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 ARTICLE 1128 SUBMISSIONS OF THE GOVERNMENTS OF CANADA AND MEXICO

Christopher F. Dugan
Claudia T. Callaway
Quisaira A. Whitney
Alexander W. Koff
Matthew S. Dunne
Sabrina Rose Smith
PAUL, HASTINGS, JANOFSKY & WALKER LLP
Tenth Floor
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Attorneys for Claimant
Methanex Corporation

TABLE OF CONTENTS

I. INTRODUCTION.

1. Methanex welcomes the opportunity to respond to the submissions offered pursuant to the North American Free Trade Agreement ("NAFTA") Article 1128 by the Government of Canada and the Government of Mexico (the "Parties")[1]. The Parties made their fourth written submissions on January 30, 2004. By letter dated April 15, 2004, the Tribunal invited the disputing parties to respond to the Parties' submissions by April 23, 2004.

2. Despite the extension of time to file their submissions from January 9, 2004 to January 30, 2004, the fourth submissions of the Parties add little insight into the issues set for arbitration by the Tribunal. Both Parties restate the United States' arguments as set forth in the U.S.' Amended Statement of Defense, and in so doing, the Parties adopt the same omissions and misstatements Methanex responded to in its most recent Reply to the U.S. Amended Statement of Defense ("Methanex Reply").

3. Aware of the many pages of submissions the Tribunal will receive on the date set for this response, Methanex has attempted to limit its response to the Parties' submissions to those points where the Parties mischaracterize Methanex' arguments or where the Parties argue for an interpretation of the NAFTA that Methanex believes is unsupported by existing principles of treaty interpretation. The Tribunal should not interpret this response to concede any point not specifically refuted.

---

[1] Methanex and the United States are referred to collectively herein as "the disputing parties."

II. THE TRIBUNAL SHOULD REJECT ATTEMPTS TO MINIMIZE THE IMPORTANCE OF A DIRECTLY COMPETITIVE RELATIONSHIP WHEN DETERMINING THAT METHANEX AND THE ETHANOL INDUSTRY ARE IN LIKE CIRCUMSTANCES.

4. As a preliminary matter, both of the Parties make every effort to minimize the importance of a directly competitive relationship between methanol and ethanol to the "in like circumstances" analysis. Canada asserts that, while the fact that investors or investments compete may be a relevant factor, it cannot be the "sole or determining factor."[2] Canada also asserts that the "like products" analysis in GATT and WTO cases are inapplicable to NAFTA Chapter 11 cases.[3] In requesting that the Tribunal disregard GATT and WTO cases and guidance, Canada argues that the competitive relationship between the products, a central factor in GATT and WTO analysis, is only minimally important in NAFTA Chapter 11 analysis.

5. Like the U.S., the Parties seek to shift the Tribunal's focus from the competitive nature of the products back to the undefined concept of "like circumstances," but the U.S. and the Parties offer very little guidance as to what "circumstances" the Tribunal **should** consider.[4] Canada notes only that the "activities

---

[2] Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128 ("Canada Submission"), at ¶ 8.

[3] *See* Canada Submission at ¶ 7 ("Canada disagrees with any interpretation that relies largely on authorities relating to Article III (national treatment) of the *General Agreement on Tariffs and Trade*.").

[4] *See* Amended Statement of Defense at ¶¶ 300-302 (arguing that GATT standard does not apply, and that the Tribunal should take a "broad account of all the circumstances," but failing to define circumstances applicable to the analysis).

and operation of the respective investments, and the nature of the goods involved" may be considered,[5] while Mexico, like the U.S., offers no definition at all.[6]

A. Article 1102 Provides Equality of Competitive Conditions for Foreign Investments in Relation to Domestic Investments.

6. In response, Methanex first disagrees with any attempt to de-emphasize the role a directly competitive relationship must play in the like circumstances analysis. The most effective way to promote the NAFTA's anti-protectionist goals is to evaluate the nature and extent of the competitive relationship between the investments of the disputing parties when determining whether those investments are "like," especially with regard to trade, which relates most significantly to commerce. The fact that the investments compete directly should be a deciding factor because the NAFTA was drafted to promote equality of competition between foreign and domestic investments, and specifically to prevent a Party from making it more difficult for the foreign investment to compete.

