DAVID HALL 6/4/13

Case Summary: *Methanex v. United States*

1. Claims – Methanex, a Canadian company and its U.S. subsidiaries, brought claim pursuant to NAFTA Articles 1116 and 1117 for $970 million USD against U.S. for two California "measures" – a 1999 executive order and the CaRFG3 regulations adopted in 2000—that banned the use of MTBE in reformulated gasoline in California, which Methanex claimed were adopted with the intent to discriminate against and to harm Methanex and all foreign methanol producers and to favor domestic ethanol producers, in violation of NAFTA Articles 1102, 1105, and 1110.

Art. 1102 – National treatment – the US, through California measures, intended to deny foreign methanol producers the best treatment it has accorded to domestic ethanol investors

Art. 1105 – Minimum Standard of Treatment – US measures were intended to discriminate against foreign investors and their investments, and intentional discrimination is by definition unfair and inequitable

Art. 1110 – Expropriation and Compensation – a substantial proportion of Methanex's investments, including its share of the California and US oxygenate markets, were taken by discriminatory measures and hand over to the domestic ethanol industry, which taking is at a minimum "tantamount to expropriation"

2. Timeline of Significant Events

2007 – California adopts S.521, which requires a comprehensive study of the environmental effects of MTBE on water quality, the environment, and health, and directs the governor to adopt an executive order to implement measures in response to the conclusion of the report once completed

1998 – Lt. Governor Gray Davis, candidate for governor, meets with executives of Archer Daniels Midland (ADM) at an ADM-hosted dinner in Illinois; ADM makes campaign contributions to Davis throughout gubernatorial election cycle

1998-1999 – University of California teams conduct study pursuant to S.521

1999 – UC Report issued; finds that MTBE does not add any additional air pollution gains relative to other CaRFG2 compliant formulas; MTBE is bad for the environment, pollutes water; MTEB may be bad for people, but data gaps exist; the cost for treatment of MTBE is potentially in the tens to hundreds of millions per year; all costs considered, MTBE is the most expensive option among non-oxygenated gasoline, ethanol-oxygenated gasoline, and MTBE-oxygenated gasoline. Conclusion: it would be best for CA to transition to non-oxygenated gasoline, but federal law requires a 2%

oxygenation rate, so CA should conduct a comprehensive assessment of MTBE alternatives, could implement a phase-out of MTBE, and could seek a federal waiver from the Clean Air Act's oxygenation requirements

1999 – Four months after UC Report – Governor's Executive Order; based on findings and recommendations of UC report; directs CA agencies to develop timetable for MTBE phase-out by 12/31/2002, to seek a federal waiver, and to review and report on the environmental effects of using ethanol in oxygenated gasoline

1999 – Initial request for federal waiver from oxygenation requirements; CA adopts S.989 for MTBE protection for water, codifies executive order; 1999 Cal EPA Ethanol Report finds than ethanol is less expensive and less harmful than MTBE

2000 – CaRFG3 Regulations adopted; prohibition on used of MTBE as of 12/31/02; ethanol only oxygenate allowed in CA

2002 – Executive Order delaying MTBE ban for one year due to cost concerns over available supply of ethanol-oxygenated gasoline

2003 – Amended CaRFG3 regulations expressly ban methanol as oxygenate

3. Methanex's Substantive Case

Methanex does not provide direct evidence of California's intent to discriminate against and harm Methanex and foreign methanol producers, but urges the tribunal to infer discrimination by "connecting the dots"

Dot 1 – CA wanted to create an in-state ethanol industry; Trib: facts don't support conclusion that CA sought to create an in-state ethanol industry with the intent to harm Methanex or other foreign entities

Dot 2 – Leakage of MTB from underground storage tanks was used as a pretext for favoring the ethanol industry; Trib: facts show the "measures" were adopted based on scientific research, and notes that Methanex doesn't challenge as a "measure" original bill S.521 – requiring investigation of USTs and methanol, which was adopted before Davis took office

Dot 3 – ADM executives were previously convicted for price-fixing in other industries, and its modus operandi is to influence policy through dubious or criminal means; ADM supported a ban on methanol, this influenced CA's decision-making process, and this is evidence the ban was discriminatory and intended to favor ethanol and ADM; Trib: ADM is a large company, conviction of officers in other industry has nothing to do with methanol or impugn CA's motives

Dot 4 – ADM made sequential contributions to Davis's gubernatorial campaign; though Methanex does not allege criminal intent, it repeatedly suggests that campaign contributions were part of a deal with Davis to aide ADM and ethanol; Trib: in the U.S. electoral system, campaign contributions are allowed subject to disclosure rules; contributions do not equal corruption; ADM donations were less than 1% of Davis's campaign budget; methanol industry also contributed to his campaign

Dot 5 – Davis went to a "secret" dinner with ADM executives in Chicago at which he was influenced, or made a quid pro quo, to benefit ADM and ethanol; Trib: facts don't support Methanex's conclusion; S. 521 adopted before Davis took office; 521 required Exec order to be narrow and consistent with UC Report; Davis pursued federal waiver for all oxygenates; 521 and subsequent legislation adopted by major consensus and motivated by popular concerns over MTBE and water pollution

Dot 6 – Methanex attributes a statement made by State Senator Burton to the effect that "one could benefit from the direction the methanol industry in CA is headed by selling Methanex stock short." Trib: unreliable "statement" is double-hearsay; even if true, one State Senator's statement on what was obvious in political climate has no bearing on case

3. Tribunal on NAFTA Claims

Article 1102 – National Treatment. "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

Trib: here the proper comparator for "like circumstances" is not the ethanol industry, but rather, the U.S. methanol industry, which is in identical circumstances as Methanex. Ethanol is an oxygenate; CA measures banned MTBE, an oxygenate of which methanol is *a component*. The ban and market effects on MTBE affected methanol producers uniformly; there was no intent to discriminate against investors of another Party.

Article 1105 – Minimum Standard of Treatment. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Trib: Cites 1105 standard articulated in *Waste Management*: "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial

proceedings or a complete lack of transparency and candour in any administrative process."

Trib: Article 1105 does not mention or preclude discrimination and does not prohibit differentiations between nationals and aliens that might otherwise be deemed legally discriminatory; consistent with the FTC's 2001 interpretation, a violation of Article 1102 does not equal a violation of Article 1105 (even assuming Methanex had demonstrated discrimination under 1102); Methanex has not demonstrated discrimination.

Article 1110 – Expropriation and Compensation. "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and(d) on payment of compensation in accordance with paragraphs 2 through 6."

Methanex: expropriation, as defined in *Metalclad,* includes market share, customer base, and goodwill – CA measures are tantamount to expropriation.

Trib: Agrees that the value of property expropriated can include intangible property such as market share, but no expropriation or taking of property occurred here – Methanex did not lose ownership or control of its businesses to California. Methanex must demonstrate CA ban was tantamount to expropriation:

"7. In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfills a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

8.As the arbitration panel decided in *Rever Copper & Brass, Inc. v. OPIC*: 'We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interest of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action.'"

Trib: No representations or reliance were made to Methanex in this case; it entered the market with eyes wide open; the process was open and transparent and complied with due process; measures were non-discriminatory, and the ban was made for a public purpose. And, we don't have jurisdiction to decide any of this under NAFTA Art. 1101.