

0616 Day 8

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C O N T E N T S

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CLOSING ARGUMENT

For Methanex Corporation: Mr. Dugan

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P R O C E E D I N G S

PRESIDENT VEEDER: Good afternoon, ladies and gentlemen. We start day eight of this hearing. And we now hear Methanex's closing oral submissions.

Mr. Dugan, the floor is yours.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT/INVESTOR

MR. DUGAN: Thank you very much.

Members of the Tribunal, I'd like to start off with the question of what is the appropriate test here, and that will include the motion to reconsider, and the first issue I'd like to draw the Tribunal's attention to is the letter that we sent to the Tribunal on June 13th, in which we pointed out that the California regulation that we have been--that we have identified as one of the measures in this case does, in fact, ban methanol by name.

Now, I think you all have seen the letter, and it says that covered ox--I will wait for the Tribunal.

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(Pause.)

MR. DUGAN: Now, if I could direct your attention to the second to the last page of the

4 letter, that includes the operative language of the
5 regulation as it exists today, and on the--I'm
6 sorry, of the exhibits to the letter. Yes, that's
7 it.

8 And if you look at the left-hand column,
9 number four, it says, covered oxygenates. Oxygen
10 from the following oxygenates is covered by the
11 prohibitions in Section 2262(6)(C)(1), (2), and
12 (3), and then, of course, it lists methanol as the
13 first one, along with some of the other familiar
14 oxygenates that we have seen in the list from the
15 EPA and from Mr. Caldwell. At the very end is
16 TAME, there's also DIPE, ET, BE. So, it quite
17 specifically bans methanol in its use as an
18 oxygenate.

19 And one other point to make: It
20 specifically identifies methanol as an oxygenate.

21 PRESIDENT VEEDER: Mr. Dugan, just as a

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1 matter of paperwork, to what extent does this
2 enclosure differ from the actual regulations you
3 handed out last Monday in your opening oral
4 submissions when you added a document to Tab 41?

5 MR. DUGAN: It should be identical. It
6 should be identical. It's just a different format.
7 This one was printed out on the computer. I think
8 the other one was copied, actually, from the book
9 of California regulations. But I don't have--I may
10 be wrong, but I have no reason to believe that they
11 are different.

12 Now, the issue of whether or not the
13 California regulations banned all oxygenates other
14 than ethanol, Methanex raised over two years ago.
15 In its First Amended Claim on February 12th, 2002,
16 it expressly said that one of the measures that it
17 was complaining of at that time, before the
18 amendment was formally granted, was that--I'm
19 referring now to page eight, paragraph 22 of the
20 Draft Amended Claim of February 12, 2001. The
21 second measure that Methanex challenges is the set

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1 of California or CarFG3 regulation adopted by CaFRB
2 on September 2nd, 2000 which implemented Executive
3 Order D 599. In implementing Governor Davis's
4 Executive Order, the CarFG3 regulations prohibited
5 the use of MTBE as of December 31st, 2002, and
6 facilitated its accelerated removal from all
7 California gasoline prior to that date.

8 The regulations, and I'm skipping the word
9 CarFG3 because it doesn't lend itself to an easy
10 acronym, went beyond merely banning MTBE, however.
11 They also provided that only methanol, which is
12 almost entirely a domestic product, could be used as
13 an oxygenate in California gasoline. Consequently,
14 the regulations ban not only MTBE, but methanol as
15 well, from competing with methanol in the
16 California oxygenate market.

17 Now, the difference between the
18 regulations as they existed in proposed form in

19 February of 2002, and the regulations as they exist
20 now, is that now California has specifically named
21 methanol as one of the banned substances.

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1 PRESIDENT VEEDER: Mr. Dugan, would it be
2 helpful if we just came to the point that concerns
3 the Tribunal, and it's really a clarification of
4 your case. Are you relying upon either the
5 proposed regulations, which you exhibited to the
6 legal authorities to your Amended Statement of
7 Claim, or the actual regulations which came into
8 effect in May of 2003, which you gave to us on day
9 one of this hearing, as separate measures which you
10 attack, or do you rely upon these documents as
11 evidence in your attack on the two measures which
12 you originally pleaded in the Amended Statement of
13 Claim; namely, the Executive Order and the
14 California regulations before they expressly
15 mentioned methanol?

16 MR. DUGAN: Well, the California
17 regulations that we included with the Second
18 Amended Claim actually include this very language.

19 PRESIDENT VEEDER: Well, they weren't
20 regulations. They were proposed regulations.

21 MR. DUGAN: Correct. They were proposed

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1 regulations that were adopted I think two months

2 after we filed the claim

3 So, I mean, if the--we certainly are
4 relying on the regulations as they exist now in
5 banning methanol.

6 PRESIDENT VEEDER: But what form? Is it
7 evidence of your existing case or development of
8 your case?

9 MR. DUGAN: No, no. It's a development of
10 the case. This is obviously an amendment by
11 California that took place after we filed our
12 Second Amended Claim, and we assert that it's
13 relevant for the obvious purpose. We go back to
14 what the Tribunal was concerned about two years
15 ago, and that was the fact that the ban did not
16 identify methanol, and because it did not expressly
17 name methanol as one of the banned substances, the
18 Tribunal set up this test in order to determine
19 whether it was a legally significant relationship
20 that would meet the requirements of relating to.
21 Well now, the measure, the very measure

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1 that we complain of, as amended, bans methanol, and
2 so, yes, we rely on the measure as amended after we
3 filed our Second Amended Complaint.

4 Now, if it's necessary for us to amend our
5 complaint yet again to rely upon the language that
6 we included in the Second Amended Complaint that
7 was subsequently adopted by California in, I
8 believe, May of 2003, eight or nine months after we
9 put it in, and which goes into effect I think in

10 January of this year, then we move to amend the
11 complaint because of a subsequent amendment of the
12 regulations after our Second Amended Claim was put
13 in.

14 Now, I'm not sure that's
15 necessarily--that's actually necessary because it's
16 the same measure that we are complaining of, and
17 it's the same legal effect that we are complaining
18 of; namely, the banning of everything except
19 ethanol.

20 The only difference is is that now the
21 express itemization of methanol has, in fact,

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1 become a regulation.

2 Now, if an amendment is necessary, I don't
3 think--there is no reason in Methanex's mind why it
4 should be denied. There's certainly been no
5 prejudice to the United States. They briefed every
6 single argument.

7 PRESIDENT VEEDER: Just take it very
8 slowly in stages because we are trying to see
9 whether it goes to evidence, where obviously there
10 is an argument for a ruling evidential case, or
11 whether it's an additional measure or an addition
12 to an existing measure which is subject to
13 criticism.

14 And if you have referred to paragraph 22,
15 if you could turn to that, it's page eight of your
16 Amended Statement of Claim, if you can just go

17 through the language of that to see to what extent
18 the May 2003 regulations fit into that language.
19 It's paragraph 22, page eight, of Methanex's
20 Amended Statement of Claim.
21 You see you there identify the second

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1 measure that Methanex challenges is the set of Cal
2 Reg 3 regulations adopted by CAFRB on September the
3 2nd, 2000.

4 Now, if you at this date, namely the 5th
5 of November, 2002, identify what those regulations
6 were, they will be the regulations which did not
7 expressly mention methanol; would that be right?

8 MR. DUGAN: That would be right because at
9 that time, obviously, we didn't have any
10 regulations that expressly banned methanol. They
11 weren't--

12 PRESIDENT VEEDER: But what you say is
13 that those regulations implicitly banned methanol
14 because they provided that only ethanol could be
15 used as an oxygenate in California gasoline.

16 MR. DUGAN: Right. I don't think they
17 implicitly. I think--they certainly didn't
18 expressly methanol qua methanol, but I think they
19 expressly banned all alcohols other than ethanol.

20 PRESIDENT VEEDER: Well, I'm looking at
21 the last sentence.

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1 MR. DUGAN: Correct, consequently the
2 regulations ban not only MTBE, but methanol as well
3 from competing with ethanol in the California
4 oxygenate market.

5 I think the regulations had the same legal
6 effect as far as the ban on methanol at that time.
7 Methanol was not allowed to compete with ethanol at
8 that time. So, the legal effect of the regulations
9 was the same. The difference now is that the
10 regulation, as amended, in more detail expresses
11 exactly what the effect of the ban is, which is to
12 ban methanol.

13 Now, we've always complained of a
14 California measure that bans methanol, not just
15 MTBE, but bans methanol as a competitor to ethanol.
16 And we have consistently done that since we first
17 put in our amended claim in February of 2002. The
18 change here is that California has amended its
19 regulations subsequent to our last amended claim of
20 October 2002 to expressly name methanol.

21 PRESIDENT VEEDER: Mr. Dugan, if I can

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1 just come to the point that troubles the Tribunal,
2 if it's part of a rolling evidential case, subject
3 to failure of the United States, you are probably
4 pushing at an opened door. If it's a modification
5 or an amendment of your previous case, heading the
6 May 2003 Cal regs as a new measure subject to
7 attack, particularly for the purpose of 1101, then

8 I think you've got to help us on jurisdiction,
9 power, and discretion to allow that amendment, as
10 we understand it because that is and will still be
11 opposed by the United States.

12 MR. DUGAN: I understand that, and
13 obviously I think, then, you know, perhaps we are
14 relying on it for two purposes, if I could state
15 for the record. For the second, we are clearly
16 relying upon it as evidence of--and we would say
17 conclusive evidence--of California's intent to harm
18 methanol producers and to ban methanol and harm all
19 methanol producers, including foreign medical
20 producers.

21 Secondly, in terms of whether an amendment

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1 should be allowed to put this specific measure in,
2 we think quite clearly it should. Number one, the
3 UNCITRAL regulations create, I believe, a
4 presumption that amendment can be made, so long as
5 there is no undue prejudice. We think we fit
6 squarely within that presumption.

7 The amendment, the regulation amendment
8 that we are pointing to, was adopted by California
9 well after we put in our amended claim. We noted
10 in the amended claim that we included the proposed
11 regulations that were actually going to be adopted
12 naming methanol. So, as of October 2002, we had
13 done everything that we could.

14 Now, the regulations were subsequently

15 adopted. They did, in fact, name methanol, so it
16 was an amended regulation.

17 Remember, the regulations are what we've
18 always posited as the measure that we are
19 complaining of, the CaFRB regulations, and this is
20 just the latest iteration of the CaFRB regulations.

21 But, if an amendment is required, again, I

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1 think the presumption is we are entitled to amend
2 unless there is a showing of prejudice, and I can't
3 see what showing prejudice there is for the United
4 States, since they briefed and argued at length, as
5 the Tribunal knows well, every single argument in
6 this case.

7 And it obviously prejudices them in the
8 sense that I think it takes away any possible case
9 for arguing that the specific intent to harm test
10 should be applied, but that's obviously a
11 substantive consequence that's not within the scope
12 of a reason why an amendment should not be allowed.
13 So, if an amendment is necessary, and I don't think
14 it is, but if an amendment is necessary, then, yes,
15 we formally move to amend it, and we ask the
16 Tribunal to consider what prejudice there is to the
17 United States, especially given the fact that this
18 amended regulation was amended after we filed our
19 last amended complaint.

20 PRESIDENT VEEDER: Another possible
21 complication is not Article XX alone, but also the

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1 scope of the dispositive in our Partial Award.

2 Would you like to address us on that.

3 MR. DUGAN: I'm not quite sure what you're
4 referring to.

5 PRESIDENT VEEDER: If you refer to--if you
6 can refer to the Partial Award, and if we can start
7 with the dispositive at the very end, it's page 74,
8 paragraphs four and five.

9 MR. DUGAN: I'm sorry, I must have a
10 differently paginated version.

11 PRESIDENT VEEDER: It's Chapter M, 102.
12 If you go to paragraph 172, if you start with
13 subparagraph three, and then turn to four.

14 MR. DUGAN: Yes, I see that. I guess our
15 response would be that this is overtaken by
16 subsequent facts.

17 PRESIDENT VEEDER: Just to complete the
18 reference, turn back to 162, which is page 68 of
19 our pagination.

20 MR. DUGAN: Paragraph 162?

21 PRESIDENT VEEDER: Paragraph 162, which is

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1 page 68. And if you turn to line six, The fresh
2 pleading must not exceed the limits of Methanex's
3 existing case, pleaded and unpleaded. That's
4 reference to the oral argument that you advanced on
5 jurisdictional hearing.

6 MR. DUGAN: Correct. Um-hmm.

7 PRESIDENT VEEDER: We do not intend
8 Methanex to make any new claim in its fresh
9 pleading and so on.

10 MR. DUGAN: And I don't think we did.
11 Remember, that's why I pointed back to what we
12 filed in February of 2001, before this came out.
13 We argued in 2001 in our First Amended Claim that
14 what California had done was to ban all competing
15 alcohols, including methanol from competing with
16 ethanol.

17 So, we made the same claim in the February
18 2001 First Amended Claim as we made in the Second
19 Amended Claim.

20 So, I don't think the Second Amended Claim
21 went beyond what was in the First Amended Claim in

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1 any way.

2 And I think--the reason why I don't think
3 an amendment is necessary is I think the operative
4 legal effect of these various measures has been the
5 same in their various amended forms. And their
6 operative legal effect is to ban all competitors to
7 ethanol. That's what we alleged in February of
8 2001, and that's what we allege now. The
9 difference, of course, is that there has been a
10 specific amendment to this expressly name methanol,
11 and that's been adopted and come into force.

12 ARBITRATOR REISMAN: Mr. Dugan, perhaps

13 you could help me, since I was not part of the
14 Tribunal for the rendering of the Partial Award.

15 Didn't the RFG2 say that other oxygenates
16 could not be used until a multimedia study was
17 conducted and RFG3 simply indicates which other
18 oxygenates have not yet been the subject of the
19 multimedia study.

20 MR. DUGAN: No, I would agree that is
21 correct. And it's what the--

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1 ARBITRATOR REISMAN: My next question then
2 goes to the substantive implication, if in the
3 Partial Award the Tribunal was unable to get over
4 1101 on the basis of something that was implicit,
5 why would it get over Article 1101 now when
6 subsection four simply makes explicit what was
7 already available to the Tribunal at the time of
8 the Partial Award?

9 MR. DUGAN: Because the way I read the
10 Partial Award, the Partial Award couldn't get over
11 1101 because methanol was not expressly named. And
12 I think that's referred to a number of times in the
13 Award as one of the principal bases, principal
14 bases why the measure did not, on its face, meet
15 the relating-to requirement because it didn't name
16 methanol.

17 Now, obviously that has now changed, and I
18 don't think it was a question of whether it was--in
19 fact, I would go so far as to say that the Tribunal
20 implicitly rejected our argument that the

21 California regs implicitly banned methanol and

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1 required an express naming in order to meet the
2 relating-to test on a per se basis. And now we
3 have that.

4 ARBITRATOR ROWLEY: Mr. Dugan, if you
5 could turn with me to paragraph 33 of the Partial
6 Award, if you have it handy, and if not, I will
7 read it to you.

8 MR. DUGAN: Paragraph 33?

9 ARBITRATOR ROWLEY: Yes, paragraph 33.

10 MR. DUGAN: Yes, I have it.

11 ARBITRATOR ROWLEY: And you will see there
12 is a bolded subtitle of the California regulations,
13 and if you drop down to the fourth, last line in
14 the middle, and there is a reference to several of
15 the earlier California reformulated gasoline
16 regulations, but in the fourth line it says, in
17 particular, subsection 2262.6 provided at
18 Subsection A 1 that starting in December 31, 2002,
19 and it reads on.

20 Now, as I understand it, that regulation
21 was referred to in your Draft Amended Claim

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1 because, if you look at paragraph 32, we say the
2 U. S. measures, and I emphasize that, the U. S.
3 measures, our language, for the purposes of Article

4 1101, NAFTA, as alleged in the Amended Statement of
5 Claim, and actually it was a draft Amended
6 Statement of Claim, are the California Executive
7 Order described above and the CFRFG3 regulations
8 described below.

9 So assuming that we are right on that,
10 that in your draft Amended Statement of Claim you
11 referred to, 2262(6), that was a regulation which
12 you said was a measure under attack as falling foul
13 of Chapter 11.

14 MR. DUGAN: Correct.

15 ARBITRATOR ROWLEY: Now, that measure did
16 not mention methanol specifically.

17 MR. DUGAN: Correct.

18 ARBITRATOR ROWLEY: You now, and the
19 President has read you the language of our order
20 found at paragraph 162 which says, We do not intend
21 Methanex to make any new claims, and it must not

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1 exceed the limits of Methanex's existing case
2 pleaded and unpleaded.

3 What we now understand you to say is that
4 you are attacking as a measure the California
5 regulation, albeit of the same number which has
6 recently been amended to name methanol, and I
7 suppose will be argued by the United States that
8 that is, indeed, because it has been amended, is a
9 different measure than was previously attacked.

10 And I have a couple of questions that

11 would follow from that argument, if that argument
12 is right.

13 One, are there preconditions to Methanex
14 under Chapter 11 bringing before an Arbitral
15 Tribunal a measure for arbitration under Chapter
16 11, and have they been met with respect to the
17 current version of the California regulations which
18 you gave us at Tab 41 in your opening? I think I
19 will just ask you to address those questions,
20 first.

21 MR. DUGAN: Whether all the specific

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1 procedural requirements, such as the waiver and
2 things like that have been met, no, I don't think
3 they have been met. Obviously we have not filed a
4 waiver on that. But, if that type of formal
5 procedural--those procedural requirements need to
6 be met, it seems to me that the way to do it is
7 simple to grant an amendment to the claim. It's
8 certainly allowed by the UNCITRAL Rules, and, in
9 fact, as I said, the UNCITRAL Rules create a
10 presumption that an amendment should be allowed,
11 and there is nothing in NAFTA, as I see it, that
12 would prevent that type of amendment.

13 But again, going back to your question,
14 there is one point that I still to want come back
15 to because I think it's very important. The way
16 that the Tribunal described the impact of the CaRFG
17 regulation in its Partial Award, we believe, is not
18 complete, because the way the Tribunal described

19 it, it quite clearly does ban MTBE, but as we
20 raised in our February filing, February 2001
21 filing, other portions of the regulation had the

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1 effect of banning all competing alcohols, including
2 methanol. And so, that prohibition was already in
3 place.

4 Now, the measure that we were complaining
5 of was one that banned alcohols such as methanol.
6 The measure as it exists today has precisely the
7 same legal operative effect. The only difference
8 is now it names it. In our mind, that is a
9 distinction without a difference, or a difference
10 without a distinction.

11 If the operative legal effect of the
12 regulations that we were complaining of in 2001 is
13 precisely the same as is now, the California has
14 changed its words in how it describes that
15 operative legal effect, why is there any need for
16 an amendment at all when we are complaining about
17 precisely the same set of regulations that do
18 precisely the same thing.

19 ARBITRATOR ROWLEY: But if Professor
20 Reisman is correct, that if the regulation, the
21 current version of the regulation is no different

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1 than the original version of the regulation, and

2 the original version of the regulation could not
3 get you through the 1101 aperture, then why can it
4 get you through today.

5 And I don't want to put words in your
6 mouth, but these are the words that I--this is the
7 distinction I understood to you make in your
8 opening, and it was that the new version of the
9 regulations specifically names methanol as a target
10 of the regulation, and because it names methanol,
11 you say that or I think you've said that we no
12 longer had to worry about there being a showing of
13 an intent to harm methanol because methanol was
14 specifically named.

15 So, anyway, let me stop there. Am I right
16 on that?

17 MR. DUGAN: You're right, that's what I
18 said, and I still say that, and I say it for two
19 reasons. One is because we think it is conclusive
20 evidence of an intent to harm methanol producers;
21 and secondly, because again, and I don't see any

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1 reason why we can't put forward this in the
2 alternative, we believe that this--California's
3 amendment of this measure to expressly name
4 methanol clearly satisfies the relating to/legally
5 significant relationship test that the Tribunal
6 posited in its Partial Award. We say it for both
7 reasons.

8 Now, you said that the regulation is the

9 same now as it was then. And I guess that's not
10 precisely true. We would say the operative legal
11 effect is the same now as it was then; i.e., that
12 methanol was banned, but the regulation is
13 different now because it does expressly name
14 methanol. That's the difference.

15 ARBITRATOR ROWLEY: Yes, and I guess my
16 point is that if there is a real difference, then
17 is it not a different measure, and if it's a
18 different measure, then in order to rely on it,
19 because of it being a different measure, not for
20 evidentiary purposes, as the President said you may
21 be pushing on a reasonably open door for use of it

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1 as evidentiary--evidence of intent, but if you're
2 using it as a measure which, because it names
3 methanol, we don't have to worry about intent, then
4 you will have to get--you will have to, at the end
5 of the day, convince us that an amendment is
6 appropriate and that we have the power to make that
7 amendment.

8 MR. DUGAN: Well, in terms of your power
9 to make the amendment, I think the UNCITRAL Rules
10 quite clearly give you that power. I don't think
11 there is any doubt whatsoever about that. And, in
12 fact, I don't have a copy of the UNCITRAL rule in
13 front of me. I know Mr. Veeder does.

14 PRESIDENT VEEDER: Can I read it out
15 because it actually highlights, I think, part of
16 the problem we are addressing. I will read it out

17 and then I will make the point. DURING the course
18 of the arbitral proceedings, either party may amend
19 or supplement his claim or defense unless the
20 Arbitral Tribunal considers it inappropriate to
21 allow such amendment having regard to the delay in

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1 making it or prejudice to the other party or other
2 circumstances.

3 The second sentence goes on, However, a
4 claim may not be amended in such a manner that the
5 amended claim falls outside the scope of the
6 arbitration clause or separate arbitration
7 agreement.

8 Now, the first sentence goes to
9 discretion. The second goes to jurisdiction and
10 power, even if we were with you as a matter of
11 discretion.

12 And I think just to summarize, I think
13 where we have gotten to, if this is part of your
14 evidential case, i.e. it supplies evidence as to
15 the intent of California relevant to the two
16 measures you originally pleaded, as we said,
17 subject to hearing the United States, you're
18 pushing an open door as far as deploying this
19 material. If you're saying that this is the same
20 measure, but like Topsy, it grew up between 1999
21 and 2003, but it's the same Topsy because what was

1 implicit or necessarily there but not explicit is
2 now explicit.

3 Again, it doesn't seem to us from what
4 you're saying that you're applying for an
5 amendment. You're just looking at the same
6 measure, albeit in rather more developed form.

7 But if you're going to the third stage and
8 saying this is not Topsy, this is a new measure,
9 this is Tom, but we haven't got Tom pleaded, the
10 Amended Statement of Claim. We haven't got Tom
11 identified in our Partial Award, and Tom is a new
12 person in this arbitration, and it came effectively
13 with your letter of the 13th of June.

14 Now, leave aside discretion, just think
15 very hard how it is that we have power under
16 Article XX or under our Partial Award to allow Tom
17 to arrive, given also the terms of Chapter 11.

18 MR. DUGAN: Well, I think of the three
19 personages that you just posited, Dick, Harry, and
20 Tom, in terms of the first one, only because you
21 used Tom, in terms of the first one we are

1 obviously pleading it, if nothing else, as evidence
2 of California's intent.

3 As far as the second one, was this Harry
4 pleaded in October of 2002. We would say yes,
5 Harry was quite pleaded October 2002. What we said
6 then was CAFRB's latest amendments to the CaFRB3

7 regulations, which are to be adopted in December
8 2002, expressly identified methanol as one of the
9 alternatives to ethanol that are currently banned
10 in use after December 31st, 2003.

11 PRESIDENT VEEDER: Give us the reference.

12 MR. DUGAN: Paragraph 122 of the Second
13 Amended Statement of Claim.

14 PRESIDENT VEEDER: I will make the point,
15 but I'm sure it's well in your mind. This is
16 certainly a pleaded reference to the proposed
17 regulation, which was exhibited, and we have that
18 point. But in one view all this deploys is those
19 proposed regulations as evidence of intent. It's
20 not elevating it into a new separate measure, which
21 is the subject of your complaint under 1101.

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1 Now, we can go through the pleadings, and
2 we have looked at the Amended Statement of Defense
3 and the reply and the rejoinder, and the disputing
4 parties' opening oral submissions, but there is an
5 ambiguity in this Amended Statement of Claim as to
6 whether it was deployed as evidence or, as you say,
7 as a measure. And that's the point that troubles
8 us.

9 MR. DUGAN: Well, again, and I understand
10 what you're saying, but the measure that we are now
11 complaining of is in precisely the same language as
12 what we supplied to the Tribunal in October of
13 2002, and in essence what he said, we were
14 complaining about this particular regulation, and

15 this is what it's soon going to look like. And in
16 fact, as a factual matter, it now does look like
17 what we told the Tribunal it would look like. It
18 has the same operative legal effect now as it did
19 when we actually filed this Amended Complaint,
20 because like I said, at that time it banned
21 methanol, although it didn't name methanol.

1806

1 So, I guess in terms of your second
2 category, is this the same measure that we've
3 always been complaining of, we would say, yes, it's
4 is the same measure we have always been complaining
5 of. We have been complaining about a California
6 regulation in different guises, or using different
7 words that has the same legal effect, which is what
8 we are worried about, which is the ban on methanol.

9 And this no more increases the ban on
10 methanol than it was--than the previous versions
11 did. The ban has been in place since we filed our
12 First Amended Claim.

13 All this does is, again, no change in the
14 operative legal effect. It uses different words,
15 but it comes to precisely the same conclusion.

16 So, in that case we would say, to take
17 your second category, that this is still Harry.
18 Harry has got a different shirt on. That's all,
19 but that different shirt makes a big difference in
20 terms of how the Tribunal posited the relating-to
21 test because now it expressly de jure relates to

1807

1 methanol. So even though the operative legal
2 effect is the same in terms for purposes of the
3 test you posited, it's still Harry.