7. As Methanex and the U.S. have both acknowledged, the objective of the NAFTA is to increase investment opportunities in the territories of all NAFTA

---

[5] Canada Submission at ¶ 10 ("The Tribunal must therefore take into consideration other elements such as the activities and operations of the respective investments or investors, and the nature of the goods involved and the services provided.").

[6] *See* Jan. 30, 2004 letter from the Government of Mexico to the Tribunal ("Mexico Submission") at ¶ 15 (noting that "Article 1102 requires a comparative analysis" without elaborating on what factors should be compared).

Parties.[7] The NAFTA increases investment opportunities by preventing the NAFTA Parties from favoring domestic investors in competition with foreign investors. Without the NAFTA, the Parties would have incentive to protect the market for domestic investments, preventing fair competition. Protecting this competition is a primary responsibility for the Tribunal in fulfilling the goals of the NAFTA.

8. NAFTA and international law precedent supports Methanex' arguments. First, the *S.D. Myers* Tribunal found that the most obvious test for whether foreign and domestic investors (or their investments) are in like circumstances is whether they are in a position to take business away from each other.[8] The *S.D. Myers* Tribunal recognized that the "in like circumstances" analysis should focus on the relevant economic and business sectors of the investments, and further noted that NAFTA parties discriminate against foreign investments precisely to influence the competitive relationship between the investments.[9] Thus, in determining like circumstances, the Tribunal should evaluate the nature of the competitive relationship and evaluate whether,

---

[7] *See* Amended Statement of Defense at ¶ 303 (citing NAFTA Article 1102(1)(c)); *see also* Methanex Reply at ¶ 174 (noting and agreeing with U.S.).

[8] *See S.D. Myers v. Canada* 40 I.L.M. 1408, 1437 at ¶ 251 (Partial Award Nov. 13, 2000) ("it is clear that" foreign and domestic investors are in like circumstances when each is "in a position to attract customers that might otherwise have gone to" the other) (4 U.S. Reply tab 57).

[9] *See id.* 40 I.L.M. at 1437 ¶¶ 250-251 (In like circumstances "invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor … 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector… It was precisely because [the U.S. foreign investor] was in a position to take business away from its Canadian competitors that [the Canadian domestic investors] lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.") (4 U.S. Reply tab 57).

in favoring the domestic investment over the foreign, a NAFTA Party unfairly influenced that relationship.

9. Second, because this case involves novel issues of interpretation of the NAFTA, Methanex offers the GATT "like products" standard as useful guidance in determining what factors are relevant to the "in like circumstances" analysis. In its submission, Canada willingly looks to international law to interpret the expropriation provision of Article 1110, but asserts that, in interpreting Article 1102, the Tribunal should rely solely on the text of Article 1102 (without reference to international law).[10] Methanex disagrees. As Canada correctly noted in its submission, Article 1131 specifically incorporates international law in the governing law for NAFTA Chapter 11 disputes.[11] GATT and WTO cases offer useful guidance on the practices of the member countries with regard to national treatment.[12]

B. Canada's Hypothetical is Inapposite.

10. Canada mistakenly argues that giving primary consideration to the competitive relationship between the investments will "expand the scope of Article 1102

---

[10] *Compare* Canada Submission at ¶ 13 ("Thus, the threshold requirement for finding a breach of Article 1110 is that there has been expropriation at international law, or a measure tantamount thereto."), *with* Canada Submission at ¶ 6 ("The starting point for interpreting any provision of the NAFTA is Article 31 of the *Vienna Convention on the Law of Treaties*, according to which the words are to be given their ordinary meaning in their context and in light of the object and purpose of the NAFTA as a whole.").

[11] *See* Canada Submission at ¶ 16 ("Furthermore, Article 1131(1) specifically provides that applicable customary international law is part of the governing law of NAFTA Chapter 11.").

