

**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

PETITIONERS RESPONSE

**TO THE SUBMISSIONS OF THE CLAIMANT, METHANEX CORP.,
IN THE PETITION OF THE
INTERNATIONAL INSTITUTE FOR SUSTAINABLE
DEVELOPMENT TO THE ARBITRAL TRIBUNAL**

Response submitted by

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1. Further to its Petition of August 25, 2000 to the Tribunal, directed at seeking the permission of the Tribunal to submit an *amicus curiae* brief in the present arbitration, the Petitioner wishes to make certain brief responses to the submissions of the Claimant, Methanex Corporation in regard to the petition. The following paragraphs will address certain issues raised by the Claimant's submissions in the order they have been raised therein.
2. With respect to paragraph 2 of the Claimant's submission, concerning a rapid decision on the Petition, the Petitioner is concerned solely that the response of the Tribunal be made when the Tribunal is satisfied that it has had the opportunity to properly consider the arguments put forward in the petition, the submission of the Claimant, this brief response, and any other submissions the Tribunal may receive.

Confidential Nature of the Proceedings (paras 3-6)

3. Article 25.4 of the UNCITRAL Rules, referred to by the Claimant, which provides for "in camera" proceedings does not override the authority of the Tribunal in Article 15 to conduct the arbitration in the manner it deems appropriate. The presence for whole or part of the proceedings of an *amicus curiae* when so authorized by the Tribunal, does not make proceedings any less "in camera". An authorized *amicus* is not the type of spectator referred to in the quotation by the Claimant from Black's Law Dictionary.
4. The same reasoning applies to the submission of the Claimant regarding the confidentiality of documents. The extract quoted by the Claimant from the judgment of Colman J. in *Hassneh Insurance Co. of Israel and others v. Stuart J. Mew*¹ related to the disclosure of documents to a party that had not been duly authorized to take part in the arbitration. Thus, it has nothing to do with this Petition which requests the Tribunal to grant *amicus* status to the Petitioner.

¹ [1993] 2 Lloyds Rep. 243 (Q.B.) Commercial Court

5. Moreover, the UNCITRAL Rules do not impose confidentiality restrictions. Indeed, the UNCITRAL Rules contemplate that such issues can be resolved by agreement between the parties, where appropriate, and with the approval of the Tribunal.² Hence, where a Tribunal grants access for an *amicus* to arbitration documents, no rules on confidentiality are breached.

6. The Claimant's submission (para. 6) refers to a joint submission of the parties on such a confidentiality agreement, referred to as a "Confidentiality Order", which it regards as a barrier to the receipt by the Petitioner of any documents. Counsel for the Petitioner has been informed that this order remains unsigned and hence in draft form. However, since the conduct of the arbitration by the United States is subject to the laws of the United States of America, it is subject to the United States Freedom of Information Act (FOIA). It is the Petitioner's understanding that access to key materials, such as memorials and counter-memorials can be obtained through an application pursuant to this Act, and that such access has been granted in at least one other Chapter 11 case under the Act to date. In this respect, in requesting that the Tribunal allow an *amicus* submission to be informed by such materials in the present case, the Petitioner is requesting no more than it is entitled to under applicable United States legislation.

7. Further, as is stated in para. 6.1 of the Petition, the IISD and its Counsel are fully prepared to comply with any obligations on confidentiality that the Tribunal may require.

Parties to the Arbitral Agreement (paras 8 and 9)

8. Contrary to the Claimant's arguments, the Petitioner is not seeking to become a "party" in this case.

9. Claimant refers to NAFTA Article 1128, which deals with "Participation of a Party." This refers to the participation of Parties to the NAFTA itself and is simply not relevant to the Petition. Article 1128 does not deal with the question of an *amicus* brief. The inference in paragraph 9 of the Claimant's submission that the inclusion of a right of a NAFTA Party to make submissions exhausts all possibility of the exercise of the discretion of the Tribunal to allow *amicus* submissions cannot be sustained. The Claimant is seeking to use the absence of a reference to *amicus* status in NAFTA Article 1128 as a prohibition on the Tribunal granting such status in the exercise of its power under Article 15 of the UNCITRAL Rules to control the proceedings. There is no legal or logical basis for such a conclusion.