4 Now, to take your third category, to adopt
5 a belts-and-suspenders approach, we do formally
6 move to amend because we don't think that if we are
7 allowed to amend, we don't think there is any need
8 to resatisfy us, especially in a situation like
9 this where the legal effect is precisely the same.
10 I would submit to you it's within your discretion
11 to do so, and that there is no reason why we have
12 to meet all the various procedural requirements.

13 And finally, getting to the matter of your
14 discretion, I mean, if this were--the way you
15 posited the test, if this amendment were not
16 granted, then what would be the consequence would
17 be, I mean, if we were to lose the case and the
18 amendment had not been granted, then we would have
19 to refile the case and start the whole thing all
20 over again, and we would instantly meet the legally
21 significant test that you posited. And I submit

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1 that that would be a tremendous waste of everyone's
2 resources if we were required to do that.

3 You have the amendment before you. We
4 identified in October of 2002 specifically what it

5 was, that it was coming, it has now come. We see
6 no equitable reason whatsoever why it shouldn't be
7 before the Tribunal.

8 So, to take your three categories, we will
9 make all three arguments, and we think under any of
10 those three arguments we're entitled to have this
11 placed before the Tribunal.

12 ARBITRATOR REISMAN: I would like to
13 understand the substantive implication of the
14 introduction of RFG3, CaRFG3, and I'm still a bit
15 puzzled by this.

16 If RFG2, by implication, excluded any
17 oxygenate that had not been the subject of a
18 multimedia study, multimedia evaluation, and that
19 was RFG2, and by implication that had to include
20 methanol and everything else that's now listed in
21 subsection four of RFG3, and the Tribunal did not

1809

1 find that that established the intent to harm, and
2 reached the threshold required under 1101, why did
3 does the introduction of RFG3, with its explication
4 now do that?

5 More specifically, a related question, if
6 the Legislature says you cannot use another
7 oxygenate until it has gone through a multimedia
8 evaluation, and without discrimination lists all
9 those others that have not gone through the
10 multimedia evaluation, is that evidence of intent
11 to harm those others?

12 MR. DUGAN: Well, it is in the context of

13 the record here because one of the principal pieces
14 of evidence that we say supports our case is that
15 Governor Davis ordered the State of California to
16 pay for the multimedia evaluation of one oxygenate,
17 namely ethanol. None of the others. He selected
18 out ethanol. He paid for the evaluation of that.
19 He ordered that the steps go forward to create an
20 in-state ethanol industry, and you know why we say
21 that he did that.

1810

1 So, yes, it is a conditional ban in that
2 sense, but it is quite clear that in the totality
3 of the facts and circumstances that it was intended
4 by California to be in effect a permanent ban, and
5 that's why only ethanol was selected for evaluation
6 is because there was quite express favoritism to
7 ethanol that was not shown to any of these other
8 competing oxygenates.

9 But again to get back to the first part of
10 your question, if I could, I don't think the
11 Tribunal focused on the fact that the ban of other
12 alcohols was also in place, and the reason why I
13 say that is because what the Tribunal has expressed
14 is the rationale for why, as a de jure matter, the
15 methanol could not make a case unless it had this
16 significant intent to harm case is because the
17 measure that we were complaining about did not
18 expressly name methanol. And that appears, I
19 think, four or five times during the Partial Award.

20 I could take you through it, but I think it's
21 abundantly clear that, in my mind at least, that

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1 was the principal reason why the Tribunal found no
2 de jure relationship because the words weren't
3 there.

4 Now, again, one final point. I may be
5 beating a dead horse at this point. You asked what
6 is the subsequent effect of this latest change for
7 a methanol producer? There is none. It's been
8 banned for use as an oxygenate conditionally to use
9 the words of the United States, since for many
10 years.

11 Subsequent--I mean, the substantive effect
12 is really for this Tribunal because the Tribunal
13 laid so much emphasis on the de jure aspect of the
14 measure, that it didn't, de jure and ipso facto,
15 ban methanol by name, and therefore this test was
16 created. And we simply made the point, the measure
17 as it exists now, does, indeed, do that, but in
18 terms of its operative impact as a legal measure in
19 California, it has no different operative legal
20 impact.

21 ARBITRATOR REISMAN: I thank you for that

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1 clarification, which is very helpful.

2 Just could you remind me, when did the

3 multimedia study of ethanol take place?

4 MR. DUGAN: The multimedia study of the
5 ethanol took place, it began in 1999. It was
6 ordered, I think, in paragraph 10 or paragraph 11
7 of Governor Davis's Executive Order of March 1999,
8 and it took place in stages. The first stage was a
9 lengthy study that was published in, I think, late
10 December or early January of 1999. That study
11 identified a number of very serious gaps with
12 respect to the knowledge base of ethanol in
13 groundwater in particular, and a further study took
14 place. There was an addendum to the first study
15 that I think was first published in February or
16 March of 2000, and then the final portion of the
17 study, the study of the fate and transport of
18 ethanol in subsurface water was finally completed
19 in October 2001.

20 PRESIDENT VEEDER: Just before we leave
21 this topic, it would be very useful if the parties

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1 together or one or the other party could prepare
2 for us the collection of different regulations.
3 What we have is the proposed regulations in Volume
4 1, Tab 30 of the legal authorities to Methanex's
5 Amended Statement of Claim. We understand that's
6 the same document that appeared at Tab 41, at the
7 front of Tab 41, Mr. Dugan, of your exhibits to
8 your opening oral submissions.

9 At the same time, you handed in the final
10 version, and some of us added it to the back of Tab

11 41. And as you said, that's the same document as
12 was later appended in a different format to your
13 letter of the 13th of June.

14 MR. DUGAN: I believe that's the case. I
15 think it will be very useful for us to get the
16 different iterations because I'm not precisely sure
17 of that. I know in substance for what we were
18 talking about it was the same, but it might not be
19 complete.

20 PRESIDENT VEEDER: What we don't have the
21 room, although we've looked for it, is the document

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1 that was before the Tribunal for the purpose of its
2 First Partial Award.

3 MR. DUGAN: Okay. We will do that, then.
4 Just let me warn you that the regulations
5 themselves were very unclear, and there was a--I
6 will dig this out for you as well. There was a
7 clarification by the staff that they had intended
8 to ban all alcohols except for ethanol, and then in
9 the next iteration they did ban all alcohols except
10 ethanol, but that was clearly their intent, but
11 it's hard to derive from the language itself. But
12 we will try to dig all that out and put together
13 for you an interim set of the regulation as it
14 developed over time.

15 (Pause.)

16 PRESIDENT VEEDER: Thank you, Mr. Dugan.

17 MR. DUGAN: Okay.

18 The second aspect of the Partial Award I
19 would like to draw the Tribunal's attention to,
20 it's now clear that the jurisdiction has to be
21 based on the Findings of Fact that come out of this

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1 merits hearing and not the assumed Findings of Fact
2 that the Tribunal assumed at the time that it
3 issued the Partial Award. And Methanex would
4 submit that there are two significant factual
5 changes from what was assumed by the Tribunal at
6 the time that it issued the Partial Award.

7 In the Partial Award, repeated references
8 to methanol as merely a feedstock for MTBE, we
9 think that a better, more accurate characterization
10 of the market that was there is that methanol is a
11 feedstock for RFG, just as ethanol is a feedstock
12 for RFG. I think Mr. Burke conceded that the
13 market, it's a continuous supply chain, that there
14 is no distinction in the sense of continuity
15 between the refiners and the blenders, and so I
16 think the whole manufacturing process has to be
17 taken into account.

18 And when viewed that way, ethanol and
19 methanol are both feedstocks for the manufacture of
20 RFG.

21 And secondly, they both compete directly.

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1 And I think that that's a signal fact that the
2 Tribunal didn't assume at the time and wasn't aware
3 of, that there was this direct competition between
4 methanol and ethanol as oxygenates, and that the
5 sale of one would, in some instances, result in the
6 loss of contracts for the other, that type of
7 direct one-to-one relationship.

8 PRESIDENT VEEDER: I think whenever you
9 refer to testimony that we've heard, it would be
10 very useful if you could give us the reference to
11 the transcript.

12 MR. DUGAN: I will get back to that during
13 my closing. It is in there. I just don't have it
14 at my fingertips. I'm sorry.

15 So we think that once the Tribunal views
16 the facts as we have developed them here, we think
17 that the rationale for the specific intent to harm
18 test may well disappear because if there is this
19 existence of a direct competitive relationship
20 between ethanol and methanol as oxygenates, then
21 that in a factual way, as a factual matter, affects

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1 the need for this specific intent to harm test. It
2 creates a different set of facts that would affect
3 whether or not or how the legally defined
4 relationship is articulated.

5 Now, those are our two principal arguments
6 why we don't believe the specific intent to harm
7 test is any longer necessary in the case, that in
8 essence it's moot. If those are two not accepted,

9 then we filed our formal Motion to Reconsider that
10 we filed--well, we originally raised the issue in
11 October of 2002, and we filed our formal motion
12 back in January, and I don't propose to go into
13 that in any great detail unless the Tribunal has
14 any questions, and we just propose to rest on the
15 papers with respect to that.

16 PRESIDENT VEEDER: We have a couple of
17 questions, and we would like to raise it first by
18 reference to your letter of the 14th of April,
19 2004. Do you have that letter before you? If you
20 could turn to page four.

21 MR. DUGAN: Yes.

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1 PRESIDENT VEEDER: You just referred to
2 the formal motion to reconsider the Partial Award
3 in October of 2002. Is that a reference to your
4 November 2002 Amended Statement of Claim, or some
5 other request?

6 MR. DUGAN: No, it's a reference to the
7 November 2002 Amended Statement of Claim where we
8 raised in substance our objection to the--what we
9 thought as the conflict between the like
10 circumstances test and the specific intent to harm
11 test.

12 PRESIDENT VEEDER: But if you could just
13 turn to your Amended Statement of Claim, where do
14 we see a request?

15 MR. DUGAN: There is no formal request for

16 reconsideration in the Amended Statement of Claim
17 We--I would characterize it most accurately as an
18 objection to the test that the Tribunal adopted.

19 PRESIDENT VEEDER: Well, it's a criticism,
20 but no formal request.

21 MR. DUGAN: No, there was no formal

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1 request.

2 PRESIDENT VEEDER: When does the first
3 formal request, according to you, arrive before the
4 Tribunal, apart from the request that was made
5 immediately after the Partial Award?

6 MR. DUGAN: Not until January,
7 January 28th of this year.

8 PRESIDENT VEEDER: You've seen obviously
9 the United States's objection as regards the timing
10 of such a request. Do you have any further
11 submissions to make?

12 MR. DUGAN: No. Beyond what we put in the
13 correspondence, no.

14 PRESIDENT VEEDER: Okay. Thank you,
15 Mr. Dugan.

16 MR. DUGAN: Okay.

17 Now, I think there are two other issues,
18 two other preliminary issues I would like to go to
19 before I start the actual closing. And those are
20 the discovery issues. And I will touch upon them
21 only briefly. And more as an indicator of how I

1 intend to approach it in the argument.

2 The first is our request for our third
3 party evidence that we referred to a number of
4 times throughout this. We made good faith requests
5 for third party evidence, and at every juncture the
6 U.S. blocked them, and we are now faced with a
7 situation where there are some fairly significant
8 evidentiary deficiencies, most obviously what would
9 be the testimony of the Andreases and Governor
10 Davis, for example.

11 We believe that because the United States
12 has blocked these, that the Tribunal should draw
13 adverse inferences against them, and I will make
14 reference to those inferences as we go through.

15 Secondly, with respect to our request for
16 the negotiating history of NAFTA, I just want to
17 point out to the Tribunal that the negotiating
18 history, at least in the form of draft texts, does
19 exist. It has been produced by the United States
20 in other cases. It's never been produced here. We
21 believe that that negotiating history would quite

1 clearly shed light on issues such as how to define
2 national treatment, how to define like
3 circumstances, how to define fair and equitable
4 treatment, how to define international law.

5 And as I said, the Tribunal I think is
6 entitled to those texts. I think it puts both us

7 and the Tribunal at a disadvantage that the United
8 States produces them in some cases but not in
9 others. And again, I will try to point out where I
10 think that had they been produced, it would shed
11 light on what the meaning of the specific treaty
12 terms is, and ask the Tribunal to draw adverse
13 inferences for the failure of the United States to
14 produce any of this specific negotiating history.

15 Now, with that, I would like to turn to my
16 actual closing.

17 PRESIDENT VEEDER: Just to make it clear,
18 you're coming back to those two items later, aren't
19 you?

20 MR. DUGAN: Well, I will be making
21 reference throughout the--throughout my development

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1 of the facts where I think the particular
2 inferences should be drawn.

3 PRESIDENT VEEDER: But are you coming back
4 to your motion for the travaux?

5 MR. DUGAN: No. I mean, I think that the
6 time for additional evidence is past, and so we are
7 not renewing.

8 PRESIDENT VEEDER: Well, maybe not as far
9 as we are concerned. We would still like you to
10 develop why you think you need the travaux for the
11 interpretation of the particular provisions of
12 NAFTA where you seek them given the Vienna
13 Convention.

14 And we would also like to draw the
15 parties' attention to a recent order made in
16 another NAFTA proceeding by a Tribunal chaired by
17 Professor Gaillard.

18 MR. DUGAN: Is that the Camfor proceeding?

19 PRESIDENT VEEDER: Yes.

20 MR. DUGAN: That's what I'm talking about
21 where I believe the United States agreed to produce

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1 the negotiating texts in that one.

2 PRESIDENT VEEDER: We have a copy of the
3 order, and I hope the parties have a copy of the
4 order also. If not, we can distribute it.

5 MR. DUGAN: No, no, I have a copy of the
6 order.

7 PRESIDENT VEEDER: It doesn't strike us as
8 obvious that the United States had agreed to that.

9 MR. DUGAN: Well, perhaps I'm overstating
10 it. The United States, I think what they said in
11 the order was that they had no objection or maybe,
12 perhaps the other NAFTA signatories had not
13 objected to the release of the negotiating texts.
14 Perhaps that's all they said.

15 PRESIDENT VEEDER: I think if both sides
16 have got copies of it, we may want to come back to
17 it, but I think we would like to hear you a little
18 bit more at some stage. We don't want to take your
19 submissions out of order, Mr. Dugan, as to why you
20 think it's important to have the travaux in this
21 case.

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1 MR. DUGAN: Let's start with the first
2 issue in the case relating to. The Tribunal has
3 read quite a bit of significance into the term
4 "relating to." It may be that the travaux will
5 indicate that the parties never read that type of
6 significance into it. It may be that the parties
7 would have indicated a wider scope for what the
8 meaning of "relating to" is. If may be that there
9 was a dispute between the United States and Canada
10 on the one hand, and Mexico on the other, with the
11 United States and Canada seeking to protect their
12 investors at the time that this was negotiated and
13 arguing for the widest possible scope for the term
14 "relating to." And perhaps Mexico was arguing for
15 a different scope. Perhaps there were different
16 terms used in the drafts. Perhaps the striking of
17 different terms and the adoption of the "relating
18 to" language indicates that this was meant to be an
19 expansive, an expansive legal phrase, rather than a
20 restrictive legal phrase. We don't know obviously.

21 PRESIDENT VEEDER: Let me put the riposte

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1 to you and we'll come back to you. The time for
2 such a request was before we made our Partial
3 Award?

4 MR. DUGAN: Agreed.

5 PRESIDENT VEEDER: Was there such a
6 request from Methanex for 1101?

7 MR. DUGAN: I believe there was--I'm not
8 sure there was request for 1101, no. I know that
9 we made a request prior to the Partial Award for
10 certain portions of the negotiating history, but it
11 may have been limited to 1105.

12 PRESIDENT VEEDER: I think if you have an
13 1101 request, we would like you to identify it
14 before the Partial Award.

15 MR. DUGAN: I don't think we do, but
16 certainly if only in terms of the relationship to
17 the motion for reconsideration. And I think we
18 did--I think we did make a request for the
19 negotiating history for 1101 at the time that we
20 asked for clarification. And this is in August 28,
21 2002. We said, indeed, it would be fundamentally

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1 unfair to accept the United States's argument that
2 allow 1101 requires a legally significant
3 connection while simultaneously allowing it to
4 withhold evidence that very likely would shed
5 important light on the proper meaning of that term.
6 Accordingly, Methanex respectfully renews its
7 request for an order compelling the United States
8 to produce any potentially relevant segments of
9 NAFTA's negotiating history. So, that was the
10 request that we filed in August 28th, 2002,
11 admittedly after the Tribunal issued its order with

12 respect to the First Partial Award.

13 And I think we have identified some of the
14 other issues that we think would be relevant as
15 well.

16 Fair and equitable treatment, Article 1105
17 has been the subject of enormous debate as to its
18 meaning, especially in light of the FTC
19 interpretation. We think that release of the
20 negotiating drafts could well shed light on that.
21 If you recall, one of the issues that was raised

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1 was whether the concept of international law in
2 1105 is limited to customary international law
3 where it includes broader forms of international
4 law. And I think that there is evidence in the
5 record from Mr. Aguilar that there was one draft
6 that did include the word customary, but that that
7 was struck. That's the type of thing, that's the
8 type of negotiating history that I think would be
9 relevant not just for Methanex, but to the Tribunal
10 as well.

11 Similarly, the concept of like
12 circumstances, how that is to be defined. There
13 may be well be drafts that were proposed but not
14 adopted that would shed some light as to how
15 expansive or restrictive a legal term that is meant
16 to be.

17 PRESIDENT VEEDER: Just to complete the
18 procedural story, there was correspondence
19 partially between the parties, disputing parties

20 and the Tribunal about this request, and it was
21 envisaged it would be dealt with at the procedural

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1 hearing in March 2003, and we would like your help
2 as to how that particular request was pursued--of
3 that hearing.

4 MR. DUGAN: I'm not sure the negotiating
5 history was pursued, and frankly, we never received
6 a response from our August letter, and we never
7 received--

8 PRESIDENT VEEDER: We need to look at the
9 letter from the Tribunal from the 25th of
10 September, 2002.

11 MR. DUGAN: Perhaps I have misspoken now.

12 PRESIDENT VEEDER: Well, you need not do
13 it now, but at stage we'd like some explanation as
14 to this request having been made, the Tribunal
15 having responded, the procedural meeting having
16 been held here in March 2003, why wasn't it pursued
17 by Methanex at that time.

18 MR. DUGAN: Frankly, it wasn't pursued by
19 Methanex at that time because we thought that the
20 Tribunal had absolutely no interest in granting it,
21 and we had been making a number of requests for the

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1 negotiating history; a request for the 1105
2 negotiating history I think goes back to 2001.

3 PRESIDENT VEEDER: Mr. Dugan, we can go
4 through this, and you are entitled to criticize the
5 Tribunal. Please don't resist if you have
6 criticisms to make, but it ought to be fair
7 criticism. There was a 1105 request, and we dealt
8 with it in the Partial Award. At the time of the
9 Partial Award, as best as we can recollect, there
10 had been no request from Methanex for any travaux
11 relating to 1101.

12 MR. DUGAN: And I don't dispute that.

13 PRESIDENT VEEDER: I think you agree with
14 that?

15 MR. DUGAN: I do agree with that.

16 PRESIDENT VEEDER: After the Partial Award
17 there was such a request, there were further
18 intonations for travaux. And if you look through
19 the correspondence, the Tribunal indicated that it
20 wanted that to be discussed with the parties at a
21 procedural meeting which eventually took place in

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1 March of 2003. And before March 2003, if there is
2 any criticism of the Tribunal, we would you like to
3 specify precisely what it is.

4 MR. DUGAN: I don't have any precise or
5 specific criticism the Tribunal, and as to what
6 should have been raised in 2003, Methanex, in
7 retrospect, probably should have raised it, but it
8 was a matter of in litigation you pick and choose
9 where you make your requests and where you fight

10 your fights. And Methanex decided not to. I
11 decided not to at that point to raise that issue,
12 and the Tribunal didn't raise it, and the issue was
13 put to the side. That's quite clear.

14 PRESIDENT VEEDER: For now, please don't
15 assume the Tribunal is disinterested in your
16 application, which it is treating as a live
17 application. We have not determined it one way or
18 the other, but we do need your help this afternoon
19 as to why you still think it's relevant to have
20 travaux on 1101, given that we made a Partial
21 Award on the meaning of Article 1101, and just let

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1 me finish. If you can go through the other
2 requests, you're asking for the travaux in
3 relation to 1102. You are not, I think, making any
4 request of present in regard to 1105 or 1110, but
5 you are in relation to Article 2101. Is that
6 right?

7 MR. DUGAN: I think that is right.

8 PRESIDENT VEEDER: So, we are looking at
9 1101, 1102, and 2101.

10 MR. DUGAN: Well, I mean it says that it's
11 not exhaustive if I could amend that and ask for
12 the history with respect to 1105, I would as well,
13 because I think that's a very important nearby this
14 case.

15 PRESIDENT VEEDER: And again, you've got
16 to make out a case for it.

17 MR. DUGAN: Okay.

18 PRESIDENT VEEDER: You are going to make
19 out a case for it.

20 MR. DUGAN: The question of what fair and
21 equitable treatment actually means, actually

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1 covers, has been, as I said, an object of quite a
2 bit of dispute. There is dispute now, for example,
3 about whether or not Professors Crawford's
4 articulation of what it means in the waste
5 management case is reflective of customary
6 international law.

7 I think one of the things that we've
8 argued is that 1105 is not limited to customary
9 international law. It includes international law.
10 That's what it says, and that's what it means, and
11 we very much would like to see the negotiating text
12 to see whether the word "customary" was included in
13 one of the drafts, and then struck. We think if it
14 was, that is persuasive evidence in that the fair
15 and equitable treatment must be in accordance with
16 all aspects of international law, including, for
17 example, WTO law, and that the protections of the
18 WTO can to some degree be imported through 1105 if
19 1105 is meant to provide all the protections of all
20 of international law, including treaty law, not
21 just customary law.

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1 Now, the United States has asserted that
2 it doesn't, and they now have the FTC
3 interpretation, which attempts to deliver the
4 protection of that to customary international law.
5 Methanex submits that if the phrase "customary" was
6 strike struck from the negotiating history, then
7 it's quite clearly the intent of the parties to
8 include the protections of all of international
9 law, not just customary international law. And if
10 that's the case, then the FTC interpretation of
11 2001 is quite clearly an amendment. It's not an
12 interpretation, and it's an impermissible
13 amendment. It's not an interpretation.

14 We don't know that. And all the parties
15 have been assiduous in trying to protect themselves
16 with respect to what the negotiating history says,
17 and I submit that one of the reasons why they do is
18 because they now realize that, as drafted, it
19 provides quite broad protections for investors, and
20 that was the intent, we submit, of the parties,
21 specifically of Mexico--I mean, of Canada and the

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1 United States, which at the time were looking for
2 the protections that would be provided by NAFTA and
3 looking for expansive protections just as they were
4 in all other investment treaties that they were
5 signing.

6 And that the arguments that are reflected
7 in the FTC interpretation of 2001 are post hoc,

8 after-the-fact arguments that express nothing more
9 than buyer's remorse; that United States and Canada
10 didn't anticipate that they would be in this room,
11 as they are today, to the defendants in an
12 important proceeding alleging very serious charges.
13 They anticipated that American corporations would
14 be in hearing rooms and the Mexican Government
15 would be here defending these very serious charges.

16 And finding themselves in the position of
17 defendants, they are now retroactively attempting
18 to restrict the scope of 1105 and the scope of fair
19 and equitable treatment. They are trying to
20 pretend that fair and equitable do not mean fair
21 and equitable, and we say that's nonsense. Sir

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1 Robert Jennings said that was nonsense, he said
2 that was a preposterous argument.

3 Now, could the negotiating history shed
4 light on that? We believe that it could, but
5 you're asking me to, in essence, speculate what's
6 in the negotiating history. I don't know. But
7 it's hard to believe that some concept, some
8 expression of the potential scope of fair and
9 equitable treatment was not raised during the
10 course of the proceeding--during the course of the
11 negotiation. Perhaps it wasn't. And if that's the
12 case, then I guess we are left with trying to
13 figure out what it means on its surface.

14 But those are the types of things that we
15 believe could well be useful in aiding the Tribunal

16 to understand what fair and equitable means.
17 That's why we believe it's entirely appropriate for
18 the Tribunal to have that negotiating history
19 before it.

20 (Pause.)

21 ARBITRATOR REISMAN: As a matter of

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1 international law's interpretive methodology, what
2 is the relationship between text and travaux under
3 the Vienna Convention, Articles 31 and 32?

4 MR. DUGAN: I don't have it in front of
5 me, and I can't quite remember what the precise
6 standard is, but I guess what I'm submitting here
7 is that the FTC interpretation of 2001 articulates
8 an interpretation of 1105 that I think is
9 inconsistent with the text of 1105.

10 ARBITRATOR REISMAN: Doesn't Article
11 31--Articles 31 and 32 deal with subsequent
12 agreement by the parties?

13 MR. DUGAN: I think 1131 deals with it--I
14 think it does, but the subsequent agreement is
15 agreement as to interpretation. And our point is
16 that if they are trying to substantively limit the
17 scope of 1105, they can only do that by formally
18 amending NAFTA, invoking all the known federal
19 legislative procedures that are required before an
20 amendment to an American treaty or a Canadian
21 treaty takes place, and that's what they have

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1 avoided. There is no doubt that they have the
2 power to restrict the scope of 1105 if the parties
3 agree; but if they do so, adopting all the
4 procedures that are known to the parties to exist,
5 i.e. in the case of NAFTA it would have to be
6 approved by Congress. It's a trade agreement
7 rather than a treaty.

