

# **The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles**

Howard Mann

August 2005



© 2005 International Institute for Sustainable Development (IISD)

Published by the International Institute for Sustainable Development

The International Institute for Sustainable Development contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change, measurement and assessment, and natural resources management. Through the Internet, we report on international negotiations and share knowledge gained through collaborative projects with global partners, resulting in more rigorous research, capacity building in developing countries and better dialogue between North and South.

IISD's vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the Canadian International Development Agency (CIDA), the International Development Research Centre (IDRC) and Environment Canada; and from the Province of Manitoba. The institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations and the private sector.

International Institute for Sustainable Development

161 Portage Avenue East, 6th Floor

Winnipeg, Manitoba

Canada R3B 0Y4

Tel: +1 (204) 958-7700

Fax: +1 (204) 958-7710

E-mail: [info@iisd.ca](mailto:info@iisd.ca)

Web site: <http://www.iisd.org/>

### **The Final Decision in Methanex v. United States**

#### ***Some New Wine in Some New Bottles***

**By Howard Mann**

Howard Mann is the Senior International Law Advisor to IISD and a practising international lawyer in Ottawa, Canada. IISD was one of the *amicus curiae* interveners in the case. IISD's submissions and record of the case can be found at

[http://www.iisd.org/investment/methanex\\_background.asp](http://www.iisd.org/investment/methanex_background.asp). Howard Mann was counsel, with Prof. Don McRae, for IISD in its Methanex interventions.

The long-running saga of *Methanex Corp. v United States of America*, an investor-state case under NAFTA's Chapter 11, has finally come to an end.<sup>1</sup> Begun in 1999, the case has meandered through different permutations and claims by Methanex against the United States. All such claims have now been dismissed, six years after it began.

This brief note assesses the contribution of the Methanex case to the state of international law under NAFTA's Chapter 11 and more broadly under international investment agreements. It does so in a non-technical, essay-type manner rather than a scholarly legal exposition. Time prevents the latter from emerging so quickly with such a detailed and lengthy decision, while the need for an initial assessment of the case is more pressing.

The discussion begins with a short review of the essence of the case and claims. It is followed by a summary of the conclusions of the Tribunal on the main substantive points and the contribution the findings make to the case law in this field. Not every issue addressed by the Tribunal is considered here. Rather, those issues of broader importance to the evolution of international investment law are highlighted. In addition, the discussion will raise a potential hidden gem of this decision concerning how corruption by investors can be addressed in future cases.<sup>2</sup> Finally, the critical contribution of the Methanex case to procedural developments in the area of international investment arbitration will be considered.

The overall result can be stated in a nutshell: while not all of the Methanex case history or final award is of seminal importance, several parts of it are. This is an arbitration that has added new wine (some of it very good!) in new bottles to the evolution of international investment law.

---

<sup>1</sup> *Methanex Corporation v. United States of America*, In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, August 7, 2005. Available at [http://www.naftaclaims.com/disputes\\_us\\_6.htm](http://www.naftaclaims.com/disputes_us_6.htm). The long history of the case is reviewed in the award and previous decisions of the Tribunal. The Web site noted here contains copies of all relevant legal documents in the arbitration. There is a still a possibility, though a small one in the present case, that Methanex will seek judicial review of this case.

<sup>2</sup> To be clear, there is no hint of Methanex having undertaken or attempted to undertake any corruptive practices in this case, and no such implication is in any way being made here. Rather, the decision of the Tribunal on the corruption Methanex alleged occurred here of government officials in California raises important questions of application to foreign investors in other circumstances who may have acted in a corrupting manner.

### ***About the Methanex Case***

The Methanex case is an investment dispute between Canadian-based Methanex Corporation and the United States, arising from 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 of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanex launched its 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 argued that banning MTBE was 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 ban is tantamount to an expropriation of the company's investment and thus a violation of NAFTA's Article 1110; was enacted in breach of the national treatment obligation in Article 1102 of NAFTA; and was also in breach of the minimum international standards of treatment obligations in Article 1105 of NAFTA. It was seeking almost \$1 billion in compensation from the United States.

The Tribunal undertook an extensive review of the process by which California enacted its MTBE ban. In brief, it found that the legislative process had been transparent, science-based, subject to due process and to legitimate peer review, and done in a manner that was consistent with California practice in this area.<sup>3</sup> Methanex' allegations of corruption on the part of California Governor Gray Davis as a key factor in the decision-making, were determined to be unfounded, and thus were not accepted as a basis to interfere with the overall assessment of the legislative process as summarized above.

