METHANEX CORPORATION vs. THE UNITED STATES OF AMERICA

A backgrounder on the controversial case under NAFTA’s Chapter 11, and on IISD’s involvement

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About the Methanex case: The Methanex case is an investment dispute between Canada-based Methanex Corporation and the United States, based on the provisions in the North American Free Trade Agreement’s (NAFTA) Chapter 11 on investment. Methanex is a major producer of methanol, a key component in MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanex launched an international arbitration against the United States in response to the March 1999 order by the State of California to ban the use of MTBE by the end of 2002. California argues that banning MTBE is necessary because the additive is contaminating drinking water supplies, and is therefore posing a significant risk to human health and safety, and the environment. Methanex argued in its original submission that the ineffective regulation and non-enforcement of domestic environmental laws, including the U.S. Clean Water Act, is responsible for the presence of MTBE in California water supplies. The company argued that the planned ban is tantamount to an expropriation of the company’s investment; a violation of NAFTA’s Article 1110, and was enacted in breach of the national treatment (Article 1102) and minimum international standards of treatment (Article 1105) provisions. It was seeking financial compensation from the United States in the amount of over $900 million U.S.

IISD and the Methanex case. The International Institute for Sustainable Development (IISD) has sought to intervene on a number of levels in the Chapter 11 case of Methanex Corporation V. the United States of America. Through a petition (128kb) on August 26, 2000, and two subsequent submissions in September and October to the Methanex Tribunal, the IISD requested that it be permitted to submit an amicus (“friend of the court”) brief to the NAFTA arbitral Tribunal hearing the case, after examining the submission and counter submission of the litigating Parties. IISD also requested that it be allowed to make an oral submission in the proceedings, to support its (written) amicus submission, and that it be granted “observer status” at the oral proceedings. This three-pronged request was submitted to the tribunal on the basis that:

- Unlike most private or commercial arbitrations, there are great public interests in the Methanex case. IISD would help to represent these interests;
- The participation of IISD would help to build confidence in the dispute settlement system, regardless of the final decision of the Tribunal;
- Arbitrations ought to recognize legal principles of sustainable development – IISD could use its expertise to assist the Tribunal in incorporating these principles into its work; and
Article 15 of the arbitral rules of procedure that apply to this case, the United Nations Centre for International Trade Law (UNCITRAL) rules, are broad enough to allow IISD a participatory role in the arbitral process.

Shortly after IISD submitted its petition to the Tribunal, Methanex opposed IISD’s request. The company argued that the Tribunal had no authority to accept this petition, and that should it accept the Petition, this risked opening a floodgate of such interventions in the arbitration process in the future.

In October 2000, the United States formally supported the IISD intervention effort (see submission: 152kb). In November, Canada also formally supported the intervention (see submission: 115kb), while Mexico formally opposed the intervention (see submission: 277kb).

In January 2001, the Tribunal ruled that it does have the authority to accept written amicus briefs, and that it is "minded" to accept IISD's petition in the Methanex case (see ruling: 1092kb). Although the Tribunal did not then issue an actual order allowing the amicus participation pending resolution of the preliminary phase of the case and the development of procedural rules on the intervention, IISD believes that this is an important decision in support of openness in Chapter 11 proceedings that have until now been quite secretive. Still, at that time the Tribunal did not order the hearings to be made public as this required the agreement, in its view, of both arbitrating parties.

August 2002: Over the course of 2000 and 2001, the United States argued that the claims of Methanex are outside the scope of Chapter 11 and hence the Tribunal does not have the jurisdiction to rule on them. In addition, Methanex amended its original claims, and added new allegations of fact to support new allegations of breaches of Chapter 11. All these issues were addressed in a Partial Award issued on August 7, 2002. The Tribunal rejected some claims as being outside their jurisdiction under Chapter 11, while ordering Methanex to prepare a second amended statement of claim in keeping with its partial award.

November 2002: Methanex filed a second amended statement of claim, retaining its claims that the California measure has breached the national treatment, minimum international standards of treatment and expropriation obligations on California and the United States under Chapter ’11 of NAFTA.

