proof that the two investments at issue are in like circumstances and that the foreign investment was discriminated against. As such, Methanex met the only burden allocated by Article 1102, and "raise[d] a presumption that what is claimed is true." Because Methanex established a *prima facie* case of discrimination against a foreign investment, the burden has shifted to the United States to rebut the presumption that what is claimed is true.[27]

20. The doctrine of *omnia praesumuntur rite esse acta*, which was cited by the Tribunal in the Partial Award, further supports the presumption favoring Methanex. This doctrine only requires Methanex to adduce sufficient proof to establish a presumption in its favor: "Courts often refer to a presumption of official regularity and propriety; but it is more precise and accurate to eschew the term 'presumption' in this context, and refer directly to the petitioner's burden of proving impropriety."[28] Here, Methanex has provided substantial evidence that California acted improperly and contrary to its NAFTA obligations in enacting the ban on MTBE and favoring the U.S. ethanol industry. Because Methanex established that California discriminated against the foreign investment, the burden shifts to the United States to demonstrate that California's

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not limited to the WTO or trade context. *See* Amended Statement of Defense at ¶ 104 n.190 (referencing the general principle articulated in Article 24 of the UNCITRAL Arbitration Rules that the burden of proof falls on the party asserting a position); *see also*, *e.g.*, *Iran v. United States (Case No. A/20)*, 11 Iran-U.S. Cl. Trib. Rep. 271, 274 (1986) ("The Tribunal Rules provides that **[e]ach party shall have the burden of proving the facts relied on to support his claim or defense**.") (emphasis added) (IV Amended Statement of Defense tab 47).

[27] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, 30 I.L.M. 577, 604 (1991) ("In case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent.") (I Methanex Amici Reply tab 10).

[28] 29 Am. Jur. § 202 (2d ed. 1994) (I Methanex Amici Reply tab 11).

measures were **legitimate** and **necessary**: "where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade."[29] The United States knows that it cannot meet this burden. Methanex has already demonstrated that less foreign-investment-restrictive and more environmentally effective alternatives exist to achieve California's stated objective of reducing groundwater contamination. For example, Methanex demonstrated that repairing or upgrading USTs would have reduced or ended groundwater contamination.[30] In light of this evidence, the Tribunal must disregard the *Amici's* argument and conclude that the United States has failed to meet its burden of proving that California's measures were legitimate and necessary—*i.e.*, that there were no less foreign-investment-restrictive or more effective alternatives that could achieve the stated objective.

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[29] *See S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, 1431 at ¶ 221 (Partial Award Nov. 13, 2000) (4 U.S. Reply tab 57); *see also* WTO Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 22, 2001) (I Methanex Amici Reply tab 12); *S.D. Myers*, ¶¶ 165-166 (Partial Award) ("[A] [signatory to a treaty] cannot justify a measure inconsistent with [its treaty obligations] as "necessary"…if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with [its treaty obligations] is available to it. By the same token, in cases where a measure consistent with [its treaty obligations] is not reasonably available, a [signatory] is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with [its treaty obligations].").

[30] As noted in footnote 121 of Methanex' Reply, the UC-Davis report calculated that upgrading underground storage tanks would reduce gasoline leaks into groundwater by up to ninety-seven percent. *See* UC Report, Vol. IV, *Leaking Underground Storage Tanks (USTs) as Point Sources of MTBE to Groundwater and Related MTBE-UST Compatibility Issues*, at 2 (4 JS tab 39B at 2); Exponent Report, Executive Summary, at xiii, citing Winston Hickox, Secretary of California EPA (Second Amended Claim Ex. E at xiii) (confirming that "the pace of contamination has slowed tremendously").

V. ENVIRONMENTAL MEASURES ARE NOT ENTITLED TO A HEIGHTENED PRESUMPTION OF LEGITIMACY.

21. Earthjustice next argues that environmental measures are entitled to a "special" or heightened presumption of legitimacy.[31] In support of this argument, Earthjustice cites NAFTA's preamble and the North American Agreement on Environmental Cooperation ("NAAEC"),[32] neither of which state that government or environmental measures are entitled to a presumption of legitimacy, let alone a special or heightened one.

22. Earthjustice claims that "[t]he environmental provisions of [NAFTA and NAAEC] are part of the context in which this Tribunal must interpret Methanex' claim under Chapter 11."[33] Yet Earthjustice ignores the larger context within which those provisions and hortatory language appear. Earthjustice selectively quotes the few portions of NAFTA and its side agreements that relate to environmental protection and conservation, but disregards the fact that those environmental provisions occupy a subordinate position in the overall framework of NAFTA. The primary purpose of NAFTA is to foster open trade and investment liberalization, thus the core obligations relate to the achievement of those objectives. Environmental protection and conservation is only a secondary objective, cited in hortatory language in the Preamble and in a little-used side agreement. Earthjustice cannot seriously think that it can misconstrue hortatory statements to create positive obligations to which the signatories never agreed, or that it

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[31] *See* Earthjustice Submission at ¶ 9 ("In the context of NAFTA, therefore, environmental and health measures are to be accorded a special presumption of legitimacy.").

[32] *See* Earthjustice Submission at ¶¶ 6-9.

[33] *See* Earthjustice Submission at ¶ 6.

can use a side agreement (NAAEC) as a prism for interpreting the primary agreement (NAFTA). The Tribunal can only accept Earthjustice's argument if it disregards traditional principles of treaty interpretation and forgets that NAFTA is a trade and investment treaty with environmental provisions, not an environmental treaty with trade and investment provisions. The proper context within which the Tribunal must consider Methanex' claim consists of the trade and investment obligations that are the essence of NAFTA, not the environmental provisions and hortatory language that are subordinate to those core trade and investment obligations.

23. Similarly, IISD seeks to create a false context for the interpretation of Chapter 11 by isolating it from the larger international context and characterizing GATT/WTO caselaw, "trade law," and other chapters of NAFTA as "wholly irrelevant" to Chapter 11 and these proceedings.[34] IISD protests that Methanex relies to a certain extent on GATT/WTO caselaw or "trade law," yet IISD relies on GATT/WTO caselaw and "trade law" throughout its submission, which reflects the disingenuous nature of its protestations.[35] While seeking to divorce Chapter 11 from the international context on the one hand, IISD seeks to draw support, on the other hand, from the Preamble and the objectives of NAFTA, as well as from GATT/WTO caselaw. In citing these sources,

[34] *See* IISD Submission at ¶ 22 (characterizing WTO/GATT caselaw and trade law as "wholly irrelevant"); *see id.* at 18 ("Methanex in its pleadings has raised, on several occasions, the question of the right to regulate for protection of the environment as it relates to the [WTO] and NAFTA even though it is not relevant to Chapter 11."); *see id.* at ¶¶ 20-21 (contrasting Methanex' approach of interpreting Chapter 11 within the context of other chapters of NAFTA, as well as GATT/WTO agreements and caselaw, to the IISD approach of viewing Chapter 11 as "a single, largely self-contained set of rules").

[35] *See, e.g.*, IISD Submission at ¶ 41 ("This is perfectly consistent with the reasoning of the WTO Appellate Body…"); *id.* at ¶ 71 ("It is important to recall paragraphs 40-46 here, which noted that trade law clearly allows the state to choose the level of risk and level of protection it believes is appropriate for the public interest.").

IISD selectively quotes hortatory language and other statements that evince at least some support for environmental protection measures, and seeks to interpret these statements to create positive obligations that might excuse California's failure to comply with its NAFTA obligations. Surely the Tribunal cannot permit such a skewed approach to treaty interpretation, under which international law is deemed "wholly irrelevant" unless it is helpful, and express treaty text is ignored unless it can be misinterpreted to favor one party.