### ***The Hidden Gem: The Corruption Allegations Addressed in Detail***

The Methanex Tribunal made a very significant effort to investigate the alleged corruption of Governor Davis, arising primarily from campaign and post-campaign contributions from

---

<sup>3</sup> See Final Award, part III, Chapter A, section 6 for the conclusions.

Archer Daniels Midland (ADM), a leading company in the ethanol business. Three points stand out from the analysis: the methodology, the scope of the investigation undertaken, and the potential breadth of the approach taken.

The methodology adopted by the Tribunal has two hallmarks: the use of logical inference and the self-labelled “connect-the-dots” approach to the evidence. The Tribunal expressly recognized that it had the capacity, in the face of circumstances where clear evidence may not be available, to draw logical inferences from the evidence that was adduced. By analogy, the Tribunal could rely upon circumstantial evidence. It recognized the need to do so with caution, but its review and assessment of the facts was clearly based on this approach. Indeed, it labelled the key evidentiary elements of Methanex as Dot 1 and Dot 2, etc., for purposes of analyzing each in its own context and in relation to the other.<sup>4</sup>

The Tribunal concluded that the dots did not connect into a pattern of corruption as alleged by Methanex. But, and this is the beginning of the hidden gem of this Chapter of the decision, it recognized that such evidence could lead to a finding of fact of corruption, and that a Tribunal was perfectly entitled to use this method and reach such a conclusion.

The second element of the decision on this point is the breadth of the review. The Tribunal made it clear that acts that are illegal under national law and international law could be the basis of a finding of corruption. As the corruption of government officials by investors is likely to fall into that category in most cases, significant scope for a finding of illegal activity is present. The Tribunal went on, however, to note that acts not considered illegal could also, in some circumstances, lead to a finding of corruption.<sup>5</sup> Thus, the potential breadth of investigation can be wide.

Why is this considered so important for this review? The answer is the potential application of this approach to allegations of corruption by investors of host government officials to achieve benefits relating to an investment. The issues in this case related to allegations of corruption upon Governor Davis by a third party, namely ADM. These allegations were

---

<sup>4</sup> The full elaboration is found in the Final Award, Part III, Chapter B.

<sup>5</sup> For example, see Final Award, Part III, Chapter B, paras 19 and 37-38.

directly related to alleged breaches of obligations to Methanex under Chapter 11 of NAFTA. But elements of the decision also highlight the need for investors to come to court in good faith, indeed, the duty of good faith that each party in an arbitration owes to each other and the Tribunal.<sup>6</sup> This is not a new idea in any way, but it does, for the first time in an investment arbitration, appear to provide the legal rationale for connecting the dots of corruption by investors to the jurisdiction of Tribunals to hear a case that they may bring. It also sets out a broad methodology for investigating such a claim, and makes it clear that allegations of corruption do not have to be proven in criminal trials for them to be taken into account by a Tribunal.<sup>7</sup> In short, this decision sets out the tools for arguing that when an investor in an arbitration seeks to rely upon the fruits of its own corrupt activities, the jurisdiction of the Tribunal to hear that case can be vitiated. Alternatively, the investment agreement, contract, permit or other authority being relied upon can be legally determined not to create any legitimate expectations for the investor because it was illegitimately obtained.

### ***The National Treatment Ruling<sup>8</sup>***

The national treatment part of the ruling is one of three key rulings on the substantive provisions of NAFTA's Chapter 11. The main aspect of this ruling is the tightness with which it approaches the key test of "in like circumstances." Under most national treatment obligations, host states must treat foreign investors no less favourably than domestic investors "in like circumstances."<sup>9</sup> Methanex sought to have the Tribunal adopt a very broad economic sector reading of this requirement, arguing that the economic competition or sector approach of the "like product" analysis in trade law should be applied here. A broad economic sector approach had been applied, for example, in the previous Chapter 11 case of *S.D. Myers v. Canada*. The Tribunal expressly rejected the view that they were bound to apply the trade law analysis or approach, based on different language in trade and investment provisions in NAFTA and in trade law and investment law more broadly.

---

<sup>6</sup> E.g. at Part II, Chapter I, paras 59, 60, albeit in a different context.