January, 2003: IISD, along with another potential amicus (EarthJustice with Center for International Environmental Law), reiterated its request to the Tribunal to make written submissions, and seeking a formal order to do so. It also restated its request for the hearings to proceed in public. Methanex later sought to have any such submissions limited to issues of law, and exclude any issues of fact. The US opposed this submission. A ruling has not yet been issued by the Tribunal.

June 2003: The Tribunal formalized its position and decision at a procedural hearing in April to address the ongoing jurisdictional arguments of the United States and the merits
of the case in a combined proceeding. It set out a draft schedule for written and oral submissions by the arbitrating parties and the other NAFTA parties (pursuant to Article 1128 of NAFTA). In addition, the Tribunal formally ordered the hearings to proceed in public, and indicated it intended to issue an order to amici to submit written briefs.

July 2003: The Tribunal issued an order scheduling the remaining submissions, leading to oral hearings in early June 2004 at the ICSID facilities in Washington, D.C. They restated the intent to issue a request for amicus submissions, to be scheduled for January 9, 2004. At this point in time, a formal order remains anticipated. This order will set out the date, length, and possibly the scope of the amicus submissions.

October, 7, 2003: The NAFTA Free Trade Commission issued, for the first time in any international arbitration context, a decision supporting amicus curiae submissions in the Chapter 11 investor state cases. While not legally binding, the procedure signals the end of Mexico’s opposition to such filings, and sets out a process that Tribunals could adopt and adapt to their specific circumstances. The decision further legitimizes the effort by IISD to initiate the process, and is later to become the basis for the Methanex Tribunal to set out its final decision on amicus submissions (see below, January 2004). See IISD’s full commentary on the decision.

December, 2003: IISD and EarthJustice, in a letter to the Tribunal, reiterated their ongoing interest in the proceedings and the need for the Tribunal to issue its order on modalities and related issues for the submission of the amicus briefs.

January 30, 2004: International investment law history is made! The Methanex Tribunal issued a press release indicating its decision to allow NGOs or other interested non-parties to apply to make submissions. In accordance with the FTC guidelines of October 7 (see above) the application is to be accompanied by the submissions themselves, with specific explanations of the scope of the submissions, the interests of the organization or person making the submission, as well as the funding sources or other assistance to the organization making the submissions. In a nod to the role of IISD in initiating this process, and its subsequent joinder by EarthJustice, the Tribunal indicated it would communicate its decision to the “existing amici”, as well as ensure it is published promptly for others to have the same opportunity to make submissions.

March 9, 2004: IISD submits its precedent-setting amicus curiae brief to the Tribunal. The brief deals with several key issues of law relevant to sustainable development, including the definition of expropriation, national treatment and government intent, burden of proof, and costs associated with litigation.

June 2004: The Tribunal holds its final hearings in Washington, DC. For the first time in the history of international investment arbitration, outside observers are allowed to view the hearings on the merits live (via closed circuit TV), following a second request by IISD and the other amicus intervenors. Only one other NAFTA hearing (that one dealing with jurisdiction) was previously open to the public in this way.
June 29, 2004: Thanks to the process of open hearings, IISD and EarthJustice, the other amicus, learn that the US is arguing that the California ban is a public health measure, and therefore (the argument goes) protected by "police powers" exclusions from being considered an expropriation. This misses, first, the point that the measure is also an environmental measure and, second, the opportunity to have the Tribunal rule on the argument that both human health and environmental measures are protected by these exclusions. IISD and EarthJustice jointly petition for the right to submit a post-hearing submission to clarify these points, transmitting at the same time the actual submission. Lacking joint consensus of the disputing Parties, the Tribunal denies the petition to submit.

For more information on IISD and its Petition for Amicus status on the Methanex case see Howard Mann’s “Opening the Doors, at least a little: Comment on the Amicus decision in Methanex V. United States.” RECIEL 10 (2, 2001): 241-245.