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

PETITION TO THE ARBITRAL TRIBUNAL

Mr. V.V. Veeder, Q.C., Chair
Mr. Warren Christopher
Mr. J. William Rowley, Q.C.

submitted by

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1. Introduction

1.1 The purpose of this Petition is to request permission to submit an *Amicus Curiae* brief to the Tribunal on critical legal issues of public concern in the arbitration between Methanex Corporation and the United States of America.

2. The International Institute for Sustainable Development

2.1 The International Institute for Sustainable Development (IISD) is a Canadian-based international non-governmental organization originally established by an Act of the Parliament of Canada. The mandate of the IISD is to foster local, regional and international policies and practices in support of the achievement of sustainable development. The IISD has an independent and international Board of Directors.

2.2 The IISD is a global leader in the field of sustainable development, with a special focus on the linkages between trade and investment on the one hand, and the environment and sustainability on the other. Senior officers of the IISD are regularly consulted by the World Trade Organization and its Director General, the Organization for Economic Cooperation and Development, the North American Commission for Environmental Cooperation (NAFTA's environmental agency) and the United Nations Commission for Sustainable Development. The IISD record of publications and participation in international conferences and processes that link trade, investment and sustainable development is reflected in this unique and ongoing consultative role.

2.3 In this case, IISD is represented by counsel with considerable expertise in international trade law, particularly in dispute settlement in international trade, and in international environmental law. A brief introduction to Counsel for the IISD is appended to this petition.

3. Why is an *Amicus Curiae* brief necessary?

3.1 The legal issues raised in this case are of immense public importance. The claim of Methanex under Article 1105 raises both procedural and substantive issues concerning how a government can make environmental laws and the scope of those laws. The Methanex claim under Article 1110 raises critical questions concerning the definition of the concept of "expropriation" and its relationship to the regulatory function of governments, often referred to under international law as the government's "police powers."

3.2 The Methanex claim goes to the heart of the limits placed by NAFTA on governmental authority. They concern whether, under NAFTA, environmental legislation can be enacted only with compensation to foreign investors. Thus, the ruling of this Tribunal will have a critical practical impact on environmental and other public welfare law-making at the federal, state and provincial levels throughout the NAFTA region.

3.3 The issues in this case are matters of public interest distinct from the commercial issues that arbitration processes normally handle. It is because of this vital public interest dimension that the IISD wishes to submit an *amicus* brief in this case.

3.4 The IISD approaches this issue from the perspective that, properly construed, investment agreements providing effective protection for foreign investors can be a significant component of a sustainable investment strategy. Nevertheless, such a strategy also requires the ability of governments to maintain an optimum environmental protection process.[1] This requires an interpretation of the provisions of international investment agreements and of the applicable international law that reflects the commitment of the three NAFTA Parties, found in the Preamble to the NAFTA, to strengthen the development and enforcement of environmental laws, to maintain their flexibility to safeguard the public welfare and to proceed in a manner consistent with environmental protection.

3.5 Furthermore, the interpretation of the provisions of Chapter 11 of NAFTA in this case must also reflect the legal principles underlying the concept of sustainable development. This concept is also included in the Preamble to the NAFTA, but so far has not been raised by either party before this Tribunal. The importance of the principles relating to sustainable development to the interpretation of trade and investment agreements has been acknowledged by the Appellate Body of the WTO.[2] In the Petitioner's view, they are principles that should be brought to the attention of, and taken into account by, this Tribunal.

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[1] See e.g., Per G. Fredrikson, ed., *Trade, Global Policy, and the Environment*, World Bank Discussion Paper No. 402, 1999.

[2] *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para. 129.

3.6 The IISD seeks an opportunity to bring its international expertise to the assistance of the Tribunal to ensure that the joint goals of investment protection and environmental integrity can be achieved in the interpretation of Chapter 11, consistent with the principles of sustainable development and the other closely related commitments in the Preamble of NAFTA.