[12] *See* Methanex Reply at ¶¶ 181-183.

in manifestly unreasonable ways…."[13] As Methanex has previously demonstrated, this slippery slope does not exist. Methanex argued in its Reply that the "like circumstances" requirement itself serves a gate-keeping function, barring claims by truly remote suppliers.

11. Similarly, Methanex' interpretation of Article 1102 would not result in the hypothetical posed by Canada, where a well established foreign company would be entitled to the same privileges granted to start-up domestic companies under the NAFTA. As a threshold matter, this is **not** a case where a "well-established foreign-owned" company seeks privileges granted to "start-up businesses offering similar products or services."[14] Here, the domestic industry – Archer Daniels Midland ("ADM") – is extremely well-established.[15] Moreover, were Canada to give its infant industries "start up" privileges in order to protect it from foreign-owned industries that are directly competitive, that would itself be a violation of Article 1102, unless some specific treaty exemption exists. Thus, Canada's example is inapposite.

C. Oxygenate Consumers Had a Binary Choice Between Methanol and Ethanol.

12. Like the U.S., the Parties ignore those factors that make methanol and ethanol direct competitors in the California oxygenate market. Both methanol and

---

[13] Canada Submission at ¶ 8.

[14] Canada Submission at ¶ 8.

[15] *See* Second Amended Claim at ¶ 205 ("ADM's share of the domestic ethanol market is thirty percent larger than the next seven largest ethanol producers' shares *combined*, and growing.") (emphasis original).

ethanol provide the essential oxygenating element for reformulated gasoline ("RFG") and oxygenated gasoline (which shows similar end-uses). Consumers such as integrated refiners consider methanol and ethanol to be competing oxygenates, and but for the California measures, those California consumers would be using methanol, the product they had historically and overwhelmingly chosen before the ban, rather than ethanol to manufacture RFG and oxygenated gasoline.

D. The Meaning of "Like Circumstances."

13. Methanex agrees that the GATT "like products" standard is not exactly the same as the NAFTA Article 1102 "in like circumstances" standard—the GATT standard is **narrower**.[16] Rather, Methanex argues that the GATT standard gives the Tribunal a reference point for determining whether the investments at issue in this case are "like." If methanol and ethanol are "like" for purposes of the GATT's narrow test, they necessarily must be "in like circumstances" for purposes of the NAFTA's broad Article 1102 test.

14. Methanex disagrees with any interpretation of the NAFTA requiring that all circumstances be like in order to be considered "in like circumstances" under Article 1102.[17] There is no support for a requirement that the investments be

---

[16] *See* Amended Statement of Defense at ¶ 301 ("Article 1102 contemplates that **broad account** be taken of the circumstances of the treatment, the investor and the investment … the GATT provision **narrowly focuses** on the good in question and whether it is like other goods.") (emphasis added) (footnotes omitted).

[17] *See* Canada Submission at ¶ 11 ("Consideration is then given to the treatment that is accorded by that Party to an investor or investment where *all* the circumstances of the according of the

(continued...)

identical or **in precisely the same circumstances** except that one investment is domestic and one foreign. Such an interpretation would impermissibly narrow the plain meaning of the word "like" and scope of Article 1102.

15. A broad definition of "like circumstances" is confirmed when Article 1102 is read in light of its object and purpose, as Canada concedes.[18] As noted above, both Methanex and the U.S. recognize that "[t]he objective of the NAFTA relevant to the investment chapter is to '**increase substantially** investment opportunities in the territories of the Parties.'"[19] Investment opportunities are increased by preventing NAFTA members from favoring domestic investors. A narrow interpretation of Article 1102 that only permits comparisons of investors in precisely the same circumstances undermines this goal. Article 1102 requires a broader comparison here than the Parties advocate.

III. ARTICLE 1110 PROHIBITS DISCRIMINATORY REGULATIONS.

16. Both Parties assert that the threshold question under Article 1110(1) is whether there has been an expropriation as defined by customary international law.[20] The Parties argue that Article 1110 incorporates the customary international law principle that States generally are not liable to compensate aliens for economic loss

(...continued)

treatment are "like," *except* that the investor or investment is domestic.") (emphasis in original); *see* Mexico Submission at ¶ 16 ("When applying the national treatment rule, the *only* relevant issue of status is the investor's nationality.") (emphasis in original).