Jurisdiction of the Arbitral Tribunal to add Parties to the Proceedings (paras 10-15)

10. Equally, the Claimant's arguments regarding the jurisdiction of the Tribunal to add parties to the proceedings are all inapplicable to the Petition. The Petitioner in no way

² Paragraph 6 of the *Annotations to the UNCITRAL Notes on Organizing Arbitral Proceedings*.

seeks to be added as a party. The status and function of an *amicus* is well known and understood as substantially different from being added as a party to a proceeding.

11. Petitioner also notes that the cases referred to by the Claimant concern only matters of true private commercial relations. The present case presents a very different picture. It concerns limits that may be placed on the ability of governments to enact environmental laws. This important public policy aspect to this case presents a new context for the application of the UNCITRAL Rules. Thus, as argued in the Petition, (paras. 4.4 and 4.5) this means that the experience of the World Trade Organization in addressing similar concerns is particularly relevant.

12. As regards the Claimant's allegation that it would be forced to arbitrate issues that the Petitioner wishes to raise, this is clearly incorrect. The Petitioner wishes to submit arguments on the scope and interpretation of the relevant articles of Chapter 11 of NAFTA on which the Claimant expressly bases its claim, specifically Articles 1105 and 1110.

13. With respect to paragraph 15 of the Claimant's submissions, the Petitioner points out that it was merely referring to Article 27 of the UNCITRAL Rules on the use of experts as an example of the type of procedural approaches the Tribunal may adopt in the granting of the Petition.

Equality and Fairness

14. The Petitioner recognizes the need expressed in paragraph 17 of the Claimant's submissions to not unduly burden the parties to the arbitration. The Petitioner submits that an orderly process established by the Tribunal for the receipt of an *amicus* submission and the presence of the Petitioner in the oral proceedings with the opportunity to make an oral submission will not constitute such an undue burden.

Further Considerations

15. In its Petition, (para. 3.7) the Petitioner drew the Tribunal's attention to the advantage that would accrue from granting the Petitioner *amicus* status in helping to remedy a public perception of the Chapter 11 process as "closed, secretive, non-transparent and one-sided." The need to remedy that perception has been rendered more acute by the recent decision of a NAFTA Chapter 11 Tribunal in *Metalclad and The United Mexican States* (Award of August 30, 2000).³ That Award has already been publicly criticized on the ground that the Tribunal failed to take into consideration environmental issues concerning the deposit of hazardous wastes. The Petitioner believes that a properly established process for the *amicus* status requested here will enhance the public acceptability of any ultimate decision of this tribunal, and hence of the Chapter 11 process.

³ *Metalclad Corporation v. United Mexican States*, International Center for Settlement of Investment Disputes (Additional Facility), August 30, 2000 (Case No. Arb(AF)/97/1, at para. 13.

16. The Petitioner would also like to draw the Tribunal's attention to the discussion of the tribunal in the *Metalclad* case on the question of confidentiality. Since that decision was released after the filing of the Petition, it was not available when the Petition was prepared. In its decision, the *Metalclad* tribunal reprints the text of a determination previously made on October 27, 1997, which deals with the issue of confidentiality in connection with the public discussion of the arbitration by the parties. Although this matter is not directly related to the Petitioner's claim, it does throw some light on the question of confidentiality. The *Metalclad* tribunal recognizes that while it is desirable to maintain a degree of confidentiality for the orderly functioning of the process, there is no general principle of confidentiality in the NAFTA or in the ICSID (Additional Facility) Rules, nor is there any such general principle in the UNCITRAL Rules or in the draft Articles on Arbitration adopted by the International Law Commission. It also acknowledges that a public company has positive obligations to provide certain information and that both the Claimant and the respondent government may be under duties of disclosure. Thus, the *Metalclad* determination makes clear that the principle of confidentiality does not pose an absolute barrier and, contrary to the Claimant's arguments, it is not a barrier to the granting of this Petition. A copy of the full passage of the *Metalclad* decision dealing with this issue is attached hereto.

For the reasons expressed in its initial Petition, and for the reasons expressed above, the Petitioner respectfully requests the Tribunal to accede to the requests of the Petitioner found in paragraph 5.1 of its original Petition of August 25, 2000.

Respectfully submitted this 6th day of September, 2000.

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