8 So, those are the procedures that had been
9 bypassed here, and Methanex submits that unless
10 those procedures are adhered to, if the changes
11 that are proposed in the FTC interpretation are, in
12 fact, an amendment, then it's invalid. And we
13 submit that they are. That this was not a
14 permissible interpretation as articulated, far too
15 narrow--it attempted to far too narrowly restrict
16 the scope of 1105.

17 PRESIDENT VEEDER: We also need your help
18 to understand what you intend by the phrase
19 "travaux." We've looked to paragraph 20 of the
20 procedural number five in the Camfor USA
21 arbitration, and there was perhaps a rather

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1 original definition of what travaux might be. But
2 given that you're asking for travaux now, in
3 respect to 1105 as well, we would like you to spell
4 out what you think travaux would be relevant in
5 these arbitration proceedings.

6 MR. DUGAN: Well, approaching it from the
7 lex arbitrii, the U.S. definition of discovery, I
8 think the travaux that would be relevant is the
9 discovery that the U.S. would be liable to produce
10 in an American court that would bear upon the
11 meaning of these words, and in an American court
12 that covers a lot of ground. It covers ground for
13 everything. Obviously stuff that is legally
14 privileged would not be covered. There is a
15 question about certain other categories of
16 documents, but material that is not legally
17 privileged, such as letters back and forth between
18 the parties, as well as negotiating texts, minutes
19 of meetings between the parties, memoranda that are
20 prepared for the negotiations. In the Loewen case,
21 the United States selectively released I think one

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1 or two memoranda that did include extensive
2 discussion of the issues to be negotiated. And it
3 indicated, and I think it's a very accurate
4 inference to draw from the existence of those
5 memoranda, that there was an ongoing process where
6 the United States would develop in writing and
7 brief the negotiators in writing as to the
8 consequences of and as to the meaning of various
9 negotiating positions taken by the parties. And
10 that process, I submit, must have existed, that
11 there must be a long document trail as to many of
12 these provisions and as to what they say.

13 And it's that document trail that has been

14 partially disclosed in bits and pieces that we
15 think would aid both the Tribunal and Methanex in
16 articulating-- sorry, Methanex in articulating this
17 case.

18 PRESIDENT VEEDER: In making this request
19 by reference to U. S. discovery, are you limiting
20 your request of materials that were shared between
21 the three negotiating parties to NAFTA?

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1 MR. DUGAN: It certainly encompasses all
2 that, but to the extent that there are--I would go
3 beyond that. To the extent there are memoranda
4 that were used by the negotiating teams in order to
5 understand what the issues were in the
6 negotiations, we believe that would be relevant as
7 well.

8 It's quite clear it would be relevant.
9 The question, I guess, is whether it's under
10 traditional Rule 26 procedure, that's the type of
11 thing that normally would have to be produced.

12 PRESIDENT VEEDER: Okay.

13 MR. DUGAN: Now, with respect to the
14 third-party discovery, I think Methanex did on a
15 quite diligent basis raise the issue of third-party
16 discovery at periodic integrals. I think the
17 first--the first request was filed in October of
18 2002, it was raised again at the March hearing, and
19 it was raised again earlier this year. And every
20 attempt or every time we were on the verge of

21 taking the discovery, such as in January of 2002,

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1 the U. S. objected, and we held off and waited for
2 the Tribunal to decide. And I think the record on
3 that is pretty clear that they used every possible
4 avenue to block that discovery.

5 And I think the normal common law
6 evidentiary inferences should be drawn, where a
7 party blocks discovery, then if there is a disputed
8 fact, and it can be shown that the testimony that's
9 been withheld would or the testimony that has been
10 blocked would shed light on the fact, then the
11 adverse inference should be drawn at that point.

12 ARBITRATOR REISMAN: You're referring to
13 the 1782?

14 MR. DUGAN: The 1782 stuff, that's
15 correct, which as I said we first asked for, I
16 believe, in October of 2002.

17 ARBITRATOR REISMAN: When you say block,
18 the implication is that when a party resorts to
19 objections available to it at law, that's blocking?

20 MR. DUGAN: Well, arguably available to it
21 in law. There has been no showing that the

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1 objections are, in fact, available to the United
2 States. The provision calls for broad discovery
3 powers in aid of International Tribunal which we

4 think this quite clearly is. This fits
5 specifically within the scope of that, and we were
6 faced with a position where had we gone to a
7 Federal court while the matter was still pending
8 before the Tribunal, I think it's virtually certain
9 the Federal court would have done nothing, pending
10 clarification from the Tribunal as to whether or
11 not we had the power to go before the court.

12 And so, merely by making--you're reading
13 1782 as meaning that if you had--

14 ARBITRATOR REISMAN: If Methanex had
15 turned to a United States court, the court would
16 not decide until the Tribunal had endorsed your
17 application?

18 MR. DUGAN: Until the Tribunal expressed
19 its opinion about whether it was permissible or
20 not, yes, as a practical matter.

21 ARBITRATOR REISMAN: Does 1782 say that?

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1 MR. DUGAN: 1782 doesn't say that, but the
2 case law expresses in many instances a preference
3 for that, for finding out what the Tribunal
4 actually--what the Tribunal's view is with respect
5 to that particular type of evidence. It's not a
6 necessity. It's not a legal necessity. There have
7 been cases that went forward without Tribunal
8 forward.

9 But in this case where the United States
10 had objected to the Tribunal allowing us to go
11 forward and where the Tribunal reserved judgment on

12 it, I think that the United States would surely
13 have made the same objection to the U.S. court, and
14 the U.S. court almost certainly, in my judgment,
15 would have said, well, let's see what the Tribunal
16 says. If the Tribunal blocks you from going
17 forward with this discovery, then I think the
18 Tribunal never would have issued it.

19 So it's key what position the Tribunal
20 takes, for all the obvious reasons. I don't think
21 the Federal court has ever ordered discovery,

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1 perhaps I'm wrong. I don't remember all the case.
2 I don't think it's ever ordered federal discovery
3 where an international tribunal has ordered a party
4 not to pursue it. So, I think the attitude of a
5 Tribunal in a 1782 proceeding is a key element, and
6 had the Tribunal adopted the position of neutrality
7 in January of 2003, when it first arose, then we
8 would have had time to pursue it. As it is now, I
9 just don't think we have time to effectively pursue
10 that avenue.

11 And again, it's because of the U.S.
12 objections. And we think that the U.S. should be
13 held to account for those objections.

14 ARBITRATOR REISMAN: When you say had the
15 Tribunal adopted position of impartiality or
16 neutrality. Can you explain that.

17 MR. DUGAN: Sure. In January 2002, we
18 raise the issue in October--we raised it again in

19 October of 2002. We raised it again, I believe, in
20 January 2003, and as I recall the documentary
21 record, and I haven't reviewed it for a while, so

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1 I'm not entirely clear, I may be off in some of the
2 details, the Tribunal at first adopted a position
3 that it was appropriate for Methanex to go out and
4 obtain this evidence if it wanted to. The United
5 States then objected and said, no, that wasn't
6 appropriate until there was an affirmative order
7 from the Tribunal.

8 The Tribunal then sent out some letters,
9 which we took as meaning that it wanted to review
10 this issue at the March 31st hearing, the issue
11 being whether Methanex could go off on its own
12 without the endorsement of the Tribunal in response
13 to the U.S. objection.

14 The issue was discussed at the March 31st
15 hearing in considerable detail. At that point, the
16 Tribunal issued an order, an oral order, to the
17 effect that it wasn't minded at that point to, and
18 I can't quite remember how it's phrased, to either
19 allow or order the discovery requested.

20 PRESIDENT VEEDER: No, no, no. You may
21 want to review this very carefully, and please

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1 don't hesitate to express any criticism that you

2 have in mind, but the Tribunal was never minded to
3 require Methanex not to apply to a state court
4 under 1782, so that was, I hope, always made clear.
5 What was not made clear was whether the Tribunal
6 should bless such an application; i. e., by granting
7 you the approval of the Tribunal for such a
8 request.

9 The other matter that we're going to
10 invite to you raise, today if you can, is the way
11 that 1782 and the Tribunal's rule under 1782, which
12 is not explicit, ties in in this case with the IBA
13 Rules, Article 4(10) and Article 3(8), which at one
14 stage was an argument being raised by the United
15 States as a qualification on your application in
16 regard to 1782.

17 MR. DUGAN: Well, I guess taking the first
18 issue, with all due respect, it certainly was not
19 clear to Methanex that Methanex was free at that
20 point to go forward with its own application. And
21 in that respect, the Tribunal indicated that it

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1 would be issuing a letter or a decision shortly,
2 and a decision was never issued, and I think had
3 the decision been issued, perhaps at that point it
4 would have been clear. But not having any
5 affirmative decision or any decision from the
6 Tribunal, we continued in the posture that we were
7 in, which is consistent with our understanding that
8 we were not entitled to go forward unless the
9 Tribunal had said either it's blessed or you may do

10 what you want. That was the position--

11 PRESIDENT VEEDER: We have to look back at
12 the transcript, but during the March 2003 hearing,
13 as I recall, it was your argument that you didn't
14 need the positive blessing of the Tribunal to make
15 an application under 1782. That was the argument
16 of the United States.

17 MR. DUGAN: Correct, but that we wanted
18 the blessing of the Tribunal.

19 PRESIDENT VEEDER: You wanted the
20 blessing, but you didn't need it.

21 MR. DUGAN: That's correct.

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1 And it was our understanding that the
2 Tribunal--the objection of the United States was
3 that we couldn't do it unless we had the blessing
4 of the United States--blessing of the Tribunal, and
5 it was that issue that was never decided. There
6 was a clear objection from the United States.
7 There was no decision, and the effect was,
8 certainly in our minds, to prevent us from
9 obtaining 1782 evidence.

10 Now, in terms of, you know--

11 ARBITRATOR REISMAN: As I understood the
12 sequence of events, the position of the Tribunal
13 was on the record that Methanex could proceed, that
14 it was not minded at that time to issue an
15 endorsement, that as to the question of whether it
16 would issue an endorsement it would take that under

17 advisement, but the general license of Methanex to
18 proceed under 1782 was never in doubt.

19 MR. DUGAN: With all due respect, I don't
20 believe that there is an expression toward that
21 effect. And again, that would have required a

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1 ruling on the objection of the United States that
2 we lacked that power, and there was no ruling on
3 the objection of the United States that we lacked
4 the power to go forward independently.

5 PRESIDENT VEEDER: Mr. Dugan, do you
6 remember the debate? I'm sorry to get back to the
7 March hearing. We indicated that was something
8 that this Tribunal could not decide. It had to be
9 for a court to decide whether or not the Tribunal's
10 blessing was required or not in the exercise of
11 that court's jurisdiction.

12 MR. DUGAN: I will go back and read the
13 transcript.

14 PRESIDENT VEEDER: I will give you one
15 reference which I do recall, which is that--this is
16 the transcript for the 31st of March, and I'm
17 reading from page 108, 109, what was said on behalf
18 of Methanex was this:

19 We have always taken the position
20 with the Tribunal that we didn't believe
21 that the Tribunal's blessing was necessary

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1 in order to invoke 1782, and then you
2 referred to your October letter. And you
3 concluded, In the best of all possible
4 worlds, we would prefer a Tribunal order,
5 but if the Tribunal, for whatever reason,
6 is unwilling to issue it, we believe that
7 under the statute we are entitled to go to
8 the District Court as an interested party
9 and seek to convince the District Court to
10 grant us this additional evidence. In
11 other words, while we would welcome a
12 Tribunal order, we don't believe it is
13 necessary for us to succeed at the
14 District Court level, and I don't believe
15 that position has changed.

16 Now, clearly, you wanted our blessing
17 because you thought it would help, but our
18 recollection is that you didn't say you needed it
19 to make the application.

20 MR. DUGAN: But we also wanted a ruling on
21 the U. S. objection, which is what we were expecting

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1 would happen, and the U. S. had quite clearly made a
2 ruling--made an objection--and what we were afraid
3 of, without a ruling on the U. S. objection as to
4 whether we had that power, if we went into a
5 Federal court, the United States would make the
6 same objection that this is pending before the
7 Tribunal. It would be premature for this court to

8 take any position with respect to a 1782 request
9 until the Tribunal has issued a decision on the
10 U.S. objection, which it indicated it would be
11 issuing soon. And so, that's why we didn't do it.

12 PRESIDENT VEEDER: Thank you, Mr. Dugan.

13 MR. DUGAN: Would this be an appropriate
14 time to take a break and I could come back and
15 begin the closing.

16 PRESIDENT VEEDER: I'm sorry if we have
17 taken you out of turn. I think we should take a
18 break. We have a shorthand writer who has taken
19 down a lot of words this afternoon. Let's take a
20 10-minute break.

21 (Brief recess.)

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1 PRESIDENT VEEDER: Let's resume.

2 Mr. Dugan, I'm conscious that we have been
3 interrupting you, and we apologize for that, but
4 it's certainly been very helpful to have this
5 exchange with you, and we thank you for answering
6 our questions, but we don't want to remove your
7 allocation of time because of what we call injury
8 time from the Tribunal. So, we can go beyond 5:30
9 this afternoon. Please don't feel that you have to
10 speak any faster or truncate any of your
11 submissions.

12 MR. DUGAN: Thank you. I appreciate that.

13 All right. To begin with, proceeding on
14 the assumption that Methanex does have to meet the

15 standard set forth in the Partial Award, a specific
16 intent to harm, later in my presentation I will go
17 over what evidence we think clearly supports that
18 inference. So, it will come at a different portion
19 in the presentation today.

20 Now, the first issue I would like to turn
21 to is 1102, but before we actually turn to 1102, I

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1 think it's necessary to deal with the governing law
2 issue and what law is to be relied upon by the
3 Tribunal in resolving this.

4 Now, obviously, Article 1131, which we
5 will put up as a slide, states quite clearly what
6 the Tribunal is to rely upon. A Tribunal
7 established under this section shall decide the
8 issues in despite in accordance with this agreement
9 and applicable rules of international law.

10 Now, international law usually includes
11 under Article 38 of the ICJ, jurisprudence,
12 international jurisprudence.

13 The U.S. argue that is WTO law and GATT
14 law has no on place in this proceeding. So, in
15 essence, what they want 1131 to say is this: A
16 Tribunal established under this section shall
17 decide the rules, the issues in despite in
18 accordance with this agreement, and applicable
19 rules of international law, except for WTO, GATT
20 law, and national treatment because they decided
21 that they really don't much like that law, and I

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1 think to phrase it that way to expresses precisely
2 what's going on here. The United States is trying
3 to pick and choose which issues, which areas of
4 international law apply, and they can't do that.
5 Under 1131 the Tribunal is required to take into
6 account all of international law, not just
7 customary international law, but all of
8 international law. And that's the standard.

9 So, the U.S. statement that WTO law has no
10 place in this dispute is simply wrong as a matter
11 of the governing law.

12 Now, I'd also point out that in cases such
13 as Pope and Talbot, they rely on WTO law. So,
14 there is traditional of NAFTA Tribunals relying on
15 WTO law, and we think it's perfectly appropriate
16 for the Tribunal to do so here.

17 Now, this also points out two other
18 issues. This is a place where negotiating history,
19 I think, could be very useful, to see exactly what
20 law does apply. We don't have that here. The
21 United States is arguing for interpretation of 1131

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1 that can't be supported by the text of the
2 provision. And if that's the case, it seems to me
3 incumbent upon the United States to produce any
4 relevant negotiating history.

5 The second point I would like to make is I

6 don't think that the--even if there had been, for
7 example, an FTC interpretation saying that WTO law
8 has no role in NAFTA dispute, that the parties have
9 the power to do that. This is a good example of
10 what would be an impermissible amendment.

11 The parties, by agreement, three parties
12 who are defendants in numerous suits by agreement
13 cannot issue an interpretation that reads a
14 specific area of law out of the Treaty. They can
15 only do that by formally amending the Treaty.
16 That's too distinct and too important a deletion
17 from the Treaty to be anything other than an
18 amendment.

19 Now, the first point I would like to make
20 is 1102, and what it is that 1102 prohibits. The
21 U.S. argues that 1102 prohibits discrimination

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1 against foreign investments because they're
2 foreign. Now, that's surely true. No one can
3 dispute or quibble with that interpretation, but
4 1102 prohibits something else as well. It
5 prohibits discrimination that favors a domestic
6 industry. And again, what's the legal basis for
7 this? The legal basis for this is the express
8 language of 1102: A foreign investment is entitled
9 to the most favorable treatment as a domestic
10 industry receives. If the domestic industry is
11 favored, then the foreign investor is equally
12 entitled to that favored status.

13 So it's not simply discrimination against
14 an investment because it's foreign owned, although
15 we think that took place here. That's not all that
16 1102 prohibits. It prohibits favoritism. It
17 prohibits economic protectionism. It prohibits
18 precisely the type of behavior that we contend the
19 United States and California engaged in here.

20 And once again, the fact that California
21 may have discriminated against U.S. methanol

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1 producers while it was favoring U.S. ethanol
2 producers is irrelevant. And I think the case that
3 best serves this point is the European Commission
4 versus Denmark where they were trying to determine
5 whether there was discriminatory intent in a Danish
6 tax provision.

7 Now, a statement there said, viewed by
8 itself the tax system introduced by the Danish
9 legislation contains incontestable discriminatory
10 or protective characteristics. Although it does
11 not establish any formal distinction, according to
12 origin of the products, it has been adjusted so
13 the bulk of the domestic production of spirits
14 comes within the most favorable tax category,
15 whereas all imported products come within the most
16 heavily tax category. These characteristics of the
17 system are not obliterated by the fact that a very
18 small fraction of imported spirits benefits from
19 the most favorable rate of tax, whereas conversely,
20 a certain proportion of domestic production comes

21 within the same tax category as imported spirits.

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1 It therefore appears that the tax system
2 is devised so that it largely benefits a typical
3 domestic product and handicaps imported spirits to
4 the same extent.

5 Now here, the California regulatory
6 scheme, the ban on MTBE, and the ban on all the
7 competing oxygenates, including methanol, largely
8 benefits the U.S. ethanol industry which, as we
9 have seen, produces 93 percent of the ethanol
10 consumed in the United States. And it handicaps
11 foreign methanol and MTBE to the same extent.

12 Now, one of the things that came out in
13 the hearing was testimony by Mr. Burke, I believe,
14 who testified at page 1425. The question was,
15 (reading):

16 So, if 47 percent of the methanol
17 operating capacity is domestically owned,
18 that would mean that the majority or
19 53 percent is foreign owned; is that
20 correct?

21 That's correct.

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1 So, we are dealing here with an industry
2 that is majority foreign owned, and that's in
3 considerable contrast to the United States's

4 ethanol industry, and that's an important fact for
5 the Tribunal to consider.

6 Now, if 1102 prohibits favoritism to a
7 domestic industry, then one of the key issues here
8 obviously is whether California and former Governor
9 Davis intended to, and did, in fact, favor the U. S.
10 ethanol industry. So what I would like cover is
11 the evidence of an intent to favor, and
12 specifically the evidence that there was some type
13 of implicit arrangement between Davis and the U. S.
14 ethanol industry.

15 Now, as a preliminary point, we think that
16 the evidence that was adduced during the hearing
17 also shows fairly clearly that MTBE was singled out
18 in contrast, for example, to benzene.

19 Again, there was no doubt there was
20 testimony to this effect. Benzene is a known
21 carcinogen, and it's one of the worst components of

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1 gasoline.

2 Now, Dr. Happel, in response to a question
3 about the NRDC listing of the most prevalent
4 contaminants in California's water, the one that
5 lists benzene but does not list MTBE, said she had
6 done her own analysis, and she had come to a
7 different conclusion. And what she said at 1208 of
8 her testimony, and this is lines 11 through 16,
9 (reading):

10 Use of the primary MCL value of 13

11 parts per billion for MTBE would show that
12 the percentage of public drinking water
13 wells with detections of MTBE at or above
14 the primary MCL is nearly equivalent to
15 benzene. By the use of this primary MCL,
16 MTBE would rank 14th in this analysis.

17 Well, what's significant about that is
18 that even their own expert concedes that benzene is
19 a worse problem than MTBE. Now, if that's the
20 case, what's California doing about benzene?
21 Nothing. They may be reducing it, but they're

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1 certainly not eliminating it. They're not taking
2 benzene anywhere near as seriously as they took
3 MTBE. And that's an important fact to consider
4 because benzene is universally acknowledged to be
5 more dangerous and damaging than MTBE is, because
6 it is a carcinogen, a known carcinogen.

7 Now, there is no doubt that they could
8 have acted, that California could have acted. It
9 could have taken steps with respect to benzene.
10 Burke testified again at page 1475, lines 6 through
11 13, (reading):

12 But you would agree that if the EPA
13 can ask refiners to remove sulphur, it can
14 ask refiners to remove benzene; is that
15 correct?

16 Well, the EPA has asked refiners to
17 reduce benzene content, and they could ask
18 them to remove it too, couldn't they?

19 I suppose they could.
20 So, taking action against benzene was
21 perfectly feasible for California to do. It

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1 didn't.
2 Now, he took the position that it was
3 prohibitively expensive. But I would like to draw
4 your attention to a chart that was shown to
5 Mr. Burke during his cross-examination. This chart
6 shows that the cost of taking 70 percent of the
7 benzene out of gasoline, last number down there,
8 was .67 cents per gallon, and right above that it
9 shows that the cost of using ethanol in California
10 was 3.9 cents a gallon.

11 So, it was approximately six times more
12 expensive to use ethanol than it would have been to
13 reduce benzene, and yet California showed
14 absolutely no interest in meeting the benzene--in
15 dealing with the benzene problem.

16 MR. LEGUM: Mr. President, we would like
17 to note our objection to this use of this document.
18 It was offered for addressing the credibility of
19 Mr. Burke's testimony. This is now being offered
20 as primary evidence that if it was to be relied on,
21 should have been submitted with Methanex's reply or

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1 before.

2 PRESIDENT VEEDER: I think we're going to
3 need to look at the passage of Mr. Burke's evidence
4 because we do recollect the challenge made to the
5 United States and the way in which this document
6 was allowed to be put to Mr. Burke.

7 MR. DUGAN: I don't think we have the
8 actual passage. I don't know the actual passage
9 where he was.

10 I will withdraw the document.

11 ARBITRATOR REISMAN: Could I get a
12 clarification, please. Dr. Happel was testifying
13 about groundwater and, as I recall, the issue there
14 was whether or not MTBE undergoes ambient and
15 transient bioremediation as does benzene; that if
16 there is a spill, the benzene undergoes an
17 intrinsic bioremediation, and that MTBE did not.

18 Wasn't that the issue of benzene that the
19 context in which she made that point?

20 MR. DUGAN: I don't believe it was. I
21 believe what she was responding to was the

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1 criticism that the MTBE was not as serious a
2 contaminant as benzene was, and she took
3 dispute--she disputed, she took issue with the NRDC
4 chart and said that, no, in fact, under her
5 analysis it was almost as serious as benzene and
6 that it would have ranked in the chart of the top
7 24 contaminants.

8 And the question of biodegradation I think

9 is a different question. It's a precedent
10 question, and the comparative rates of
11 biodegradation would affect the contamination of
12 drinking water. But I think that's what she was
13 talking about, was where it ranked on the list of
14 list of comparative contaminants of drinking water.

15 So, I offer that for the purpose of just
16 showing that even their expert recognized that the
17 threat actually posed to drinking water which,
18 remember is what the NRDC chart was intended to
19 show, was still, even under their own expert's
20 calculation, showed that benzene was worse as a
21 contaminant in terms of its prevalence of

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1 California's drinking water than MTBE is.

2 Now, California has not acted anywhere
3 near as aggressively against benzene as it did
4 against MTBE, and we ask the question why.

5 ARBITRATOR ROWLEY: Mr. Dugan, is there
6 evidence before us that benzene was perceived to be
7 a problem in California to the same extent, at the
8 same time that MTBE was perceived to be a problem?

9 MR. DUGAN: No. There isn't evidence, and
10 there is a reason for that, and that's the reason
11 that we tried to set out, which is that the relying
12 upon the two news stories that we put into the
13 record, that ADM went about hiring people to stir
14 up, to whip up hysteria about MTBE. Oxy Busters,
15 that whole front organization that was described in
16 the two articles, I think, and Methanex thinks,

17 explains why MTBE was perceived to be a problem,
18 and benzene was not. It was because the ethanol
19 industry stood to benefit if it could eliminate
20 MTBE as a competitor, and there was no comparable
21 U. S. industry that was interested in getting rid of

1866

1 benzene.

2 PRESIDENT VEEDER: Just for the record, in
3 case we come back to it, Mr. Dugan, I think the
4 reference to our ruling in relation to the document
5 you've just withdrawn is at page 1466 of day six.

6 MR. DUGAN: I'm sorry, I wasn't aware of
7 the ruling, so I--

8 PRESIDENT VEEDER: It was expressly put in
9 by Ms. Callaway in her words--well, the comment was
10 made, (reading):

11 Ms. Callaway, is this document in the
12 record for the United States?

13 MS. CALLAWAY: No, it is not. It is
14 used for credibility and goes directly to
15 the conclusion regarding the cost of
16 reducing benzene content. It was put in
17 on the basis of credibility only and not
18 as evidence of its contents.

19 MR. DUGAN: Well, I remember Mr. Burke's
20 testimony. His witness statement was that the cost
21 was prohibitively expensive. I think that to a

1 degree this undercuts that. So, if it's taken in
2 for the purposes of challenging Mr. Burke's
3 credibility, it seems to me it's properly before
4 the Tribunal.

5 PRESIDENT VEEDER: As an attack on his
6 credibility, but not as evidence on its own, that's
7 the point. But maybe you want to think about it a
8 little bit further.