[18] Canada Submission at ¶ 3.

[19] U.S. Amended Statement of Defense at ¶ 303 (citing NAFTA Article 1102(1)(c) (emphasis added)).

[20] *See* Canada Submission at ¶¶ 13-14; *see* Mexico Submission at ¶ 13 ("Article 1110, which must be interpreted in accordance with the applicable rules of customary international law…").

resulting from non-discriminatory regulatory measures.[21] The Parties then argue that customary international law excludes a states' regulatory power from the scope of expropriation.[22] Therefore, a *bona fide* regulation, one that is a nondiscriminatory regulatory measure protecting legitimate public welfare objectives, is not an expropriation.[23]

17. Methanex agrees. Methanex noted in its Reply that customary international law generally excludes nondiscriminatory, *bona fide* regulations.[24] In this case, however, the MTBE ban was not a *bona fide* regulation. The ban was (and is) discriminatory, and it was not enacted for a legitimate public welfare objective. Both Parties deliberately ignore Methanex' evidence on this point.

18. First, as Methanex has repeatedly shown, the ban on MTBE was not a health measure. It was not characterized as such by Governor Davis, and the fact that California waited almost five years – for economic reasons – to implement the ban proves it was not a "health" measure. Second, the ban was clearly discriminatory. The California MTBE ban was implemented with the intent to favor the U.S. ethanol industry.[25] The Tribunal owes no deference to protectionist regulations that intentionally

---

[21] Canada Submission at ¶¶ 13-14.

[22] *Id.*

[23] *Id.*

[24] *See* Methanex Reply at ¶¶ 207-208.

[25] *See id.* at ¶¶ 93-101.

discriminate and favor domestic investments. The Tribunal can and should consider the MTBE ban to be an indirect expropriation, or an action tantamount to expropriation.

IV. THE TRIBUNAL SHOULD NOT CONSIDER THE FTC INTERPRETATION TO BE THE GOVERNING LAW ON ARTICLE 1105.

19. In its submission, Mexico again asserts that the interpretation of Article 1105 by the NAFTA Free Trade Commission ("FTC") must be considered as part of the governing law on Article 1105. Mexico thus argues that while a measure may violate both Articles 1102 and 1105, these are separate and distinct provisions requiring separate and distinct legal analogies, *i.e.*, the fact that a measure offends one provision does not give rise to any presumption that it offends the other.[26]

20. As Methanex previously argued, the July 31, 2002 "interpretation" of Article 1105 should have no material impact on **this** Tribunal's decision. First, as an issue of fairness, the timing of the FTC interpretation makes it suspect, and a Tribunal should not be bound by an FTC interpretation issued after a request for arbitration is filed. To do so would not only permit but invite the Parties to influence the outcome of an arbitration by changing the rules mid-stream. Such an outcome would damage seriously the credibility and reliability of the NAFTA Chapter 11 process.

21. Second, the text of the NAFTA is of paramount importance in interpreting Chapter 11. The text explicitly requires "fair and equitable treatment" and

---

[26] *See* Mexico Submission at ¶ 14.

"full protection and security" for all NAFTA investments, without exception.[27] Mexico has agreed in the past that the phrase "fair and equitable treatment" is to be given its ordinary meaning, and that Article 1105 therefore incorporates ordinary requirements of fairness and equity.[28] Before the *Azinian* Tribunal, Mexico — like Methanex in this matter — urged that "[t]he ordinary meaning of the word 'fair' is 'just, unbiased, equitable; in accordance with the rules' and that the ordinary meaning of the word 'equitable' is 'fair and just.'"[29] Mexico made the same argument in *Metalclad v. Mexico*,[30] and the *Metalclad* Tribunal agreed.[31] A finding under Article 1102 that a measure provides "less favorable" treatment to foreign investors and their investments necessarily must impact a determination under Article 1105 regarding whether that same measure is "just" or "unbiased."