<sup>7</sup> This was the approach that seemed to be adopted by the Tribunal in e.g., the *Wena v. Egypt* case under the UK-Egypt Bilateral Investment Treaty, in the face of an allegation of corruption by Wena officials to get the initial investment contract that underlay the claim in that arbitration.

<sup>8</sup> This is found in Final Award, Part IV, Chapter B.

<sup>9</sup> Some agreements do not include such a reference, but most do today, with some variations on the theme, for example, in like situations.

The Tribunal also made it clear that the like circumstances test, in its view, required that the Tribunal compare the foreign investor to those most closely comparable in the domestic sphere. In this case, that meant Methanex, as a manufacturer of methanol, had to be compared to other U.S.-based manufacturers of methanol, of which there were several, all in identical circumstances to Methanex. The Tribunal did not accept that Methanex should be compared to manufacturers of all or any other gasoline additives as it had sought to do, at a minimum not when more direct and exact comparisons were available. The Tribunal also made specific references to legitimate differences in regulatory treatment between methanol and ethanol as a factor in why ethanol manufacturers were not in like circumstances with methanol manufacturers.<sup>10</sup>

This ruling approaches the comparative requirement from a basic common sense point of view, rather than seeking complicated legal rationales that work to over-extend the comparisons. In effect, it rejects the “accordion-like” approach to the like products test found in trade law and adopted in some earlier Chapter 11 cases (S.D. Myers is again an example) and makes a clarion call for the most direct comparison reasonably available in all the circumstances. This, if followed, will reduce the scope for theoretical interpretive exercises and require a focus instead on the real facts underlying a comparative process. It is a welcome direction.

### ***The Minimum International Standards Rulings<sup>11</sup>***

The ruling on NAFTA’s minimum international standards article, 1105 of NAFTA, focuses on the issue of whether the NAFTA Free Trade Commission interpretive statement of July 2001 is binding upon it. In so doing, it breaks little new ground, following similar decisions that the statement is binding from other Tribunals.<sup>12</sup>

The Tribunal did, however, also go on to address the question of whether discriminatory conduct by a host state based on a foreign nationality of an investor is a breach of the

---

<sup>10</sup> This specific point is seen in Final Award, Part IV, Chapter B, para 28.

<sup>11</sup> Final Award, Part IV, Chapter C.

<sup>12</sup> For example, *Pope & Talbot v. Canada*, *Mondev v. United States*.

minimum international standards obligation. Here, it appears to have ruled (though not without some ambiguity) that this was not prohibited conduct under international law, absent other aggravating factors that might elevate the discrimination to a breach of international law. This ruling should help clarify the legal reality that non-discrimination is a treaty-law construct in this area, not a customary international law one.

### ***The Expropriation Ruling***<sup>13</sup>

The ruling on Article 1110 of NAFTA, on expropriation, is potentially the most significant part of this decision. From a public interest perspective it is also very welcome, caveats adduced by the Tribunal notwithstanding.

Methanex claimed that the regulatory ban on MTBE amounted to a measure tantamount to expropriation in breach of Article 1110 of NAFTA. The economic impact of the measure on Methanex amounted to a taking that required compensation. Methanex relied in large part on the approach to expropriation in the *Metalclad v. Mexico* decision under Chapter 11, which highlighted the economic impact of a regulatory measure as the key factor for analysis under Article 1110.

The Methanex Tribunal rejected this approach. In its place, it took an approach much more akin to a classic police powers<sup>14</sup> approach under international law. It did so without using those words, however, and thus without having to parse through the implications of what appeared to be the United States' argument that the police powers applied to health measures but may not have extended to environmental measures. In effect, the Methanex Tribunal has applied a modern regulatory approach to the police powers concept, an approach long argued for by IISD and other civil society groups.

The clear legal lines drawn by the Tribunal, which are cited below due to their seminal importance, were clearly chosen by the Tribunal. It cites in its decision the approach argued for by Methanex, and does not accept it. The pleadings of the United States were complete

---

<sup>13</sup> Final Award, Part IV, Chapter D.