9 MR. DUGAN: I understand. I will withdraw
10 the document, that's fine.

11 But our point, even without that document
12 is that they were, at worst, comparable problems
13 and yet California took no steps. It only singled
14 out MTBE, and there is no--there is no asserted
15 health or environmental reason why it would go
16 after one and not the other, and Methanex submits
17 that the reason is because of the favoritism that
18 was shown to the U.S. ethanol industry.

19 Now, turning to what is really in many
20 ways the central issue of the case, Professor, you
21 focussed during my opening on a critical aspect.

1 You asked me does Methanex contend that wherever a
2 political contribution is followed by governmental
3 acts favoring the contribution, is it invariably
4 corrupt, and I said no, of course not. It's a
5 question of the particular facts and circumstances
6 that surround the case. And that is the--that's

7 the situation here.

8 I think you have to start with the
9 proposition that the U.S. now finally concedes, or
10 it was forced into conceding because of the
11 language in the Supreme Court decision, and the
12 language of the Solicitor General and the words of
13 Senators like Senator Rudman and Senator McCain
14 that there do exist situations, instances in the
15 United States of corruption, and that's the word
16 the Supreme Court used, that are not criminal acts,
17 there is no quid pro quo, but there are nonetheless
18 corruption where contributions are given and favors
19 are granted in return.

20 To use again Senator Rudman's words, money
21 affects outcomes, and it was that type of

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1 corruption that the Supreme Court approved--it was
2 that context in which the Supreme Court approved
3 the McCain-Feingold campaign reform bill.

4 Now, if you start with the proposition
5 that these types of instances do, in fact, exist,
6 Methanex submits that look at the evidence in this
7 case, and determine what conclusion you can arrive
8 at. I think the only way a decision maker can
9 determine whether this type of corruption exists in
10 a particular case is to fairly weigh the evidence,
11 all the evidence, all the facts and circumstances.

12 So, let's review the evidence here. First
13 of all, let's start with the industry. The
14 industry we are talking about is the U.S. ethanol

15 industry which the United States, by its own
16 admission, and we put this slide up before, we
17 won't put it up again, the General Accounting
18 Office, the investigating arm of the United States
19 Congress, said that the industry exists only
20 because of political decisions. Without
21 congressional approval of the tax credit,

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1 commercial ethanol production would cease.

2 So, this is an industry that owes its very
3 existence to political favoritism. It was created
4 and it survives only because of continuing
5 governmental favoritism. It was created and it
6 survives only because of continuing governmental
7 favoritism. It's not like the ethanol industry.
8 It's not like the gasoline industry. It's not like
9 the automobile industry. It's not like the corn
10 industry. Those industries would exist without the
11 Federal tax--regardless of Federal action.

12 PRESIDENT VEEDER: Just a correction to
13 help us later. You said it's not like the ethanol
14 industry. You meant like the methanol industry.

15 MR. DUGAN: That's correct. Thank you
16 very much. It's not like the methanol industry.

17 All those industries exist independent of
18 a Federal grant of tax relief. The ethanol, the
19 commercial ethanol industry does not. It exists
20 only because, as Senator McCain put it, ADM has
21 used--has traded its political contributions for

1871

1 the tax subsidy.

2 Second, second point to take into account,
3 who is making the contributions here? It's ADM
4 ADM and Vind, but certainly ADM with a company with
5 an undisputed record of influence seeking and
6 corrupt, indeed, illegal acts, all of which is in
7 the record, and again, to use Senator McCain's
8 words, ADM traded political contributions for the
9 Federal tax subsidy.

10 And there is no doubt that that's what
11 Vind and ADM looked for when they made
12 contributions. Let's go, if we could, to
13 Mr. Vind's own witness statement. He said, From
14 time to time ADM and my companies jointly sponsored
15 legislation encouraging increased use of ethanol
16 and as part of this effort we jointly and
17 independently supported various legislators and
18 members of Congress whom we felt might support the
19 expanded use of ethanol.

20 ARBITRATOR ROWLEY: Is this Vind at page
21 988?

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1 MR. DUGAN: No, no, I'm sorry. This is
2 Vind's witness statement, his written sworn
3 statement that he put in prior to his
4 cross-examination testimony.

5 ARBITRATOR ROWLEY: Is it part of your
6 package?

7 MR. DUGAN: It should be part of the
8 package of the--

9 ARBITRATOR ROWLEY: If you can refer us to
10 tab numbers when you are--

11 MR. DUGAN: Certainly.

12 ARBITRATOR ROWLEY: That would be helpful.
13 Thank you.

14 MR. DUGAN: It's the last two pages of
15 Tab 5.

16 PRESIDENT VEEDER: Which is what paragraph
17 number?

18 MR. DUGAN: It's paragraph number four.

19 So, in Vind's own express words, what he
20 and ADM were looking for was politicians who would
21 support the expanded use of ethanol. That's what

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1 they wanted. That's why they made political
2 contributions. And his testimony confirms that.

3 And this is from page--I believe it's page
4 975 of Mr. Vind's testimony, and it states, line 6,
5 (reading):

6 You were looking for legislators who
7 would support the expanded use of ethanol?

8 That is correct.

9 And it was to those legislators you
10 directed your contributions; correct?

11 That's correct.

12 So it's clear what they were looking for.

13 Someone who would expand the use of ethanol.

14 He goes on, page 976, (reading):

15 THE WITNESS: I would raise money for
16 legislators in California at the Federal
17 level who supported the use of ethanol as
18 a renewable fuel and expanded use of
19 ethanol and expanded production of
20 ethanol, that is correct.

21 Now, if you had a legislator either

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1 at the state level and Federal level and
2 you gave them money but they refused to
3 support the expanded use of ethanol, would
4 you continue to raise money for them?

5 Probably not.

6 Again, I think Mr. Vind is making it as
7 clear as he possibly can, not as he possibly can.
8 He's making it quite clear that the intent is to
9 give contributions in exchange for politicians who
10 would give him expanded use of ethanol. And it was
11 exactly in terms of what he was looking for with
12 respect to then-Senator--Representative and Senator
13 Torricelli. Page 988 of his testimony, line 15,
14 (reading):

15 You were looking for help from
16 Mr. Torricelli on your El Salvador?

17 I was looking for help from
18 Mr. Torricelli on my problem in El
19 Salvador, that is correct.

20 And you were also looking for help
21 from Mr. Torricelli on the ethanol fuel

1875

1 tax excise credit; correct?

2 Yes, I believe so.

3 So, Mr. Vind frankly admits what he's
4 looking for. He's looking for legislators who will
5 favor his interests, and that's why he makes
6 contributions.

7 PRESIDENT VEEDER: Just to make it
8 absolutely clear, somebody who makes a contribution
9 to a politician looking for a quid pro quo,
10 Mr. Dugan, by itself, that is not a criminal
11 offense.

12 MR. DUGAN: No, that is not a criminal
13 offense unless there is a quid pro quo. As I
14 understand the criminal aspects of the law, unless
15 there is an express quid pro quo.

16 PRESIDENT VEEDER: So if the politician is
17 expressly or by some understanding agreeing to a
18 quid pro quo that makes it an illegal act?

19 MR. DUGAN: By expressly doing so, that
20 would make it an illegal act, unless clear about
21 whether it would be illegal or implicit.

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1 Remember, the Supreme Court went to great
2 lengths to distinguish that type of quid pro quo

3 illegality and other types of corrupt implicit
4 agreements where, again, to use Senator Rudman's
5 words, money affects outcomes, and it was that they
6 were concerned with in upholding the
7 constitutionality of McCain-Feingold. But for
8 purposes of what I'm trying get across is, that
9 type of not necessarily illegal corruption does
10 exist. And it's corrupt.

11 PRESIDENT VEEDER: But it's not corrupt in
12 seeking to give money to a politician to do
13 something, and when he doesn't do it, to cease
14 giving him money to it him. When I say him, I mean
15 full campaign contributions, irrespective of the
16 donor?

17 MR. DUGAN: Well, I mean, I think--without
18 an express agreement, the money affects the
19 outcomes, yes, I think that is corrupt, and I think
20 that is exactly what the Supreme Court said. And I
21 think that's exactly what the Solicitor General

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1 said.

2 And the fact that you can't prosecute it
3 criminally because you don't have sufficient
4 evidence of a quid pro quo connection does not mean
5 that it's corrupt. When money affects outcomes,
6 when a legislator favors an interest because he's
7 received a large political contribution--

8 PRESIDENT VEEDER: Forgive me, you are
9 moving away from the donor to the donee. Mr. Vind,
10 of this world, who gives political contribution

11 almost always is intending to affect the result of
12 that politician's future acts?

13 MR. DUGAN: Right. And if the
14 politician--

15 PRESIDENT VEEDER: That's the point. At
16 that point, there is nothing morally or legally
17 criminal or corrupt, is there, as regard the donor?

18 MR. DUGAN: There is certainly nothing
19 criminal about it, but I would submit that's not
20 necessarily true, and I think ADM is a good
21 example. That makes contributions to politics of

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1 all parties because it expects that its money would
2 buy it favorable outcomes.

3 PRESIDENT VEEDER: That point. Both
4 parties, the point made by the Solicitor General is
5 you're buying access.

6 MR. DUGAN: And not just access. To use
7 the words of Senator Rudman, money affects outcome.
8 It's not just access. It's attempt to influence
9 the outcome of policymaking decisions through the
10 use of money, and I think again the Supreme Court
11 and the Solicitor General, Senator McCain, Senator
12 Rudman quite clearly said that that's what happens.
13 And they think it's corrupt, and they think it
14 should be stopped. And one of the questions for
15 this Tribunal to decide is: Is that unfair and
16 inequitable? And we submit that it is. We think
17 it's arbitrary and its unjust, and if it results in

18 favoritism for a local industry, then it's
19 prohibited by NAFTA as an improper investment
20 practice.

21 ARBITRATOR ROWLEY: Mr. Dugan, as I

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1 understand your case at this stage, it is that
2 California, as led by Governor Davis, did not act
3 to cure a perceived problem because of the problem,
4 but it acted on the basis of Governor Davis'
5 corruption, and the corruption being that he
6 directed to the extent that he was able, California
7 to act with the purpose of benefiting ethanol and
8 with the purpose of disadvantaging foreign methanol
9 producers.

10 MR. DUGAN: That's correct.

11 And the key to it, we believe, are the
12 decisions that we think show quite clearly that he
13 acted to benefit the U.S. ethanol industry.

14 Now, the third point is, who is receiving
15 the contributions here? It was Gray Davis,
16 Governor Gray Davis.

17 Now, many people in California have
18 labeled him the "coin-operated Governor." That's
19 not Methanex's label. That's California's label.
20 And Governor Davis was the object of a successful
21 recall campaign that was one of the most

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1 humiliating recalls in American political history,
2 and there is evidence in the record that we have
3 supported that one of the key factors in that
4 recall was that perception of corruption, The
5 Sacramento Bee newspaper. Is it simply a
6 coincidence? Many people in California did not
7 believe it was simply a coincidence. They thought
8 that it can certainly be inferred from what
9 happened that they thought that there was too much
10 money affecting outcomes. Again, to use Senator
11 Rudman's words.

12 So, Gray Davis is not Mother Teresa. He's
13 in a different category.

14 Fourth, at the time of the secret meeting,
15 ADM had not yet decided to support Gray Davis.
16 They hadn't made up their mind whether to support
17 him, and we get that from Mr. Listenberger's
18 witness statement. This is paragraph two of
19 Mr. Listenberger's written witness statement. It
20 was my understanding that the dinner was arranged
21 in order for me and others to meet Mr. Davis,

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1 discuss his candidacy, and assess whether to
2 support his campaign.

3 PRESIDENT VEEDER: He had already given
4 him three campaign contributions?

5 MR. DUGAN: Yes, they'd given him minor
6 contributions, but in California contributions of
7 \$15,000 are not big money, and I think that shows
8 in terms of what they gave him after the meeting,

9 where they gave him at least another \$150,000 after
10 the meeting. And they were known for being very
11 generous supporters for those whom they supported,
12 and Davis knew that.

13 PRESIDENT VEEDER: Do we know, does the
14 record show if they supported his opponents?

15 MR. DUGAN: I don't know whether the
16 record shows that or not. I just don't know.

17 But in any case, the purpose of the
18 meeting was for ADM to decide whether or not to
19 support Gray Davis. As we now know, they jumped in
20 and they supported him very, very heavily, very,
21 very generously.

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1 Now, fifth, the meeting was secret, and
2 the United States placed up before you and will
3 place it before you again the campaign reporting
4 form in which ADM reported the use of an airplane,
5 and as I think you pointed out, Mr. Veeder, this
6 does not disclose where the plane was flying to or
7 from. It simply says use of an airplane. It
8 doesn't in any way disclose the existence of the
9 secret meeting.

10 In addition, we have been unable to find
11 any evidence that ADM ever disclosed the value of
12 the dinner itself. In comparison to the next page
13 where you see that Mr. Jack Cox reported dinner
14 costs. We have never seen any dinner costs
15 reported by ADM with respect to the dinner that

16 they hosted for Gray Davis, which was quite clearly
17 a fundraising dinner.

18 So, we think the evidence is very
19 compelling that they intended to keep this secret.

20 PRESIDENT VEEDER: Is there not a minimum
21 cutoff below which you don't have to declare?

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1 MR. DUGAN: That, I don't know, and
2 perhaps that's the reason--I don't know. The
3 cut-off here was \$480, so I don't know. Perhaps
4 that is the reason. Above that it's \$426.

5 Now, sixth, everyone agrees that ethanol
6 was discussed at the meeting in Illinois.
7 Listenberger agreed to it in his witness statement
8 in paragraph five, in his transcript at page 775,
9 lines two to four. Vind agreed to it in his
10 transcript at 964 and 966.

11 So, there is no doubt that ethanol was, in
12 fact, discussed at the meeting, and that's evidence
13 of record that can't be denied.

14 In addition, there is testimony that many
15 of the people who were at the meeting were there
16 because they had a connection with ethanol.

17 ARBITRATOR ROWLEY: Isn't the evidence
18 that's before us benign on that point?

19 MR. DUGAN: The evidence before you is
20 benign. There is no express evidence that there
21 was any type of agreement and we don't assert that

1 there is any evidence in the record to that effect,
2 but there is evidence that there were discussions
3 of ethanol and that many of the participants who
4 were at the meeting had fairly clear connections to
5 ethanol, and ethanol only. Mr. Listenberger, for
6 example.

7 Seventh, after the meeting, ADM did,
8 indeed, decide to support Davis, and they gave him
9 a hundred thousand dollars in 1998, and at least
10 another 50,000 in 1999.

11 Eighth, other than ADM's obvious desire
12 and Mr. Vind's express desire to expand the use of
13 ethanol in California, there is no apparent link
14 between Davis and ADM. ADM is an Illinois company.
15 It's not a constituent of anyone in California. I
16 don't believe it had any ethanol plants in
17 California.

18 This was similar to Vind's approaching
19 Torricelli. Vind was a California businessman who
20 approached a New Jersey politician to give him
21 help. It's the same thing here. You've got an

1 Illinois corporation, a Midwest-centered
2 corporation approaching a California corporation
3 seeking help.

4 Now, did Davis take steps to benefit
5 ethanol? Well, indeed, he did. First of all, he
6 banned MTBE.

7 Second, and more importantly, he
8 precipitously decided to use ethanol as its
9 replacement.

10 Now, the U.S. doesn't dispute that the
11 evidence shows that Davis ignored all the other
12 potential oxygenates and decided upon ethanol. You
13 saw the list, the EPA list, Caldwell's list. None
14 of those, there is no evidence, not a shred of
15 evidence that Davis considered anything except
16 ethanol.

17 And the most important step he took when
18 he issued the Executive Order in addition to
19 banning MTBE was to order California to evaluate
20 ethanol as a substitute. That was the only
21 oxygenate that he ordered California to initiate a

1886

1 study of and paid for this type of multimedia study
2 in order to see whether ethanol would be
3 appropriate. None of the other potential
4 oxygenates did he order a similar study of.

5 ARBITRATOR ROWLEY: Can you just help me
6 on this point. I cannot recall the evidence about
7 the UC report.

8 Was there reference in the UC report
9 concerning the possibility of the use of ethanol as
10 a substitute oxygenate for MTBE?

11 MR. DUGAN: There was, but I think the
12 thrust of the UC report, as I think one of the
13 experts, I think it was Dr. Fogg, testified to was

14 that they recommended that the oxygenate be removed
15 from RFG completely and that it be replaced with
16 toluene. They did consider the possibility of
17 replacing MTBE with ethanol, but they cautioned
18 very, very strongly that it wouldn't be appropriate
19 until all the adequate studies were done because
20 they were cognizant of the potential impact, the
21 cancer impact, the air quality impact, and the

1887

1 unknown impact on groundwater.

2 So, they cautioned very strongly not to
3 use ethanol unless a complete study was done.

4 ARBITRATOR ROWLEY: Stopping you there, we
5 have two competing possible theories. One is that
6 after election Davis decides to recommend a ban of
7 MTBE, and its possible replacement with ethanol and
8 orders a study of ethanol, as recommended by the UC
9 report. The other competing theory is that he does
10 so not because of recommendation in the U. S.
11 report, but because of corruption having received
12 the contribution.

13 How do we balance those two competing
14 theories, one being a corruption theory and the
15 other being a theory as I described following of
16 the UC recommendations?

17 MR. DUGAN: Again, I think it's a
18 combination of all the facts and circumstances.
19 But I think the first question is why did he select
20 only ethanol? There were many other oxygenates
21 that could have been used, and, in fact, Senate

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1 Bill 521 identified a number of other oxygenates
2 that the UC, University of California was intended
3 to study as possible replacements. But Governor
4 Davis did not order a study of any of them except
5 for ethanol.

6 The UC-Davis report didn't tell him to
7 only study ethanol, but there was absolutely--there
8 is no evidence in the record as to why Governor
9 Davis selected only ethanol to be studied. And why
10 Governor Davis selected only ethanol to start the
11 process of creating, to continue the process, to
12 jump start the process of creating an in-state
13 California ethanol industry. And that's a critical
14 fact, that he selected ethanol and only ethanol to
15 receive this obvious benefit, and didn't select
16 methanol, didn't select any methanol blend, didn't
17 select TAME or DIPE or any of the others. Not even
18 the ones that the Senate had ordered the UC to
19 evaluate.

20 Now, with respect to the waiver request,
21 there are, I think, two pieces of evidence that

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1 it's important for the Tribunal to focus on. When
2 he made his decision banning ethanol--I mean,
3 banning MIBE and ordering the study of ethanol and
4 ordering steps to be taken to create an in-state

5 ethanol industry, he also included the waiver
6 request. But I would like to go back to a slide
7 that we put up before because I think there is some
8 focus there, there's some evidence there that the
9 Tribunal should focus on. And this is Tab 9 in the
10 books that you have.

11 One final aspect of an oxygenate waiver
12 bears emphasis. Even without a waiver of the
13 Federal RFG oxygen mandate, a significant portion
14 of California gasoline would still contain ethanol.
15 There is supposed to be a period there. That
16 emphasis is in the original, but go on to the next
17 phrase: The MathPro analysis indicates that from
18 cost savings perspective, the optimal share of
19 nonoxygenated CaRFG would be less than 50 percent.
20 Moreover, ethanol would still be needed to meet the
21 continuing requirement for oxygenated gasoline in

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1 the winter in the greater Los Angeles area.

2 So, from this, I think the only inference
3 is that Governor Davis intended that oxygenate,
4 that ethanol, as an oxygenate, would receive half
5 the market in California, and I think that was an
6 effort by Governor Davis to split the baby, but I
7 think that Mr. Vind testified with respect to that
8 as well, and corroborated what I speculated on in
9 response to your question, Professor.

10 Mr. Vind testified--Mr. Vind
11 testified--Governor Davis, and I'm going up to the

12 top of page 10, which is page 969 from the
13 transcript, line 4, I believe, (reading):

14 If Governor Davis banned MTBE, that
15 would expand the use of ethanol, wouldn't
16 it?

17 That is true.

18 Did you talk to Governor Davis about
19 that at the meeting?

20 I did not.

21 Did you ever talk to him about that?

1891

1 I only talked to him after the fact,
2 after he was elected Governor, when, at a
3 birthday party held in his honor he came
4 over to me and asked that I intercede with
5 the oil companies and the ethanol
6 producers to try to see if some
7 accommodation could not be reached so that
8 there would not be shortages of gasoline
9 supply in the state of California, which
10 was his fear.

11 And what did you do? Did you act
12 upon that request?

13 I, in fact, did. I went to the
14 Secretary of CalEPA, contacted at least
15 one chairman of one major oil company, and
16 I contacted people at ADM and some other
17 suppliers of ethanol to try to see if I
18 couldn't negotiate some type of compromise
19 that would allow for perhaps some type of

20 shifting where the refiners could, in
21 fact, comply with Federal law. Federal

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1 law requires the addition of oxygen to
2 gasoline in a--nonattainment areas. So,
3 the refiners in California were concerned
4 about not so much the use of ethanol, but
5 whether they had to be refinery-specific
6 or whether it had to be throughout the
7 entire state. So, that was the thrust of
8 my conversations in my meetings.

9 Now, he dates that as Governor Davis's
10 birthday after he was elected, and he later said he
11 was uncertain about the date, and that it was
12 after, substantially after the time when he was
13 elected. But I submit that it was on December 26,
14 which was Governor Davis's birthday, and it was in
15 the time period between the time Governor Davis was
16 elected and the time the ban went into place, and
17 that this request for compromise reflects precisely
18 what the Governor adopted. He gave half the market
19 to ethanol and the other half of the market, the
20 refiners were intended to be able to meet that with
21 the production of RFG without oxygenates, which is

1893

1 why he asked for the waiver.

2 So, I think this is corroborating

3 testimony of precisely the type of political
4 compromise that politicians often enter into, an
5 allocation of the market to a favored interest
6 without at the same time disrupting the supply
7 economics for the citizens of California.

8 Now, the next piece of evidence is
9 October of 1999, when Davis tells Congress that
10 ethanol will be the replacement for MTBE, and if we
11 could look at a time line we prepared, and that is
12 Tab 11, November 3rd, Davis elected Governor.
13 December 26th, the date that we believe Davis and
14 Vind discussed the compromise. January 4th, Pete
15 Wilson, who was an opponent of ethanol, leaves
16 office. Davis is sworn in. March 25th, Davis bans
17 MTBE, asks for the RFG waiver, asks for an ethanol
18 study, and again, a study of ethanol and only
19 ethanol, and attempts to jump start the California
20 ethanol industry. In October of 1999, Kenny of the
21 California Air Resources Board, testifies to the

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1 United States Senate on behalf of Governor Davis
2 that after MTBE is eliminated, the only feasible
3 oxygenate will be ethanol.

4 Well, how did he know that? There had
5 been no evaluation of any other oxygenate. There
6 had been no attempt to evaluate any other
7 oxygenates. This was, quite obviously, a
8 precipitous decision to embrace ethanol without any
9 consideration of the possible advantages of any

10 other oxygenate.

11 Now - and this statement was made before
12 the evaluations had been completed. 1999, CalEPA
13 issues a partial health and environmental
14 assessment of the use of fuel as an oxygenate.
15 February 15th, 2000, CalEPA issues an addendum to
16 its December 1999 study.

17 October 2001, CalEPA issues the final
18 portion of the environmental assessment on the use
19 of ethanol as a fuel oxygenate, the subsurface fate
20 and transport of gasoline containing ethanol. And
21 that's the one that shows that, in fact, ethanol

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1 does have a very damaging impact on the water
2 because it increases benzene plumes by up to
3 150 percent.

4 But the key here is that you have these
5 series of decisions favoring ethanol and announcing
6 to Congress that ethanol will be the replacement
7 for MTBE before any evaluation has been completed.
8 That, in combination with the fact that only
9 ethanol was selected for evaluation, we submit, is
10 very strong evidence, compelling evidence, of
11 favoritism towards ethanol, favoritism that's not
12 justifiable on any environmental grounds.

13 Now, thereafter, California took specific
14 steps to accommodate ethanol, steps that it did not
15 take in any way to accommodate methanol or any of
16 the other oxygenates.

17 Let me back up for a second. Let me go

18 back to this December 1999 CalEPA study. Again,
19 this was two months after Kenny had announced to
20 Congress that the only feasible oxygenate would be
21 ethanol. In the 1999 study, acknowledged that

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1 there were very, very significant gaps in CalEPA's
2 knowledge with respect to what ethanol would do to
3 the environment. And I think it's useful to focus
4 on those gaps in knowledge because they signify
5 that CalEPA was not satisfied that ethanol would be
6 environmentally benign.

7 As a result of the assessment contained in
8 this volume, we have identified important knowledge
9 gaps regarding the anticipated environmental
10 behavior of gasoline containing ethanol. This
11 Chapter summarizes those knowledge gaps and
12 provides recommendations for future research that
13 would improve decision making regarding the use of
14 ethanol in oxygenated and reformulated gasolines in
15 California. One of the most critical knowledge
16 gaps is the nature of the interaction of
17 groundwater and the air multiphase flow with
18 ethanol containing gasoline in unsaturated zone.
19 Understanding this process is crucial because
20 knowledge gaps about the early states of overall
21 flow and transport make adequate prediction of the

1897

1 important impacts of ethanol on BTEX contamination
2 difficult. BTEX stands for benzene, toluene,
3 ethylene, and, I believe xylene. So, that's the
4 issue. They didn't know what was going to happen
5 to benzene.

6 And then you have on the next page, three
7 more quotes from the 1999 study again identifying
8 very significant gaps in the knowledge with regard
9 to ethanol, and they ordered another study and the
10 final study wasn't completed until October of 2001,
11 and that's the next page, chart--Tab 13. Modeling
12 results indicate a possible fourfold decrease in
13 the mean benzene biodegradation rate as a
14 consequence of ethanol biodegradation and
15 associated electron receptor depletion. This could
16 potentially increase benzene plume lengths by a
17 factor of 2.5.