22. Third, the text of the FTC interpretation does not support the meaning offered by the Mexico and the U.S. The actual language of the FTC interpretation identifies the "fair and equitable treatment" and "full protection and security" standards as part of the body of customary international law regarding the

---

[27] NAFTA Article 1105(1).

[28] *See, e.g., Azinian v. United Mexican States*, Mexican Counter-Mem. at 248-49 (Oct. 1, 1998), *available at* http://www.naftalaw.org/ (last visited Apr. 23, 2004).

[29] *Id.* at 250.

[30] *Metalclad Corp. v. United Mexican States*, Counter-Mem. at 834-36 (Feb. 17, 1998), *available at* http://www.naftalaw.org/ (last visited Apr. 23, 2004).

[31] *See Metalclad Corp. v. United Mexican States,* 40 I.L.M. 36, 50 at ¶ 101 (Award, Aug. 30, 2000) (holding "that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105").

treatment of investors and their investments. The interpretation does not preclude Article 1105 claims based on violations of independent treaty obligations.

23. In adopting its "interpretation," the FTC did not state that investments are no longer entitled to fair and equitable treatment and full protection and security. It also did not state that independent treaty violations can never constitute a violation of Article 1105. The FTC interpretation avoids such straightforward language, almost certainly because it recognized that a clear statement of such an intent would always be seen as an improper amendment of Article 1105.

24. Instead, the FTC recognized that the protections of "fair and equitable treatment" and "full protection and security" are part of customary international law. Likewise, the formulation does not preclude a finding that a violation of an independent treaty obligation may also, in appropriate circumstances, constitute an Article 1105 violation. In other words, the FTC interpretation's actual language is consistent with Methanex' position in this case.

25. Finally, the FTC does not have the power to diminish NAFTA protections or limit their scope, because any attempt to do so would be an amendment, and NAFTA amendments must follow the procedures set forth in Article 2202(2). If the FTC "interpretation" was designed to eliminate the express protections of Article 1105, including the protections of independent treaty obligations, then it is quite clearly an amendment of NAFTA, not a mere interpretation. As Methanex has argued in prior submissions to the Tribunal, a critical distinction between interpretation and amendment

is that "interpretation" simply pronounces the meaning of a text as it always was, while "amendment" changes the meaning of a treaty's terms.[32] Deleting NAFTA's express investment protections would be a drastic revision, *i.e.*, a substantial **amendment**, to NAFTA.

26. Yet the FTC has no power of amendment or modification.[33] It has the power only to "interpret" the provisions of NAFTA.[34] In contrast, Article 2202(2), which deals with amendments, provides that "[w]hen so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement." This political process for changing NAFTA ensures that the rights of all affected parties will be respected, including investors.

27. NAFTA, like many investment treaties, creates explicit protections for investors and their investments and allows them to control the prosecution of investment disputes arising from a Party's alleged breach of Chapter 11 guarantees. These rights can only be curtailed by the full exercise of the amendment process, involving the constitutional processes of all three countries, and not through a

---

[32] *See* [1964] II Y.B. Int'l Law Comm. 5, 55 (where subsequent practice in respect of a treaty "br[ings] about a change or development in the meaning of the treaty through a revision of its terms," that change may only be recognized "as an agreed revision but not as an interpretation of its original terms") (emphasis in original).

[33] *See* NAFTA Article 2001(2) & (3).

[34] *See* NAFTA Articles 1131(2) & 2001(2)(c).

determination by the executive branches of the U.S., Mexico, and Canada that they wish to alter the scope of the investment protections in the treaty.

28. This Tribunal should protect the distinction between amendment and interpretation by refusing to consider the FTC "interpretation" to the extent that it attempts to limit the rights granted previously by Article 1105.