24. Earthjustice also claims that California's measures are entitled to a special presumption of legitimacy as a result of NAFTA Article 1114, which permits signatories to "adopt[], maintain[] or enforce[e]" any environmental measures they consider appropriate as long as the measures are consistent with Chapter 11. NAFTA Article 1114 says nothing about presumptions of legitimacy and gives no indication that there is a sliding scale of government measures wherein some measures are entitled to a heightened presumption of legitimacy and other measures are entitled to a lesser presumption. Furthermore, Article 1114 **expressly requires** that environmental measures must be **consistent with** the other provisions of Chapter 11, which Earthjustice ignores. For example, Article 1102 obligates the United States, and by extension California, to accord "treatment no less favorable" to the investment of foreign investors like Methanex, *i.e.*, it prohibits California from favoring U.S. domestic investors like Archer Daniels Midland ("ADM"). As Methanex previously demonstrated, California accorded preferential treatment to domestic ethanol producers and blatantly discriminated

against Methanex as a foreign investor by banning MTBE.[36] Therefore, California's ban on MTBE is not entitled to a special or heightened presumption of legitimacy, or any presumption at all.

VI. THE PRECAUTIONARY PRINCIPLE DOES NOT ALLOW THE UNITED STATES TO VIOLATE ITS TREATY OBLIGATIONS AND DISCRIMINATE AGAINST FOREIGN INVESTORS AND INVESTMENTS.

25. Earthjustice argues repeatedly that nothing should constrain the imposition of government measures like California's ban on MTBE. "Governments must [] be free[] to address legitimate threats, even when circumstances—such as the fact that a majority of investors in a given field are foreign—give them reason to know that their actions will fall disproportionately on foreign investors."[37] Earthjustice conveniently ignores that, as the United States has itself recognized,[38] governments are free to address **legitimate** threats in **legitimate** ways, but governments are **not** free to ignore binding

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[36] *See* Methanex Reply at ¶¶ 168-202.

[37] Earthjustice Submission at ¶ 23.

[38] USTR Press Release, *U.S. and Cooperating Countries File WTO Case against EU Moratorium on Biotech Foods and Crops*: *EU's Illegal, Non-Science Based Moratorium Harmful to Agriculture and the Developing World* (May 13, 2003), *available at* http://www.ustr.gov/releases/2003/05/03-31.pdf (emphasizing that the EU was acting in an illegal manner by banning agricultural biotech products without sufficient scientific evidence and ignoring the "[n]umerous organizations, researchers and scientists [who] have determined that biotech foods pose no threat to humans or the environment") (I Methanex Amici Reply tab 13); *see also* Ambassador Peter Scher, U.S. Special Trade Negotiator for Agriculture, *Trade Policy And The Scientific Revolution: The Case Of Agricultural Biotechnology* (Nov. 24, 1999), *available at* http://www.useu.be/ISSUES/biot1124.html (stating that it is unreasonable to interpret the precautionary principle to stand for the proposition that "until you can prove that there can never be a risk from a product, it should not be introduced," and pointing out that Europe banned tomatoes for three centuries based on similar irrational fears and extreme standards) (I Methanex Amici Reply tab 14).

treaty obligations or to respond to threats that are not based on credible scientific evidence.

26. First, California was not free to ignore its binding obligations under NAFTA in addressing the groundwater contamination problem. As the Panel is aware, California is bound by the provisions of NAFTA. Under NAFTA Article 1102, governments, including California's, must accord "treatment no less favorable" to foreign investors and investments than is accorded to domestic investors and investments. NAFTA Article 1114 reinforces this obligation by stating that all environmental measures must be consistent with the other provisions of Chapter 11, including the national treatment obligation contained in Article 1102. Thus, California was not free to accord preferential treatment to domestic ethanol producers or discriminate against Methanex' investments nor Methanex as a foreign investor. Yet California did just that. In doing so, California acted in an illegitimate manner and violated its national treatment obligations under NAFTA.

27. Second, California was required to base its measure on credible scientific evidence.[39] The United States' efforts to defend the underfunded and incomplete UC Report reflects its recognition of this principle. Yet, as the EU concluded, no credible scientific evidence exists to support the ban on MTBE.

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[39] *See, e.g.*, WTO Appellate Body Report, *EC Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, at ¶¶ 192-209 (adopted Feb. 19, 1998) (interpreting the precautionary principle to require that governments base their environmental measures on credible scientific evidence) (I Methanex Amici Reply tab 15).

28. There was no credible scientific evidence supporting the necessity of a ban on MTBE. MTBE is neither toxic nor carcinogenic. The overall weight of evidence shows that MTBE is not a human carcinogen, and that the evidence for human carcinogencity is far less for MTBE than for contaminants present in greater amounts than MTBE, such as benzene and acetaldehyde.[40] The UC Report found that concerns over the impact of MTBE on human health were merely "plausible," but had not been substantiated in studies.[41] Based on the same evidence, the California Proposition 65 Scientific Advisory Panel Carcinogen Identification Committee declined to list MTBE as a carcinogen.[42] Similarly, the EU found that "the suspicion that MTBE can cause cancer was not sufficiently founded by the available data."[43] The EU further concluded that MTBE is not a known carcinogen, that it is not a human health threat, that it reduces air pollution, and that the proper measure for preventing MTBE contamination was not to

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[40] Rebuttal Report by Dr. Pamela Williams to Amended Statement of Defense of Respondent and Selected Expert Reports in Methanex v. USA, dated February 19, 2004. (20 JS tab C at 44).

[41] *See* Second Amended Claim at 112 (citing UC Report, Vol. V, MTBE: Evaluation of Management Options for Water Supply and Ecosystem Impacts, at 8) (5 JS tab 40B at 8).

[42] *See* Press Release, Cal. EPA, *Prop. 65 Scientific Review Panels Copnclude MTBE is Neither a Reproductive or Developmental Toxicant nor a Carcinogen* (Dec. 10, 1998), *available at* http://www.calepa.ca.gov/PressRoom/Releases/1998/C2898.htm (last visited Nov. 1, 2002) (finding insufficient support for the proposition that MTBE is a carcinogen) (7 JS tab 83 at 1); *see also* J. McCarthy & M. Tiemann, *MTBE in Gasoline: Clean Air and Drinking Water Issues*, CRS Report, Order Code 98-920, at CRS-6 (updated May 3, 2002) (stating that IARC, NTP, and California's Carcinogen Identification Commission have "all determined not to list MTBE as a human carcinogen") (3 JS tab 27 at CRS-6).