18 So, once the multimedia evaluation was
19 finished, it turns out that ethanol may not be any
20 better for the water than MTBE. That didn't stop
21 Governor Davis. He'd long since decided to shift

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1 to ethanol prior to the completion of these
2 studies, and long after deciding that only ethanol
3 would be studied.

4 And if you remember, one of the quotes
5 that we put up, and I don't have it readily to mind
6 so I'll just try to draw your attention to it, was
7 a statement from, I think either Gordon Schremp or

8 Walter Hickcox in which he said that the detects of
9 MIBE are way down, but there is no chance they are
10 going to repeal the ban because there was too much
11 political momentum behind it. And Methanex submits
12 that the political momentum there was that Governor
13 Gray Davis was intent on favoring ethanol. He was
14 intent on ignoring all alternatives to ethanol, and
15 he was intent on doing so until he received some
16 type of devastating criticism after the fact from
17 the environmental evaluators. And all of that
18 shows, again, an intent to favor ethanol.

19 Now, additional evidence of intent to
20 favor ethanol is how California accommodated
21 ethanol but not methanol. There was testimony from

1899

1 Mr. Fogg, Dr. Fogg, this page 1285, line 4,
2 (reading):

3 Is it your testimony that the
4 increase in the oxygen capped at 3.7 was
5 not done in part to accommodate the
6 addition of ethanol?

7 The reason for doing so was to
8 accommodate the ability of refiners to
9 blend ethanol at 10 percent.

10 Now, would sell other oxygenate such
11 as methanol have required the same type of
12 accommodation?

13 Probably so.

14 I'm going to Burke's testimony. It starts
15 on page 1437, line 18.

16 You state informal discussions with
17 refiners and suppliers of splash blending
18 systems did not produce a clear answer as
19 to whether methanol can be used in the
20 same systems that have been--that have
21 been installed for methanol splash

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1 bending.

2 That's correct.

3 So, Burke is testifying that he doesn't
4 know.

5 PRESIDENT VEEDER: Pausing because we'll
6 have a problem, I think, in a month or so. That
7 was page 1347.

8 MR. DUGAN: I'm sorry. That was page--no,
9 1437, 1437 starting at line 18, carrying over to
10 1438, lines one, two, and three.

11 PRESIDENT VEEDER: I got it. Thanks.

12 MR. DUGAN: And then at the bottom of
13 1438, line 20, (reading):

14 But if the gasoline base stock was
15 adjusted to accommodate methanol's pure
16 effect on the RVP--and this is going over
17 to 1439--the resulting gasoline would not
18 be out of compliance with the RFG
19 provisions; is that correct?

20 If refiners put in the extra
21 investment and changes needed to make the

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1 more difficult underapplying blend stock
2 that I feel would be needed to blend in
3 methanol, that's correct. And they could
4 do it. There is no question about that.
5 So, the same types of accommodations could
6 have been made for other oxygenates, but they
7 weren't. They were made only for ethanol.

8 ARBITRATOR ROWLEY: Mr. Dugan, you make
9 your case turn on the contributions that were made
10 by ADM and the ethanol industry to Mr. Davis. Is
11 there evidence before us, or do we have knowledge
12 as to whether methanol producers and/or Methanex
13 made contributions to Governor Davis or his
14 predecessor?

15 (Pause.)

16 MR. DUGAN: I'm not sure.

17 I'm not sure. I'm frankly not certain
18 what the evidence is in the record. I think there
19 is evidence of one contribution by Methanex that
20 was rejected because Methanex is a Canadian
21 corporation, and it's not allowed under U.S.

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1 campaign contribution laws to make contributions.
2 That contribution was not to Gray Davis. It was
3 not to Gray Davis or to anyone in California. The
4 check was--I don't know who it was to. The check
5 was returned, and Methanex has since adopted a

6 policy of not making any political contributions.

7 ARBITRATOR ROWLEY: Could you have one of
8 your assistants just identify in the record what
9 that evidence is so we can turn to it, if
10 necessary.

11 MR. DUGAN: We'll do so.

12 ARBITRATOR ROWLEY: Thank you very much.

13 ARBITRATOR REISMAN: Mr. Dugan, the two
14 corporations in the United States also had a policy
15 of not making contributions?

16 MR. DUGAN: And actually--probably I
17 should make that clear. Corporations in the United
18 States can't make contributions, either. But
19 corporations--

20 ARBITRATOR REISMAN: They have no PACs?

21 MR. DUGAN: I will check that.

1903

1 PRESIDENT VEEDER: I misunderstood, then.
2 In paragraph 178 of the United States Amended
3 Statement of Defense, page 72, it's pleaded that
4 ARCO, an MTBE producer, amongst others, made
5 contribution to Governor Davis's campaign.

6 MR. DUGAN: We don't dispute that, that
7 some of the refiners undoubtedly made contributions
8 to Governor Davis's campaign. I'm sorry, perhaps I
9 misunderstood the question. I thought the question
10 was--the question was directed towards Methanex.
11 If it's directed--

12 PRESIDENT VEEDER: Was the answer you gave
13 that corporations can't make campaign

14 contributions?

15 MR. DUGAN: Right. And I think that that
16 is a shorthand that many newspapers use. What
17 they're really talking about is that there's
18 something, and I'm speculating, but I know this is
19 done as a matter of course, there is something like
20 an ARCO Political Action Committee, and executives
21 in ARCO make contributions to the Political Action

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1 Committee and then the Political Action Committee
2 actually makes contributions to particular-- and
3 that's the way it is with ADM as well, so in terms
4 of using that shorthand, when I say that ADM made
5 contributions, I think that those are contributions
6 from an ADM good government fund, or something like
7 that, a Political Action Committee, as opposed from
8 ADM itself, because it is illegal for corporations,
9 as I understand it, to directly make contributions.

10 PRESIDENT VEEDER: Could you just help us
11 on the pleading references and come back to it
12 later, but it's our recollection that there is in
13 the evidence two attempts by the Methanex U.S.
14 subsidiaries to make political contributions which
15 were returned because of the ownership by the
16 Canadian parent; is that right?

17 MR. DUGAN: I don't think that is right,
18 but let me check.

19 (Pause.)

20 MR. DUGAN: We will look up the cite, but

21 I'm informed that what happened is that a Methanex

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1 entity, whether it was Methanex-US or Mexican
2 Canada is unclear, made a contribution drawn on a
3 Canadian bank, and it was rejected because it was
4 drawn on a Canadian bank. But we are checking to
5 find out exactly what the facts are.

6 The next point, I think that it's
7 important to consider in this whole evaluation of
8 the facts and circumstances surrounding it is that
9 the question of whether ADM did, in fact, benefit
10 from the shift to ethanol, and I think the evidence
11 is undisputed that it did.

12 Tab 16, in 2002, as it was starting to
13 kick in, ADM clearly benefited--quote, We, ADM have
14 reason to believe there is a very strong demand for
15 ethanol across this country. We're in a strong
16 position in the ethanol business.

17 Now, in addition to that,
18 Mr. Listenberger, in his testimony acknowledged
19 that ADM had benefitted, and this is from page 878
20 and 879, starting on line 20, (reading):

21 Will you admit that ADM's

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1 ethanol--you admit today as you sit here
2 six years after having Gray Davis and five
3 years after the MTBE ban that ADM's sales

4 of ethanol increased after that ban?

5 Yes, they did.

6 Mr. Listenberger further admitted-- and

7 this is on page 876, (reading):

8 You would agree that the ban was good

9 for ADM's sales, wouldn't you?

10 It had the potential to be very good

11 for ethanol sales over the entire

12 industry, yes. In fact, ADM celebrated

13 this ban, didn't they?

14 I thought it was a good idea, so, by

15 thinking it was a good idea, you

16 celebrated, didn't you?

17 I suppose in our own way.

18 So, the evidence that ADM has benefited

19 and, in fact, celebrated when the ban was enacted,

20 I think, is irrefutable. This was very good for

21 ADM

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1 Now, Methanex submits that once you accept

2 the premise that there are instances of political

3 corruption in the United States, where again to use

4 Senator Rudman's words, money affects outcomes,

5 that the evidence that I have just gone through,

6 the 11 factors, all points to that conclusion here.

7 This was an instance where ADM's money obtained

8 favoritism for ethanol in California just as, to

9 use Senator McCain's words, ADM traded its

10 political contributions for the political tax

11 credits.

12 This is very similar, identical in
13 technique to that. That's what we believe the
14 evidence shows.

15 And we don't think that is merely a prima
16 facie case. We think that barring any rebuttal
17 evidence, this is a conclusive case. Again, once
18 you accept this premise that this type of
19 corruption exists, this fits that pattern to a T.
20 Why else would Gray Davis select ethanol and only
21 ethanol for evaluation? Why else would Gray Davis

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1 announce that ethanol was the only feasible
2 substitute when no one in California had bothered
3 to evaluate anything else. Why else would they
4 focus on ethanol and only ethanol as the possible
5 replacement for MTBE?

6 The only possible reason that we could
7 think of is because Gray Davis was doing his best
8 to favor an interest that had contributed heavily
9 to him.

10 Now, what's the evidence rebutting the
11 conclusion that there was some type of implicit
12 accommodation at the meeting? And again, go back
13 to the circumstances of the meeting. Prior to the
14 meeting, ADM had not decided whether to support it.
15 After the meeting, he decided to support
16 him - decided to support him quite heavily.

17 The evidence from Listenberger, Vind, and
18 Weinstein are neutral with respect to what

19 happened. Yes, there was some discussion of
20 ethanol, but no discussion of MIBE or methanol.
21 But it's important that each one admitted that

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1 ethanol was discussed and, more importantly, each
2 one admitted that they didn't hear all the
3 conversations that took place that night.
4 Weinstein admitted it. Transcript 837, 16 to 20,
5 839, 17 to 840, 1. That was Weinstein,
6 Listenberger admitted it, transcript 851, lines
7 four to six, and Vind admitted it transcript 964,
8 1 through 10.

9 Now, that brings up the question, one of
10 the critical evidence questions in here: Why are
11 Listenberger and Weinstein here testifying as to
12 what happened at the meeting? Well, here is what
13 Weinstein said. This is at page 847, (reading):

14 Well, do you honestly know why you're
15 here? You are the witness for the United
16 States rather than Alan Andreas?

17 I have no idea.

18 Do you know honestly why you are the
19 witness for the United States rather than
20 Marty Andreas?

21 I have no idea.

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1 Again, what did Listenberger say? This is

2 page 873, line four, (reading):

3 And then it's August 17, 1998, less
4 than two weeks later that Mr. Davis
5 received a contribution of \$100,000 from
6 ADM; is that correct?

7 I have no idea.

8 If it were true, that would indicate
9 that ADM assessed the candidacy of
10 Mr. Davis and decided to support his
11 candidacy; isn't that correct?

12 Again, I would have no involvement in
13 that type of decision. I don't know.

14 So, what you have here is a classic case
15 of empty chairs. Where is Governor Davis? He
16 wasn't interested in coming. Where are the
17 Andreases? They're not here. We tried to get them
18 here. We weren't allowed to. We submit that there
19 is no evidence rebutting the fact that there was an
20 implicit agreement reached at that meeting that
21 caused ADM to decide to support Governor Davis.

1911

1 And the implicit agreement was reached that they
2 would support him, and he would expand the use of
3 ethanol, and there is no evidence rebutting that.

4 In fact, we will go one step further. The
5 fact that this chair is empty, the fact that the
6 Andreases are not here, the inference to be drawn
7 from that is that were they here, they would
8 confirm this story. That's the only inference you
9 can take from the fact that they refused to come

10 and that the United States has blocked our attempts
11 to get that evidence.

12 So what you have is a series of events,
13 pieces of evidence, the totality of the facts and
14 circumstances that point to the fact that this is,
15 indeed, one of those cases where that type of
16 corruption take place, and no evidence rebutting it
17 whatsoever.

18 Now, the U. S. has raised the question of
19 ARCO. ARCO, we submit, is in a much different
20 situation. ARCO doesn't exist because there is a
21 Federal tax subsidy that keeps it alive. It exists

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1 because there is a legitimate economic need for
2 gasoline and refinery. That's not the case for
3 ethanol.

4 Second, ARCO was a California constituent
5 that had refineries in California and had a
6 legitimate interest in meeting with Davis.

7 Third, ARCO is not ADM. ARCO does not
8 have ADM's notorious history of seeking out, for
9 example, the tax credits for ethanol. ARCO is not
10 ADM and it doesn't play the same role in the
11 political process that ADM does.

12 Fourth, ARCO's meeting was not secret. I
13 believe, and we weren't able to find this, but I
14 believe that there was a public report of the
15 refinery tour that Governor Davis or his
16 representative took.

17 And all those--all those facts, we think,
18 point to a much different situation between ARCO
19 and ADM. ARCO is not ADM. ARCO may not--well,
20 ARCO isn't ADM, and the fact that it didn't get
21 anything in response for--in return for its

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1 contributions, ARCO has many, many different
2 interests in California. It's a constituent in
3 California. ADM is not. The totality of the facts
4 and circumstances, once again, once you accept the
5 premise, the Supreme Court's premise and Senator
6 Rudman's premise that there are times when money
7 affects outcomes, this was one of those times.

8 Now, with respect to 1102 there are other
9 requirements that have to be met with. The first
10 one of those is like circumstances. And here
11 again, it would be useful to know what the
12 negotiating history is with respect to like
13 circumstances. We don't know. We have one phrase,
14 unexplicated as to which the parties differed
15 greatly. It would be useful to know what the
16 negotiating texts, what the various drafts said
17 about this.

18 Now, I think there are three aspects of
19 the like circumstances test that are worth
20 responding to. First, I don't think there is any
21 longer any doubt that both methanol and ethanol

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1 compete in a single unified market, and I think
2 that the United States's economic expert,
3 Mr. Burke, confirmed that. And this is quoting
4 from page 1448, line two. I'm sorry, it's Tab 19.

5 Was it your testimony that the
6 gasoline supply chain is a continuous
7 cycle rather than divided among refiners
8 and blenders?

9 Yes, it's a continuous supply chain.

10 So, the evidence supports the chart that
11 we put up on the day that we opened in which we
12 showed that both ethanol and methanol are
13 oxygenates used in the production of RFG. They're
14 used at different points in this continuous cycle,
15 but the cycle should be viewed in the words of
16 Mr. Burke himself as a continuous supply chain.
17 And the fact that the oxygenates are used at
18 different points in this RFG production process is
19 simply not relevant.

20 ARBITRATOR REISMAN: Excuse me, I think
21 the record shows Mr. Burke then said that is not

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1 correct. I'm looking at line--

2 MR. DUGAN: He went on to say that it's
3 irrelevant--what I'm pointing at, I think what he
4 contested was the fact that it's irrelevant where
5 the oxygenate is inserted into the production
6 process, but he agreed that it's one continuous
7 supply cycle.

8 Now, second, there has been a lot of back
9 and forth over the U.S. like products test. And
10 the U.S. asserts that methanol and ethanol are not
11 like products using the GATT/WTO test. But we
12 believe the evidence shows that's simply not true.
13 Both of them are alcohols. Both of them are
14 oxygenates and both of them are used in the
15 production of RFG as oxygenates. They are the two
16 chemicals that produce the oxygenate in RFG or
17 oxygenated gasoline.

18 In addition, both can be made for the same
19 purposes. If you recall the testimony about pig
20 manure. Both could be made in from the same basic
21 processes, and that's another thing that supports

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1 the fact that they are like products.

2 In terms of end uses, as we've tried to
3 show, their end use in the context of this case is
4 identical. Both are used for precisely the same
5 purpose because they provide the oxygenate needed
6 in RFG. The fact that they're used at different
7 portions of the production process is wholly
8 irrelevant.

9 Now, furthermore, in terms of the end uses
10 what we tried to show is that the integrated
11 companies have a binary choice. They can choose
12 ethanol or they could choose methanol. So the end
13 use of the products is similar or not precisely
14 identical, but it does exist in the context of this

15 binary choice. In fact, going back to the
16 California regulation, the one that now bans
17 methanol by name, it identifies it as an oxygenate;
18 and, by implication, it identifies it as a
19 competing oxygenate, and that's why it banned it by
20 name, is because it's precisely the type of
21 oxygenate that could take the place of ethanol.

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1 MR. LEGUM Mr. President, before we move
2 on to a different subject, I would just like to
3 note our objection to the reference to the pig
4 manure. That was not offered as a part of
5 Methanex's case-in-chief, and I don't believe that
6 there is any competent evidence on that subject in
7 any event.

8 PRESIDENT VEEDER: Is there any evidence
9 on this pig manure, Mr. Dugan?

10 MR. DUGAN: I'm sorry, I thought that was
11 part of the record. Perhaps I'm mistaken.

12 PRESIDENT VEEDER: We had something about
13 digested pig manure. Is this the same point?

14 MR. DUGAN: This is the same point, yes.

15 PRESIDENT VEEDER: I'm not sure that's in
16 the evidence. I think it was a question put to the
17 witness.

18 MR. DUGAN: Okay. Then I'll withdraw it.

19 PRESIDENT VEEDER: Please don't take it
20 from me. If there is any evidence, I would like
21 you to identify it to us, but come back on it later

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1 if you'd like.

2 I can also say that we have to give our
3 shorthand writer a break within the next ten
4 minutes or so, so when you come to a natural break,
5 Mr. Dugan, we could take another short break.

6 MR. DUGAN: This is actually a good point
7 to take a break.

8 PRESIDENT VEEDER: Let's take a 10-minute
9 break.

10 (Brief recess.)

11 PRESIDENT VEEDER: Let's resume.

12 MR. DUGAN: Thank you.

13 The next point I would like go to, the
14 next chart I'd like to go is our binary choice
15 chart, and this is an extrapolation of the chart we
16 put in in the opening, and I will point out that
17 the last cite that Chairman Key's prepared witness
18 testimony to the Committee on Government Reform is
19 not actually part of the record. If the U. S. wants
20 to object, it's all available at the CEC Web site,
21 and it was used strictly to project the amount of

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1 ethanol--I mean the amount of ethanol that will be
2 consumed in the future. And this just illustrates
3 that in terms of--they are competing uses, that
4 there is a binary choice and the long-term effect
5 of what will have happened is that ethanol will

6 replace methanol completely in terms of the
7 alcohols that are used as oxygenates in California
8 in the manufacture of RFG.

9 Now, turning to the next prong of the
10 like-products test, consumer preferences, the
11 consumer preferences analysis which was used in
12 asbestos, does not support the United States here.
13 But before we get into it, I think it's appropriate
14 to point out that most WTO cases use the--do not
15 analyze the question of an environmental
16 justification in the context of consumer
17 preferences or likeness. That's usually done at
18 the stage after it's been established that there
19 are like products and there is a denial of national
20 treatment. At that point it then becomes the
21 burden of the respondent state to justify the

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1 purported environmental justification for a
2 measure. And we think that's the appropriate way
3 for this Tribunal to view it procedurally as well,
4 to place the burden on the United States Government
5 to justify the ban of methanol and, more
6 importantly, the shift to ethanol as a responsible
7 environmental measure.

8 But taking the consumer preference test at
9 face value, the first point to be made here is
10 that--and the consumer preferences comes out of the
11 asbestos case, but the first point to be made here
12 is that the consumers here are not consumers of

13 gasoline. They're not families that buy from gas
14 pumps. The consumers here of these oxygenates,
15 these competing oxygenates, are the integrated oil
16 companies and the gasoline blenders, the ones who
17 switched from methanol to ethanol or from MTBE to
18 ethanol. Those are the consumers, not individual
19 drivers.

20 And it's quite clear that their preference
21 prior to the mandated ban was for MTBE and for

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1 methanol, respectively. Those were their
2 oxygenates of preference. They dominated the
3 market, and they dominated the market for a number
4 of well-known reasons. So, if consumer preferences
5 are to be important, they showed no preference for
6 ethanol whatsoever.

7 Now, even if it were appropriate at this
8 stage of the analysis to factor in the
9 environmental and the health factors, again that
10 doesn't help the United States. It hurts the
11 United States, especially at the time that the ban
12 was implemented and the shift to ethanol was made.

13 Now, recall that in the asbestos case, the
14 competing products were different types of
15 asbestos, one of which was far more benign than the
16 others, think it's called crysolite (sic). So,
17 there was a very clear difference between the two
18 categories of asbestos in that case. The case here
19 is that especially in 1999, it was well-known that
20 ethanol far more dangerous to the environment and

21 to health than methanol was. That didn't stop

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1 California from shifting to it.

2 Let's start with--go to the evidence.

3 What was the evidence? What was known about

4 ethanol's effect at the time that the shift was

5 made? Well, and we put this up before. Under Pete

6 Wilson, Governor Davis's predecessor, California

7 had objected to the use of ethanol, and they'd

8 objected to it on health and environmental grounds.

9 The first one, again, was the veto message that

10 Governor Wilson sent to the California Legislature

11 when he vetoed a previous attempt to benefit

12 ethanol. And one of the reasons why he vetoed it

13 is that the last phrase of his veto statement,

14 "especially when the consequences will foul our

15 air." He was talking about ethanol.

16 Prior to that, when the EPA had attempted

17 to implement a 30 percent set aside for ethanol,

18 California had sued, and again he had sued on the

19 grounds that the ethanol mandate would result in

20 irreparable injury to the health and welfare of

21 California citizens and to the environment.

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1 So, prior to this ban and shift to

2 ethanol, California did not believe that ethanol

3 was a better product. In fact, they thought it was

4 quite clearly a worse product.

5 Now, similarly, even at the time when
6 Davis made the shift to ethanol, the record in the
7 case showed that ethanol could have some very, very
8 damaging consequences, and what we have plucked out
9 for you is the portion of the California report.
10 This is the UC-Davis report itself that identifies
11 the cancer risks of increased ethanol. And if you
12 look at the third column, it says acetaldehyde, and
13 footnote three, footnote three if you go to the
14 next page refers to due to ethanol.

15 And if you go all the way to the bottom of
16 page eight of Tab 22, you will see the reference
17 that we have used repeatedly. Statewide change in
18 cancer cases, acetaldehyde due to ethanol 38 to
19 2,800 additional statewide cases of cancer. That's
20 what the UC-Davis report identified as the
21 carcinogenic impact of switching to ethanol at this

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1 time.

2 And when Davis decided to evaluate only
3 ethanol and when he decided in October of 1999 that
4 ethanol was the only feasible alternative, this was
5 the operative science, up to 2,800 additional cases
6 of cancer. And the citation to that, that's
7 40 JS tab G is the original record for that.

8 Similarly, we also put up before the slide
9 from the October 2001 report that showed that
10 shifting to ethanol is going to substantially

11 increase the benzene risk, the risk of benzene
12 contamination. So, I don't think it can ever be
13 reasonable be said, especially in 1999, the time
14 that the shift was made, that methanol--that MTBE
15 was a more dangerous product than ethanol. The
16 cancer risk alone defies that conclusion.

17 Now, the third point about like
18 circumstances that I think is useful to evaluate
19 are the Pope and Talbot and the Feldman cases. We
20 don't read them the same way as the United States
21 does, not surprisingly. But we think in Feldman

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1 that there wasn't any evidence in Feldman that the
2 Mexican cigarette manufacturers were competing with
3 the cigarette resellers. There was an absence of
4 evidence to that effect. And in Pope and Talbot,
5 the competitive circumstances between Pope and
6 Talbot's Canadian subsidiary and lumber companies
7 in the other provinces was much different
8 competitively because Pope and Talbot was in one of
9 the provinces that was subject to a countervailing
10 duty which triggered the whole quota system, and
11 the other one wasn't. So the nature of the
12 competition, if it existed at all, was much, much
13 different, and for that reason, we don't think that
14 the two cases serve as a useful precedent.

15 I'm sorry, the previous citation to the
16 cancer chart I'm told is five JS tab 40 G.

17 Now, if under Methanex's analysis
18 it--methanol and ethanol are in like circumstances,

19 then I think it's quite clear that methanol didn't
20 receive the same treatment as ethanol, and I won't
21 go over that again. It has lost its California

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1 market. It's not entitled to sell ethanol as an
2 oxygenate to RFG producers. And I think at this
3 stage the burden shifts to the United States to
4 justify the ban on MTBE and the precipitous shift
5 to ethanol as a serious and valid environmental
6 measures, and I don't think they can do that.

7 We have just gone through some of the
8 cancer issues. We have just gone through some of
9 the water treatment issues, of the finding by
10 California itself that the use of ethanol poses a
11 very serious benzene risk to the drinking water of
12 California, which is itself already a more serious
13 risk than even by in the words of the United
14 States' s own expert, benzene is more serious risk
15 than MTBE, and shifting to ethanol will only
16 increase that risks.

17 But in addition to those, what is the
18 other scientific evidence? We've put a lot in and
19 there is a lot there, and I would like to pluck out
20 a few highlights of the scientific evidence. First
21 of all, was MTBE a good product? And this is just

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1 going to Dr. Fogg's testimony, page 1274, line 14.

2 And while, line 18, (reading):

3 While MTBE was the oxygenate of
4 choice in 1996, the Phase II program
5 reduced emissions of hydrocarbons by
6 17 percent; correct?

7 That is correct.

8 And it reduced the emissions of
9 oxides of nitrogen by 11 percent; correct?

10 That is correct.

11 And during that same time period in
12 1996 when MTBE was the oxygenate of
13 choice, carbon monoxide emissions were
14 reduced by 11 percent; is that correct?

15 That is correct.

16 And during the same time period
17 sulfur oxides were reduced by 80 percent;
18 is that correct?

19 That is correct. "

20 I'm sorry, that was Simeroth, not Fogg.

21 Again, pages 274 and 1275. So, I think it's--and

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1 that's the United States's own expert.