V. METHANEX IS NOT REQUIRED TO SHOW PROXIMATE CAUSE WHERE IT HAS SHOWN A DELIBERATE INTENT TO INJURE ITS INVESTMENTS.

29. In its submission, Mexico asserts that the U.S. statement of causation is correct. Like the U.S., however, Mexico argues that international law requires a showing of proximate cause without acknowledging that proximate cause [is **not** necessary when a claimant shows a deliberate intent to injure its investments.[35]] Mexico adopts the U.S. submission on causation, which centers largely around whether Methanex is a remote supplier of one component of a regulated product, and thus unable to show a close enough link to the complained of regulation in order to show damages.

30. In its Reply, Methanex again illustrated that it is not a remote supplier, because the reality of the oxygenate market is that integrated refiners will choose **either** ethanol or methanol to create RFG and oxygenated gasoline, *i.e.*, integrated refiners faced a binary choice. The California ban directly impacted Methanex' investments because, after the ban, integrated refiners can no longer choose methanol. In

[35] *See* Amended Statement of Defense at ¶¶ 218-222.

showing that it is in direct competition with the ethanol industry and thereby is not a remote supplier, Methanex has shown a direct injury and a direct intent to harm. Mexico's submission ignores the fact that proximate cause need only be shown when a deliberate intent to injure is absent.

31. Articles 1116 and 1117 both require that the Claimant incur loss or damage "by reason of, **or** arising out of" the alleged breach.[36] Mexico concurs with the U.S. argument that the terms "by reason of" and "arising out of" mean the same thing, *i.e.*, "a close and direct … link: the proximate cause standard."[37] In arguing that the two phrases are equal, the United States ignores the ordinary meaning of the word "or," which separates the two phrases, thereby ignoring basic standards of legal interpretation that the use of a disjunctive implies alternatives, *i.e.*, hereof implies different standards of causation. Mexico adopts this flawed reasoning.

32. Methanex argued this difference extensively in its Reply.[38] Methanex again urges the Tribunal to adopt the interpretation of causation that takes into account the two types of causation commonly recognized, direct causation **or** proximate cause.

---

[36] NAFTA Article 1116 (emphasis added).

[37] *See* Mexico Submission at ¶ 2 ("Mexico agrees with the United States' Amended Statement of Defense (at paragraphs 218-222) that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase 'has incurred loss or damaged by reason of, or arising out of' a Party's breach of one of the NAFTA provisions listed in Articles 1116 and 1117.").

[38] *See* Methanex Reply at ¶¶ 230-233.

33. Even if the Tribunal were to adopt the Parties' proximate cause requirement, there can be no doubt that Methanex has satisfied whatever remoteness or proximity test the Tribunal adopts. First, both sworn witness testimony and the independent, contemporaneous, and unbiased evidence of investment analysts shows that the California MTBE ban directly caused a downgrade to Methanex' debt rating, directly increasing its cost of capital.[39] The same evidence shows that the ban directly caused a decrease in the value of Methanex' share price.

34. The sworn witness testimony, contract documents, and other uncontroverted evidence shows that as a direct result of the California ban, Methanex U.S.' own customers in California – integrated refiners such as ChevronTexaco, ExxonMobil, and Valero – stopped purchasing methanol from Methanex U.S. and started purchasing ethanol from the U.S. ethanol industry.[40] There is nothing remote or attenuated about this shift, nor the damage it inflicted on Methanex U.S. by diminishing its sales, profits, market share, customer base, and goodwill.

35. Finally, one of the key tests of proximate cause is whether the damage caused was foreseeable. In this case, the evidence is undisputed that both California and the U.S. actually foresaw that a required shift from MTBE to ethanol would directly damage Methanex and other foreign methanol producers.[41]

---

[39] *See* Third Macdonald Aff. at ¶ 31. (19 JS tab A).

[40] *See* Methanex Reply at ¶¶ 18-25.

[41] *See* Methanex Reply at ¶¶ 36-40.