[43] European Comm'n, *Draft Summary Record*, Meeting of the Commission Working Group on the Classification and Labeling of Dangerous Substances, at 20 (Jan. 8, 2001) (3 JS tab 21 at 20).

ban it, but to ensure that underground fuel storage tanks do not leak.[44] In and of itself, the EU review calls into question the legitimacy of the California ban.[45]

29. Furthermore, the risk to the environment was greatly and obviously overstated in the UC Report. MTBE is not one of the twenty-three contaminants found most frequently in the state's groundwater,[46] and MTBE contamination of surface water, such as reservoirs, has been virtually eliminated. "The surface-water data show a much more notable downward trend in the overall detection frequency for MTBE since 1998 than do the groundwater data. The observed decrease in surface-water source detections is likely due to the discontinued use of two-stroke engines in selected water bodies in California. The surface-water data provide further evidence that MTBE is rarely found in public drinking water supplies at the levels of greatest concern."[47] Surface water supplies

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[44] European Comm'n, *Recommendation of 7 November 2001*, Official Journal of the European Communities, 2001/838/EC, at L319/42-44 (Dec. 4, 2001) (3 JS tab 22 at 42-44) (finding that for consumers and for human health, there was "no need for further information and/or testing"); European Chemicals Bureau, *European Union Risk Assessment Report: Tert-Butyl Methyl Ether* (2002), at 18 (indicating that methanol and MTBE "improve air quality") (21 JS tab 10 at 18); International Fuel Quality Center, *Update on the European Union MTBE Situation*, Feb. 19, 2001, at 1 (indicating that a 2001 EU study concluded that "the adequate enforcement of existing tank legislation is the key to safeguarding water quality in the EU" and preventing MTBE contamination) (3 JS tab 26 at 1).

[45] *See Some Clear Thinking in Europe*, DeWitt "MTBE & Oxygenates" Report, Issue 805, Dec. 13, 2001, at 1 (summarizing an EU report on MTBE that found "no concern" for risks to consumers, human health, and the atmosphere and ecosystem, and that recommended the EU focus on the application of the "best approaches to tank design and construction" and monitoring for early detection of groundwater contamination) (23 JS tab 64 at 1). *See* Exponent Report, Individual International Information Summaries, at 22, citing MTBE, EU Institutions (Brussels) Press Release, May 11, 2001 (Second Amended Claim Ex. E at 22) (noting the Commission's belief that robustly enforcing UST standards is "the best way to tackle the problem of possible groundwater contamination by MTBE").

[46] *See* Natural Resources Defense Council, *California's Contaminated Groundwater: Is the State Minding the Store?*, Table 4, at 18 (Apr. 2001) (3 JS tab 30 at 18).

[47] Exponent Report (Second Amended Claim Ex. E at 29).

drinking water for 60-70 percent of Californians.[48] For them, MTBE contamination is no longer a concern.

30. By banning or reducing the use of two-stroke engines, California solved the surface water MTBE problem long before the MTBE ban went into effect.[49] With respect to groundwater supplies, California's underlying problem was its failure to clean up its leaking USTs. California's State Auditor's concluded that:

> Health Services and the state and regional boards are not making certain that public water system operators, storage tank owners or operators, and regulatory agencies responsible for detecting and cleaning up chemical contamination are doing their jobs. Not only does the State regulate underground storage tanks ineffectively, it has failed in some instances to aggressively enforce the State's Safe Drinking Water Act and the laws governing underground storage tanks.[50]

The 1998 UST upgrade mandate was only the beginning in resolving California's leaking UST problem. Since then, California has addressed the inadequacies of UST leak prevention and leak detection by passing additional legislation.

31. California itself has admitted that MTBE detections in groundwater have decreased "tremendously."[51] Six days after Governor Davis delayed

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[48] *Id*. at 25.

[49] *Improvement Evident after MTBE Ban in Tahoe,* Associated Press Newswires (May 16, 2001) (23 JS tab 65 at 1).

[50] California State Auditor, *California's Drinking Water: State and Local Agencies Need to Provide Leadership to Address Contamination of Groundwater by Gasoline Components and Additives*, Summary of Report No. 98112 (Dec. 1998) (2 JS tab 12 at 1).

[51] Exponent Report, Executive Summary, at xiii, citing Hickox (Second Amended Claim Ex. E at xiii) (confirming that "the pace of contamination has slowed tremendously").

the ban for a year, Gordon Schremp, an analyst for the California Energy Commission, admitted to the 2002 World Fuels Conference that "[t]he frequency of MTBE showing up in wells is a lot less than anticipated in the UC study."[52] EPA Secretary Hickox further admitted that the decrease is due to improved underground tank management when he stated that the MTBE "problem" was being corrected through the much-improved UST management programs.[53]

32. In sum, the ban on MTBE was not supported either by credible scientific evidence or by environmental conditions. All of the evidence indicated that MTBE was safe when it was properly used and stored, and that perceived threats to the environment could be quickly remedied if the proper measures were taken.

33. Remarkably, Earthjustice implicitly concedes that the ban on MTBE was not based on credible scientific evidence, but instead on public hysteria and fears generated by the ADM-funded and -directed misinformation campaign: "While science plays an important role in identifying the existence of a risk, the decision concerning the appropriate response to that risk is **fundamentally political**. Among other things, a representative government will need to weigh how much its citizens **fear**

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[52] S. Mehta, *MTBE Phaseout Cost in Billions, Analyst Says*, L.A. Times, at B12 (Apr. 20, 2002) (quoting California Energy Commission analyst Gordon Schremp, who notes that "University of California research in 1998 projected that annual water-cleanup bills could reach $1.5 billion if MTBE were kept in gasoline, but . . . that by using new assumptions gleaned from four years of MTBE experience, cleanup costs would be less than one-sixth of that figure.") (7 JS tab 115 at B12).

[53] J. Woolfolk, *California Governor Moves To Keep Gas Prices In Check By Delaying Additive Ban*, Knight-Ridder, Mar. 16, 2002 (23 JS tab 69 at 2); *see also* Exponent Report, Executive Summary, at xiii, citing Hickox (Second Amended Claim Ex. E at xiii) (confirming that "the pace of contamination has slowed tremendously"); *see id.* (noting Hickox suggests that a delay in implementing the ban would not constitute "a great risk to groundwater").

the particular risk…."[54] In other words, Earthjustice argues that California, simply by virtue of having a representative government, should be able to derogate from its obligations under NAFTA and enact a ban on MTBE even in the absence of credible scientific evidence. Surely the Panel cannot support this outlandish assertion. As the United States has itself argued: "To find political solutions to these issues is to run significant risks – and not only of trade disputes. It is, in fact, to risk the public health. **The political approach inherently moves away from decisions based on science, and towards decisions guided by ignorance, fear, or material gain**."[55]

34. In support of its argument, Earthjustice misconstrues the precautionary principle to permit governments to derogate from their treaty obligations whenever they are purportedly responding to an environmental threat. The precautionary principle does not provide a blanket exemption from treaty obligations and does not excuse states from complying with their obligation to base environmental measures on credible scientific evidence.[56] The one iteration of the Precautionary Principle to which both the United States and Canada have agreed is contained in Article 5.7 of the WTO Sanitary and Phytosanitary Agreement:

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[54] Earthjustice Submission at ¶ 26 (emphasis added).

[55] Ambassador Peter Scher, U.S. Special Trade Negotiator for Agriculture, *Trade Policy And The Scientific Revolution: The Case Of Agricultural Biotechnology* (Nov. 24, 1999), *available at* http://www.useu.be/ISSUES/biot1124.html (emphasis added) (I Methanex Amici Reply tab 14).

[56] *See, e.g.*, WTO Appellate Body Report, *EC Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 19, 1998), at ¶¶ 192-209 (concluding that governments must base their environmental measures on credible scientific evidence) (I Methanex Amici Reply tab 15).

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

Using Article 5.7 as a guide, it is clear that the Precautionary Principle only allows governments to act where there is a gap in scientific knowledge, and the only recourse available to governments in that situation is the adoption of provisional measures with defined expiration dates, with the date of expiration determined by the length of time required to fill the gap in the scientific knowledge. In short, the Precautionary Principle is only available in limited circumstances and for a limited period of time.

