

Secretariat of the Commission for Environmental Cooperation**Determination pursuant to Article 14(3)
of the North American Agreement on Environmental Cooperation**

Submitter(s): Methanex Corporation
NESTE Canada Inc.

Concerned Party: United States

Date Received: 18 October 1999

**Date of this
Determination:** 30 June 2000

Submission I.D.: SEM-99-001 and SEM-00-002

I - Introduction

This determination addresses two submissions, SEM-99-001 (Methanex) and SEM-00-002 (Neste). Methanex filed its submission on 14 October 1999. On 30 March 2000 the Secretariat determined that the submission met the criteria in Article 14(1) for further consideration and that the submission merited a response from the Party based on the factors contained in Article 14(2). Neste filed its submission on 21 January 2000. On 17 April 2000 the Secretariat determined that it was appropriate to consolidate this submission with the submission filed by Methanex pursuant to Guideline 10.3. That guideline authorizes the Secretariat to “consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law.” The Secretariat determined that the Neste submission met the criteria in Article 14(1) for further consideration and that the submission merited a response from the Party based on the factors contained in Article 14(2). On 30 May 2000 the Secretariat received a response from the Party to the consolidated submissions.

II - Summary of the Submissions

The Methanex submission contains two basic assertions. First, Methanex asserts that the Party is failing to effectively enforce various environmental laws relating to water resource protection and concerning underground storage tanks (USTs). According to the submission, there is a regulatory scheme in place in California relating to releases of hazardous materials, including gasoline, from USTs. Methanex claims that there is a substantial number of violations of this regulatory scheme. Finally, the submission argues that the Party has failed to effectively enforce the regulatory scheme, and that this failure to enforce has allowed gasoline from USTs to be released into the environment from leaking USTs, causing harm.

The submission asserts that the California Governor's issuance of an Executive Order that phases out the use of MTBE is "wrong-headed" because it "focuses attention away from the UST issue by phasing-out the use of MTBE."¹

Second, the Methanex submission asserts that existing laws are insufficiently protective of health and the environment because they do not regulate certain categories of USTs. According to Methanex, the failure to regulate certain categories of USTs amounts to a failure to effectively enforce the Party's environmental laws. In its 30 March 2000 determination, the Secretariat declined to consider this second assertion further on the ground that Article 14 does not provide jurisdiction for the Secretariat to consider assertions that a Party's environmental laws are ineffective. Because the second assertion in the Methanex submission involved a challenge to the adequacy or effectiveness of the regulatory scheme itself, rather than to the Party's alleged failure to effectively enforce it, the Secretariat dismissed this portion of the Methanex submission.

As the Secretariat noted in its 17 April 2000 determination in SEM-00-002, the Neste submission largely tracks Methanex's submission. Neste's main assertion is that the Party is failing to effectively enforce various environmental laws relating to water resource protection and concerning USTs. Neste explicitly refers to the close link with Methanex's submission and states its belief that "the Methanex Submission accurately summarizes the nature and importance of the enforcement issues relating to USTs."²

III - Summary of the Response

The Party affirms its support for the citizen submission process and for developing factual records under appropriate circumstances. It states that, for example, "we wish to emphasize that the United States Government believes that the Articles 14 and 15 process is a critical component of the cooperative efforts for environmental protection among the Parties to the NAAEC. The United States has repeatedly been and continues to be a strong supporter of that process."³ The Party continues, however, that "as the Secretariat has recognized, not all submissions merit development of a factual record."⁴

The Party asserts that it is not appropriate to develop a factual record for the Methanex and Neste submissions. The Party identifies two reasons why development of a factual record is not warranted. First, the Response asserts that the Methanex and Neste submissions must be dismissed based on Article 14(3)(a) of the North American Agreement on Environmental Cooperation (NAAEC or the "Agreement"). Article 14(3)(a) provides that the Secretariat "shall proceed no further" if a submission "is the subject of a pending judicial or administrative proceeding." The Response asserts that there is such a proceeding, notably a pending proceeding under Chapter 11 of the North American Free Trade Agreement

¹ Methanex Submission at 11.