VI. METHANEX HAS REPEATEDLY SHOWN PROOF OF DAMAGE TO ITS INVESTMENTS.

36. In its submission, Mexico incorporates the U.S. argument that Methanex' claim does not allege damage to its investment activities. Mexico cites to the U.S. claim in its Amended Statement of Defense that "Methanex has not demonstrated that the California measures in any way addressed or even impacted Methanex as an investor in the United States. This conclusion is confirmed by a consideration of each of the investment activities referenced in Article 1102(1)."[42] Mexico argues that the definition of "investment" in Article 1139 is exhaustive, and that anything excluded from or not listed in Article 1139 cannot qualify as an investment. Thus, Mexico concludes, goodwill, market share and customer base are not investments because the definition of investment in Article 1139 does not specifically include these assets.

37. Both the U.S. and Mexico ignore the plain language of Article 1139(g) and established NAFTA and international decisions. First, Article 1139(g) defines an "investment" to include "real estate or other property, **tangible or intangible**, … used for the purpose of economic benefit."[43] Article 1139(g) defines a **class** of property that qualifies as an investment, including intangible property used for economic benefit. All property that meets that definition is a recognized NAFTA investment.

38. Second, two NAFTA tribunals have expressly recognized that market share is an investment capable of supporting an expropriation claim under

[42] *See* Mexico Submission at ¶ 3 (citing Amended Statement of Defense at ¶¶ 250-256).

[43] *See* NAFTA Article 1139(g) (emphasis added).

Article 1110. In *Pope & Talbot Inc. v. Canada*, the Tribunal concluded that "the Investor's access to the U.S. market is a property interest subject to protection under Article 1110."[44] In *S.D. Myers,* the Tribunal recognized that "there [were] a number of other bases on which SDMI could contend that it has standing to maintain its [Chapter 11 claims] including that … its market share in Canada constituted an investment."[45] In fact, the *S.D. Myers* Tribunal noted that "rights other than property rights may be 'expropriated' and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures."[46]

39. In addition, the Iran-United States Claims Tribunal explicitly recognized intangibles such as goodwill as an asset that can be expropriated. In *Amoco International Finance Corp. v. Iran*, the Tribunal held that, "a going concern value encompasses … intangible valuables which contribute to [a company's] earning power, such as contractual rights … as well as good will and commercial prospects."[47] According to the Tribunal, "[t]o the extent that these various components exist and have

---

[44] *Pope & Talbot Inc. v. Canada* (Interim Award June 26, 2000), at ¶ 96 (IV Amended Statement of Defense tab 71), also *available at* http://www.naftalaw.org/ (last visited Apr. 23, 2004).

[45] *S.D. Myers* (Partial Award), 40 I.L.M. at 1434 ¶ 232 (4 U.S. Reply tab 57); *see also id.* ¶ 218 (separate opinion of Dr. Bryan Schwartz noting that "goodwill" is a "property interest known in law").

[46] *S.D. Myers* (Partial Award), at ¶ 281; also *available at* http://www.naftalaw.org/ (last visited Apr. 23, 2004) (4 U.S. Reply tab 57).

[47] 27 I.L.M. 1314, 1375 at ¶ 267 (1988).

economic value, they normally must be compensated, just as tangible goods, even if they are not listed in the books."[48]

40. As noted above, Methanex U.S.' assets include a substantial amount of intangible property rights, such as its goodwill, marketing rights, and customer base. The Tribunal must consider these assets as Methanex investments that were expropriated and otherwise damaged, as Article 1139(g) contemplates.

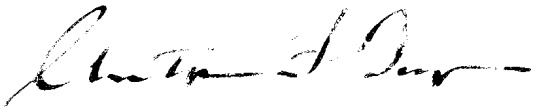
VII. CONCLUSION

41. For all the reasons set forth above, Methanex respectfully urges the Tribunal to disregard the interpretations and argument offered by Canada and Mexico in their most recent submissions.

[48] *Id*. at 1375 at ¶ 255.

Dated: April 23, 2004

Respectfully submitted,



Christopher F. Dugan
Claudia T. Callaway
Quisaira A. Whitney
Alexander W. Koff
Matthew S. Dunne
Sabrina Rose Smith
PAUL, HASTINGS, JANOFSKY & WALKER LLP
Tenth Floor
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400

Attorneys for Claimant
Methanex Corporation

WDC/272015.6