

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**STATEMENT OF RESPONDENT
UNITED STATES OF AMERICA REGARDING
PETITIONS FOR *AMICUS CURIAE* STATUS**

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**STATEMENT OF RESPONDENT
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REGARDING PETITIONS FOR *AMICUS CURIAE* STATUS**

In accordance with the Tribunal's order of October 10, 2000, Respondent United States of America respectfully submits the following written statement in response to the petition for *amicus curiae* status and supplemental statements of the International Institute for Sustainable Development, dated August 25, September 6 and October 16, 2000, and the amended petition for *amicus curiae* status of Communities for a Better Environment, Bluewater Network of Earth Island Institute and the Center for International Environmental Law, dated October 13, 2000 (collectively, "Petitioners"). The United States also responds to Methanex's August 31, 2000 Submission, in which Methanex opposes Petitioners' requests for *amicus curiae* status.

The United States supports Petitioners' requests to make written *amicus* submissions in this case. Under the rules governing this arbitration, the Tribunal may properly consider

petitions for leave to make *amicus* submissions and allow such submissions in instances it deems appropriate. Methanex's suggestion that the UNCITRAL Arbitration Rules and the NAFTA command a different result is without merit. The Tribunal may properly exercise the discretion granted it under the UNCITRAL Arbitration Rules to consider *amicus* petitions, where, as here, the arbitration is against a sovereign State and also implicates substantial public interests.

I.

GOVERNING LAW PERMITS THE ACCEPTANCE OF *AMICUS* SUBMISSIONS.

Article 1120(2) of the NAFTA instructs in pertinent part that the UNCITRAL Arbitration Rules "shall govern the arbitration except to the extent modified" by Section B of the NAFTA. Contrary to Methanex's contentions, the governing rules allow the Tribunal to accept *amicus* submissions to the extent it finds them appropriate. Nothing in those rules or Section B of Chapter Eleven requires a different result.

A. The UNCITRAL Rules Authorize The Tribunal To Accept *Amicus Curiae* Submissions If It Deems Appropriate.

1. The Rules' Inherent Flexibility Permits Their Adaptation To The Particular Needs Of Investor-State Disputes.

The United States respectfully submits that the Tribunal, in exercising the authority granted it under the UNCITRAL Arbitration Rules (the "UNCITRAL Rules"), should take into consideration the nature of the dispute before it. This is a dispute brought by a private party against a State that (1) challenges sovereign acts under international law pursuant to a trilateral trade agreement, and (2) implicates substantial public interests such as public health and the

environment. This is not an arbitration between private parties brought under the arbitration clause of a commercial agreement or contract, which is the example Methanex would have this Tribunal follow. Instead, for the reasons discussed below, the Tribunal should exercise its discretion under the Rules in a manner commensurate with the nature of this particular dispute. In adopting the UNCITRAL Rules, the United Nations General Assembly recommended their use “in the context of international commercial relations, particularly by reference to [them] in commercial contracts.” UNCITRAL Rules pmb1. Their application, however, is not limited to international commercial arbitration, even though the Rules were prepared principally with these types of commercial disputes in mind. Indeed, their scope is deliberately broad enough to apply in *any* case where the parties agree to apply them. *See* ISAAK I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES* 45 (1986).

In addition to their broad scope, the UNCITRAL Rules also are characterized by highly flexible procedures. *See* STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, *UNCITRAL ARBITRATION RULES IN PRACTICE* 75 (1992) (Rules drafted “to allow arbitrators sufficient flexibility to accommodate the UNCITRAL Rules to various cultures and legal systems”). The flexible procedures reflected in the Rules allow them to be readily adapted to circumstances beyond those of the commercial contract disputes originally contemplated by the drafters. For example, the Permanent Court of Arbitration based its rules on the UNCITRAL Rules, explaining their application to inter-State disputes under international law as follows:

Experience since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration.

MATTI PELLONPAA & DAVID D. CARON, UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED 8 (1994) (quoting *Introduction to Permanent Court of Arbitration: Optional Rules for Arbitrating Disputes between Two States*, Oct. 20, 1992).

Indeed, States have adopted the Rules for application in a variety of contexts, such as inter-State arbitration and investment disputes between States and private investors (described by some scholars as arbitration without privity). *See, e.g.*, Algiers Accords Claims Settlement Declaration, Jan. 19, 1981, art. II, para. 1 & art. III, para. 2 (Iran-United States Claims Tribunal conducts its business pursuant to UNCITRAL Rules, as modified, when deciding inter-State claims between the U.S. and Iran, and the claims of U.S. nationals against Iran and Iranian nationals against the U.S.); United States Prototype Bilateral Investment Treaty, 1994, art. IX(3) (relevant investment disputes settled by binding arbitration under UNCITRAL Rules, among other options); NAFTA art. 1120(1) (disputing investors may submit claims to arbitration under UNCITRAL Rules, among other options).