<sup>14</sup> Police powers is an old international law term for what we would now call regulatory measures by a state to protect or enhance the public welfare. The full scope of police powers has, arguably, never been firmly established in international law.



on this issue. And this issue was a central point of the two *amicus curiae* submissions. The Tribunal notes carefully the type of measure this is: not a direct expropriation or a creeping expropriation, and that there was no transfer of title or other transfer of assets from Methanex to the state or anyone else. Thus, for analytical purposes, this measure fell into the category of a measure tantamount to expropriation. The Tribunal then held that:

*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 compensatory* (then follows a caveat to be considered in a moment).<sup>15</sup>

The same reasoning is then found a few paragraphs later where the Tribunal states that *“From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.”*<sup>16</sup>

Thus, the Tribunal has drawn a sharp line: regulatory measures that are for a public purpose, non-discriminatory and enacted in accordance with due process<sup>17</sup> are not, by definition under international law, expropriations. Not being expropriations or measures tantamount to expropriation, they are not, therefore subject to any compensation.

This is the first NAFTA Chapter 11 arbitration to draw such a clear legal dividing line, (or any other recent international investment arbitration this author is aware of). The decision on this point is thus a critical point in the evolution of NAFTA jurisprudence and that of international investment arbitration generally. Its impacts, for reasons discussed in below, may not be as clear as its content, however.

First, the caveat. The Tribunal found that regulations are not expropriations *“...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.”*<sup>18</sup> Several questions arise from this

---

<sup>15</sup> Final Award, Part IV, Chapter D, para 7.

<sup>16</sup> Ibid, para 15.

<sup>17</sup> This term is properly understood here as meaning enacted as per the normal or accepted regulatory process of the jurisdiction in question, not a technical reading of due process as a term of art in any one legal system.

<sup>18</sup> Ibid, para 7.

caveat, which the Tribunal ruled was not applicable in any event in the present case. Most critically, what are its implications for future cases?

In practice, the impact of the caveat is likely to be limited. Assuming a full and literal application of the caveat, the same circumstances would be subject to a breach of contract proceeding in a variety of international or domestic processes, so adding an expropriation recourse likely changes little in practice. Second, one has to question the accuracy of the caveat in any event: is a breach of contract automatically a breach of the expropriation obligations? There is little support for such a sweeping proposition in international law—that a breach of contract (specifically an undertaking to not enact a certain measure) amounts to an expropriation or automatically converts a measure that is not otherwise an expropriation into one—though as a background fact it would unquestionably be relevant. Third, one would also have to assess the relevant circumstances though which the undertaking was given by a government. For example, was the science of the investor relied upon, only to subsequently be shown to be wrong, or even deliberately misleading in its presentation? Has there been a change in the science so that emissions of a substance previously thought, in good faith, not to be harmful, have now been shown to be harmful? Would this not fall under the classic international law doctrine of *rebus sic stantibus*, a fundamental change in circumstances that alters the ability to rely upon the undertaking? It is also questionable whether the breach of a contractual or other undertaking would automatically move the issue to the jurisdictional plane of an international treaty, in particular if there is a clear choice of forum or choice of law clause that precludes such an immediate transfer of jurisdiction for a breach of contract issue.

Thus, the caveat here raises a number of legal and factual questions that suggest it cannot stand as a blanket proposition in and of itself for all future cases. At the same time, it certainly serves notice of the importance of any undertakings a host government gives to a putative investor when key decisions about the viability of an investment are being made. To that extent, it may usefully serve to heighten the awareness of government officials of the importance of their undertakings and the potential consequences they may have.

While the caveat raises certain issues, the impact of this decision on the evolution of the international law on expropriation is also not easily determinable. One reason, of course, is that the decision in one case does not bind other Tribunals. Just as the Methanex Tribunal rejected the Metalclad approach, so can any future Tribunal reject the Methanex approach. In this sense, legal uncertainty remains the hallmark of this system of arbitration, at least until a significant number of cases adopt a single approach. This has manifestly not happened to date in the investor-state process in relation to this issue.