35. Here, California never indicated, and the U.S. does not argue, that it was acting on the basis of the Precautionary Principle or that it viewed the scientific information as being insufficient. Indeed, California could not have justified the MTBE ban based on a gap in the scientific knowledge about MTBE because it is one of the most highly studied chemical compounds currently in use. Methanex has identified approximately 200 studies that examined MTBE before the California measures were enacted. For these reasons, any assertion that the MTBE ban is justified on the basis of the Precautionary Principle is wrong in fact and represents little more than *post hoc* rationalization. If the United States wishes to justify the MTBE ban in this manner, then the onus would be on the U.S. to demonstrate that California properly relied on the Precautionary Principle by identifying the gap in scientific knowledge, the reasonable

efforts undertaken to fill that gap, and the provisional measure enacted on the basis of the Precautionary Principle. The U.S. could not meet any of these requirements.

36. In arguing that governments may enact purportedly environmental measures for any reason or no reason at all, Earthjustice fails to recognize that if the United States, Canada, and Mexico wanted the freedom to act whenever and however they wanted for whatever reason, they would not have signed treaties like NAFTA that obliged them to act in **legitimate** ways in response to **legitimate** threats. Even IISD concedes that states constrain their sovereignty by signing international treaties, and require disputes like this one to be decided in accordance with the terms of the treaty, not on the basis of hyped-up fears and disinformation.[57] While governments must protect the environment, in doing so they must act on the basis of **credible** scientific evidence, and the measures they adopt to address the perceived problem must not be **more foreign-investment-restrictive than necessary**. Neither Earthjustice's misinterpretation of NAFTA nor its mischaracterization of the precautionary principle can mask or excuse California's failure to adhere to its treaty obligations.

37. Not only was there no credible scientific evidence supporting the ban on MTBE, but there was also no credible scientific evidence supporting the switch to ethanol.

38. Instead of improving California's environment, ethanol has worsened it. The switch to ethanol has increased air pollution, thus reversing decades of

[57] IISD Submission at ¶¶ 10, 61.

progress achieved through the use of MTBE. Before the ban, MTBE helped California to reduce toxic air emissions by 27 percent, benzene ambient levels by 43 percent, nitrogen oxide ("NOx"), by 8 percent, ozone emissions by 50 percent, and "ozone exceedances" by 20 percent.[58] In contrast, "ethanol-based RFG doubled exceedances in ozone levels," and the addition of ethanol caused exceedances to increase 97 percent from 2000 and 71 percent from the prior three-year average.[59] Ethanol also "has a tendency to increase NOx emissions in automobile exhaust,…degrade drivability and increase exhaust emissions," and increase emissions of "NOx, volatile organic compounds, and carcinogens."[60] Not surprisingly, the increase in ethanol usage in California coincided with a "surge in ozone and pollution problems" after "twenty years of improving ozone conditions."[61]

39. Increasing ethanol use will also cause increased water pollution. Ethanol RFG is more volatile than MTBE, and this could increase the level of leaks in USTs.[62] Greater release rates will increase environmental water contamination by benzene, ethanol, and other chemicals classified as carcinogens.[63]

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[58] Highlights from the 12th Annual DeWitt Global Methanol & Clean Fuels Conference, DeWitt "MTBE & Oxygenates" Report, Issue 898, Nov. 6, 2003. (23 JS tab 47).

[59] *Id.* at 1 (23 JS tab 47 at 1).

[60] California Ozone Problems Continue Even As Weather Moderates, DeWitt "MTBE & Oxygenates" Report, Issue 895, Oct. 9, 2003, at 1 (23 JS tab 48 at 1).

[61] *California Dreamin*, DeWitt "MTBE & Oxygenates" Report, Issue 885, July 31, 2003, at 1 (23 JS tab 49 at 1).

[62] *See* Expert Report of Gordon Rausser at 23-24. (20 JS tab A).

[63] *See id.* at 24. (20 JS tab A).

40. In addition, evidence indicates that ethanol causes underground benzene plumes to lengthen because, as ethanol degrades, it depletes oxygen. This interferes with the attenuation of benzene. A report by the Lawrence Livermore National Laboratory to the California Water Resources Board cautioned that ethanol could cause a four-fold decrease in the rate of BTEX degradation and increase benzene plume lengths by 250 percent.[64]

41. In light of this evidence, the Tribunal must question the motives of Earthjustice and IISD in supporting the ban on MTBE while remaining silent on the scientifically-demonstrated dangers of ethanol and the twenty-three contaminants that are most commonly found in California groundwater. Their silence speaks volumes as to their motivation in this proceeding. While posing as champions of public health and the environment, the *Amici* are seeking only to stifle the application of Chapter 11 and prevent investors like Methanex from being compensated for the harm inflicted upon them. Indeed, the *amicus curiae* submissions reek of opposition to the entire concept of investor-state arbitration. Thus, the Tribunal must be cautious in considering the *amicus curiae* submissions, for it appears as if the *Amici* are only using their participation in these proceedings as a vehicle for undermining the entire investor-state arbitration process.

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[64] "Environmental Assessment of the Use of Ethanol as a Fuel Oxygenate: Subsurface Fate and Transport of Gasoline Containing Ethanol. Report to the California State Water Resources Control Board," Ed. David Rice and Rosanne T. Depue, October 2001 (10 JS tab 190); *See* Expert Report of Gordon Rausser at 30 (20 JS tab A).

VII. IISD IGNORES BASIC PRINCIPLES OF INTERNATIONAL LAW BY ASSERTING THAT INTENT CANNOT BE INFERRED FROM CALIFORNIA'S KNOWLEDGE AND CONDUCT.

42. IISD ignores basic principles of international law by asserting that California's efforts to favor domestic ethanol investments and discriminate against foreign investments cannot serve as the basis for proving intent.[65]

43. As IISD concedes,[66] it is a fundamental principle of international law that intent may be established by inference and circumstantial evidence.[67] In order to establish intent, courts look to the surrounding circumstances and the defendant's conduct and overt acts.[68] In this regard, IISD correctly states that "proof of impermissible intent…may come from a completely disproportionate response to a problem,…from a

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[65] IISD Submission at ¶¶ 75-78.

[66] IISD Submission at ¶ 65 ("[S]moking guns on impermissible intent will not often be found[, in which case] [i]nferences, circumstantial evidence, and the like may, in such circumstances, have to be relied upon.").

[67] *See* Second Amended Claim at ¶¶ 25-55 (discussing how the common law and international adjudicatory bodies like the WTO and the European Court of Justice rely on inferences and circumstantial evidence to establish intent "because, in dealing with matters of intent, direct proof is rarely (if ever) available").

[68] *See* Second Amended Claim at ¶¶ 27-31 (citing *Liparota v. United States*, 471 U.S. 419, 434 (1985) ("[T]he Government may prove [*mens rea*] by reference to facts and circumstances surrounding the case.") (II Methanex Amici Reply tab 16)); *Cramer v. United States*, 325 U.S. 1, 31 (1945) (recognizing that "intent must be inferred from conduct of some sort," and that it is thus "permissible to draw usual reasonable inferences as to intent from the overt acts") (II Methanex Amici Reply tab 17); *United States v. Chiantese*, 560 F.2d 1244, 1256 (5th Cir. 1977) (indicating that criminal intent may be inferred from "any statement made and [any act] done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.") (II Methanex Amici Reply tab 18); *Wilson v. Pringle*, [1987] Q.B. 237 (Ct. App. 1986) (holding that the question of hostile intent is a "question of fact. . . [that] may be imported from the circumstances.") (II Methanex Amici Reply tab 19).

lack of a plausible relationship between the measure and the declared objective or from the inability of the measure to achieve the objective."[69]

44. Here, Methanex has adduced substantial proof that the ban on MTBE was a "completely disproportionate" and remarkably ineffective solution to the stated objective of reducing groundwater contamination.[70] For example, repairing or upgrading USTs would have reduced or ended groundwater contamination.[71] Yet California decided to ban MTBE instead. By adopting a radical, foreign-investment-restrictive, and ineffective course of action over the simpler and more effective remedy, California revealed its measures to be nothing more than a thinly veiled effort to favor domestic investments over foreign investments. As such, California's measures bore no plausible relationship to the stated objective of reducing groundwater contamination.

