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

METHANEX CORPORATION,

*Claimant/Investor,*

*-and-*

& T E D STATES OF AMERICA,

*Respondent/Party.*

# STATEMENT OF RESPONDENT UNITED STATES OF AMERICA IN RESPONSE TO CANADA'S AND MEXICO'S SUBMISSIONS CONCERNING 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 submissions of the Governments of Canada and the United Mexican States, each dated November 10, 2000, regarding the petitions by the International Institute for Sustainable Development, *Communities* for a Better Environment, the Bluewater Network of Earth Island Institute **and** the Center for International Environmental Law (the "'petitioners") for *amicus curiae* status.

Like the United States, Canada supports petitioners' request to make *amicus curiae* submissions in this case. See Canada's Submission at 2 ¶ **3** ("the Tribunal **should** accept **the** written **submissions** of Petitioners."). The United States thus briefly responds to Mexico's submission.

I.

## NAFTA ARTICLES 1128 AND 1133 DO NOT FORECLOSE ACCEPTANCE OF *AMICUS* SUBMISSIONS.

Contrary to Mexico's suggestion, permitting *amicus* curiae submissions would be consistent with Article 1128 and would not grant *amici* greater rights than the NAFTA Parties. See Mexico's 1128 Submission at 2 ¶ 7. As demonstrated in the United States Statement Regarding Petitions for *Amicus Curiae* Status dated October 27, 2000 ("Statement") at 1 1 - 12, the NAFTA provides only the State Parties with a ***right*** to make submissions to tribunals on questions of the interpretation of the NAFTA. No provision of the NAFTA, however, limits a tribunal's ability to accept, *as a matter of discretion*, submissions by other non-parties. The fact that potential amici must petition a tribunal for leave to make a submission distinguishes this ability from the right granted to NAFTA Parties under Article l 128, and in no way elevates the position of amici above that of any NAFTA Party.

Moreover, the United States does not suggest that petitioners seeking *amicus* curiae status in this or any other Chapter Eleven arbitration become parties to the proceeding. Thus, it is not relevant that an enterprise that constitutes the investment at issue, and therefore has a direct financial interest in the dispute, cannot bring a claim under the NAFTA. See Mexico's 1128 Submission at 2 $3 . *Amici* are independent from the parties and do not have a financial interest in the outcome of a dispute. And, because they are not parties, *amici* are not encumbered by the principle of non-responsibility that forbids international law claims by nationals against their own gave-ems. In sum,

whether an entity with a direct legal interest in the dispute is permitted to bring a claim under Chapter Eleven does not speak to the question of participation by *amici.*

Finally, Article 1 133 does not counsel against permitting *amicus curiae* submissions. *See* Mexico Submission at 3 ¶ 10. *Amici* clearly do not serve the same function as tribunal-appointed experts which are the subject of Article 1133; *amici* may address the full range of issues, including legal issues, while Article 1133 experts may address only "factual issue[s] concerning environmental, health, safety or other scientific matters."

## II.

## SUPPLEMENTAL AUTHORITIES.

The United States draws the Tribunal's attention to two additional authorities that were issued after its Statement was filed.

First, although the United States maintains that the issue of whether or nor this arbitration is deemed confidential is irrelevant to the issue of participation by *amici,* on October 27, 2000, the Swedish Supreme Court issued a decision providing additional support for the United States's contention that this arbitration ought not to be considered confidential, See Statement at 4-6, 9-10. In *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, the Supreme Court of Sweden determined that international commercial arbitrations are not subject to an implied duty of confidentiality. Case No. T 1881-99 (Swed. S. Ct. Oct. 27, 2000) (copy attached hereto as Exhibit A). That case concerned an appeal of an award in an arbitration where, aside from an ***in camera rule*** for

hearings, no governing rule explicitly addressed the issue of a general duty of confidentiality. The Swedish high court firmly agreed with the High Court of Australia in *Esso Australia Resources Ltd. v. Plowman:* "a party in arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this." *Id.* at 10. In any event, whether the Tribunal has authority to accept *amicus* submissions is a separate matter from the level of confidentiality that applies to these proceedings. The rules of confidentiality, for example, govern the disclosure of particular documents to members of the public, but have no bearing on whether the Tribunal can consider submissions by potential *amici.*

Second, an November 8, 2000 a division of the WTO Appellate Body issued an order adopting procedures to deal with the *amicus curiae* submissions to be filed in a particular case. *European Communities – Measures Affecting Asbestos & Asbestos-Containing Products,* WT/DS135/9, AB-2000-11 (Nov. 8, 2000) (copy attached hereto as Exhibit B); *see also* Statement at 14- 15. This Tribunal may wish to consider adopting its own procedures for *amicus* submiss&s, tailored to the specific needs of these proceedings.

## CONCLUSION

For the reasons stated above and in its Statement, the United Stares urges the Tribunal to consider favorably petitioners requests to make written *amicus* curiae submissions in this case.

*Respectfully submitted,*

Mark A. Clodfelter
*Assistant Legal Adviser for International Claims and Investment Disputes*
Barton Legum
*Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes*
Alan J. Birnbaum
Andrea J. Menaker
Laura A. Svat
*Attorney-Advisers, Office of International Claims and Investment Disputes*
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

November 22, 2000