

## INVEST-SD Investment Law and Policy News Flash

(Editor's Note a full edition of INVEST-SD News Bulletin will appear at week's end)

### 1. Methanex Tribunal Sets Out Guidelines for Amicus Curiae Submissions, By Luke Eric Peterson

A tribunal convened to hear a NAFTA arbitration has set out formal guidelines for submissions by interested non-parties seeking to intervene in the case.

The ruling in the arbitration between the Canadian-based Methanex Corporation and the United States sets a precedent for investment treaty arbitration, and paves the way for interested groups or individuals to table written submissions to the arbitral tribunal.

The Methanex arbitration arises out of a decision by the California Government to ban a gasoline additive MTBE. The Methanex Corporation launched an arbitration claim against the United States for \$1 billion in damages, alleging that US treatment of its Methanex's investment (Methanex is a producer of methanol - a key ingredient of MTBE) violated key provisions of the NAFTA.

In the summer of 2000, two separate bids were launched to intervene as amicus curiae in the Methanex arbitration, one by the International Institute for Sustainable Development (publishers of the INVEST-SD News Bulletin) and the other by the Earth Justice Legal Defence Fund (on behalf of several US-based environmental organizations).

In a ruling of January 2001, the Methanex tribunal indicated that it was "minded" to accept submissions by interested non-parties, however it left to a later date a final determination on the procedures for such submissions.

In a press release made public last week, the tribunal indicated that it would adopt the procedures for non-party participation which were publicized last autumn by the three NAFTA parties (Canada, USA and Mexico) in a statement which set out proposed guidelines for such situations.

Accordingly, would-be intervenors will apply for leave from the tribunal to submit their arguments, at the same time as they append their written arguments to their application. The tribunal will then determine whether to accept the arguments, basing their determination on a number of factors including whether the arguments "would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge of insight that is different from that of the disputing parties."

Counsel involved in the amicus application process express pleasure with these recent developments. Howard Mann, lead counsel for IISD on the Methanex intervention, observes: "We remain concerned about the substantive direction the Chapter 11 cases are taking. For the first time, we will now be able to voice those concerns before a decision is

made in an important case, not just afterwards. This is an important step in democratizing international law and balancing the rights of investors with the rights of the public at large."

In a related development, the arbitral hearings (which are slated for later this spring) will be open to the public. Following a decision of the two parties, the tribunal has indicated that interested parties will be able to view a simultaneous video-feed of the hearings from a designated room at World Bank headquarters in Washington DC. Although the arbitration will occur under the UNCITRAL ad-hoc rules of arbitration, it is being administered by the secretariat of the World Bank's International Center for Settlement of Investment Disputes (ICSID).

Sources:

ICSID News Release, Jan.30, 2004,  
<http://www.worldbank.org/icsid/methanex.htm>

Documents related to the case available on the website of the US State Department:  
<http://www.state.gov/s/l/c5818.htm>

IISD backgrounder on Methanex arbitration:  
[http://www.iisd.org/pdf/2003/trade\\_methanex\\_background.pdf](http://www.iisd.org/pdf/2003/trade_methanex_background.pdf)