2 It's absolutely unquestioned that
3 methanol--that MTBE was a very effective pollution
4 reducer.

5 Now, with respect to one of the critical
6 scientific issues, I'd like to read from the
7 Exponent report that's at 12 A, JS Tab C. And the
8 summary there I think is the most important aspect

9 of it. In summary, the UC report significantly
10 mischaracterized the then-current impacts of
11 drinking water sources and their prediction of
12 substantially increased incidence and levels of
13 MTBE detected in drinking water sources over time
14 has not materialized. And we haven't put it back
15 up again, but just recall that when Governor Davis
16 extended the time period for the total ban on MTBE,
17 in his Executive Order, he himself said that the
18 detections of MTBE had decreased substantially. I
19 think Walter Hickox and Gordon Schremp also stated
20 that the detections of MTBE had decreased
21 tremendously.

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1 So in California's own words, the words of
2 their own officials validate what Dr. Williams has
3 said. During the period between 1999 and the time
4 when the ban went into effect, MTBE detects in
5 drinking water dropped tremendously or
6 substantially.

7 She goes to state, (reading):

8 On the contrary, the incidents of
9 MTBE in drinking water sources statewide
10 was relatively low in 1998 and has not
11 increased over time. The importance of
12 this inaccurate assessment cannot be
13 overstated because in the absence of
14 adverse ecological effects, it appears to
15 have been the sole basis for the
16 Governor's finding of a significant risk

17 to the environment.

18 Now, you heard from Dr. Happel, and she
19 came in and she talked about 10,000 points of water
20 polluted by MTBE. And I think that's telling
21 because that's an example of the type of gross

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1 exaggeration that has accompanied this whole
2 debate.

3 And I'm turning to page 1163, line 11, of
4 Happel's testimony, and in her answer, (reading):

5 I'm looking to say in your database
6 that the State Water Board--how many of
7 the leaking tank sites that have been
8 tested for MTBE have found MTBE in
9 groundwater pollution in the groundwater?

10 And the answer is 10,000.

11 And the question:

12 When you talk about groundwater
13 pollution you're not looking at the MCL
14 level; correct?

15 No, this is anything above one part
16 per billion.

17 So it's any detect; correct?

18 Yes.

19 So, again, this 10,000 is based upon
20 detects, most of which, the majority of which were
21 of no concern to anyone. They are below the MCL

1 for esthetic threshold and they're below the MCL
2 for health. Nonetheless, it was the figure that
3 was bandied about, and it did create an awful lot
4 of hysteria.

5 Dr. Happel also admitted, and this is
6 page 1260 line 20, (reading):

7 So, if you use the detect frequency
8 method rather than the cumulative detect
9 method, your charts would look different
10 today, wouldn't they?"

11 She conceded that the charts would look
12 different.

13 Testimony went on, page 1263, line 20,
14 (reading):

15 In your conclusion, the 3 percent of
16 the sources that you study were
17 contaminated by MTBE; is that a correct
18 statement of your findings?

19 No, we estimated the number of public
20 supply wells that may have been
21 contaminated using inadequate data. We

1 came up with a range of .3. I think
2 that's meant to be 1.2 percent of supply
3 wells.

4 So, even by Dr. Happel's own admission
5 with respect to drinking water sources, it was a
6 very, very small percentage.

7 And similarly, no one now disputes that,
8 as we said in the opening, the UC-Davis study
9 bungled the estimate of the cost of cleanup.
10 Whitelaw himself candidly admitted that. And going
11 to page 1527, (reading):

12 QUESTION: Let me return to your
13 analysis of the UC report and the errors
14 you attribute to it. On page three of
15 your original report you concede that the
16 authors of the UC report erred by
17 including so-called sunk costs in the
18 water quality analysis; correct?

19 I concede?

20 You contend.

21 I observed. Everyone else had

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1 observed that before I got the report.
2 Well, not everybody, but I mean a number
3 of people.
4 So, it was a blatant and serious error.
5 And finally, with respect to I think one
6 of the most important questions, was this the most
7 suitable choice for California to make, again,
8 recall that the language of SB521 required Governor
9 Davis to take appropriate choice. Didn't tell him,
10 didn't require him to ban MTBE. And the fact that
11 it contemplated MTBE ban as a possibility in no way
12 means as a matter of legislative intent that he was
13 required to ban MTBE.

14 Now, the United States tries to make it

15 out as if that were the only realistic choice.
16 That's wrong. It wasn't the only realistic choice,
17 and he was under no requirement whatsoever to ban
18 the MTBE, and he certainly wasn't under any
19 requirement to substitute ethanol without having
20 adequately studied it, which is what he did. But
21 going back to the testimony with respect to a more

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1 suitable measure, more appropriate action to
2 protect the environment, Dr. Fogg admitted that
3 banning the two-stroke engine would solve the
4 problem -

5 ARBITRATOR ROWLEY: Could I just ask you a
6 question here. I think you said that Governor
7 Davis banned the use of MTBE before completing the
8 study of ethanol.

9 MR. DUGAN: No. What I meant to say
10 was--if I said that, I misspoke.

11 What I have been trying to say is that
12 Governor Davis decided to substitute ethanol as the
13 replacement for MTBE before California had
14 completed not only the evaluation of ethanol, but
15 any comparative evaluation of any other oxygenates.
16 That's the critical decision that he made. That's
17 the second critical decision he made was to select
18 ethanol and to select it on a final basis, which is
19 what he told Congress, before the ethanol-specific
20 evaluation had been completed.

21 But more importantly, to select ethanol as

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1 the only oxygenate to evaluate. And to ignore all
2 the other potential oxygenate competitors. That's
3 the important part of the process, the two-step
4 process, first ban MTBE; second, select ethanol
5 preferentially over all its competitors.

6 Does that answer the question?

7 Now, turning to Fogg's testimony, this is
8 page 1265, line 16, (reading):

9 And you would agree that by
10 preventing the use of a two-stroke engine,
11 you're preventing the release of gasoline
12 from the two-stroke engine into the lake?

13 You are taking the source of MTBE out of
14 the water body?

15 Yes.

16 So, Dr. Fogg agreed that that was an
17 appropriate solution for solving the surface water
18 problem and that, in fact, was the solution that
19 was adopted.

20 Similarly, Dr. Happel, page 1202,
21 (reading):

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1 So, banning MTBE doesn't stop
2 gasoline release into the groundwater; is
3 that correct?

4 Banning MTBE does not affect the

5 ability of the UST tank, the underground
6 storage tank, to prevent releases.

7 Dr. Happel, page 1196, line three:

8 And you would agree that if less
9 gasoline is released into those
10 groundwater sources, that would be less
11 contamination of any kind; is that
12 correct?

13 Yes.

14 Now, at the hearings that took place after
15 the report was issued, there was a particularly
16 eloquent statement from one of California's water
17 officials, and this is found at Tab 26, and this is
18 a statement from Bill Robinson, the Director of the
19 Upper San Gabriel Water District Division Number
20 Four. He testified that, quote, The ancient
21 Egyptians had the technology to preserve corpses

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1 for thousands of years, and our state Legislature
2 can't give us underground storage tanks that don't
3 leak. That's the solution to the problem. If the
4 Legislature will fund that, the underground storage
5 tank program, they can avoid billions of dollars in
6 cleanup costs. Just avoid the costs. It's a
7 no-brainer decision to make.

8 That was a California water official who
9 repeated what Methanex believes is the obvious
10 conclusion that should have been reached.

11 PRESIDENT VEEDER: Can you just give us
12 the reference in the exhibit bundles?

13 MR. DUGAN: We'll find it and
14 cross-reference it to the exhibit bundles.

15 So, we think that reviewing the whole
16 national treatment issue, the four points, first of
17 all, we think it's especially because of the
18 competitive relationship between ethanol and
19 methanol that they are, indeed, in like
20 circumstances.

21 Secondly, that methanol does not receive

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1 the same competitive opportunities that ethanol
2 does because it can't sell methanol as an oxygenate
3 in California to RFG manufacturers.

4 And third, that the U.S. cannot justify
5 both the MBE ban and the shift to ethanol on an
6 environmental basis. The record to do that simply
7 isn't there, especially the shift to ethanol. It
8 can't be justified as an environmental measure.

9 Now, with respect to our allegations of
10 corruption, that is not necessary to prove an 1102
11 violation. We have offered that evidence because
12 we believe that that conclusively explains why 1102
13 was violated. It explains why Governor Davis took
14 the acts that he did, but that proof is not
15 necessary. All we have to prove is like
16 circumstances, disparate treatment, and that the
17 United States cannot meet its burden to justify the
18 ban and the shift to ethanol as an environmentally
19 sound measure.

20 Once we prove those three things, Methanex
21 believes it has proved a violation of 1102,

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1 regardless of whether the Tribunal was satisfied
2 that it was done for corrupt purposes.

3 Now, the cross-reference citation for the
4 Egyptian mummy quote that I just read you is
5 11 JS Tab 2 01.

6 Now, turning to Article 1105, fair and
7 equitable treatment, Methanex proffered Professor
8 Crawford's synthesis of fair and equitable
9 treatment because Methanex submits that this is
10 compelling evidence of the present state of
11 customary international law of fair and equitable
12 treatment. It's what the customary law is now.
13 The waste management decision came after the FTC
14 alleged interpretation of 1105, and it took that
15 into account. It factored that into account.

16 Professor Crawford noted that customary
17 international law is an evolving standard. He
18 noted that the parties, the NAFTA parties had
19 agreed that is an evolving standard, and taking
20 into account all the developments in development of
21 the concept of fair and equitable treatment, this

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1 was how he had--this was how he did articulate the
2 present content of the fair and equitable standard,

3 and we believe that this is as concise and as
4 persuasive an articulation of that standard as
5 exists anywhere.

6 ARBITRATOR REISMAN: The reference in
7 Professor Crawford's statement or award to
8 discriminatory treatment is what equalizes, that
9 makes the evidence that you marshalled with respect
10 to 1102 relevant to 1105.

11 MR. DUGAN: That's one of the headings,
12 not the only heading, and I will get to that, if I
13 can.

14 ARBITRATOR REISMAN: But that is why the
15 evidence that you marshalled of 1102 is relevant to
16 1105? There may be other evidence?

17 MR. DUGAN: Yes, with the same evidence
18 that I think supports 1102 supports a violation
19 under 1105, a number of different headings, one of
20 which is discrimination.

21 But turning to exactly what Professor

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1 Crawford said, he refers to conduct that is
2 arbitrary, grossly unfair, unjust, or
3 idiosyncratic. And we submit that what happened in
4 California was precisely that, that whenever a
5 political official implicit return for political
6 contributions favors one competitor and shuts
7 another competitor out of the market, that that's
8 arbitrary, it's grossly unfair, it's unjust, and
9 it's idiosyncratic because it's a policy decision
10 that's made not on the merits of the underlying

11 situation, but because of a desire to favor one
12 particular interest, an interest that had
13 contributed to that person.

14 Similarly, it's discriminatory for the
15 reasons that we just talked about.

16 Now, the United States has said there is
17 no general rule against discrimination. I submit
18 that the way that Professor Crawford has
19 articulated the current state of the law, with
20 respect to fair and equitable treatment that some
21 forms of discrimination are, indeed, illegal under

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1 international law. They are unfair, and they are
2 inequitable. And we further submit that the type
3 of discrimination that Methanex faced in California
4 at the hands of Gray Davis is precisely that type
5 of discrimination that is illegal under the fair
6 and equitable treatment standards.

7 ARBITRATOR REISMAN: You stated some forms
8 of discrimination are violations of international
9 law. You mean violations of customary
10 international law?

11 MR. DUGAN: Violations of the fair and
12 equitable standard that is included as an express
13 textual pretension in Article 1105.

14 ARBITRATOR REISMAN: Let me make sure I
15 understand. 1105, this interpretation liberates
16 1105 from customary international law. Just look
17 at the words fair and equitable. And you derive

18 from it that discrimination would be a violation of
19 fair and equitable treatment. It doesn't take you
20 back to customary international law.

21 MR. DUGAN: I think it may take you back

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1 to customary international law. I'm not quite sure
2 how Professor Crawford articulated the link between
3 this articulation and customary international law
4 and whether he fully accepted the FTC
5 interpretation that it was wholly dependent on
6 customary international law.

7 ARBITRATOR REISMAN: It's your position
8 that a state may not discriminate between national
9 and aliens under customary international law?

10 MR. DUGAN: It's certainly our position
11 that a state may not discriminate on the facts of
12 this case between an alien and a domestic interest
13 because of political contributions, that that is a
14 violation.

15 ARBITRATOR REISMAN: I don't think that
16 addresses the problem the Tribunal had with 1105.

17 First, does--if 1105 incorporates
18 customary international law, does customary
19 international law prohibit a state from treating
20 aliens and its own nationals differently?

21 MR. DUGAN: I think it depends on the

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1 circumstances. I don't think that there is a
2 blanket prohibition, and I think again, in some
3 circumstances, it does prohibit it.

4 ARBITRATOR REISMAN: Can you give us
5 authority for, international authority for
6 circumstances in which it has been held that
7 customary international law prohibits differential
8 treatment?

9 MR. DUGAN: No, I can't, not offhand, but
10 I mean in terms of authority that customary
11 international law prohibits discriminatory
12 treatment, I think this is evidence of it, the fact
13 that it is articulated, as including discrimination
14 is itself evidence, that international--customary
15 international law, as it has now developed,
16 prohibits some types of discrimination. There is
17 no attempt by Professor Crawford to detail
18 precisely what types of discrimination, but I think
19 this does recognize that some discrimination is,
20 indeed, a violation of 1105 under the customary
21 international law rubric of it.

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1 Does that answer your question?

2 ARBITRATOR REISMAN: I'm not sure, but I
3 appreciate your response.

4 MR. DUGAN: Now, the other two principles
5 that I think are articulated here are the complete
6 lack of transparency and candor in an
7 administrative process. And I think that that's
8 precisely what was violated here as well. I think

9 that Governor Davis's shift is his ban on methanol
10 and his unjustified shift--his ban on MTBE and his
11 unjustified shift to ethanol were the result of a
12 completely nontransparent process, that they were
13 motivated by attempts to favor the interests of
14 political contributors, that there was no candid
15 disclosure of why the shift was being made,
16 especially the shift to ethanol, the precipitous
17 shift to ethanol, that these are the same types of
18 government dealings that were called into question
19 in Metalclad, for example, the one that required,
20 that found the transparency was one of the most
21 important or was an important objective of NAFTA,

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1 and I think that the same issues are in play here.

2 If, as we assert, what was going on behind
3 the scenes was an attempt by Davis to favor one of
4 the groups that had supported him, then that type
5 of background undisclosed favoritism violates the
6 principles of transparency and candor that
7 Professor Crawford has identified here as being
8 part of the fair and equitable standard.

9 ARBITRATOR REISMAN: I would like to
10 understand the quotation from waste management,
11 since it is being presented now as in effect the
12 only authority we have for the proposition that
13 you're making.

14 MR. DUGAN: I'm sorry, for which
15 proposition precisely?

16 ARBITRATOR REISMAN: The proposition that
17 discrimination between an alien and a national is a
18 violation of customary international law or at
19 least 1105. I just want to go back, since we're
20 looking at that, Professor Crawford lists all of
21 those things and then says and exposes the claimant

1947

1 to sectional or racial prejudice, and that's
2 cumulative. Does he mean--I'm asking you. I don't
3 know. You're citing the case to us. Does that
4 mean that he is suggesting that this list of
5 horrors, arbitrary, grossly unfair and so on, must
6 accumulate with the additional factor that it
7 exposes the claimant to sectional or racial
8 prejudice, or do they stand alone?

9 MR. DUGAN: I think they stand alone, and
10 I think that he didn't use a comma between
11 "discriminatory" and "and," as is often the case,
12 but I think there is a comma implied there, and I
13 think each one of these is a separate heading, a
14 separate principle. Take, for example, grossly
15 unfair. I think to a degree that concept--that
16 encompasses the concepts of natural justice, I mean
17 of denial of justice, although I see that's also
18 mentioned below, but I think if there were a
19 showing that a particular situation, a particular
20 outcome at hands of a government were grossly
21 unfair, that that, in and of itself, would be

1 enough to sustain a violation of the requirement of
2 fair and equitable treatment, even if it didn't
3 culminate in an episode of sectional or racial
4 prejudice.

5 So, I think it is quite clearly from the
6 way it's expressed a stand-alone principle, not
7 tied to the last segment.

8 Now, one last point. This 1105 claim is
9 independent of the 1102 claim. It doesn't require
10 a showing of like circumstances, and it doesn't
11 require a showing of disparate treatment. If under
12 Professor Crawford's analysis Methanex can show
13 that Davis's switch to ethanol was arbitrary and
14 grossly unjust, there is no need to meet the
15 requirements of Article 1102.

16 Now, with respect to Article 1110,
17 Methanex does, indeed, have a very serious 1110
18 claim. That was its original claim, and it's
19 always maintained that claim. Methanex alleges
20 that California expropriated Methanex's California
21 market share, its customers in California, which

1 substantially interferes with its ability to do
2 business in California and interferes with its
3 expectations of what it was going to be able to do
4 in California. And I don't have it as a chart, but
5 I would like read to you what I think is the test
6 for an expropriation that was articulated in the

7 Metalclad case. Expropriation of NAFTA includes
8 not only open, deliberate, and acknowledged takings
9 of properties, such as outright seizure or formal
10 or obligatory transfer of title in favor of the
11 host state, but also covert or incidental
12 interference with the use of property which has the
13 effect of depriving the owner in whole or in
14 significant part of the use or reasonably to be
15 expected economic benefit of property, even if not
16 necessarily to the obvious benefit of the host
17 state. That's the Metalclad standard. And we
18 think that's applicable here precisely, that what
19 California did was it took Methanex's California
20 market share, the sales that it had been making to
21 the refiners such as Chevron, and Tosco and Valero,

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1 and it interfered with Methanex's ability to do
2 business in that market, and it gave that market
3 share to the U.S. ethanol industry, and that is a
4 significant deprivation of Methanex's market share
5 in the United States. It's a complete deprivation
6 of Methanex's market in California, and that was
7 not a reasonably to be expected outcome. Methanex
8 could not expect that California would
9 precipitously and without any environmental
10 justification shift to ethanol. And as a
11 consequence, that seizure of its market in
12 California and turning it over to the U.S. ethanol
13 industry meets the criteria of an uncompensated and

14 in fact illegal expropriation in California.

15 Now, I won't go over what we've already
16 put in the record about market share, customer
17 base, and goodwill being precisely the types of
18 intangible property that's protected by Article
19 1139 of NAFTA. We'll rest on the record with
20 respect to that.

21 Now, I would like to turn now to the

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1 question of the intent to harm foreign methanol
2 producers and how that intent should be inferred
3 from the evidence in the record, the inferences
4 that should be drawn.

5 Methanex believed that the test
6 articulated by the Tribunal in the Partial Award is
7 met here. The Tribunal can infer an intent to harm
8 based on two legal principles, two very well
9 developed legal principles. The first is the
10 principle of foreseeability. It's a well
11 established principle of law that an actor intends
12 the reasonably foreseeable consequences of his
13 actions.

14 Second, where two entities compete
15 directly for the same thing, in the same market, an
16 intent to harm one is the same as an intent to harm
17 the other. And because we believe we have
18 shown--I'm sorry, if I mangled it, I think you
19 understand what I'm saying, that an intent to
20 benefit one is an intent to harm the other.

21 I think we've shown that methanol competes

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1 directly with ethanol for the same market, the
2 market being the use of oxygenates in the
3 production of RFG in California. And if that's the
4 case, if there is this direct competitive link,
5 then any attempt to benefit one, by definition, by
6 legal operation, harms the other. It has to,
7 because there is no other consequence that can
8 result from that.

9 Now, turning to the first principle,
10 foreseeability, as I said, I think it's a standard
11 principle of law in all municipal systems and in
12 international law as well, that intent to cause
13 harm will be inferred where that harm is natural,
14 probable, and the foreseeable consequence of taking
15 a particular action.

16 We have a quote from Prosser and Keeton on
17 torts that very concisely sums it up. Where the
18 known danger ceases to be only a foreseeable risk
19 and becomes in the mind of the actor a substantial
20 certainty, the actor is presumed to cause the
21 dangerous result. The restatement second of torts.

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1 All consequences which the actor desires
2 to bring about are intended as the word is used in
3 this restatement. Intent is not, however, limited
4 to consequences which are desired. If the actor

5 knows that the consequences are certain or
6 substantially certain to result from his act and
7 still goes ahead, he is treated by the law as if he
8 had, in fact, desired to produce the result.

9 Now, in terms of the damage to Methanex,
10 the question of whether the damage is foreseeable,
11 I think, cannot be disputed. And we have included
12 here a slide that the United States, from the
13 United States's own EPA report in 1993, in which it
14 not only recognized the harm to foreign methanol
15 producers was foreseeable, it actually foresaw the
16 harm that a set aside for ethanol would inflict on
17 foreign methanol producers. Again, the primary
18 impacts of this proposal include, and I'm skipping,
19 the impacts on the various oxygenate and fuel
20 industries affected. And it goes to say, and I'm
21 selectively quoting here, the revenues and net

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1 incomes both corn farmers and ethanol producers
2 should rise significantly due to higher corn and
3 ethanol demand in prices, respectively. Revenues
4 and net incomes of domestic methanol producers and
5 overseas producers of both methanol and MIBE would
6 likely decrease due to reduced demand in prices.

7 Now, again--

8 ARBITRATOR ROWLEY: Can you remind me of
9 the date of this quotation.

10 MR. DUGAN: The date of that quotation is
11 in 1993. But again, the mechanics--

12 ARBITRATOR ROWLEY: And can you help with
13 the fact that it is five years before, or six or
14 seven years before the measures in question?

15 MR. DUGAN: It was, indeed, before that,
16 but I think that the fact it was before that is
17 irrelevant because the market dynamics did not
18 change, and it was foreseeable and, indeed,
19 foreseen, that a shift of 30 percent of the market
20 to ethanol would have a primary impact on foreign
21 methanol producers. For the same reasons that the

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1 United States could foresee that shift in 1993, it
2 was foreseeable in 1999 that the ban on MTBE and
3 the precipitous shift to ethanol would have
4 precisely the same easily foreseen impact on
5 foreign methanol producers. It was foreseeable,
6 and because it was foreseeable, it's entirely
7 appropriate for the Tribunal to infer that it was
8 intended.

9 ARBITRATOR REISMAN: I just want to
10 understand that. It seems rather sweeping to say
11 that foreseeability in the determination of the
12 aggregate consequences of the public policy are
13 deemed to be intent. Under the interpretation that
14 you're proposing, the last sentence of this
15 excerpt, oil refiners could experience transition
16 costs due to an intentional--additional
17 requirement, also requires us to assume there was
18 an intention to create higher transitional costs
19 for oil refiners, which would also be actionable.

20 MR. DUGAN: I'm not sure it would be
21 actionable, but if I could just--

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1 ARBITRATOR REISMAN: But you would still
2 say that this is deemed to be intent because the
3 public policy analysis indicated the aggregate
4 consequences.

5 MR. DUGAN: Well, I mean, I think you
6 could restrict it to the particular facts of this
7 case. The Tribunal has posited a very specific
8 test, a very specific intent to harm case under
9 what it believe to be the facts of the case when it
10 issued the Partial Award. As I said, we believe
11 the facts are different, but I think you can
12 confine it to the particular facts of this case.
13 There is no general liability for acts which result
14 in consequences that are foreseeable under either
15 international law or U.S. regulatory law as far as
16 I know.

17 The fact that a particular consequence can
18 be understood as having been intended because it
19 was foreseeable does not create a cause of action
20 under U.S. law that I know of. But I think that
21 for purposes of analyzing this case, where the

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1 Tribunal has said that inferences are, indeed,
2 permissible, that this is a permissible inference,

3 and, in fact, I think it's impossible to deny that
4 this is a permissible inference when the common law
5 is so clear that it is, indeed, a permissible
6 inference, and because where the evidence I believe
7 is so clear it was foreseeable and indeed foreseen
8 by the United States.

9 Now, in addition, the second piece of very
10 important evidence about the foreseeability of the
11 harm to Methanex, I think, is the statement by
12 Senator John Burton. The two statements by Senator
13 John Burton.

14 PRESIDENT VEEDER: Before you go to that,
15 a silly point on the wording of this document.
16 Rely upon this as formal admission, binding on the
17 United States regardless of the evidence. That's
18 your primary purpose in referring to this document.

19 MR. DUGAN: Well, reply at a minimum as
20 extremely persuasive evidence, if not a binding
21 admission.

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1 PRESIDENT VEEDER: Just look at the last
2 sentence. Revenues net incomes of domestic
3 methanol producers and overseas producers of both
4 methanol and MTBE would likely decrease.

5 Why are domestic producers of MTBE covered
6 by that sentence? Why is that omitted?

7 MR. DUGAN: I don't know. I suspect it
8 was just an oversight by their part, and I don't
9 think that omission in any material way affects

10 their conclusion, the fact that they foresaw a
11 shift to ethanol of 30 percent of the market would
12 have a very damaging impact on foreign methanol
13 producers.

14 And again, what happened in California, of
15 course, was a hundred percent shift to ethanol, and
16 if a 30 percent shift to ethanol would have a
17 damaging impact, then it stands to reason that a
18 hundred percent shift would have the same type of
19 damaging impact.

20 Now, the second point, the second piece of
21 evidence from which you can find foreseeability are

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1 the two comments Senator Burton made to the
2 Methanex representatives, and the methanol
3 representatives in the famous meeting where he told
4 them that you're blanked and he said to sell
5 Methanex stock short.