The adopting States' view that the UNCITRAL Rules were sufficiently flexible to be used in these instances reflects the natural presumption that tribunals constituted under the rules would use the discretion granted them in a manner appropriate to the nature of the dispute. Such a use of discretion is called for here.

The *Methanex* arbitration, like many investor-State disputes under Chapter Eleven, is of a fundamentally different nature than a typical international commercial dispute. *First*, a State is the respondent. As the High Court of Australia recognized in *Esso Australia Resources Ltd. v. Plowman*, arbitrations against a government – for that reason alone – have a public interest component different from purely private arbitrations. *See* (1995) 183 CLR 10 at ¶ 40 (“in the

public sector ‘[t]he need is for compelled openness, not for burgeoning secrecy’. The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities?’) (citation omitted).

Second, this Tribunal must decide the disputed issues in accordance with the provisions of a trilateral treaty and principles of public international law. *See* NAFTA art. 1131(1). Thus, any award issued in a Chapter Eleven dispute – although not binding beyond the particular private investor and State respondent – becomes part of a body of arbitral decisions under international law that is informative, and perhaps even persuasive, in other contexts. Indeed, every final award issued thus far in Chapter Eleven cases has been made public and, thereafter, received significant attention from international law scholars, practitioners and arbitrators. This stands in stark contrast to typical commercial arbitration where, often, even the existence of a dispute is kept from the public eye.

Finally, Chapter Eleven cases such as this one differ even from commercial arbitration involving a public entity, because they go beyond breaches of commercial contracts and implicate core governmental functions. Thus, they may have a significant effect beyond the two parties to the dispute. For example, the *Methanex* case concerns issues of considerable public interest (*e.g.*, government regulation, expropriation, state responsibility, etc.). Thus, in considering the questions before it, this Tribunal should recognize that it may be appropriate to exercise its discretion in this case in a manner that might not necessarily be appropriate in a typical commercial dispute between private parties.

2. UNCITRAL Article 15(1) Specifically Grants The Tribunal Authority To Conduct These Proceedings “As It Considers Appropriate.”

Article 15(1) is the cornerstone to the Rules’ flexible approach to arbitration. *See* BAKER & DAVIS at 75 (“Article 15(1) of the Rules summarizes the two fundamental principles of procedure – flexibility and equality.”). The Article provides that:

Subject to these 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.

UNCITRAL Rules art. 15(1) (emphasis supplied). Thus, unless a specific article provides otherwise (or the parties have agreed in writing to modify the Rules, *see id.* art. 1(1), which they have not done here), the Tribunal has the authority to conduct the proceedings as it deems appropriate, as long as the two fundamental concerns noted in the proviso are respected. *See* DORE at 54 (Article 15(1) sets forth the “freedom of the tribunal to establish procedure”). The United States respectfully submits that the discretion granted by Article 15(1) is sufficiently broad to encompass the authority to accept *amicus* submissions in a case against a State implicating substantial public interests. *See* PELLONPAA & CARON at 36 (a tribunal using the UNCITRAL Rules “may also establish specific procedural devices, such as the possibility . . . to utilize non-parties as a kind of *amicus curiae*”); JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 107 (1991) (suggesting that the allowance of non-party statements under Article 15(1) “seems a very sensible arrangement in general”); BAKER & DAVIS at 76 (disagreeing with critics who contend that the Iran-US Claims Tribunal did not take full advantage of the flexibility provided by Article 15(1): “Without any formal

authorization from the Rules, the Tribunal . . . permitted briefs from non-parties as *amici curiae*,” among other things).¹

The Appellate Body of the WTO reached a similar conclusion in construing a grant of authority different from, yet in important respects analogous to, that contained in Article 15(1) of the UNCITRAL Rules. In the Report of the Appellate Body in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted on June 7, 2000, the Appellate Body was petitioned to accept *amicus curiae* briefs. It first noted (at ¶ 39) that

nothing in the DSU [Dispute Settlement Understanding] or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs.