3.7 In addition to the substantive issues, there is an important issue of public perception about Chapter 11 proceedings. Specifically, Chapter 11 has been widely perceived as closed, secretive, non-transparent and one-sided. This arises from the fact that it is only foreign investors that may initiate the process, and that public access to any aspect of that process has heretofore been largely restricted. The closed nature of Chapter 11 proceedings stands in stark contrast to the public domestic court proceedings of the NAFTA Parties where issues of this kind would otherwise be heard.

3.8 While governments have moved to provide public access to more documents in the Chapter 11 process (and Methanex, the United States and this Tribunal have notably agreed to significant public disclosure in this case), the lack of full transparency and access only fuels public disquiet. The grant of this petition allowing IISD, a body with considerable and widely-recognized expertise in respect of the fundamental issues in this case, to provide an *amicus* brief would considerably allay such public concerns. This is especially so in a case where critical issues of the public welfare and environmental protection capacities of governments are at stake.

4. The Authority of the Tribunal to Grant this Petition

4.1 The Tribunal has the authority to grant this petition. Article 15 of the UNCITRAL Arbitration Rules provides that, subject to any contrary provisions in the Rules,

> "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

4.2 The UNCITRAL Notes cite this provision as an example of the "broad discretion and flexibility in the conduct of the arbitral proceedings" granted by the UNCITRAL Rules to an arbitral tribunal.[3]

4.3 Nothing in the UNCITRAL Rules prohibits the Tribunal from granting the *amicus* status requested here. Moreover, nothing in NAFTA Chapter 11 precludes the Tribunal from considering an *amicus* brief. The Petitioner is not aware of any previous cases under

[3] United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings, para.* 4.

the UNCITRAL process where third parties have petitioned the Tribunal to submit an *amicus* brief.[4] Thus, this issue is a matter of first impression for this Tribunal.

4.4 The power of a trade dispute settlement body to consider such *amicus* submissions has been recognized in the WTO. In *Shrimp/Turtle,*[5] the WTO Appellate Body took the view that the power of a panel under Article 13 of the *Dispute Settlement Understanding* (DSU) to seek information from sources other than the Parties included the power to consider submissions from non-governmental organizations or other non-state entities. The provisions of the DSU, the Appellate Body said, grant the panel "ample and extensive authority to undertake and control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts". (para. 106)

4.5 More recently in *United States - Hot-Rolled Steel,*[6] the Appellate Body affirmed the approach it had taken in *Shrimp/Turtle* and applied the right to consider *amicus* briefs to itself, even though there is no specific power in the *Working Procedures* of the Appellate Body authorizing it to consider information from sources other than the parties. The Appellate Body distinguished clearly between the "right" to make submissions, which belongs to the Parties only, and any authority granted by the Appellate Body to allow non-parties to make submissions. The Appellate Body took the view that it had broad authority to adopt procedural rules that did not conflict with the rules and procedures of the DSU or of the covered agreements. It concluded:

> "Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal." (para. 39)

4.6 The power of a court to receive *amicus* briefs is well recognized in domestic law. Canadian courts have "the inherent authority or power to permit interventions basically on terms and conditions that they believe are appropriate in the circumstances."[7] Indeed, in one major case going to the constitutional power of the federal government in Canada to enact environmental laws, the Supreme Court of Canada expressly relied upon submissions made by an *amicus* participant.[8] In the United States, it has been noted that

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[4] Under the closely related process of the International Centre for the Settlement of Investment Disputes (ICSID), nothing in the ICSID Rules of Arbitration bars the acceptance of *amicus* briefs. Although the Petitioner is aware of one case where an additional party was added as a claimant in the proceedings by agreement of the parties (*SPP (ME) Limited and SPP Limited v. Egypt*, Decision of 14 April 1988, 3 ICSID Reports 131), the issue of the acceptance of *amicus* briefs has not, to the Petitioner's knowledge, been dealt with in the ICSID jurisprudence.