6 Professor, you raised the question, well,
7 isn't that capable of two interpretations? Doesn't
8 that mean simply that you're going to lose? And in
9 thinking about it, I think the appropriate response
10 is that when it's phrased in that way, it means two
11 things. It means you're going lose, and you're
12 going to be harmed. Both of those meanings are
13 contained within that statement. And, Mr. Veeder,
14 you asked the question, but is he an actor? And we
15 would agree that certainly with respect to the
16 formal processes, he was not an actor.

17 But, his knowledge reflects two things.

18 It reflects the foreseeability of harm to Methanex
19 from the MTBE ban, and it reflects to a degree the
20 knowledge of how the California government was
21 going to act. It reflects to a degree the

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1 knowledge of how Governor Davis was going to act.
2 I think you can infer from his statement that it
3 was fairly common knowledge that Governor Davis was
4 going to implement the ban against MTBE.

5 And again, if our submission that the date
6 on which Mr. Vind had his conversation with Gray
7 Davis about the compromise, can't you work out a
8 compromise so that the ethanol producers get some,
9 and the refiners' concerns about supply are
10 satisfied, that would have taken place a month
11 before, which is further evidence that Governor
12 Davis had already made up his mind and further
13 evidence that knowledge about the ban is spreading.

14 So, we think from this it shows two
15 things: Again, foreseeability and the state of
16 Governor Davis's mind, that it was known that this
17 was going to have a damaging impact on methanol
18 producers, and foreign methanol producers, as well.

19 So, it is a good piece of evidence for
20 foreseeability, and from foreseeability we argue
21 that you can, and should, infer an intent to harm

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1 ARBITRATOR ROWLEY: If Governor Davis had
2 been considering the MTBE issue, the UC report
3 leading up to his election and, indeed, had been
4 tending towards a decision or had even reached a
5 decision that it would be, if elected, his
6 recommendation would be that MTBE be banned and
7 that ethanol be studied as a substitute all prior
8 to the dinner and receipt of donations from ADM,
9 would that affect your case?

10 MR. DUGAN: If he had decided that all
11 prior to the dinner?

12 ARBITRATOR ROWLEY: Yes.

13 MR. DUGAN: It would depend--

14 ARBITRATOR ROWLEY: I said prior to the
15 dinner and/or receipt of the earlier donations.

16 MR. DUGAN: I understand.

17 Not necessarily. It would certainly make
18 more difficult from an evidentiary point of view,
19 but recall here that Davis sought out ADM and he
20 sought out ADM, I think, and Mr. Vind testified
21 because he wanted money from ADM

1962

1 Now, if he made the decision in
2 anticipation of a rich stream of contributions from
3 one of the largest contributors in the nation,
4 then, no, it wouldn't affect our case. I think it
5 would make the evidentiary inference to be drawn
6 much harder, but it wouldn't affect the case. I
7 think what's critical here is that the sequence of

8 events is that based on the evidence ADM had not
9 made that decision. ADM certainly had not made
10 that decision, and it made the decision after the
11 meeting in Illinois, and we submit it made the
12 decision based on something that happened at the
13 meeting in Illinois. And what happened, again, we
14 submit, was there was some type of implicit
15 agreement that Governor Davis would expand the use
16 of ethanol.

17 So, I think the only concern we would have
18 under those facts is an evidentiary concern and not
19 a theoretical concern.

20 Does that answer the question?

21 ARBITRATOR ROWLEY: It helps, thank you.

1963

1 MR. DUGAN: All right. Now, turning to
2 the second principle on which we think that it's
3 appropriate for the Tribunal to infer a specific
4 intent to harm, we've tried to show that--I think
5 we have shown that this is a market where there is
6 a binary choice, at least with respect to the
7 integrated oil companies. Prior to the ban they
8 chose methanol. Now they choose ethanol in order
9 to manufacture their RFG. And we think in those
10 circumstances where there is a direct competitive
11 link, where it's a zero-sum game, where the
12 competitor gets the whole pot or none of it, that
13 that competitive link alters the types of
14 inferences that can be drawn.

15 Now we think that almost--that most, and

16 perhaps all antidiscrimination regimes recognize
17 that an intent to favor one competitor demonstrates
18 by definition at a harm and intent to harm the
19 unfavored competitors. And it appears--it's almost
20 self-evident, if do you have a pot of--a zero-sum
21 game where someone is favored, then someone by

1964

1 definition is going to be disfavored, and intent to
2 favor the one has to be construed as an intent to
3 favor the other.

4 And I think the U.S. itself recognized
5 that in their statement on July 12, 2001, which is
6 Tab 31. Just quoting the highlighted sections, why
7 would California have any interest in injuring
8 foreign owned producers if not to benefit U.S.
9 domestic ethanol industry, quoting selectively
10 there? And I think that's the gist of it. As the
11 U.S. itself at least implicitly recognized, these
12 are two sides of the same coin.

13 Now, again, this principle, it's not a
14 novel principle. Methanex is not putting it
15 forward in the absence of very considerable legal
16 support. If you turn to Tab 32, the statement has
17 been--this is from the WTO decision: If there is
18 less favorable treatment of the group of like
19 imported products, there is, conversely, protection
20 of the group of like domestic products.

21 Professor--and I think one particularly

1965

1 good articulation of the theory is found in the
2 Bacchus Imports, Limited, case. That was a United
3 States Supreme Court case dealing with what's known
4 as the dormant commerce clause, which is a
5 prohibition on the type of economic protectionism
6 that we are talking about. It's internal to the
7 United States. It's not a rule of international
8 law, but the analog is very, very close to what's
9 being dealt with here.

10 That case involved a tax law that the
11 State of Hawaii had passed which exempted two
12 locally produced liquors from a general Hawaii tax,
13 but the tax was applied to all other beverages
14 originating in state or out of state. Hawaii
15 argued that it didn't intend to discriminate
16 against products from out of state. It merely
17 intended to favor a couple of domestic products,
18 and urging that there was no discriminatory intent
19 on the part of the state legislature because the
20 exemptions in question were not enacted to
21 discriminate against foreign products, but rather

1966

1 to promote a local industry.

2 The Supreme Court rejected that, and they
3 rejected that using language that I think is very,
4 very relevant here: Virtually every discriminatory
5 statute allocates benefits or burdens unequally.

6 Each can be viewed as conferring a benefit on one
7 party and a detriment on the other in either an
8 absolute or relative sense. The determination of
9 the constitutionality does not depend upon whether
10 one focuses on the benefited or the burdened party.
11 A discrimination claim by its nature requires a
12 comparison of the two classifications, and it could
13 always be said that there was no intent to impose a
14 burden on one party, but rather the intent to
15 confer a benefit on the other.

16 Consequently, it is irrelevant to the
17 commerce clause inquiry that the motivation of the
18 legislature was the desire to aid the makers of the
19 locally produced beverage rather than to harm
20 out-of-state producers.

21 Now, again, we think that there is ample

1967

1 legal precedent for this type of inference drawing,
2 and we believe that the United States has itself
3 adopted this type of inference drawing in the
4 positions it's taken in trade cases. This was
5 the--actually, this was the position taken by the
6 United States in the Japan measures affecting
7 consumer photographic film and paper. Regardless
8 of whether Japan has sought to hinder imports or
9 merely help domestic producers, the direct
10 consequences of its actions were to diminish
11 opportunities for foreign photographic material
12 manufacturers and to distribute their products. By
13 creating distribution channels open exclusively to

14 domestic manufacturers, Japan intentionally
15 enhanced competitive opportunities for domestic
16 manufacturers to the detriment of imports.

17 Again, two sides to the same coin.

18 And that's precisely the case here. You
19 have a binary market where in 1999, methanol
20 completely dominated the market for oxygenates used
21 by integrated oil companies in the production of

1968

1 RFG. Now, it has no market share of that
2 whatsoever. That has all shifted to ethanol, and
3 it shifted to ethanol because of Davis's actions in
4 precipitously selecting ethanol as the favored
5 replacement.

6 Now, that's a zero-sum game. Integrated
7 oil companies have to buy oxygenates in order to
8 comply with the requirement to produce RFG, and by
9 intending to favor domestic ethanol industry,
10 Governor Davis, by definition, intended to harm all
11 its foreign producers because the two are opposite
12 sides of the same coin. And it's because of the
13 competitive relationship, the direct competitive
14 relationship between the two products.

15 Next, I would like to turn to the question
16 of Methanex's ownership of investments in the
17 United States, and--

18 PRESIDENT VEEDER: Just before do you
19 that, we are not pressing you, but can you give us
20 some rough estimate of how far you've got, and how

21 much further time you need.

1969

1 MR. DUGAN: I suspect I'll need about an
2 hour and 15 minutes.

3 PRESIDENT VEEDER: That will take us up
4 7:00.

5 MR. DUGAN: About that, yes.

6 PRESIDENT VEEDER: It's when you rest that
7 we go beyond seven because that, for administrative
8 reasons, very much the last time we can sit without
9 making special arrangements.

10 MR. DUGAN: No. I will certainly do my
11 best. I think I can get it done by seven. I will
12 certainly try.

13 PRESIDENT VEEDER: We're not pressing you.
14 You must take the time you need, but if you need
15 longer, I think you need to tell us. Seven o'clock
16 is still okay.

17 MR. DUGAN: I don't think I will need
18 longer.

19 PRESIDENT VEEDER: Let's work on that
20 basis. We'll need another short break I think just
21 to give the stenographer a little rest.

1970

1 MR. DUGAN: Now is as good a time as any,
2 if you want to do it now or we can do it later.

3 PRESIDENT VEEDER: Let's do it now.

4 MR. DUGAN: Okay.

5 (Brief recess.)

6 PRESIDENT VEEDER: Let's resume.

7 Before we do so, could we review
8 administrative arrangements for tomorrow. On one
9 view, in the light of today, we should start
10 earlier. On another view, because it may be that
11 time has been removed from the United States in
12 preparing for tomorrow, we should start later. We
13 should ask the United States as to what their
14 preference would be. It has to be one or the
15 other.

16 MR. LEGUM: It's the latter of the two.
17 We would prefer to start a bit later, around 2:30
18 is what we are proposing.

19 PRESIDENT VEEDER: If we did that, we
20 would have to be pretty sure of finishing before
21 7:00. Is that still your intention?

1971

1 MR. LEGUM: It is, indeed.

2 PRESIDENT VEEDER: And we ought to allow
3 quarter an hour at the end for various housekeeping
4 matters so that would probably mean 6:45. Does
5 that make a difference to your answer?

6 MR. LEGUM: No, no, it doesn't.

7 PRESIDENT VEEDER: So, 2:30 tomorrow. We
8 will continue until 7:00.

9 Does that cause any difficulties, Mr.
10 Dugan?

11 MR. DUGAN: No, that's fine.

12 PRESIDENT VEEDER: Mr. Dugan, let's go on.

13 MR. DUGAN: Okay. Thank you.

14 Next, I would like to turn to the question
15 of Methanex's ownership of investments in the
16 United States. The U. S. asserts that Methanex has
17 not shown that it actually owns any U. S.
18 investments. Now, Methanex--from Methanex's point
19 of view, this is an entirely frivolous argument,
20 and the Tribunal shouldn't be wasting any time on
21 it, and neither should the parties.

1972

1 The U. S. asserts, quote, the United
2 States, as a respondent in this billion dollar
3 case, has the right to insist on evidence of
4 ownership as authoritative as what would be
5 required in a corporate transaction.

6 Now, the U. S. --

7 PRESIDENT VEEDER: You're quoting from
8 what?

9 MR. DUGAN: I'm quoting from transcript
10 page 577, lines 6 to 11.

11 The United States cites absolutely no
12 authority whatsoever for the fact that they're
13 entitled to a certain level of evidence with
14 respect to a particular point that's in dispute.
15 And actually it's not even in dispute. And we
16 submit that they're not. They're simply making
17 that up. They're not entitled to evidence as
18 authoritative as if included in a corporate

19 transaction, and there is not a shred of authority
20 to support that.

21 What's on the record here is that Methanex

1973

1 has provided ample, credible, uncontradicted
2 evidence of its ownership, and that's an end to it.

3 Let's go to Mr. Macdonald's witness
4 statement. This is what he said: Methanex owns
5 several companies in the United States. Of these,
6 there are two principal operating entities:
7 Methanex Methanol Company, Methanex-US, which is
8 responsible for methanol sales and inventory; and
9 Methanex-Fortier, Inc., which is responsible for
10 methanol production. Methanex-US is a Texas
11 general partnership owned by two companies,
12 Methanex, Inc., and Methanex Gulf Coast, Inc., both
13 incorporated in the State of Delaware. Methanex
14 indirectly owns 100 percent of the shares of both
15 partners. Methanex-Fortier is also incorporated in
16 Delaware, and Methanex also indirectly owns
17 100 percent of the shares in this company. While
18 the U.S. apparently is part of a scorched-earth
19 litigation approach questions these facts, I'm
20 pleased to assure the Tribunal of the very real and
21 legal existence. In fact, I'm a director and vice

1974

1 president of each of these companies.

2 So, there you have sworn testimony from a
3 director and officer of the companies as to the
4 ownership that's there.

5 Now, the U. S. -- and he further provided a
6 detailed chart that specifically corroborates these
7 statements. We submit that there is actually no
8 basis to challenge them. They didn't even bother
9 to cross-examine Mr. Macdonald. This is
10 uncontroverted, clearly competent evidence as to
11 who owns these companies, and that should be an end
12 to it.

13 Now, even beyond that, they say there is
14 no additional evidence of that. If you see at the
15 next page, this is a chart from Methanex's annual
16 report. It's a simplified chart, but it shows the
17 same thing.

18 Now, again, this was filed with the United
19 States Securities and Exchange Commission under
20 penalty, criminal penalties, if it's fraudulent or
21 wrong. The U. S. ignored this completely, and

1975

1 insisted time and time again that Mr. Macdonald
2 produced more and more evidence of the evidence of
3 ownership.

4 And finally, the United States has not
5 asserted any reason to disbelieve anything that
6 Mr. Macdonald has said. It has done nothing. It's
7 provided no evidence to rebut anything that
8 Mr. Macdonald has said. This is sheer vexatious
9 litigation with no basis in the record whatever.

10 Now, that said, this is a good time to
11 talk about costs. Methanex believes it's fully
12 entitled to all costs and fees in this case because
13 of this type of vexatious litigation tactic. The
14 no-investment argument was frivolous. It never
15 should have been brought, and it should have never
16 been pursued. And the same was true at the
17 jurisdictional stage. If you recall, the United
18 States, I think, launched a number of
19 jurisdictional challenges, either six or seven, and
20 lost most of them. And the reason it lost most of
21 them is it didn't belong at that stage. I never

1976

1 heard of a proximate cause challenge to the
2 jurisdictional phase, and on its face it seems to
3 be frivolous. Proximate cause analysis is so
4 entirely bound up with the facts of the case that
5 bringing it at that stage can only be considered as
6 vexatious and frivolous.

7 Now, just because this is unusual case
8 with unusual allegations under a novel legal
9 instrument that's only been around for 10 years in
10 an area of law that's developing, that doesn't
11 justify putting up frivolous argument after
12 frivolous argument, and we think that's has been
13 the case here. And we think because of the way the
14 United States has conducted this litigation it
15 should be liable for all the costs and fees.

16 Next, I would like to go to the question

17 of damages, and the first point I would like to
18 make--and I don't think this is rebutted by the
19 United States--the most obvious element of damages
20 here is that Methanex has now lost its California
21 market. It's lost its customers in California.

1977

1 Prior to the time of the ban, it used to sell to
2 Chevron and Valero and Tosco and the other
3 integrated oil companies, all of which are set
4 forth in the record. Now it cannot sell to them.
5 That loss of revenue, that loss of customers, that
6 loss of market share is an obvious damage to the
7 corporation, and United States does nothing really
8 to refute that.

9 Secondly is the drop in the share price,
10 and the United States says that Methanex keeps
11 coming up with different theories, and Methanex, in
12 response to United States, went back and looked at
13 the one period that the United States had
14 proffered, which was in late January, early
15 February, 1999, to see what was the cause of that
16 decline. And it turns out from the record, which
17 is copiously described by Mr. Macdonald in his
18 affidavit, that drop was caused by the MTBE ban, as
19 well.

20 So, in terms of damage to the corporation
21 reflected by the stock price, we, in essence, break

1978

1 it up into three segments: We have the preemptive
2 drop of approximately 21 percent in late January
3 and early February--and again, the evidence is in
4 the record that the MBE ban was very much on the
5 minds of investors at that time--we had the
6 immediate drop of 10 percent on the day after the
7 ban was announced; and we have the same drop of
8 15 percent over the next 10 days. And the total of
9 those cumulate to approximately 30 percent.

10 And that is a fact which shows very, very
11 severe damage to Methanex as a corporation. And
12 there is no showing--you will see at the right-hand
13 side of that that the price has since climbed back
14 up. That's because of the price of methanol has
15 gone up. But there has been no showing that the
16 damage that was inflicted upon Methanex by the MBE
17 ban has been fully recovered. The United States
18 simply hasn't shown it.

19 And a generalized showing that the share
20 price has increased is not a particularized showing
21 that there has not been a fact of damage. That, I

1979

1 think, is conclusively established by the drop in
2 the share price that we tied to analyst reports and
3 we tied to the timing of the MBE ban.

4 Now, the U. S. also asserts that a drop in
5 share price is not a damage to a corporation. It's
6 a damage to the corporation shareholders. And as a
7 matter of law, we think that that's just not true.

8 I'm skipping over a couple of exhibits that show
9 fairly graphically the drop in the share price, but
10 if I could get to the legal issues--and this is Tab
11 40--these are some quotes from some authoritative
12 sources.

13 D i m i n u t i o n--

14 MR. LEGUM: Mr. President, these are
15 authorities that have never been before offered to
16 the Tribunal or to the United States, and we object
17 to their being introduced at such a late date.

18 PRESIDENT VEEDER: Are all these new, Mr.
19 Dugan?

20 MR. DUGAN: They are new, but I didn't--I
21 had no idea that I didn't understand that the

1980

1 closing argument was limited to legal sources in
2 direct. This is not evidence. This is law. And
3 it's always been my understanding that you can put
4 in new law at any stage up to the closing.

5 PRESIDENT VEEDER: Could we just raise a
6 preliminary issue we would like to discuss with
7 you, which is that we ordered bifurcation, and we
8 decided in our order last summer to put off all
9 issues of quantum. Does that affect your argument?

10 MR. DUGAN: Well, if the Tribunal is
11 willing to rule there is, in fact, damage, what the
12 United States--the position that the United States
13 is taking is that there is no damage whatsoever
14 and, therefore, the case can't proceed. We agree

15 with you completely that quantum has been put off,
16 but we are trying to respond to the U.S. argument
17 there has been no damage at all.

18 PRESIDENT VEEDER: So, you have got to
19 establish the probability on the balance of
20 probabilities. It's all or nothing.

21 MR. DUGAN: Exactly.

1981

1 PRESIDENT VEEDER: And that gets you
2 through the bifurcation.

3 MR. DUGAN: Correct, which gets us to the
4 next stage. We are just trying to show that from
5 the evidence in the record that the only thing the
6 Tribunal can conclude is that there was, in fact,
7 damage to the corporation. How much we have not
8 attempted to show.

9 PRESIDENT VEEDER: Before we look at this
10 to make a ruling, could you talk us through the new
11 legal materials. We are looking at Tab 40.

12 MR. DUGAN: This is Tab 40. These are
13 things like the encyclopedia of private law of
14 corporations that show, as a matter of law, a
15 damage--a drop in the share price is a damage to
16 the corporation.

17 PRESIDENT VEEDER: These are all U.S.
18 legal materials?

19 MR. DUGAN: These are all U.S. legal
20 materials, yes.

21 PRESIDENT VEEDER: Just looking at these

1982

1 abstracts, and in the absence of some injury
2 suffered by the corporation, can the corporation
3 recover for a diminution in its share price?

4 MR. DUGAN: I think it depends on the
5 circumstances. We're involved in a proceeding
6 where we hope to recover not for the damage--not
7 for the decrease in the share prices. We are
8 offering this--our calculation of damages is not
9 based on the decrease in the share price. The
10 calculation is based on an entirely different
11 market analysis.

12 We proffer this as evidence of the fact
13 that the drop in the share price is both a legal
14 injury to the corporation and that it's evidence of
15 the injury that the corporation suffered because of
16 the MTBE ban.

17 And again, this is evidence that under
18 some legal analysis, a drop in the share price is
19 considered to be a direct injury to the
20 corporation, and an injury which the shareholders
21 can recover from for derivatively.

1983

1 PRESIDENT VEEDER: Mr. Legum, I don't
2 recall if we ever actually addressed whether new
3 legal materials can be brought in at this stage.

4 MR. LEGUM I don't believe there has been
5 a specific ruling on that, either.

6 PRESIDENT VEEDER: Are there any other
7 legal materials tonight that you are going to
8 introduce tonight that are new, Mr. Dugan?

9 MR. DUGAN: There is one source on
10 proximate cause to Prosser and Keeton.

11 PRESIDENT VEEDER: What tab number is
12 that?

13 MR. DUGAN: That would be Tab 52.

14 MR. LEGUM: I believe Tab 41 also reflects
15 the new materials.

16 MR. DUGAN: Tab 41 as well, but that's the
17 same thing we're arguing about right here. But the
18 Prosser and Keeton description of proximate cause,
19 I think, has been included in the legal materials
20 before this. It's--certainly the basic
21 description, I think, has been included.

1984

1 PRESIDENT VEEDER: Mr. Legum, given we may
2 take some time to debate this, we are minded it to
3 let it in. If it causes a difficulty to the United
4 States in presenting this tomorrow, we will
5 obviously hear you sympathetically tomorrow.

6 MR. LEGUM: Very well, but in the
7 meantime, I'm assuming that Methanex will be
8 providing us and the Tribunal with fuller copies of
9 these authorities?

10 PRESIDENT VEEDER: Well, this is the
11 difficulty. I think these are sound bites and they
12 don't go very far as sound bites, particularly

13 since they are limited to U.S. legal materials.

14 Were you intending to put in the full
15 report, Mr. Dugan?

16 MR. DUGAN: We could certainly put in the
17 full report.

18 PRESIDENT VEEDER: We're not necessarily
19 asking for you to do that, but I'm asking whether
20 you intend to do that.

21 MR. DUGAN: We'll do that. We'll provide

1985

1 them -

2 PRESIDENT VEEDER: And can you get those
3 to the United States tonight?

4 MR. DUGAN: We could get them to the
5 United States tonight, yes.

6 PRESIDENT VEEDER: I think they are more
7 important than us tonight. They've got to have a
8 chance to consider these new materials.

9 And again, if the United States has any
10 new legal materials tomorrow, it's useful to get
11 them over to Mr. Dugan before we start at least at
12 2:30.

13 MR. LEGUM: I don't think we will, but if
14 we do, we will.

15 MR. DUGAN: All right. I won't read each
16 one of these individually. The first one, I think,
17 states the principle very concisely. Diminution in
18 the value of corporate stock resulting from some
19 depreciation or injury to corporate assets is a
20 direct injury only to the corporation. It is

21 merely indirect or incidental injury to an

1986

1 individual shareholder.

2 And we submit that, applied here, that
3 principle shows that the diminution in the value of
4 Methanex's stock resulting from the MBE ban which
5 eliminated its market in California is a direct
6 injury to the corporation, and that that--applying
7 that principle to the facts of the Methanex share
8 drop conclusively establishes the fact of damage to
9 Methanex.

10 Now, whether or not that damage has been
11 mitigated by the rise in the share prices as a
12 result of the change in the price of methanol, is
13 no way a showing that that damage has been
14 alleviated; and the fact of the matter is, it
15 hasn't. And that fact of damage is enough to
16 establish the level of damage needed to get through
17 to the second phase, the bifurcated phase, of the
18 hearing.

19 Now, the U.S. also argues that the drop in
20 the debt rating that Methanex quite clearly
21 suffered is not damaged because Methanex didn't

1987

1 issue any debt, which is true. But again, Methanex
2 would submit that whenever a corporation has to
3 suffer a public downgrading of its debt rating, and

4 when that downgrading is expressly tied to an MTBE
5 ban, that alone is a fact of damage. The quantum
6 of that damage may be very difficult to quantify,
7 but a decrease in the debt rating, if nothing else,
8 causes reputational harm. It undoubtedly has a
9 carryover to the damage inflicted on the share
10 price, but that alone is a fact of damage that's
11 sufficient to establish damage for purposes of
12 1116.

13 Next, the U. S. does not dispute that the
14 shift to ethanol in California has resulted in a
15 permanent loss of 6 percent of world demand. The
16 statements of Pierre Choquette that they cited
17 illustrate that. And if you will turn to Tab 42,
18 Mr. Choquette talks about the reduction in MTBE
19 consumption in the United States is taking place,
20 but, of course, it's overshadowed by supply
21 constraints, so it's hard to see the impact of the

1988

1 reduction.

2 First of all, he doesn't say it doesn't
3 cause any problems. He said it's overshadowed by
4 supply constraints. But, more importantly, he
5 talks about a loss of demand of 750,000 tons per
6 year, and that's 50 percent of the market in 2002.
7 If you double that, it's 1.5 million tons per year
8 in permanent demand loss. That's the impact of the
9 ban in California on the global supply market.

10 Now, there is no doubt that methanol is a

11 global commodity, and the price responds to those
12 types of things quite quickly. And what we have
13 cited next at Tab 43 is testimony from Mr. Burke,
14 (reading):

15 Well, methanol is a globally traded
16 commodity; do you agree with statement?

17 Yes, I would.

18 So, demand changes in one region
19 ultimately affect the global supply and
20 demand balance for methanol; you would
21 agree with that?

1989

1 Yes.

2 It's a global commodity, and any commodity
3 market which use loses 6 percent of demand has lost
4 a very significant element of demand.