² Neste Submission at 2.

³ Response at 1.

⁴ Response at 1. The Party cites to two Secretariat determinations that dismissed submissions on various grounds.

(NAFTA). The Response states that, as a result, the Secretariat must dismiss the submissions.⁵ The Party summarizes as follows its view that Article 14(3) requires that the Secretariat dismiss the submissions:

Article 14.3(a), as elaborated by Article 45.3(b), specifically precludes the preparation of a factual record where the matter submitted is the subject of an international dispute resolution proceeding involving the same Party. In this case, Methanex is already challenging California's enforcement of its UST regulations as part of its arbitration claim against the United States under NAFTA Chapter 11. Because the issue of California's enforcement of its UST regulations has been raised before the international arbitral tribunal convoked to address Methanex's Chapter 11 claim (a qualifying proceeding under Article 45.3(b)), development of a factual record is proscribed by Article 14.3(a).⁶

The Response also asserts that the Party is effectively enforcing its environmental laws. The Response describes the enforcement response of the Party to the asserted violations and claims that this response constitutes effective enforcement for purposes of the NAAEC. The Response asserts that, as a result, the Secretariat should dismiss the submission because it would be inappropriate to develop a factual record under these circumstances.⁷

The Party summarizes these two points as follows:

This memorandum serves to advise the Secretariat, in accordance with Article 14.3(a) of the Agreement, that the matter raised in the submission is the subject of a pending judicial or administrative proceeding. In accordance with Article 14.3(a), the Secretariat should proceed no further with the consideration of the submission. This memorandum also explains that California is effectively enforcing its environmental law.⁸

IV - Analysis

A. Introduction

Article 15(1) of the NAAEC directs the Secretariat to determine, based on its review of a submission and the Party's response, whether to dismiss the submission or to inform the Council that the Secretariat considers that the submission warrants developing a factual record. The text of Article 15(1), which reads as follows, provides little guidance to the Secretariat as to the factors it should consider in performing this responsibility:

If the Secretariat considers that the submission, in the light of any response

⁵ See Response at 5-8.

⁶ Response at 5.

⁷ See e.g., Response at 8-29.

⁸ Response at 1.

provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

In contrast to the general language in Article 15(1) of the NAAEC, Article 14(3)(a) requires the Secretariat to dismiss a submission in one specific situation. Article 14(3)(a) provides that if “the matter is the subject of a pending judicial or administrative proceeding..., the Secretariat shall proceed no further” (emphasis added). Accordingly, if the Secretariat determines that the matter involved in a submission is the subject of a pending judicial or administrative proceeding, under Article 14(3)(a) the Secretariat must dismiss the submission, regardless of the result the Secretariat otherwise would have reached.

B. Reasons for the Secretariat’s Dismissal of these Submissions

Applying Article 14(3)(a) to the submissions at issue here, the Secretariat determines that dismissal of the Methanex and Neste submissions is warranted. Article 14(3)(a) provides that the Party shall advise the Secretariat “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.” This legal standard requires that the Secretariat dismiss a submission if two facts exist. First, there must be a “pending judicial or administrative proceeding.” Second, the matter that is the subject of the submission must be the subject of the pending proceeding. Both facts exist here.

First, the information the Party provided in its response indicates that there is a “pending judicial or administrative proceeding.” Article 45(3)(b) defines the term “judicial or administrative proceeding” for purposes of Article 14(3) to include “an international dispute resolution proceeding to which the Party is party.” The mechanism created by Chapter 11 of NAFTA for settlement of investment disputes qualifies as an international dispute resolution proceeding.⁹ Based on the information provided to the Secretariat, it appears that such a proceeding is currently pending. The Party reports that on 15 June 1999 Methanex filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA), and that the Claim itself was filed on 3 December 1999.¹⁰ The Party also advises that the arbitration is currently a pending proceeding: as of 30 May 2000 the arbitral panel has been selected but has not yet met.¹¹ In addition, the Party in the Methanex and Neste submissions is also party to the pending Chapter 11 proceeding. Methanex’s Statement of Claim in the Chapter 11 proceeding describes the claim as one between Methanex Corporation and the United States. As a result, Methanex’s pending Chapter 11 arbitration claim qualifies as a “judicial or administrative proceeding” under Article 14(3)(a).