[5] *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12 October 1998. WT/DS58/AB/R. Public reports also suggest that the panel in the recent Asbestos Case between Canada and the EC did accept two *amicus* briefs in its case.

[6] *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body of 10 May 2000, WT/DS138/8.

[7] *Canada (Director of Investigation and Research) v. Air Canada*, 33 Admin L.R. 229 at 237, (1988).

[8] *R. .v. Hydro Quebec*, 3 S.C.R. 213 at 308-309, paras. 147-148, (1997).

amicus participation is within the "broad discretion" of the courts.[9] Recognition in the United States of the importance of public interest groups in a democratic society has led to widespread third party participation in court proceedings. One recent study indicates that in the 1980's 86% of the environmental law cases heard by the United States Supreme Court involved *amicus* briefs.[10]

4.7 Accordingly, the Petitioner submits that the Tribunal has the legal authority to consider an *amicus* brief. In establishing the process for the filing of this brief, the Tribunal can draw an analogy with the provisions relating to the receipt of information from experts.[11] Thus, the Tribunal can invite a written submission from the Petitioner, provide relevant information to the Petitioner to provide background for that submission and provide an opportunity for the Petitioner to be heard in the oral proceedings before the Tribunal.

5. Request to the Tribunal

5.1 The Petitioners respectfully request the following from this Tribunal:

a) Permission to file an *amicus* brief in writing at an appropriate time in the proceedings. In order to make the most effective submissions, the Petitioner would benefit from reading the memorial and counter-memorial of the two litigating parties prior to making its submission. However, the Petitioner is also sensitive to any concerns the parties and Tribunal may have not to unduly extend these proceedings, and not to prevent the possibility that jurisdictional issues raised by the United States may be heard as a preliminary matter. Thus, the Petitioner is in the hands of the Tribunal as to the most appropriate timing for the filing of the brief.

b) Permission to make an oral submission in support of the written brief at an appropriate time in the proceedings.

c) Permission to have observer status at the oral hearings in order to facilitate the Petitioner in making the most informed oral submissions possible.

5.2 In support of this Petition, Counsel for the IISD is available to attend at the procedural meeting of the Tribunal and the arbitrating parties on 7 September, 2000, in order to speak to this Petition and to respond to any questions the members of the Tribunal may have. The Petitioner is also prepared to elaborate in writing on any of the issues raised in this petition, should the Tribunal consider this to be useful.

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[9] *Hoptowit v. Ray*, 683 F.2d 1237, 1260 (9th Cir. 1982).
[10] Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings", 88 A.J.I.L. 611, at 618-619, (1994).
[11] UNCITRAL Arbitration Rules, Art. 27.

6. Undertaking on Confidentiality

6.1 The IISD and its Counsel are fully prepared to comply with any obligations on confidentiality that the Tribunal may require.

Respectfully submitted this 25th day of August, 2000.

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Annex: Introduction to IISD Counsel

Prof. Donald McRae: Prof. McRae is the Hyman Soloway Professor of Business and Trade Law at the University of Ottawa and former Dean of the Common Law Section of the Faculty of Law. He has chaired and been a member of dispute settlement panels under the Canada-United States Free Trade Agreement and under NAFTA and has appeared as counsel before WTO panels. He has published widely on international trade law. Prof. McRae was also Chief Negotiator for Canada in respect of the Pacific Salmon Treaty dispute with the United States and has acted as counsel for Canada in international maritime boundary disputes, all of which have involved issues of conservation and sustainability.

Howard Mann, Ph.D.: Howard Mann was previously a Canadian negotiator and legal advisor for such international environmental law agreements as the Convention on Climate Change. He was also a legal advisor and participant in the negotiation of the NAFTA-related North American Agreement on Environmental Cooperation. He has been in private practice since 1993, focusing on international sustainable development matters, primarily the relationship of trade law to environmental law at the national and international levels. Among other publications and conference papers dealing with these issues, Mr. Mann was the lead author of the IISD's *NAFTA's Chapter 11 and the Environment* publication.