The Appellate Body then noted Article 17.9 of the DSU, a provision that allows the Appellate Body to “draw up” working procedures, much like Article 15(1) of the UNCITRAL Rules allows the Tribunal here to “conduct the arbitration.” Upon considering Article 17.9, the Appellate Body found that it “makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.” *Hot-Rolled Lead and Bismuth Carbon Steel* at ¶ 39. Thus, because nothing in

¹ See also BAKER & DAVIS at 98 (“It is almost unheard of for persons who are not parties to file submissions in an arbitration. But the [Iran-U.S. Claims] Tribunal modified the UNCITRAL Rules to permit such filings by one of the two governments or, under undefined ‘special circumstances,’ other persons. These non-parties were allowed to present a written or oral statement when the Tribunal determined that the statement ‘is likely to assist the tribunal in carrying out its task.’ Although the UNCITRAL Rules contain no similar provision, *they do not prohibit a tribunal from accepting or considering amicus curiae briefs from non-parties.*”) (citations omitted) (emphasis supplied).

the DSU or covered agreements limited such authority, the Appellate Body found that it could allow appropriate *amicus* submissions.²

The United States respectfully submits that the discretion granted by Article 15(1) is similarly broad and, as explained below, is not limited by any other relevant rule or law. Accordingly, this Tribunal has the authority to grant Petitioners leave to make *amicus* submissions in this case.

B. No Provision Of Governing Law Prohibits Acceptance Of *Amicus* Submissions By The Tribunal.

1. Nothing In The UNCITRAL Rules Prohibits Acceptance Of *Amicus* Submissions.

The United States recognizes that the discretion granted the Tribunal by Article 15(1) of the UNCITRAL Rules is not without limits. A tribunal's discretion is limited, among other things, by the Rules themselves. *See* UNCITRAL Rules art. 15(1) ("Subject to these Rules . . ."); PELLONPAA & CARON at 22 ("Hence the ostensibly wide discretion of the arbitrators is subject to certain limitations . . . *i.e.*, . . . the more specific provisions of the UNCITRAL Rules.").

Contrary to Methanex's suggestion, however, no other provision of the Rules limits the Tribunal's discretion to accept *amicus* submissions.

First, there is no merit to Methanex's argument that Article 25(4) limits the Tribunal's discretion to accept *written* submissions by *amici*. Rather, that Article limits the set of persons who can attend a hearing (absent the consent of the parties) to the disputing parties and their representatives and assistants. *See* Pieter Sanders, *Commentary on UNCITRAL Arbitration*

² *See also Esso* at ¶ 25 ("It is well settled that when parties submit their dispute to a private arbitral tribunal of their own choice, in the absence of some manifestation of a contrary intention, they confer upon that

Rules, II Y.B. COMM. ARB. 172-223, 202 (1977) (“The arbitrators should therefore ask the permission of the parties if they want to allow the presence at the hearings of persons other than the parties and those who represent or assist them.”); *see also* PELLONPAA & CARON at 513 (“If the arbitral tribunal wishes to allow the attendance of an outsider (*e.g.*, an academic arbitration expert), it must ask the permission of the parties.”) (footnote omitted); BAKER & DAVIS at 121 & n.527 (Article 25(4) originally gave the tribunal power to allow non-disputing parties to attend hearings, but this early “draft was rejected, and the final version leaves the presence of non-parties to the agreement of the parties.”). Thus, nothing in Article 25 purports to address written submissions, which are dealt with elsewhere in the UNCITRAL Rules. As the Australian High Court recognized in *Esso Australia Resources Ltd.*, there is an important distinction between *privacy* of arbitration hearings (which the parties here agree is contemplated by Article 25), and the supposed *confidentiality* of arbitration proceedings (on which the parties do not agree and therefore entered into an agreed Order Regarding Disclosure and Confidentiality as a compromise). *See Esso*, (1995) 183 CLR 10 at ¶¶ 30-32. Indeed, the Australian court in *Esso* rejected the reasoning of the Queen’s Bench in *Hassneh Insurance* – upon which Methanex relies to assert that Article 25 by implication cloaks the entire proceeding in secrecy – and explicitly denied that:

confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.

Esso at ¶ 35.

tribunal a discretion as to the procedure to be adopted in reaching its decision.”).

The United States respectfully submits that the Tribunal should look to *Esso*, rather than to *Hassneh Insurance*, for guidance in interpreting Article 25(4). *Esso*, like this case, involves an arbitral dispute where one of the disputing parties is a government entity. In contrast, the court in *Hassneh Insurance* was concerned with arbitration between private parties for recovery under private reinsurance contracts. *See generally Hassneh Insurance Co. of Israel v. Mew*, 2 LLOYD'S REP. 243 (Q.B. 1993).³

Thus, it does not follow in the context of NAFTA Chapter Eleven disputes that, simply because the hearings shall be held *in camera*, this Tribunal lacks the power to accept written *amicus* submissions. Article 25(4) is a specific limitation on the Tribunal's otherwise broad authority to regulate its own procedures, but it is limited to its specific context: the attendance list for hearings.