⁹ See e.g., section 906 of the Restatement (3d) of the Foreign Relations Law of the United States (1987), “Private Remedies for Violation of International Law.” Comment a states: “A few international agreements have given private persons access to an international forum where the agreement establishing the forum allows such extension of its jurisdiction [to include claims by private persons].”

¹⁰ Response at 4. The Party has attached to its Response a copy of the Statement of Claim filed on 3 December 1999.

¹¹ Response at 6.

Second, the matter that is the subject of the Methanex and Neste submissions is also the subject of the pending NAFTA proceeding. The NAAEC does not define the term “matter” or the term “subject” for purposes of Article 14(3)(a). Nor do the Council’s Guidelines for Submissions, which essentially track the language of Article 14(3)(a).¹² Under any common sense reading, however, it is clear that the “matter” before the Secretariat in the Article 14 submissions is the “subject” of the pending Chapter 11 proceeding. That is, the “matter” before the Secretariat is encompassed within Methanex’s Chapter 11 claim. In each forum, Methanex contends that, *inter alia*, the government should address the risks associated with leakage of gasoline from USTs by improving its enforcement of legal measures designed to prevent such leaks rather than by banning the use of MTBE.¹³

As noted above, the primary focus of the Methanex and Neste Article 14 submissions is California’s asserted failure to effectively enforce its UST laws. The assertion is that this failure to enforce results in leakage of gasoline containing Methyl Tertiary-Butyl Ether (MTBE), creating a risk to human health and the environment. The Submitters assert that in order to address this threat, California should enhance its enforcement, not ban the use of MTBE.¹⁴

Methanex’s pending Chapter 11 claim involves this “matter” as well. The “Facts” section of the Statement of Claim devotes several paragraphs to UST legislation and the requirements it imposes on UST facilities to protect waters of the state from leaks.¹⁵ The section of the Claim entitled “Nature of the Claim” contains assertions by Methanex about the reasons why MTBE is present in drinking water. It states as follows:

21. The presence of MTBE in drinking water occurs primarily as a result of gasoline releases to the environment. Gasoline is released primarily due to:
 - i. the failure of the State of California to enforce its environmental legislation relating to underground storage tanks (“USTs”) and water resource protection; and
 - ii. local municipalities permitting the operation of inefficient two

¹² See Guidelines for Submissions on Enforcement Matters 9.2-9.4.

¹³ See e.g., Notice of a Submission of a Claim to Arbitration at 5-7; Statement of Claim at paras. 21, 23, 33-35; Methanex Submission at 11-12.

¹⁴ See e.g., Methanex Submission at 2, 11-12; Neste Submission at 2. As the Secretariat stated in its 30 March 2000 Determination, the submission suggests that the approach of phasing out MTBE is a flawed strategy for addressing the environmental problem at issue here, and that heightened enforcement of UST requirements to prevent leakage would be a better approach. In particular, Methanex asserts that the Executive Order “treats a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from the State’s failure to enforce its environmental laws.” Methanex Submission at 2. See also Neste Submission at 3.

