

**Todd Weiler**

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**From:** Todd Weiler [tweiler@naftalaw.org]  
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Dear NAFTA News Subscribers

Since I last wrote to you, one very significant award has been issued, in: *Methanex v. U.S.A.* In addition, some new NAFTA documents have been made public, and have been placed on my web site; and one important -- but as of yet unnoticed -- procedural order has been issued in: *Pope & Talbot v. Canada.*

### 1. Methanex

The Methanex case is about whether Methanex should be compensated for a series of California measures, which essentially have had the effect of gradually banning all commerce in a gasoline additive, MTBE, in California. The Methanex Tribunal's jurisdictional award turned on its interpretation of NAFTA Article 1101, which states that the obligations of NAFTA Chapter 11 apply to measures that "relate to" investors or their investments. Generally, the link between any given measure and an investor or an investment can be quickly ascertained by inquiring as to whether a measure negatively affects the business of investor or investment. However, because Methanex was only a downstream producer of an ingredient of MTBE, neither it nor its investment necessarily met the normally simple Article 1101 threshold test. On the face of the claim, Methanex's business was only indirectly affected by the measures at issue. They banned MTBE, not the ingredient Methanol. Accordingly, the Methanex Tribunal had to really think about whether the measures in question actually "related to" Methanex or its investment. If the measures didn't "relate" to the investor or the investment, the tribunal had no business entertaining the claim.

From a doctrinal standpoint, the ratio of the Methanex award is of little practical significance for other would-be claimants. Normally, it is obvious that the measures in question relate to (i.e. directly affect) the business of the investor/investment. Accordingly, the impact of the tribunal's "fine tuning" on Article 1101 (more clearly concluding that "affecting an investor/investment" basically means something slightly more like "directly affecting") will probably be marginal.

Accordingly, I think the most important finding in the Methanex Tribunal's award was actually the crystal-clear distinction it made between issues of "admissibility" and issues of "jurisdiction." In this, and in almost every other NAFTA claim thus far filed, NAFTA governments have repeatedly attempted to convince sceptical tribunals to rule on issues of admissibility by dressing the up as issues of jurisdiction. As my old administrative law professor used to say: "It is an error of jurisdiction when the dog catcher attempts to suspend your driver's license." It is not an error of jurisdiction if the dog catcher interprets a by-law regulating appropriate dog collars in a way that the claimant doesn't like. In other words, the Methanex Tribunal did an excellent job of explaining, once and (hopefully) for all, that just because a NAFTA government vehemently disagrees with a claimant's interpretation of a NAFTA obligation, it does not mean that the government can

convince a tribunal to dismiss the matter as if it were entertaining a motion to strike pleadings (in Canada) or for summary judgement (in the USA). The only question for a tribunal to consider, in a true motion to dismiss based on lack of jurisdiction, is whether it has any business considering the claim (as opposed to whether the claim has any merit).

Further, some people have expressed doubt as to whether Methanex can resubmit its claim, based on a belief that the Tribunal has the bar very high for resubmission. I disagree. All Methanex basically needs to do is establish a prima facie case that one or more of the measures in question may have been motivated by an intent not only to harm MTBE makers, but also those who supply the primary ingredients of MTBE (such as Methanex). In this regard, the issue should come down to whether a third party (ADM Corp.) improperly influenced the decision to ban MTBE because it saw itself in some form of competition with both MTBE makers and downstream producers such as Methanex, and California complied. Methanex has so far alleged that ADM Corp. influenced the Governor and other politicians through lobbying and campaign donations, to have MTBE banned. The fact that Methanex has been forced to lay its metaphorical cards on the table (by having to tender its evidence with the amended claim) is unusual, but not so unusual when one recalls that NAFTA tribunals are masters of their own proceedings; that this particular arbitration has already been dragging on for three years; and that the resubmitted claim would be the third one that Methanex will have filed. In other words, the Tribunal knows it is time to move ahead.

Surely Methanex has the evidence available to submit an amended claim. Otherwise one wonders why it would have changed counsel in mid-stream (since previous counsel would have been placed in a conflict if it had to proceed with the claim involving ADM Corp.). One doesn't go to that kind of trouble (changing counsel and submitting a considerably amended claim one year after its first claim, and after the first round of jurisdictional arguments had been exchanged), unless one has discovered some pretty good evidence to justify the trouble. Accordingly, there is little doubt that the Methanex arbitration will continue.