A second factor is that the United States, in particular, has modified its recent treaties by incorporating interpretive statements on expropriation. This was seen publicly as an attempt to tighten the language and reduce the risks of findings of regulatory expropriations after the first NAFTA decisions came out. However, the exact opposite may now be the result. Because the Methanex Tribunal has drawn such a clear line, the new U.S. treaties are arguably weaker from a governmental and public interest, and open loopholes in an otherwise clear division. Take the U.S.-Central America Free Trade Agreement (the CAFTA) as an example. It has a special annex dealing with the definition of expropriation.<sup>19</sup> As far as the present author understands, it holds that the issue of regulatory expropriation should be determined by three factors: the economic impact of the government action; the extent of interference with distinct, reasonable investment backed expectations; and the character of the government action. The Methanex decision covers the third of these elements only. The caveat arguably addressed the second, but no part of the Methanex decision appears to address the first element, which is derived from the Metalclad case and some U.S. takings jurisprudence. The final paragraph of the CAFTA says that rarely will a normal regulatory measure be expropriatory, but does not define what those rare circumstances are. One can argue that the Methanex caveat and the idea of rarely should be read as concordant, but that is not what the text of the CAFTA annex appears to be limited to.

That the Tribunal should be able to arrive at a clean, updated definition that closely reflects the traditional police powers approach should not be a surprise: they did not have to negotiate inter-departmentally. They had to reach a view of their understanding of the proper state of the law. That the U.S. treaty language should now be weaker than this is also

---

<sup>19</sup> US-Central America Free Trade Agreement, Annex 10-C.

not a surprise. It derives from a series of highly political inter-departmental negotiations dominated by economic agencies like USTR with close ties to industry, and stakeholder dialogues. These discussions sought, at the same time, to push the limits on protections for U.S. investors abroad and to limit its application in the U.S. to the forever debated U.S. domestic law on expropriation.

The result today is a potentially stronger NAFTA text if the Methanex decision is followed by other Tribunals, and potentially weaker protection for the U.S. and its government partners in treaties like CAFTA and the US-Singapore Free Trade Agreement that include the more open criteria.

But, for the U.S., this shift in language also has to be understood in the light of the most-favoured nation provisions in the same range of treaties, a provision which according to a number of recent investor-state arbitrations allows investors to cherry-pick the best of the treaty protection language available to any foreign investor in the host state. As a result, Canadian and Mexican investors into the United States will be able to argue first that the Methanex decision is wrong and the Metalclad decision is right and should be re-applied; and secondly that in any event the arguably lesser standards of the CAFTA should be applied to them under the MFN rules, allowing them to argue they fall within the rare circumstances or within certain reading of the three more open ended criteria set out therein. In other words, there will be two avenues open for argument for NAFTA investors into the U.S. (This will not apply to Canada or Mexico however, as they do not appear, to this author's knowledge, to have entered into agreements with the kind of explanatory text on expropriation that the United States has.) The only apparent way out of this potential problem now, and the potential for ongoing uncertainty for governments and investor's alike, will be an interpretive statement by the NAFTA Free Trade Commission adopting the clean lines of the Methanex decision.

Finally, on a different issue, the Tribunal also makes one additional point of importance. This is the exclusion of trade in goods as an investment in itself. Previous NAFTA cases

have suggested that market share is an investment in itself.<sup>20</sup> Thus, loss of market share, even through foreign-based trade, could be the basis for an investor-state arbitration under this approach. The Methanex Tribunal rightly questions this broad approach, applying a more limited and appropriate view that market share may be part of the assets of an investment and may have an impact in calculations of damages for a breach of an obligation, but does not itself form an investment.<sup>21</sup> In the long run, this should help reduce the opportunity for investors to use Chapter 11 as a back-door way to challenge trade measures with an impact on its business.

### ***Costs***

It is also worth noting that the Tribunal assessed all costs against Methanex in this case, a rare practice to date in NAFTA cases. This will, hopefully, mark a change in the approach to this question, and help investors understand, prior to launching an arbitration, that they may indeed be subject to awards of cost that are significant. This will reduce any incentives for initiating arbitrations that push beyond the reasonably intended state of international law.

### ***The Procedural Rulings on Public Participation: The Methanex Tribunal's Biggest Contribution?***

In addition to its substantive decisions, the Methanex case has already made an important, indeed salutary, contribution to the development of international investment law that should be restated here. IISD and the present author of course have a direct involvement in seeking the procedural determinations discussed below, an interest that one is quite happy to disclose as a prelude to the discussion in this case.<sup>22</sup>

The Methanex Tribunal was the first to allow the participation of *amicus curiae* in an investor-state arbitration. The initial decision on this point, rendered in January 2001,<sup>23</sup> provided the legal basis for procedural decisions to be taken at a later time to formalize the process. The

---

<sup>20</sup> E.g., *Pope & Talbot v. Canada*.

<sup>21</sup> Final Award, Part IV, Chapter D, para 17.