¹⁵ Statement of Claim at paras. 14-19. Annex 2 of the Statement of Claim, provided to the Secretariat as an annex to the Party’s response, is captioned, “Summary of California’s Environmental Laws Relating to Underground Storage Tanks.” It contains an extensive review of these laws and their requirements.

stroke engines on drinking water reservoirs.¹⁶

The section on the “Nature of the Claim” describes California’s response to the discovery of MTBE contamination in ground and surface waters as follows: “The response of the government of California was to propose legislation which, rather than address the problem of environmental law enforcement and specifically leaking USTs, arbitrarily called for a ban on the use of MTBE in gasoline.”¹⁷

According to Methanex’s Statement of Claim in the Chapter 11 proceeding, the action by the State Governor in phasing out the use of MTBE

- i. was arbitrary and based on a process which lacked substantive fairness;
- ii. penalizes and bans only one component of gasoline;
- iii. failed to consider alternative measures to mitigate the effects of gasoline releases into the environment;
- iv. resulted from the failure or delay in enacting or enforcing legislation to reduce or eliminate gasoline releases into the environment;
- v. failed to take proper consideration of the legitimate interests of Methanex and Methanex US; and
- vi. goes far beyond what is necessary to protect any legitimate public interest.¹⁸

Methanex claims that, because of these purported flaws in the government’s approach to addressing MTBE, “the State of California did not accord to Methanex US treatment in accordance with international law, including fair and equitable treatment.”¹⁹ Methanex also asserts that the government’s approach “is both directly and indirectly tantamount to an expropriation.”²⁰

In sum, Methanex’s Statement of Claim in the Chapter 11 NAFTA proceeding specifically alleges that, *inter alia*, the California Governor’s ban on the use of MTBE “resulted from the failure or delay in ... enforcing legislation to reduce or eliminate gasoline releases into the environment.”²¹ Thus, one of the assertions Methanex makes in the Chapter 11 proceeding is that there has been a failure or delay in enforcing legislation intended to reduce or eliminate releases of gasoline. The issue that is at the heart of the Methanex and Neste submissions under the NAAEC is whether California is failing to enforce legislation to reduce or eliminate gasoline releases into the environment. Thus, to return to the language in Article 14(3)(a) of the NAAEC, the matter that is the subject of the submission is also the subject of a pending judicial or administrative proceeding. In both proceedings, Methanex

¹⁶ Statement of Claim at para. 21.

¹⁷ Statement of Claim at para. 23.

¹⁸ Statement of Claim at para. 33 (emphasis added). Methanex’s Notice in the Chapter 11 proceeding contains the identical list of reasons why the Executive Order purportedly is flawed. Notice at 7.

¹⁹ Statement of Claim at para. 34.

²⁰ Statement of Claim at para. 35.

²¹ Statement of Claim at para. 33.

(and Neste, in the case of its Article 14 submission) has alleged that the Party should have pursued enforcement actions against those responsible for leaks of gasoline from USTs rather than prohibit the use of MTBE in gasoline.²²

As a result, the Secretariat believes that dismissal of the submissions is required under Article 14(3)(a). The matter raised by the Methanex and Neste submissions is the subject of a pending arbitration proceeding initiated by Methanex under Chapter 11 of NAFTA.

Because of the Secretariat's determination on this threshold issue, the Secretariat does not reach the question of whether a factual record would be warranted absent the pendency of such a proceeding. Thus the Secretariat does not address the nature and extent of the violations of the laws governing releases of MTBE from USTs, or the effectiveness of the Party's enforcement efforts. Both the submission and response highlight the significance of the environmental problems posed by such releases.

Conclusion

For the foregoing reasons, the Secretariat considers that the submissions SEM-99-001 and SEM-00-002 do not warrant developing a factual record. Instead, because the matter is the subject of a pending judicial or administrative proceeding, under Article 14(3)(a), the Secretariat is to proceed no further.

Respectfully submitted.

(original signed)
Janine Ferretti
Executive Director

c.c. Mr. William Nitze, US-EPA
Ms. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Mr. Michael Macdonald, Methanex Corporation
Mr. Kimmo Rahkamo, Neste Canada Inc.

²² Similarly, in the Notice of a Submission of a Claim to Arbitration, Methanex asserts that “[r]ather than address the primary issues causing gasoline releases into the environment, the government of California proposed legislation that arbitrarily called for a ban on the use of MTBE in gasoline.” Methanex Notice of a Submission of a Claim to Arbitration at 5, 6. See also Methanex Statement of Claim at para. 23, 33.