Second, Article 22 of the UNCITRAL Rules, which *does* deal with written statements, does not limit the Tribunal's discretion either. That Article specifies that it is the Tribunal that decides what written statements in addition to the pleadings the parties shall or may present. Nothing in the language of the Article suggests a limitation of the Tribunal's discretion under Article 15(1) with respect to receiving non-party statements. To the contrary, Article 22 is consistent with Article 15(1) in that it also authorizes the Tribunal to exercise discretion on a procedural matter.

³ In addition, the reasoning in the *Esso* decision is more easily adapted to a case like *Methanex*, to which the U.S. Freedom of Information Act applies. *Id.* at ¶ 39 (recognizing the premium placed on openness in the public sector where the "onus of proof" is reversed: "the government must prove that the public interest demands non-disclosure.").

2. Nothing In The NAFTA Prohibits Acceptance Of *Amicus* Submissions.

The scope of the Tribunal's discretion to "conduct the arbitration in such manner as it considers appropriate" may also be limited by the terms of Section B of Chapter Eleven. *See* NAFTA art. 1120(2). But again, contrary to Methanex's suggestion, no provision of Section B limits the Tribunal's authority under Article 15(1) of the UNCITRAL Rules to accept *amicus* submissions if it deems it appropriate.

Article 1128 does limit the Tribunal's discretion in one sense: it grants non-disputing State Parties a *right* to make submissions to tribunals on questions of interpretation of the NAFTA. It therefore removes any discretion the Tribunal might otherwise have had to decline to accept such a submission.

Article 1128's grant of a *right* to non-disputing State Parties to make certain submissions, however, does not speak to whether the Tribunal may exercise its discretion to accept, *as a matter of permission*, submissions by other non-parties as a general matter.

There is therefore no merit to Methanex's suggestion that recognizing a tribunal's authority to accept *amicus* submissions would grant *amici* greater rights than those accorded to the NAFTA Parties. Only NAFTA Parties have the *right* to make submissions on questions of interpretation of the NAFTA. Other non-parties have no such right, and the United States does not suggest that they do. As the WTO Appellate Body held in rejecting an argument similar to Methanex's:

Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus*

curiae briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute.

Hot-Rolled Lead and Bismuth Carbon Steel at ¶ 41 (emphasis in original). As the United States has noted above, however, the Appellate Body determined that it has the discretion to accept non-party submissions under Article 17.9 of the DSU, just as this Tribunal does under Article 15(1).

Rather than limit the Tribunal's authority under Article 15(1) of the UNCITRAL rules, as Methanex suggests, Section B provides support for the argument that the Parties to the NAFTA intended investor-State dispute resolution under Chapter Eleven to differ significantly from traditional private commercial arbitration. Indeed, unlike private arbitration, Chapter Eleven arbitration is subject to both Article 1126(10) and Article 1137(4) (together with Annex 1137.4), which demonstrate that the State Parties expected the substance of each Chapter Eleven dispute and most awards to be made available to the public.⁴ Such provisions clearly recognize the public interests implicated by Chapter Eleven cases.

3. Methanex's Contentions On "Intervention" And The Order Regarding Disclosure And Confidentiality Have No Merit.

Methanex's contentions concerning "intervention" and the Order Regarding Disclosure and Confidentiality are not only unfounded, they are also, in part, irrelevant to the issue before this Tribunal. *First*, Methanex's argument on "intervention" misses the point. *See* Methanex's

⁴ *Cf.* VAN HOF at 108 (recognizing that the historically low level of outside interest shown in an arbitration is due primarily to what is often the complete lack of awareness that an arbitration is taking place).

August 31, 2000 Submission at 3-4. The Petitioners here do not seek the status of parties or intervenors to this dispute.

There is a fundamental distinction between a disputing party and an *amicus*. That Petitioners seek to make *amicus* submissions does not suggest that they wish either to intervene or to be joined as third parties in this arbitration. Moreover, Methanex's claim that consideration of *amicus* submissions would unduly burden it is without merit. Both disputing parties will necessarily have an added burden if the Tribunal were to accept an *amicus* submission. Yet, the United States submits that such a burden would be justified where the Tribunal has made the determination that the submission would be helpful. In any event, the Tribunal is required to ensure "that the parties are treated with equality" as it conducts the arbitration. *See* UNCITRAL Rules art. 15(1).