45. By arguing that Methanex cannot infer intent from California's efforts to favor domestic investments over foreign investments, IISD contravenes long-

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[69] IISD Submission at ¶ 70; *see also* P. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 121-22 (1971) (indicating that a "conscientious decisionmaker . . . considers the costs of a proposal, its conduciveness to the ends sought to be attained, and the availability of alternatives less costly to the community as a whole," but when "a decision obviously fails to reflect these considerations with respect to any legitimate objective [such failure] supports the inference that it was improperly motivated") (7 JS tab 116); L. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 San Diego L. Rev. 1041, 1125 (1978) (noting, in the discrimination context, that "[p]roof of less imperfect means could well tip the scales if the plaintiff has produced other evidence of prejudice, as, for example, evidence of social context or legislative history") (7 JS tab 121).

[70] *See* Section VI *supra.*

[71] As noted in footnote 121 of Methanex' Reply, the UC-Davis report calculated that upgrading underground storage tanks would reduce gasoline leaks into groundwater by up to ninety-seven percent. *See* UC Report, Vol. IV, *Leaking Underground Storage Tanks (USTs) as Point Sources of MTBE to Groundwater and Related MTBE-UST Compatibility Issues*, at 2 (4 JS tab 39B at 2).

established precepts of international law. In effect, IISD contends that environmental measures should not be subject to the same principles that govern other governmental measures. But there is no justification for such a carve-out for environmental measures. No treaty or law permits such differential treatment amongst governmental measures, and none of the hortatory language on which the *Amici* heavily rely supports IISD's bizarre legal theory.

VIII. THE TRIBUNAL MUST REJECT IISD'S PROPOSED BALANCING TEST BECAUSE IT LACKS ANY FOUNDATION IN U.S. OR INTERNATIONAL LAW.

46. In its *amicus* submission, IISD repeatedly misconstrues Methanex' argument as to the burden of proof. As a result, Methanex is compelled to restate its position as to the burden of proof here.

47. First, Methanex, as the Claimant, has the preliminary burden under Article 1101 to show that its claim falls within the scope of Chapter 11, which requires a showing that it has investments in the United States that have been damaged, and that the measures it claims have damaged those investments "relate to" Methanex.[72] In the initial pleadings, the parties to this dispute disagreed over whether the measures at issue even related to Methanex' U.S. investment. The U.S. argued that the measures must have some legally significant connection to Methanex' investments, but did not define "legally significant connection" other than to say it meant more than "affect."[73]

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[72] NAFTA Article 1101(1).

[73] *See* Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment (Apr. 12, 2001), at 43.

48. Methanex, in turn, argued that California's intent to benefit the ethanol industry, and its detrimental effect, **intended or unintended**, on foreign producers of methanol and MTBE, satisfied the "legally significant connection" sought by the U.S.[74] In its partial award, the Tribunal went a step further, and determined that the "relating to" requirement in article 1101 actually required a more specific intent to harm foreign MTBE and methanol producers.[75] It then ordered Methanex to submit a fresh pleading in line with this determination.[76] Accordingly, Methanex has shown that California intended to benefit the domestic investments of the U.S. ethanol industry and to discriminate against and thus harm the investments of foreign methanol producers like Methanex.[77]

49. Second, Methanex has the burden under Article 1102 to show that its investments are in like circumstances with the domestic investment at issue, and that its investment has been damaged due to less favorable treatment.[78] Methanex will not repeat the entire substance of its arguments on this point here, but suffice it to say that having established that the two investments at issue are in like circumstances, and having established that the foreign investment was discriminated against, Methanex meets the

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[74] *See* Methanex Rejoinder Memorial on Jurisdiction and Its Proposed Amendment (May 25, 2001), at 25-28.

[75] *See* Partial Award on Jurisdiction at ¶ 154 (Aug. 7, 2002). Methanex continues to dispute the "specific intent test" announced in the Partial Award on Jurisdiction based on the impartiality of one of the members of the Tribunal and test's radical departure from international precedent and argument by the parties. Although Methanex cites the award and its contents, this should not construed as a relinquishment Methanex' Request for Reconsideration.

[76] *Id.*

[77] *See* Methanex Reply at ¶¶ 147-167.

[78] NAFTA Article 1102(2).

only burden allocated by Article 1102. Therefore, the burden shifts to the United States to prove that California's measures were a legitimate and necessary means of achieving the stated objective—reducing groundwater contamination—because no less foreign-investment-restrictive or more effective alternatives were available.

50. Although Methanex' position on the allocation of the burden of proof is clear from the pleadings, IISD mischaracterizes Methanex' position on this issue: "Methanex notes that there is no exception provision for Chapter 11, but then appears to carry on as if there were…Methanex argues repeatedly that it is up to the United States to establish the validity of the environmental measures as an exception to the rules under Chapter 11."[79] Nothing could be further from the truth.

51. Methanex has **never** argued that there is an environmental exception to Chapter 11.[80] Indeed, in paragraph 188 of Methanex' reply, which IISD cites without irony, Methanex clearly states "[t]here is no provision in NAFTA Chapter 11 explicitly permitting environmental exceptions to the national treatment obligation." Methanex cannot state this principle any more clearly, and is unsure how IISD comes to believe that Methanex argues that there **is** an exception when IISD was able to find and cite the clearest statement in Methanex' reply that **no such exception exists**. Yet IISD insists that Methanex is "carrying on" as if an exception existed to Chapter 11.

52. Strangely enough, IISD concedes that Chapter 11 must be interpreted as an "integrated conception," which signifies that the same approach must

[79] IISD Submission at ¶¶ 22, 64.

[80] *See* ¶ 55 *infra.*

apply to the Preamble and Objectives, at a minimum. As such, the Tribunal should consider the whole of the Preamble and Objectives. The Preamble contains nine hortatory statements that refer to reducing distortions in trade, establishing clear and mutually advantageous rules for governing trade, ensuring a predictable commercial framework for business planning and investment, and enhancing the competitiveness of firms in global markets. The nine statements relating to trade, compared to three related to environmental protection and conservation, indicate that NAFTA is **primarily** intended to promote and liberalize trade among the signatory countries. Importantly, the statements relating to trade precede, and are incorporated into, the statements relating to environmental protection. For example, the signatories agreed to "undertake each of the preceding [obligations to create and support open trade and liberalization] in a manner consistent with environmental protection and conservation."[81] More importantly, the Objectives of NAFTA, in Article 102, do not refer to the environment or to sustainable development, but do mention promoting fair competition and substantially increasing investment opportunities as objectives of the agreement. By ignoring this context, IISD has violated traditional rules of treaty interpretation, which require consideration of the treaty text as a whole rather than selective parts thereof.