5 Now, the next chart which is taken from a
6 Methanex annual report, I think, illustrates this.
7 You see this is the price history for methanol, and
8 you can see that it's very, very volatile. It's
9 always been like that. Like many commodities, it's
10 volatile. It could go up and down sharply.

11 Now, at the present time we're in a strong
12 market, but the fact of the matter is with
13 6 percent extra demand, the only inference the
14 Tribunal can draw is that the price would be much
15 higher. That's what happens: Supply and demand.

16 And you will see that the price of
17 methanol went much higher in 1994, and Methanex
18 submits that but for the 6 percent drop in demand

19 caused by the shift to ethanol in California that
20 the price of methanol would be approaching what it
21 was in 1994. Methanex would be making more

1990

1 revenues and a lot more profits because the price
2 would be higher.

3 Now, to get to some of Mr. Choquette's
4 statements that we believe the United States took
5 out of context, this is one of the statements that
6 they quoted, and the full statement says this:
7 There is no new news related to MIBE. It--the loss
8 of the California market--just happens to be coming
9 at a time where it's unlikely to have any
10 significant impact.

11 Now, that's the part they quoted. But he
12 went on to say, The impact of what might happen in
13 California over the next year, but, you know, the
14 longer term, that the California MIBE ban would be
15 a factor. Now, that's Mr. Choquette saying the
16 long-term effect of the California ban is going to
17 be a factor.

18 United States attributed almost prophetic
19 status to everything Mr. Choquette says. Methanex
20 submits that here he recognizes that in the long
21 term it's going to be a factor, and quite obviously

1991

1 it's not going to be a good factor; it's going to

2 be a damaging factor.

3 Similarly, next slide, page 46, the United
4 States quoted the portion of the--this quote that's
5 not highlighted, or it's not bolded: We don't
6 expect the impact of such a change to have much of
7 an impact on pricing, if at all. But, if you take
8 the whole statement in context, he's obviously
9 talking about a short-term analysis. And again,
10 many of these comments are made at either quarterly
11 earnings conference calls or investor--investor
12 meetings where the emphasis is almost always on the
13 short term. As we look forward to the switch to
14 ethanol over the next year or so--so, by the end
15 this year, sometime early next year--in our view,
16 the current supply-and-demand environment, and it
17 goes on to quote the statement. This is very much
18 a short-term analysis, not a long-term analysis.
19 And in the long term, Mr. Choquette expressly
20 recognized that there would be damage to Methanex.

21 Again, there was a selective quotation

1992

1 from Mr. Macdonald's affidavit. If you read the
2 full quotation, he focuses--the last sentence: In
3 other words, pricing is currently robust due to
4 supply limitations compared to the underlying
5 demand. That emphasis is supplied, but I think it
6 illustrates the point. You can't extrapolate from
7 what's happening right now in the market what's
8 going to happen in the future. Methanol is very

9 volatile. The bottom could fall out of the market
10 next month; and in that case, there could be
11 buckets of red ink at Methanex, and the red ink
12 will be even greater, the losses would be even
13 greater, because at this point the methanol market
14 has lost 6 percent of demand. And in a commodity
15 market, and in global commodity market, that is a
16 huge drop in demand that at the margins has a
17 tremendous impact on the price, it has tremendous
18 impacts on the revenues of Methanex, and it has a
19 tremendous impacts on the profits of Methanex.

20 Now, with respect to Fortier, the next
21 exhibit is the statement issued by--or I guess the

1993

1 annual report issued by Methanex at the time that
2 it idled Fortier, and Fortier was not shut down in
3 1999, and this says exactly what happened to it.
4 In Fortier, Louisiana, we reached a new
5 understanding with our partner, Cytec. As a
6 result, we now have hundred percent ownership and
7 gained much needed flexibility. This plant will
8 remain shut down until market conditions are more
9 favorable. So, that's why it was idled, because it
10 was waiting for better market conditions.

11 Now, again, the next slide is from
12 Methanex's 2002 annual report, which the United
13 States notes is filed with the SEC, subject to the
14 stringent requirements of accurate reporting
15 imposed by the securities laws. Limiting or
16 eliminating the use of MTBE in gasoline in

17 California or more broadly in the United States
18 will reduce demand for MTBE and methanol in the
19 United States and negatively impact the viability
20 of MTBE and methanol plants such as our Fortier
21 facility in the United States.

1994

1 So, that's a securities law
2 acknowledgement of the continuing impact of the
3 MTBE ban on the viability of Fortier.

4 Now, what we have next in the book are two
5 selections from Mr. Macdonald's third affidavit,
6 and they're put in here just to show that all the
7 while that Fortier was shut down, it was still
8 being carried as a potentially--as a plant that
9 could potentially be reactivated if the price went
10 up. And this is paragraph 10 of Macdonald's third
11 affidavit: We have spent approximately 5 million
12 CAFRB cash per year over the past several years
13 since idling the plant to maintain our ability and
14 flexibility to reopen the plant. And while it
15 would be accurate to say that a significant portion
16 of this expenditure was to meet contractual
17 obligations, it's also a fact that the structure of
18 such payments was specifically tailored to maintain
19 our ability to restart the plant.

20 Similarly, on the next page, Mr. Macdonald
21 puts in testimony--and again, this testimony is

1 uncross-examined and uncontradicted. It's one
2 thing for the United States to speculate on what
3 might have happened when Methanex did a particular
4 act. It's another thing to try to bring out
5 through cross-examination. They chose not to do
6 that. And so this stands effectively unrebutted
7 and uncontradicted.

8 Paragraph 12, Mr. Macdonald puts in
9 evidence as to why Fortier was finally and
10 permanently shut down. On February 18, 2004, at a
11 regular meeting of our executive leadership team,
12 of which I'm a member, Methanex took the decision
13 to cease all discretionary payments related to our
14 Fortier and Medicine Hat, Canada plants and to
15 proceed toward permanent abandonment of those
16 assets. In arriving at this decision, our
17 discussion included both aspects of the economic
18 outlook for our remaining North American assets,
19 namely gas price and market demand. The permanent
20 loss of California MTBE demand with the ban now
21 having been fully implemented and the losses

1996

1 triggered by bans in other states was a substantial
2 consideration in our decision.

3 Again, Mr. Macdonald's testimony is
4 uncontradicted, uncross-examined, and it has to be
5 accepted as evidence of why Methanex finally
6 decided to permanently close Fortier.

7 And I think if you put this together with
8 the evidence about the 6 percent loss in demand and
9 the volatility of the market, the reason is quite
10 clear. But for the California ban, there would be
11 6 percent more demand. With 6 percent more demand,
12 the price for methanol would be much higher. If
13 the price for methanol was much higher, they
14 wouldn't have decided to close Fortier.

15 So, it's Methanex's position that the ban
16 in California had a direct link to the final
17 closure of Methanex-Fortier.

18 Now, if the United States has said no, the
19 reason why Methanex-Fortier was closed is because
20 plants in the Gulf cannot make money because the
21 price of gas is so high, and they're half right.

1997

1 The price of gas is very high, but that doesn't
2 mean plants there can't make money. Plants make
3 money if their price exceeds their costs, if their
4 revenues exceed their costs.

5 And one of the pieces of evidence that the
6 United States pointed to in showing how dire the
7 situation is for the methanol industry of the
8 United States was the statement of Mike Bennett.
9 It's at Tab 51. And it says that 34 percent of
10 U.S. capacity has been permanently closed, which is
11 true, but the converse of that is also true:
12 66 percent of permanent capacity remains open--most
13 of that is in the Gulf states--and there is no
14 reason to believe they aren't making money;

15 otherwise, they would be closed, too. And again,
16 if the price were high enough, Fortier could have
17 made money, regardless of the high cost of gas.
18 And the price is not higher because of the
19 6 percent drop in demand caused by the California
20 MTBE ban.

21 The JS cite for that particular exhibit is

1998

1 16 JS tab 48. That's the Mike Bennett quote.

2 Now, Methanex believes that all five of
3 those indicia of damage are sufficient to establish
4 a very serious damage to the corporation. And
5 again, the chart that the United States showed you
6 showed an increase in share price and decrease in
7 methanol price in recent years. There hasn't been
8 any showing that that wiped out the damage. We
9 know that we have very significant damage in 1999
10 when the price dropped--the price of the stock
11 dropped precipitously, and we know that the debt
12 rating dropped precipitously, or dropped. The U. S.
13 cannot show that that damage was eliminated. A
14 cyclical rise in the price of methanol does not
15 necessarily eliminate all the damage that was
16 inflicted at that time.

17 Now, would our damage calculation now be
18 different from what it was in 1999? Almost
19 certainly, but what that difference is, we don't
20 know. It remains the fact that Methanex was
21 damaged in 1999-2000, and remains damaged, and

1999

1 that's enough to satisfy the criteria at this stage
2 and see the case through to the quantum stage with
3 respect to damages.

4 Now, with respect to proximate cause, the
5 chart we put up is just a plain vanilla
6 description, a legal description of what is
7 proximate cause from Prosser and Keeton, a
8 well-known treatise in the United States. It's
9 described-- proximate causation is described as some
10 reasonable connection between the act or omission
11 of the defendant and the damage the plaintiff has
12 suffered.

13 Now, two principal points with respect to
14 this. Again, going back to the California market,
15 it's a binary choice market. And I won't put the
16 slide back up there, but from the slide that we put
17 up previously, it shows it quite clearly. In 1999
18 and 2000, Methanex and the methanol industry sold a
19 lot of methanol into California. Now it sells
20 none. 1999, Methanex had customers in California.
21 The integrated oil refineries who bought methanol

2000

1 for use in making RFG. Now it has none.

2 And we showed you the Valero contract, and
3 directly as a result of the California MTBE ban,
4 Valero stopped buying methanol from Methanex.

5 That, we contend, far more than meets the
6 requirement of some reasonable connection between
7 the act of the defendant and the damage the
8 plaintiff has suffered. It's not just a reasonable
9 connection. It is direct cause and effect. The
10 ban went in place, our customers disappeared. We
11 submit that that satisfies any criteria for
12 proximate cause.

13 In addition, we submit that the permanent
14 drop of 6 percent demand and the admission by the
15 United States expert that this is a global
16 commodity market, that the ordinary understanding
17 of any global commodity market is that when you
18 have a 6 percent permanent drop in demand, that's
19 going to permanently affect the price, at least
20 until as long as the capacity is taken up. But
21 that type of permanent drop in demand will have a

2001

1 corresponding impact--in fact an exaggerated
2 impact--because it is a volatile commodity market
3 that will continue to cause damage to Methanex for
4 some period of time.

5 ARBITRATOR REISMAN: One clarification
6 going back to Fortier. Fortier did not supply
7 California; is that correct?

8 MR. DUGAN: Fortier did not supply
9 California, that's correct.

10 ARBITRATOR REISMAN: So, why would the
11 drop in demand in California affect Fortier? I can
12 understand why it would affect Medicine Hat, but

13 why Fortier?

14 MR. DUGAN: Because it's a global market.

15 ARBITRATOR REISMAN: No, global market is
16 simply a concept, but if Fortier does not sell
17 under these circumstances to California--Fortier
18 has a segmented customer base; it doesn't sell to
19 California. Why is it that when California no
20 longer purchases MTBE or allows MTBE Fortier
21 suffers, what is the proximate relationship there?

2002

1 MR. DUGAN: Perhaps you reject the notion
2 of a global market, but when there is a decrease in
3 demand, the plants that don't get reopened are the
4 ones that operate at the margins. And again, had
5 the price but for the California ban, the demand
6 for MTBE would be higher. If the demand for MTBE
7 were higher, the price would be higher. And if the
8 price would be higher, Fortier could perhaps
9 reopen. That is the logical consequence. And it
10 it's because it is a global market. It is a
11 pricing factor because the MTBE ban has had such an
12 impact on the price of methanol and depressed it
13 below what it otherwise would be. That's what's
14 contributed to the closure of Fortier.

15 Just so you don't misunderstand, the sales
16 into California were sales from Methanex-US, the
17 other main Methanex company.

18 ARBITRATOR REISMAN: Which is a marketing
19 company?

20 MR. DUGAN: Which is a marketing and
21 distribution company, which has real assets. It

2003

1 has a fleet of rail cars. It has leases where it
2 stores it.

3 ARBITRATOR REISMAN: I'm glad you raised
4 that point. I would like to get a clarification on
5 that, if I may. I don't mean to interrupt your
6 presentation, but since you raised it, Methanex-US
7 did not, as it were, receive supplies at a depot in
8 Texas and then tranship them to California. The
9 supplies were shipped directly from Medicine Hat to
10 California?

11 MR. DUGAN: But I think they were shipped
12 and may have been stored in inventory in
13 California, in Methanex-US's inventory in
14 California.

15 ARBITRATOR REISMAN: But they came
16 directly from Canada as opposed to supplies that
17 might have been produced in Fortier, which would
18 have been sent from the U. S. --from Methanex
19 investment in the United States which would have
20 been sent directly to California. Do they--do the
21 imports from Medicine Hat qualify as investments

2004

1 just because you have a marketing center in Texas?

2 MR. DUGAN: Well, I think the way we

3 approach the question is that Methanex-US, the
4 distribution and marketing arm, is quite clearly an
5 investment in the U.S. It has all the requisite
6 properties needed to be an investment in the U.S.
7 It has assets, real assets, and intangible assets.
8 It has employees. It has income. It transfers the
9 income to its parent corporation.

10 There is no reason whatever to doubt that
11 it is a very substantial company, and that's laid
12 out in the Macdonald affidavit.

13 ARBITRATOR REISMAN: Yes, and I understand
14 that, and that seems to be beyond any question.

15 MR. DUGAN: Right.

16 ARBITRATOR REISMAN: My question, to put
17 it in more general terms, is where an investor
18 establishes an investment, does that investment
19 transform anything that it regularly effectively
20 imports into the United States into an investment
21 by some sort of association or affiliation?

2005

1 MR. DUGAN: Well, I don't think it
2 transforms the imports into an investment, and
3 that's not our case. Our case is that Methanex-US
4 is an ongoing concern. It's an ongoing operation
5 with a going value--going-concern value. And that
6 consists of not just its tangible assets such as
7 its rail cars and its storage depots, but it's
8 also--the assets of the corporation include its
9 customer base, its goodwill, its customer list, and
10 its market share. And it was those assets of the

11 investment that were damaged by the MBE ban. It
12 was the elimination of that market share--that list
13 of customers, if you will--that damaged
14 Methanex-US.

15 Now, again, it's an active operation, and
16 if you had a situation where simply assets were
17 coming--imports were coming straight into the
18 country without any corresponding U.S. investment,
19 to manage the sale and the distribution of those
20 assets, it would be a much different situation, but
21 obviously that's not what we are faced with here.

2006

1 Now, the U.S. also makes the point that
2 NAFTA--that Chapter 11 is not meant to apply to
3 cross-border trade, but there had been a string of
4 cases saying the various chapters of NAFTA are
5 cumulative, and you could have a situation that
6 involves both cross-border trade and investment,
7 and I think that's precisely what the situation is
8 here.

9 So long as Methanex meets the criteria for
10 bringing a claim under Chapter 11, the fact that
11 the original source of the products is Canada and
12 not Fortier is irrelevant. If we can show a damage
13 to our investment assets in the United States, then
14 we meet the legal criteria for bringing a Chapter
15 11 claim, and it's simply irrelevant where the
16 assets originated from.

17 And if, indeed, Methanex has or Canada is

18 entitled to protections under other Chapters of
19 NAFTA for the cross-border trade, that is also
20 irrelevant. The question here is whether
21 Methanex-US, as a U.S. investment with real assets,

2007

1 both tangible and intangible in the United States
2 has been damaged. If it has been, then it meets
3 criteria for a Chapter 11 claim

4 Now, I have actually got only about 10
5 minutes, I think.

6 Now, one point I would like to make, I
7 have spent a lot of time today in the opening
8 pointing to what we think is one of the more
9 significant--what is the most significant factor,
10 and that is the shift to ethanol. That's Governor
11 Davis's decision not just to ban MTBE, but to shift
12 to ethanol.

13 His decision in the Executive Order in
14 March 1999 to evaluate only ethanol, and
15 Mr. Kenny's statement to Congress in October of
16 1999, prior to the time that any evaluation was
17 completed, that ethanol was going to be--was going
18 to be, will be, I think is the phrase, substituted
19 for MTBE because it's the only feasible oxygenate.

20 Now, we have made that point that there
21 was this precipitous shift to MTBE without any

2008

1 environmental justification, without any rational
2 justification whatsoever for quite a long time, and
3 you know what Methanex's position is as to why they
4 shifted so precipitously to ethanol. But I've
5 never heard the U.S. response. I never heard the
6 U.S. explain what it could possibly be meant by
7 Mr. Kenny when he said in October of 1999 that
8 ethanol was the only feasible alternative. We
9 never heard an explanation from the United States
10 as to why Governor Davis selected only ethanol as
11 an oxygenate to evaluate in March of 1999. And
12 that's a very, very important point for our case.
13 It's a very, very important piece of evidence.

14 And the United States has a habit of
15 simply ignoring inconvenient and stubborn facts and
16 then waiting to the last moment to come up with
17 some purported justification for what really
18 happened. We think, as a matter of the requirement
19 of UNCITRAL for an opportunity, a fair opportunity,
20 to present our case that if they come back tomorrow
21 and try to explain why Mr. Kenny said in October of

2009

1 1999 that ethanol was the only feasible oxygenate,
2 or if they come back tomorrow with some explanation
3 as to why Governor Davis selected ethanol and only
4 ethanol for evaluation in March 1999, that we
5 should have a chance to respond to that, however
6 briefly. We never heard their explanation, and we
7 think we are entitled to respond to it, whatever it
8 is.

9 Now, the last thing I would like to draw
10 the Tribunal's attention to is the chart that the
11 United States itself put up with respect to a
12 statement of Mr. Macdonald, in which they said that
13 this was somehow evidence of improper intent. We
14 think that's virtually perverse. We think what it
15 shows is something entirely the opposite.
16 Mr. Macdonald stated that a lot of the energy today
17 in the U.S. is on energy security, and methanol has
18 pounced on that, said Michael Bennett, senior vice
19 president of technology for Methanex. The voice of
20 methanol has not been heard in that debate, he
21 said. Our strategy, as a company, was to get

2010

1 involved through an international trade dispute.

2 And then he goes on, and this is the
3 important point: That's the only forum where we
4 have an opportunity to even get a hearing, because
5 the media and the rhetoric of the ethanol lobby had
6 made it difficult for the facts to be heard, he
7 said.

8 And that's precisely the point. Methanex
9 agreed to open this hearing--it didn't have to, and
10 it agreed to open this hearing--before there were
11 any rulings, before the FTC interpretation, because
12 I think it's important for this to be an open
13 hearing and for the facts to get out.

14 PRESIDENT VEEDER: But just don't forget
15 the point you might want to make. When this case

16 started, it wasn't intended to be an open hearing.

17 MR. DUGAN: That's my point, and we agreed
18 to open it up because we thought it important to be
19 aired publicly, the facts with respect to what
20 ethanol has done be heard publicly, and that is the
21 reason Methanex changed its position and agreed to

2011

1 it.

2 But more importantly, and here is the key
3 to this: Methanex did not believe that it would
4 get a hearing, much less a fair hearing, in
5 California from Governor or Davis for all of the
6 obvious reasons that had been presented here.
7 Methanex did not believe it would get a fair
8 hearing from the United States Government. The
9 Federal Government itself created the ethanol
10 industry with the Federal tax subsidy in 1977, and
11 since then has continued the subsidies and put in
12 place a whole range of programs designed to protect
13 and cosset the ethanol industry, including, for
14 example, the 54 percent gallon import duty.
15 Methanex did not believe it could get a fair
16 hearing from the Federal Government, either.

17 Methanex did believe it could get a fair
18 hearing from a neutral international tribunal,
19 where it could present the facts, it could present
20 the law, and it could respectfully ask for a
21 decision on the merits, independent of the

1 political pressures that exist in California and in
2 Washington, D. C. , and that's why it brought this
3 case to this Tribunal.

4 And that's what it asks for here: A fair
5 hearing and a decision on the merits of case,
6 independent of the politics of ethanol.

7 Thank you.

8 PRESIDENT VEEDER: Thank you very much,
9 Mr. Dugan.

10 Just before we wrap things up because we
11 still have a little time, the matters on which you
12 are going to come back to us, Mr. Dugan, was a
13 package of the relevant California regulations, the
14 three sets of regulations: the original, the
15 proposed, the ones as they came into force.

16 MR. DUGAN: Right.

17 PRESIDENT VEEDER: And I think also in
18 answer to my colleague, Mr. Rowley, you were going
19 to come back with some answers regarding political
20 contributions.

21 MR. DUGAN: Right. I think I could answer

1 that now, actually.

2 And this is--I'm citing footnote 78 from
3 the U. S. rejoinder, and I have no reason to believe
4 this is not true. Methanex Management,
5 Incorporated, a subsidiary of Methanex Corporation,
6 made a \$10,000 donation to the Democratic National

7 Committee and a \$15,000 donation to the Republican
8 National State Elections Committee one week apart.
9 They were returned, even though Methanex
10 Management, Inc., a U.S. couple, I believe, because
11 they were drawn on a Canadian bank. Thereafter,
12 Methanex has made no more contributions to the--any
13 politician in the United States and has a corporate
14 policy against it.

15 And we are going to get the cases to the
16 United States tonight. I assume you would like
17 them by E-mail?

18 MR. LEGUM: That's okay.

19 PRESIDENT VEEDER: Could we go through as
20 housekeeping matters certain matters which we need
21 to address. You're still pursuing your application

2014

1 to maintain the three exhibits which you adduced in
2 evidence in response to the amici submissions.
3 These are Tabs 3, 13, and 14 of volume one to your
4 response to the amici submissions which were
5 opposed by the United States. If you have anything
6 to say further beyond your written submissions on
7 that, we would gladly hear you.

8 MR. DUGAN: I do not.

9 PRESIDENT VEEDER: In regard to your
10 motion regarding the travaux, we have asked you
11 some questions and you have done your best to
12 answer them. Do you need any more time to
13 elaborate on your answers further?

14 MR. DUGAN: No, we do not.

15 PRESIDENT VEEDER: Canada and Mexico have
16 not yet intimated they want to address us orally at
17 this hearing, but they have intimated that they
18 would like to put in possibly further written
19 submissions under Article 1128 after this hearing.
20 If they did so, would you be minded to want an
21 opportunity to respond to those written

2015

1 submissions?

2 MR. DUGAN: We would like an opportunity
3 to respond. I'm not sure that we will, but we
4 would like an opportunity to respond, number one.

5 But number two, I would like--the
6 signatories have had a tendency to comment on
7 factual matters in the case. I believe that the
8 Article gives them the right to comment on the
9 interpretation only, and we would request the
10 direction from the Tribunal that if they are going
11 to comment that their comments be limited to an
12 interpretation of the Treaty itself.

13 PRESIDENT VEEDER: Next, although the
14 transcript has been splendidly produced and
15 prepared, there are occasional mistakes which we
16 can see. What we have in mind, and will address
17 this tomorrow with both parties, is a procedure for
18 correcting any significant errors. We are not
19 concerned with obvious errors or minor matters, but
20 we would want a fairly prompt timetable for
21 notifying errors between the parties and agreeing,

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1 where they can, certain corrections; and where they
2 can't agree, parties can notify us with respective
3 corrections. But we will come back to that
4 tomorrow, if you could think about your position
5 about that.

6 The other matter is costs which you
7 touched on. We need some information about costs
8 from both parties, and what we are minded to do is
9 asking for the parties in a fairly short order to
10 produce their respective figures broken down at
11 least in part with any submissions in support of
12 the quantum of costs to date. And we also
13 envisaged there would be an opportunity for each
14 party, disputing party, to comment on the other
15 side's figures. So, we need to build that
16 timetable into the future program after this
17 hearing.

18 Subject to that, unless anybody has
19 something to raise now, we will adjourn until 2:30
20 tomorrow afternoon, anticipating that we shall
21 finish by seven that evening.

2017

1 MR. LEGUM: That sounds very good, but
2 there is one matter that the United States will
3 raise tomorrow at the close of the hearing, and I
4 might as well provide advanced notice so everyone

5 has a chance to think about it, and that is that we
6 will request the Tribunal to enter an order closing
7 the proceedings subject to further order from the
8 Tribunal. I think after the last hearing there
9 were a succession of posthearing submissions and it
10 would be best if we maintain--if the Tribunal
11 maintained control over further submissions that
12 were received.

13 PRESIDENT VEEDER: You have in mind
14 Article 29 of the UNCITRAL Rules?

15 MR. LEGUM Yes.

16 PRESIDENT VEEDER: We'll come to that,
17 certainly.

18 MR. DUGAN: I would just like to note that
19 what I think you're referring to is the issuance of
20 the FTC interpretation that came after the close of
21 this jurisdictional phase, and that's what

2018

1 triggered the back and forth. And I would like to
2 reserve for the record our right to respond to any
3 purported interpretation issued by the FTC.

4 PRESIDENT VEEDER: Mr. Dugan, you are
5 quite right. That's what Mr. Legum had in mind,
6 but we could address that tomorrow.

7 Of course, it's not a complete closure.
8 The Tribunal always has the right to reopen, having
9 closed the hearing to the parties under Article
10 29(2).

11 But if that's all, we will stop here.

12 Thank you very much, Mr. Dugan. And we will start
13 again tomorrow at 2:30.

14 (Whereupon, at 6:40 p.m., the hearing was
15 adjourned until 2:30 p.m. the following day.)

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2019

1 CERTIFICATE OF REPORTER

2

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

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

16

17 DAVID A. KASDAN, RDR-CRR

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19

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21