Second, nothing in the Order Regarding Disclosure and Confidentiality forecloses Petitioners' requests for leave to make *amicus* submissions that will assist the Tribunal. The Order does not even purport to address the issue of *amicus* submissions. Nor does the Order, as Methanex suggests, prohibit these Petitioners from receiving relevant documents generated during the arbitration. To the contrary, it specifically envisages that important documents generated during the course of the arbitration will be releasable immediately to the public and that the remainder would be releasable pursuant to lawful requests under the U.S. Freedom of Information Act.

II.

**ACCEPTANCE OF *AMICUS* SUBMISSIONS
IS APPROPRIATE WHEN LIKELY TO ASSIST THE TRIBUNAL.**

In cases involving the responsibility of a NAFTA Party for the alleged injury of an investor of another Party, a non-disputing party may have knowledge or expertise that could be of value to a Chapter Eleven tribunal. In these circumstances, the appropriateness of such input is evident, though not unlimited. Article 15(1) qualifies the Tribunal's discretion with the following proscription: "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." There is nothing inherent in the allowance of *amicus* submissions that conflicts with either of these admonitions.

Furthermore, failure to accept such submissions will reinforce the growing perception that Chapter Eleven dispute resolution is an exclusionary and secretive process. NAFTA's Chapter Eleven plays an important role in settling investment disputes in the NAFTA territories, and in developing generally applicable principles of state responsibility under international law. Thus, a Chapter Eleven arbitral tribunal should be free to accept *amicus* submissions – "in such manner as it considers appropriate" – where they provide insight into, and experience with, the issues before the tribunal. UNCITRAL Rules art. 15(1).

To facilitate making such a determination, the Tribunal could, in its discretion, impose procedural requirements upon Petitioners. For instance, before deciding whether to grant leave to file a full submission, the Tribunal could require a prospective *amicus* to submit a summary or précis that describes the issues the petitioner wishes to address and provides information necessary to judge the petitioner's expertise to address those issues. This case in particular raises important issues regarding the application of NAFTA disciplines to public health and

environmental measures. Thus, the Tribunal may determine that Petitioners have demonstrated their particular expertise in these areas and that their participation will assist the Tribunal in deciding this matter. In addition, the Tribunal may, once it decides to receive an *amicus* submission, impose upon the submitter appropriate page limits and deadlines to ensure order in the proceedings.⁵

Finally, the Tribunal need not fear a deluge of petitions for *amicus* status. If the instant case is any indication, groups with shared interests are unlikely to file duplicative submissions. Here, the Tribunal received only two *amicus* petitions on behalf of four Petitioners, when it appears that approximately 90 non-governmental organizations in the NAFTA territories alone have expressed some interest in the case. *See* Letter from NGOs attached to October 13, 2000, amended petition for *amicus curiae* status. Likewise, the record before both WTO dispute settlement bodies and the WTO Appellate Body demonstrates that a Chapter Eleven tribunal will not be overburdened with requests. Even if duplicative or frivolous petitions are received, it remains within the Tribunal's discretion not to consider them.

Therefore, upon a showing by a non-disputing party of knowledge or expertise, and upon a determination by the Tribunal that the submission would be both relevant and helpful to the Tribunal – yet would not prejudice the rights of the parties or interfere with the efficient advancement of the proceedings – the Tribunal should permit such non-disputing party to make a submission as *amicus curiae*.

⁵ The United States notes that the long-standing tradition in U.S. courts and, more recently, in WTO dispute resolution bodies has been to accept *amicus* submissions, yet employ procedural devices that, like those suggested here, help the decision-makers maintain control over the proceedings.

III.

PETITIONERS' OTHER REQUESTS

The United States wishes to respond briefly to the Petitioners' additional requests for permission to (1) attend any hearings before this Tribunal, and (2) receive copies of all documents filed with, or orders issued by, the Tribunal in this case.

First, as the United States has explained above, Article 25(4) of the UNCITRAL Rules governs the attendance at hearings. Notwithstanding the fact that Article 25(4) instructs that “[h]earings shall be held *in camera*” absent the consent of the parties, it has been the United States' position since the inception of this case to agree to attendance at hearings by members of the general public, which would include any prospective *amicus curiae* the Tribunal may allow to file a submission. The United States hereby reaffirms its previously stated position and consents to the open and public conduct of all hearings before this Tribunal.

Second, with respect to the issue of documents and orders generated during the course of this arbitration, the United States supports disclosure to *amici curiae* and the general public to the fullest extent possible, provided that such disclosure is consistent with the Order Regarding Disclosure and Confidentiality.

CONCLUSION

For the reasons stated above, the United States urges the Tribunal to consider favorably Petitioners' requests to make written *amicus curiae* submissions in this case.

Respectfully submitted,

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