And finally, one should not conclude that just because Methanex appears to have been told that to succeed in its claim it must prove the existence of discriminatory intent behind California's measures, that all future claimants will be required to do the same. While proof of discriminatory intent is a nice thing to have in any trade or investment case, it is no more REQUIRED in most cases than a smoking gun is required to convict someone of murder. Such evidence merely helps. Methanex finds itself in this position because it and the USA agreed that if such specific intent existed to harm Methanex or firms like it, Methanex would meet the test of the measure "relating to" its investment, as required under Article 1101. For most investors, meeting the Article 1101 threshold is automatic, meaning that whatever the Methanex Tribunal said about discriminatory intent in its jurisdictional award may have little or no relevance to the determination of the merits in any other case.

## 2. New Stuff

There is a new claim mentioned on my web site: *International Thunderbird Gaming v. Mexico*. It involves alleged breaches of national treatment and fair and equitable treatment in respect of the closure of casino operations which favoured the businesses of local competitors. The notices of intent and arbitration should be available soon.

I have also added some new document links for the Loewen case, involving written arguments and expert opinions that the US Government has apparently chosen not to include on its web site, but which have been found elsewhere.

### 3. The New Pope Confidentiality Order

The most interesting NAFTA news has been delivered in the form of a new confidentiality order in the *Pope* case (available on my web site). The amended order provides for the public release of virtually all of the written arguments and all of the oral transcripts of hearings, which is great news. The bad news, however, is that the documents have not actually been made public yet, and -- of much greater concern -- the Canadian Government has succeeded in keeping all of the previous negotiating texts it provided to the tribunal in relation to NAFTA Article 1105 secret. For those of you who followed the negotiations on the Multilateral Agreement on Investment a few years ago, to hear word of a NAFTA Government is still taking steps to keep negotiating texts secret must come as a deep disappointment.

Why does this matter? One of the most important questions for NAFTA lawyers over the past year (since the NAFTA Parties issued a statement basically mandating what Article 1105 was always "supposed" to mean) has been the question of "what the negotiating documents, and explanatory notes actually said?" Canada never provided any of the explanatory notes to its negotiations on Chapter 11 to the Pope Tribunal (a fact which caused much consternation for the Tribunal), but it did provide some of the draft texts. The reason that this material is being kept secret today is most likely simple: the NAFTA governments do not want the truth to come out.

When the NAFTA governments attempted to mandate what NAFTA Article 1105 actually meant, as drafted, by issuing a Free Trade Commission statement on July 31, 2001, they opened the door to tribunals, commentators and lawyers to query what the actual intent of the NAFTA drafters was, in 1992 to 1994, concerning the meaning of NAFTA Article 1105. The governments took this extreme step (which some commentators and tribunals, including me, consider to have been an ultra vires attempt to amend the NAFTA) because tribunals were not accepting their arguments about original intent in any of the NAFTA proceedings. These arguments, and the Commission statement, begged the question of tribunals of what the NAFTA preparatory works said. The problem was that in various proceedings it appeared as if no such documents existed. Eventually, it came out that some did exist, and in a last-ditch attempt to defeat Pope & Talbot's claim, Canada provided some of them to the Tribunal. As it indicated in its Damages Award, the Tribunal was unimpressed with what it saw, and what it believes it was not allowed to see.

Given this background, one can only wonder if the reason behind Canada's continued attempt to keep these negotiating texts secret is that, just as in the Wizard of Oz, other tribunals might also be considerably unimpressed should they be permitted to look behind the curtain and see the actual history of the negotiation of NAFTA Article 1105. Hopefully the press will pick this story up and one or more of the NAFTA governments will be shamed into showing us all what was really negotiated in NAFTA Chapter 11 one decade ago.

### 4. Legal Note

As some of you know, I participated on the claimant's counsel team during the merits and damages phases of this arbitration, but have not been involved since earlier this summer,

when I began my new position at the University of Windsor. My evaluation of the Pope Tribunal's order, which states that its terms have been the product of an agreement of the parties to the arbitration, in no way reflects the views of my former clients.

Also, please note that the contents of NAFTA News Updates cannot be reproduced in any form without my express consent.

Kindest regards,

TJW

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