53. Unlike the *Amici*, Methanex does not contend that the hortatory language in the Preamble and Objectives creates any positive obligations on the part of the signatories. However, this language does reinforce the obligations specified in the agreement and create a context within which to interpret those obligations. The

[81] NAFTA, Preamble.

signatories' emphasis on open trade and liberalization, as well as their specific reaffirmation of national treatment and other core principles of international trade law in the Objectives,[82] reinforce the signatories' obligation to adhere to the terms of the treaty and not deviate from the core principles governing it, including the principle of nondiscrimination. The signatories have, as IISD concedes, restrained their sovereignty to act,[83] and have committed to enact **legitimate** measures in **legitimate** ways, as defined in NAFTA. As such, the obligations are not to be taken lightly, and indeed are to be enforced vigorously.

54. For these reasons, when an investor like Methanex alleges and provides substantial proof that a signatory has not complied with its treaty obligations and has discriminated against that investor, then those measures must be viewed with the greatest suspicion and subjected to the harshest scrutiny in order to ensure that the measures were **legitimate** and **necessary**—*i.e.*, that no other measures were available that were equally (or even more) effective and less discriminatory or foreign-investment-restrictive.

55. Finally, although the Parties failed to negotiate a positive rule regarding the environment in Chapter 11, Methanex recognizes the political pressures placed on the Tribunal to find some allowance in Chapter 11 for genuine attempts by the Parties to protect the environment. For this reason, Methanex has argued that because

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[82] NAFTA Article 102(1) ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to…").

[83] IISD Submission at ¶ 10.

any such allowance would by its nature constitute a limited derogation from other substantive provisions—*i.e.*, it would be the equivalent of an exception—the Tribunal should look to the exception provisions elsewhere in the NAFTA as the basis for applying the allowance here.[84] Article 2101 is a logical choice, as it is a general exception to the Parties' obligations. Since Article 2101 specifically incorporates the standards of Article XX of the GATT, Methanex points to GATT and WTO cases to guide the Tribunal in determining the practical matter of burden allocation should the Tribunal wish to find an allowance. Simply placing the burden on Methanex would constitute a manifest injustice and would seriously undermine investor confidence in the investor-state arbitration system.

56. GATT and WTO cases require the complaining party to make a *prima facie* case, and then shifts the burden of proof to the defending party to rebut that case.[85] Using GATT/WTO caselaw as the model for the burden of proof allocation, Methanex has simply argued that if the Tribunal finds that an exception exists to the U.S. national treatment obligations under the NAFTA for legitimate environmental regulation, the Tribunal should then require the United States to prove that its "environmental regulation" is, indeed, legitimate and necessary.[86] Methanex continues to believe the U.S. cannot overcome this burden.

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[84] *See* Methanex Reply at ¶¶ 188-190. Methanex notes that, had the Parties intended an exception for legitimate environmental protection, they were capable of formulating such exceptions, as Article 2101 illustrates.

[85] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, AB-1997-1, WT/DS33/AB/R, at 14 (adopted May 27, 1997) (I Methanex Amici Reply tab 9).

[86] Methanex Reply at ¶ 189.

57. IISD rejects the GATT/WTO model and asserts that the Tribunal should adopt a novel and unprecedented balancing test. Under this test, the Tribunal would accord "significant deference"—which IISD likens to Chevron deference under U.S. law—to the governmental measure[87] and consider all of the evidence together at the same time, including proof of permissible and impermissible intent, like circumstances, and less favorable treatment.[88]

58. IISD's approach has **no** basis in U.S. or international law. Further, the balancing test advocated by IISD lacks any foundation in the NAFTA or GATT/WTO context. As previously noted, all of these bodies of law rely on allocating the burden of proof, not on a shotgun approach that forces the conflation of different types of burdens and evidence together.[89] If the signatories had wanted to create a new analytical framework and deviate from settled international law, then surely they would have done so in the text of the agreement. Their refusal to do so clearly indicates that they wanted to adhere to existing norms of burden of proof allocation, not create new ones. To the extent the Tribunal adopts an active role to read environmental safety valve into NAFTA

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[87] *See* IISD Submission at ¶ 73.

[88] IISD argues that: "If consideration of permissible intent is not made in the analysis of like circumstances and less favourable treatment. . .Chapter 11 provides nowhere else for it to be made." IISD Submission at ¶ 69.

[89] WTO Appellate Body, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 14 (adopted May 27, 1997) (noting that the WTO Appellate Body's approach is "a generally-accepted canon of evidence in civil law, common law and…most jurisdictions") (I Methanex Amici Reply tab 9); *see also* Amended Statement of Defense at ¶ 104 n.190 (referencing the general principle articulated in Article 24 of the UNCITRAL Arbitration Rules that the burden of proof falls on the party asserting a position); *Iran v. United States (Case No. A/20)*, 11 Iran-U.S. Cl. Trib. Rep. 271, 274 (1986) ("The Tribunal Rules provides that **[e]ach party shall have the burden of proving the facts relied on to support his claim or defense**.") (emphasis added).

Chapter 11, it must do so in accordance with established international precedent and basic canons of legal theory, *i.e.*, it must place this burden of proof squarely on the United States. Accordingly, Methanex urges the Tribunal in the strongest terms to reject IISD's unjustifiable and irredeemable balancing test.

IX. METHANOL AND ETHANOL ARE LIKE PRODUCTS IN LIKE CIRCUMSTANCES IN THE CALIFORNIA MARKET.

59. The *Amici* contend that methanol and ethanol are not in like circumstances because the like circumstances test is broader than the like products test. For example, IISD asserts that "like circumstances" is different from "like products," but apart from asserting that the use of "circumstances" indicates a broader test than just the competitive relationship, IISD does not proffer venture a definition of "like circumstances."[90] What the *Amici* fail to recognize is that if Methanex satisfies the narrower like products test, then, by extension, Methanex also satisfies the broader like circumstances test. And it does.

60. Earthjustice asserts that the like circumstances test requires the Panel to consider (1) the "market structure" of oxygenates in California, and (2) the "need to protect freshwater resources" from contamination.[91] Methanex agrees with Earthjustice that it is useful to compare the market structure of oxygenates in California. As Methanex demonstrated in its Second Amended Statement of Claim and Reply Brief, the market structure of oxygenates in California indicates that for integrated refiners, at

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[90] *See* IISD Submission at ¶ 38.

[91] *See* Earthjustice Submission at ¶ 31.

least, there is a binary choice between methanol and ethanol. Indeed, Earthjustice concedes this point by failing to argue that methanol and ethanol are not like products.

61. On the other hand, Methanex does not agree that the Tribunal should consider the "need to protect freshwater resources" from contamination as part of its "like circumstances" analysis. While there is some difference of opinion as to what the "like circumstances" test requires,[92] there is no support for the notion that the "like circumstances" test requires the consideration of environmental factors. No previous NAFTA tribunal convened under Chapter 11 has considered environmental factors in the course of conducting a "like circumstances" analysis, and Earthjustice offers no reason for the Tribunal to depart from that precedent here.

62. If the Tribunal determines that the "like circumstances" test requires the consideration of environmental factors, then the Tribunal should recall that the monumental threat posed by ethanol is no less severe, and potentially more so, than the threat posed by MTBE. Neither substance appears on the list of the twenty-three chemicals most commonly found in California groundwater,[93] yet both substances have

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[92] *See* Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 Vanderbilt J. Transnat'l L. 37, 64 (2003) ("Chapter 11 tribunals have not produced a complete definition of the term 'like circumstances' for purposes of national treatment.") (II Methanex Amici Reply tab 20); Stephanie B. Gordon, *Application of NAFTA's Investor-State Provisions: Is There a Remedy for the Punta Banda Eviction Chaos?*, 9 S.W. J.L. & Trade Am. 173, 184 (2002-2003) ("The phrase like circumstances is open to various interpretations within the context of a particular dispute.") (II Methanex Amici Reply tab 21). Methanex agrees with IISD that "[i]nvestments are not just physical things." IISD Submission at ¶ 39.

