

**In the Arbitration under Chapter 11
of the North American Free Trade Agreement
and the UNCITRAL Arbitration Rules**

between

Methanex Corporation, Claimant/Investor
and
United States of America, Respondent/Party

**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**

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1. *Amici* wish to acknowledge and congratulate the Tribunal on its leadership in making the proceedings on the merits open to the public. It is precisely because of this leadership that *Amici* have the opportunity to make this brief post hearing submission.
2. During this month's hearings on the merits, the disputing parties addressed, *inter alia*, their disagreement concerning whether the California MTBE measure was a human health measure, an environmental measure or neither, and the implications of each alternative. On this point, the United States presented evidence that the measure was a legitimate human health measure, and then reiterated its argument that States are not liable to compensate for economic losses resulting from *bona fide* human health measures. *See Methanex v. United States* (uncorrected transcript), 9 June 2004, pp. 568-72. Methanex argued that the measure was not a human health measure, and that it was not a *bona fide* exercise of *any* kind of police power by California. *See Methanex v. United States* (uncorrected transcript), 7 June 2004, pp. 53 *et seq.*, 199.
3. Neither disputing party addressed the legal consequences of a finding that California's measure is a *bona fide* (non-health) environmental measure. It is this omission that *Amici* address here.
4. *Amici* first remind the Tribunal that we support the United States' argument that California's measure is a *bona fide* public health measure. If the Tribunal agrees, the issue of the scope of the police powers exclusion from the concept of expropriation should not arise in this case, because the Tribunal may conclude, with the agreement of the disputing and non-disputing parties,¹ that the measure does not violate Article 1110.

¹ All interested parties have agreed that, "as a general matter, States are not liable to compensate ... for economic loss incurred as a result of a nondiscriminatory action to protect the public health." US Amended Statement of Defense, 23 Apr. 2004, ¶ 411; *see also* Methanex Reply, 19 Feb. 2004, ¶ 208 (agreeing with the US formulation). *See also* Mexico, Art. 1128 Submission, 30 Jan. 2004, ¶ 13 (customary international law incorporates the principle that "States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest"); Canada, Art. 1128 Submission, 30 Jan. 2004 ("At international law, expropriation does not result from *bona fide* regulation: a state is not required to compensate an investment for any loss sustained by the imposition of a nondiscriminatory, regulatory measure protecting legitimate public welfare objectives.").

5. If, however, the Tribunal finds the California measure not to be a *bona fide* public health measure, it will have to address whether the measure is a *bona fide* non-health-related environmental measure and to determine whether such a measure can constitute a violation of Article 1110. In this regard, there is substantial support for the principle that legitimate environmental measures, like other legitimate police power measures, are not expropriatory under international law.

6. In its initial pleadings, the United States argued that *neither* public health nor environmental protection measures are expropriatory under NAFTA. *See* US Amended Statement of Defense, 23 Apr. 2004, ¶¶ 411 (public health measures), 412 (environmental measures). Methanex appears to have taken no position on this question, emphasizing instead its argument that the measure was discriminatory and thus not a legitimate measure of any kind. *See Opening Statement for Methanex Corporation, Methanex v. United States*, 7 June 2004, p. 199 (uncorrected transcript) (“at the heart of what we are alleging here [with respect to Article 1110] is discrimination... and I don’t think any public action that is discriminatory can ever be squared with the requirements of 1110”).

7. Canada, in its Article 1128 submission, clearly states its position that legitimate environmental measures are not expropriatory: “[G]overnments must be free to act in the broader public interest through protection of the environment ... and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.” Canada’s Article 1128 Submission, 30 Jan. 2004, ¶ 15 (quoting *Marvin Feldman v. Mexico*, 16 Dec. 2002, Award, ¶ 103). Mexico would agree. *See* Mexico, Art. 1128 Submission, 30 Jan. 2004, ¶ 13 (customary international law incorporates the principle that “States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest”).

8. *Amici* submit that this is the correct view under international law today: there is no limitation on the concept of the police powers that excludes *bona fide* environmental protection measures of the type being discussed in this case from its scope.

9. Most of the extant case law in relation to expropriation and the police powers rule was formulated several decades ago under the phrase of “public health, safety and morals.” This formulation should not, however, be read as precluding the recognition that international law more generally has evolved today to recognize that legitimate non-health-based environmental protection measures would also fall within a modern formulation of the police powers rule.

10. The International Court of Justice and the Appellate Body of the World Trade Organization have both recognized that older formulations of international law should be reflected upon in order to adjust for the rise of environmental protection as part of the fabric of domestic and international law. This rationale is inherently applicable to a modern conception of the police powers rule.

11. In holding that treaty obligations concerning water quality protection must evolve in step with awareness of the importance of environmental issues, the ICJ has stated: “Throughout the

ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”
Gabcikovo/Nagymaros Case, Hungary v. Slovakia, 1997, para. 140.

12. Similarly, in the *United States – Shrimp* case, the WTO Appellate Body noted that the words “exhaustible natural resources” in GATT Article XX(g), must be read “in light of contemporary concerns of the community of nations about the protection and conservation of the environment.” WT/DS58/AB/R (1998), para. 129.

13. Other tribunals addressing claims under NAFTA’s Chapter 11 have concluded that the police powers rule applies to legitimate environmental measures. As Canada noted in its Article 1128 submission in this case, *see supra* para. 6, the tribunal in *Marvin Feldman v. Mexico* reached this conclusion explicitly.

14. International legal scholars have also noted that States’ police powers include the power to protect the environment, and that measures implemented for this reason are nonexpropriatory. *See, e.g.,* M. Sornarajah, *The International Law on Foreign Investment* (1994) at 283 (“[E]nvironmental protection ... legislation [is a] non-compensable taking[.]. These regulations are regarded as essential to the efficient functioning of the state.”); *id.* at 299 (“Obviously, infringements of property rights in controlling hazardous or environmentally sound use of property ... are regulatory takings that require no compensation.”).

15. Recognizing the application of the police powers rule to environmental measures does not threaten any internationally recognized principles of expropriation or property rights. Measures, whether taken for public health or environmental reasons, that require the transfer of title to property would continue to be considered expropriatory and to require compensation. (Even under the public health exception, which does not consider the economic impacts of legitimate public health regulations to be expropriatory, the outright taking of property for the creation of a public hospital would require compensation. Similarly, while the police powers rule provides that *bona fide* environmental regulations are not expropriatory, the rule would not foreclose a claim for compensation for the taking of land to create a national park.) While there may be some grey areas, the current arbitration concerns what is clearly a classic regulatory measure in the sense described above. The only issue raised here is whether describing it as an environmental measure or a public health measure has any legal bearing on its status as a police powers measure. *Amici* submit that it does not.

16. *Amici* believe the Tribunal must decide the issues based on NAFTA and international law, and is not limited by one or both party’s view of that law. Under international law, a State’s police powers include the ability to protect the environment and *bona fide* environmental

regulations are non-expropriatory to the exact same extent as are any other *bona fide* measures implemented under the police power.

Respectfully submitted this 29th day of June, 2004,

A handwritten signature in cursive script that reads "Martin Wagner".

Martin Wagner

A handwritten signature in cursive script that reads "Howard Mann".

Howard Mann