<sup>22</sup> IISD was one of two *amici* in the Methanex case. The author was co-counsel with Prof. Don McRae to IISD in that process. The documentation relating to the events set out below are all available through the IISD investment Web site, *supra*, n. 1.

<sup>23</sup> *Methanex v. United States*, Decision of the Tribunal on Petitions of Third Persons to Intervene as *Amici Curiae*, January 15, 2001, available at <http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>

present author has elsewhere described the January 2001 decision as an unexecuted decision in principle to accept *amicus* submissions in the arbitration.<sup>24</sup> That decision was fully executed, following several joint submissions by the potential *amici*, through a press release whose existence was communicated to potential interveners that announced the procedures for applying formally for *amicus* status. The first ever *amicus* submissions in investor-state arbitration by civil society actors were then duly made in March, 2004 by the International Institute for Sustainable Development, and three United States-based NGOs: Bluewater Network, Communities for a Better Environment and the Centre for International Environmental Law.<sup>25</sup>

In addition, following a second request by the potential *amici* in January 2003, the Tribunal issued a procedural order in June 2003 indicating that the hearings on the merits would be open to the public. This important decision was then applied through the medium of live, closed circuit television broadcast of the proceedings in World Bank facilities, close to the site of the actual hearings. This provided an opportunity for the Tribunal to extend the courtesy of a “meet and greet” meeting with counsel for the *amici* during the hearings. Although this did not allow for any discussion on the merits of the case, it did indicate the commitment of the Tribunal members to their decisions. This commitment is further reflected in the text, where the IISD brief is noted and briefly quoted,<sup>26</sup> thus allowing future petitioners for *amicus* status in other arbitrations a reference that the process has its own merits for a Tribunal.

It might also be noted that the fact of public hearings also allowed counsel for the *amici* to make a second, joint submission, expressing concern with what appeared to be a United States exclusion of environmental protection from its explanation of the police powers rule in customary law.<sup>27</sup> This could not have been done without the ability of counsel to not

---

<sup>24</sup> "Opening the Doors, At Least a Little: Comment on the *Amicus* Decision in *Methanex v. United States*," Review of European Community and International Environmental Law, Vol. 10, 2001, pages 241-245

<sup>25</sup> The briefs are available at the IISD Web site, *supra*, n. 1 and at <http://www.naftaclaims.com>

<sup>26</sup> Final award, Part IV, chapter B, para 27.

<sup>27</sup> *Methanex v. United States, Joint Post-Hearing Submission By Amici To The Tribunal International Institute For Sustainable Development And Communities For A Better Environment Bluewater Network Center For International Environmental Law*, June 29, 2004, available at [http://www.iisd.org/pdf/2004/trade\\_methanex\\_post\\_hearing\\_submissions.pdf](http://www.iisd.org/pdf/2004/trade_methanex_post_hearing_submissions.pdf) Although the Tribunal did not formally accept this second submission, the legal point was nonetheless made through its submission.

simply read transcripts after the fact, but to fully appreciate the dynamic of a difficult and often diffuse technical discussion in this regard during the proceedings.

Both of these precedents of the Methanex Tribunal have now been acted upon elsewhere. By virtue of a further NAFTA Free Trade Commission decision in October 2003, a process for *amicus* submissions in Chapter 11 cases has been established. Other cases have also now accepted (in principle so far) the idea of such submissions, including in a critical water case between Bechtel subsidiary Aguas del Tunari and Bolivia, and another involving Argentina.<sup>28</sup> The NAFTA governments (at least Canada and the United States), have also indicated they expect all of their future cases to be open to the public. Additionally, ICSID continues to pursue new rules for its proceedings on transparency and *amicus* submissions. And other recent investment agreements, most notably those with the United States as a partner, also include rules on open access to documents and proceedings and *amicus* submissions.

In short, there is no doubt that the Methanex case has been pivotal in beginning the transition of international investment arbitrations from a secret and secretive process into a more transparent, accessible and thus accountable process. There is much to be done yet in this regard, but the starting line has been crossed, and it is self-evident that there is no turning back from this process in the post-Methanex era. That alone marks the Methanex arbitration as a seminal part of the evolution of international law in this field.

---

<sup>28</sup> The later is the *Suez/Vivendi v. Argentina* case. See the Centre for International Environmental Law, on investment, at <http://www.ciel.org>