[93] *See* Natural Resources Defense Council ("NRDC"), *California's Contaminated Groundwater: Is the State Minding the Store?*, Table 4, at 18 (Apr. 2001) (citing data collected by the California Department of Health Services for October 1999 to October 2000) (3 JS tab 30 at 18).

seeped into certain groundwater supplies from leaking USTs.[94] While MTBE may affect the taste and smell of water, ethanol is a known carcinogen.[95] In the broader environmental context, the use of MTBE improved air quality in California, but the increase in ethanol usage in California coincided with a "surge in ozone and pollution problems" after "twenty years of improving ozone conditions" achieved through the use of MTBE.[96]

X. THE TRIBUNAL MUST REJECT IISD'S METHODOLOGY FOR ANALYZING METHANEX' CLAIM UNDER NAFTA ARTICLE 1110.

63. As previously noted, California justified the ban on MTBE on the grounds that MTBE posed a threat to the environment, not on the grounds that MTBE posed a threat to human health. IISD concedes that the ban on MTBE was not a public health measure, yet IISD disingenuously seeks to apply an analysis suitable only for public health measures to Methanex' claim relating to expropriation. In discussing Methanex' claim under NAFTA Article 1110, IISD cites the U.S. statement regarding state liability for public health measures:

> It is a principle of customary international law that, where economic injury results from *bona fide* regulation within the police powers of a State, compensation is not required…Thus, as a general matter, States are not liable to

[94] *See* A. Bourelle, *Ethanol — the Solution to MTBE or Another Problem?*, Tahoe Daily Tribune, Mar. 24, 2000 (reporting that ethanol was detected in groundwater in Tahoe, California) (7 JS tab 80).

[95] California's own expert acknowledged ethanol to be a known carcinogen. *See* Deposition Transcript of Dr. Bernard Goldstein, at 66-67 (*South Tahoe Pub. Util. Dist. v. Atlantic Richfield Co.* (Cal. Super. Ct. Dec. 13, 2000) (confirming that "[e]thanol is recognized as a human carcinogen") (7 JS tab 150).

[96] *California Dreamin*, DeWitt "MTBE & Oxygenates" Report, Issue 885, July 31, 2003, at 1 (23 JS tab 49 at 1).

> compensate aliens for economic loss incurred as a result of a **nondiscriminatory action to protect public health**.[97]

64. Through this language, the U.S. suggests that nondiscriminatory public health measures cannot constitute expropriations. IISD asserts that this same principle applies to environmental measures: "Whether one cites [the ban on MTBE] as a health measure or an environmental measure is irrelevant, the result would be the same as a *bona fide* public protection measure."[98] By conflating public health measures with environmental measures, IISD seeks to sidestep the dilemma faced by the United States, which was unable to demonstrate that the ban on MTBE was a public health measure.[99] Yet IISD offers no evidence or support for its assertion that States are not liable for nondiscriminatory environmental measures to the same extent as for nondiscriminatory public health measures.[100]

65. Because IISD cannot demonstrate that the ban on MTBE was a public health measure or that the principle cited by the U.S. applies to environmental measures, the Tribunal must reject IISD's proposed methodology for analyzing Methanex' claim under NAFTA Article 1110. IISD's proposed methodology is predicated on the assumption that the principle cited by the U.S. applies to environmental measures. If this were the case, the Tribunal would have to first determine whether an

[97] IISD Submission at ¶ 84 (citing Amended Statement of Defense at ¶¶ 410-411) (emphasis added).

[98] *See* IISD Submission at ¶ 84.

[99] *See* Methanex Reply at ¶¶ 212-214.

[100] IISD also fails to rebut the substantial evidence adduced by Methanex that California discriminated against foreign methanol producers, so even if states are not liable for nondiscriminatory environmental measures, the ban on MTBE cannot be considered a nondiscriminatory environmental measure.

expropriation occurred before proceeding to analyze whether the expropriation required the payment of compensation.[101] But there is no proof that environmental measures cannot constitute expropriations or are treated the same as public health measures. Indeed, U.S. courts have repeatedly held that environmental measures can constitute expropriations, even when the expropriations are regulatory takings.[102]

66. Methanex has identified **significant** U.S. investments, including two U.S. subsidiaries, Methanex U.S. and Methanex Fortier, as well as the respective market shares, customer base, and goodwill of Methanex, Methanex U.S., and Methanex Fortier. Methanex has alleged that the California measures at issue substantially interfere with the business and property rights of Methanex and its U.S. investments, and therefore constitute measures "tantamount to expropriation."[103] Methanex alleges that the measures at issue severely infringe its ability, and the ability of Methanex U.S. and Methanex Fortier, to conduct business in the United States. Methanex' argument is supported by the NAFTA Tribunal's clear language in *Metaclad Corp.* that a taking need not take the form of a clear and deliberate transfer of ownership to be an expropriation.[104]

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[101] *See* IISD Submission at ¶ 86 ("The initial formulation of the United States, which IISD submits is correct, leaves bona fide public health and welfare measures. . . outside the concept of an expropriation: they are not expropriations of any kind. That is why they are not subject to compensation."); *see also id.* at ¶ 89 ("IISD submits that the US approach of determining the primary issue of whether or not a measure is an expropriation is the correct approach.").

[102] *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-20 (1992) (II Methanex Amici Reply tab 22); *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 26-27 (Fed. Cl. 1999) (II Methanex Amici Reply tab 23).

[103] NAFTA Article 1110.

[104] *See* Methanex Reply at ¶ 216.

Therefore, Methanex has met its burden of establishing a claim under Article 1110, and United States bears the burden of rebutting that evidence.

XI. METHANEX SHOULD NOT BEAR THE COSTS OF THIS PROCEEDING.

67. In keeping with the mischaracterizations pervading their submissions, the *Amici* characterize Methanex' claim as "frivolous" and ask for the Tribunal to grant the United States' request for an award of costs. Earthjustice asserts that "Methanex has brought a frivolous claim apparently intended either to create opportunities to create publicity, to insulate itself from the normal business risks of doing business in a highly regulated industry, or both."[105] Similarly, IISD claims that these proceedings have been "cost free" for Methanex and that Methanex is pursuing a remedy simply "for strategic purposes" in order to "mount opposition to environmental and other regulatory measures."[106]

68. First, Methanex' claim is far from frivolous. As IISD concedes, if California had an improper intent in enacting the ban on MTBE, then Methanex' claim is, by definition, not frivolous.[107] Any claim based on a viable legal theory that needs only sufficient evidence to succeed can never be fairly characterized as frivolous. Here, Methanex has shown that political contributions, not sound science or environmental concerns, directed the decision to ban MTBE in California. The U.S. Supreme Court made clear that, far from the "highly transparent" workings of government envisioned by

[105] *See* Earthjustice Submission at ¶ 43.

[106] *See* IISD Submission at ¶ 97.

[107] IISD Submission at ¶¶ 10, 61.

IISD, U.S. politics are at times inappropriately and secretly influenced by political contributions. In this case, California politics were influenced by contributions from ADM to Governor Davis. ADM made clear that it wished to harm methanol in order to benefit ethanol, and Governor Davis, in his constant quest for political funding, knowingly adopted that goal, and actively assisted it—for money, not safety reasons. As such, the Tribunal should disregard Earthjustice's mischaracterization of Methanex' claim.

69. Second, Methanex' claim does not represent an attempt to "create publicity." Earthjustice offers no explanation of why Methanex would want to create publicity. Indeed, Methanex has been demonized in the media and before the public by Earthjustice and ADM-funded groups whose sole purpose has been to destroy the market for methanol and MTBE in California and hand the entire oxygenate market on a silver platter to the ethanol industry.[108] The vitriol of these groups has only damaged, not burnished, Methanex' reputation, thus Methanex has nothing to gain from these proceedings except just compensation.

70. Third, Methanex is not seeking to insulate itself through this arbitration from the risk of doing business in a highly regulated industry. Methanex would not have the Tribunal believe it blindly entered the oxygenate market in California, unaware that environmental regulations would impact the industry. During previous

[108] *See, e.g.*, Earthjustice, *Groups Defend California's Right to Protect Public Health, available at* http://www.earthjustice.org/news/display.html?ID=793 (Mar. 10, 2004) (quoting an Earthjustice attorney as stating: "Methanex' claim is tantamount to extortion, undermining health protections by demanding that the government pay nearly a billion dollars to protect citizens from harm. Our submission defends the right of California and all governments to protect public health and the environment without paying a fee to a corporation.") (II Methanex Amici Reply tab 24).

administrations, Methanex found California's regulation of the environment to be thematic, following a preset system for protecting the state's environment. Methanex factored in this regulatory environment when determining where to locate its investments, but Methanex could not reasonably expect that the state regulatory apparatus could be hijacked by large political contributors to destroy Methanex' investments without any regard for facts or science.

71. Fourth, these proceedings have been anything but cost-free for Methanex. In economic terms, Methanex has paid the cost of choosing to pursue the expensive, lengthy, and uncertain process of NAFTA arbitration. In addition, the constant attacks on Methanex by groups like Earthjustice has damaged Methanex' reputation and business. To date, Methanex has reaped little reward for its investment in the arbitration process. Indeed, this arbitration has only served notice to other investors that playing by the rules is costly and inadvisable, while investing in politicians, as ADM did here, is quick, easy, and produces better returns.

72. Fifth, Methanex is not pursuing this arbitration for strategic purposes in order to mount opposition to environmental and other regulatory measures.[109] IISD's allegations to this effect amount to nothing more than an unsubstantiated conspiracy theory that is more befitting an Internet chat room than an arbitral proceeding.

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[109] IISD repeats this allegation elsewhere in its *amicus* submission. *See* IISD Submission at ¶ 3 ("Investor-state arbitrations are not intended as an insurance vehicle for all negative impacts of state actions or business events on a foreign investor); *id.* at ¶ 4 ("Investment agreements cannot, therefore, be relied upon as a bulwark against factors that might affect an investment environment . . ."); *id.* at ¶ 97 ("The fact is that Chapter 11 arbitrations can be used for strategic purposes, to mount opposition to environmental and other regulatory measures that could have an impact on an investor.").

Indeed, Methanex' commitment to the environment is well-known and would be evident to any objective researcher. Methanex has demonstrated its commitment to the environment through its CEC submission that focused attention on leaking USTs in California; its operating philosophy which is publicly disclosed in annual reports and other similar filings; its global leadership in the voluntary Responsible Care initiative; and the many environmental or related accolades it has received in Canada, Chile, and New Zealand. IISD's allegations are absurd and clearly show its less than objective positioning.

73. Finally, the *Amici* have overstepped the bounds of their role as "friends of the court"[110] by asking the Tribunal to award costs to the United States. The purpose of *amicus curiae* submissions is to benefit the Tribunal with alternative perspectives on the litigants' arguments.[111] Asking the Tribunal to award costs to one party does not comport with that purpose.

74. Indeed, by making this request, the *Amici* seek to take on the role of litigants. *Amicus curiae* submissions cannot and should not serve as a vehicle for third parties to assume the role of litigants.[112] The WTO Appellate Body has noted that

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[110] *Leigh v. Engle*, 535 F. Supp. 418, 419 (N.D. Ill. 1982) ("The term 'amicus curiae' is old Latin which literally means 'a friend of the court.'") (II Methanex Amici Reply tab 25).

[111] *See, e.g.*, Robert L. Stern et al., Supreme Court Practice 467 (8th ed. 2002) (noting that the U.S. Supreme Court requires *amicus curiae* submissions to, among other things, present a "view [of] the case from a broader or different perspective") (II Methanex Amici Reply tab 26).

[112] *See, e.g.*, James W.M. Moore, 20A Moore's Federal Practice § 329.11 (3d ed. 2003) ("An amicus does not have the status of a named party or a real party in interest and is precluded from initiating legal proceedings, filing pleadings, or otherwise assuming a completely adversarial role.") (II Methanex Amici Reply tab 27); *Waialua Agric. Co. v. Maneja*, 216 F.2d 466, 470 n.11 (9th Cir. 1954) (discussing another case in which an *amicus curiae* was in fact a "bitterly partisan

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"private individuals and organizations, which are not Members of the WTO,…do not have a legal right to participate in [WTO] dispute settlement proceedings."[113] Similarly, Earthjustice and IISD have no legal right to participate in these dispute settlement proceedings. It is only by virtue of their role as *amicus curiae* that they have the opportunity to make submissions to the Tribunal. Their unilateral effort to expand their role represents a gross violation of their role as *amicus curiae* and an abuse of the Tribunal's, and Methanex', goodwill.[114]

75. As IISD notes, this arbitration will serve as an important legal precedent.[115] The *Amici* should have considered more carefully the precedent-setting nature of their involvement in this arbitration, for their rampant mischaracterizations and abuse of their role as *amicus curiae* will discourage future arbitral tribunals from accepting submissions by non-litigants.

(...continued)

litigant [acting] under the guise of *amicus curiae"*) (citing *Miller Hatcheries, Inc. v. Boyer*, 131 F.2d 283, 285 (8th Cir. 1942)) (II Methanex Amici Reply tab 28); *Spokane Arcades, Inc. v. Eikenberry*, 544 F. Supp. 1034, 1037 n.1 (D. Wash. 1982) (expressing concern that *amicus curiae* had improperly assumed the positions of litigants) (II Methanex Amici Reply tab 29); *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) ("Historically,…an amicus curiae is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another.") (II Methanex Amici Reply tab 25).

[113] WTO Appellate Body Report, *European Communities – Trade Description Of Sardines*, WT/DS231/AB/R, at ¶ 158 (adopted Oct. 29, 2002) (II Methanex Amici Reply tab 30).

[114] Methanex also notes IISD's deliberate and disingenuous effort to evade the Tribunal's 40-page limit on *amicus curiae* submissions by manipulating font sizes, spacing and margins.

[115] *See* IISD Submission at ¶ 68.

76. For these reasons, Methanex asks the Panel to admonish the *Amici* for their abuse of the *amicus curiae* process and to reject their improper request for the award of costs to the United States.

XII. CONCLUSION.

77. For all the reasons set forth above, Methanex respectfully urges the Tribunal, in reaching its final determination, to disregard those portions of the *amicus curiae* submissions that are founded on misstatements of law and fact or on mischaracterizations of Methanex' claim and arguments. The *Amici* have offered little in the way of novel arguments or new perspectives on the issues in this proceeding, and have provided no substantive basis for the acceptance of their arguments. Furthermore, the *Amici* have acted in a manner not befitting a friend of the court, adopting an inappropriate adversarial approach to these proceedings.

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