

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

APPLICATION FOR *AMICUS CURIAE* STATUS

**BY THE
INTERNATIONAL INSTITUTE FOR
SUSTAINABLE DEVELOPMENT**

March 9, 2004

Submitted by

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INTRODUCTION

1. On 30 January 2004, the Tribunal hearing the above noted case issued a press release outlining the steps and modalities for interested non-parties to apply for *amicus curiae* status. Pursuant to those procedures and modalities, the International Institute for Sustainable Development (IISD) hereby applies for the status of *amicus curiae*.

2. Pursuant to an exchange of letters between the present Applicant and Earthjustice on the one hand, and the Tribunal on the other, the Tribunal agreed in a letter dated 10 February 2004 to accept the application of these two original *amicus* Petitioners on or before 10 March 2004.

3. The Tribunal has required all Applicants to follow the rules and procedures adopted by the NAFTA Free Trade Commission on October 7, 2003, as interpreted by the letter of Mr. Christopher Dugan on behalf of the arbitrating parties. These requirements are fulfilled in the sections that follow. IISD's formal submissions and arguments are attached to this application.

4. The International Institute for Sustainable Development initiated the petition process for the intervention of *amici* in the present arbitration on August 26, 2000. It has been a long road since then, as the arbitration has taken many twists and turns, one of which involves the current *amicus* process. IISD wishes to acknowledge the groundbreaking decision of the Tribunal of January 15, 2001 on this issue, and the resolve of the Tribunal to complete and execute the *amicus* process.

**APPLICANT: THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE
DEVELOPMENT**

5. The International Institute for Sustainable Development 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. IISD receives some core funding from the governments of Canada and Manitoba, as well as core and project funding from a wide range of governmental and non-governmental funding sources. IISD retains full control over the content of its work and projects, regardless of funding source. It is governed by an independent, international Board of Directors. Its program areas and major projects are fully open to the public at www.iisd.org

6. IISD's Trade, Investment and Sustainable Development Program area is a global leader in the integration of trade, investment and sustainable development law and policy. IISD officials are regularly consulted by inter-governmental organizations such as 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), the United Nations Commission for Trade and Development (UNCTAD), and the United Nations Environment Programme (UNEP). The IISD record of publications and participation in international conferences as well as national and international consultation processes that address international investment law and policy, including Chapter 11 of NAFTA, reflects this unique and ongoing consultative role.

7. Funding for IISD's participation in the present arbitration process has been provided by the Ford Foundation, and IISD gratefully acknowledges their support in making these groundbreaking submissions possible.

8. IISD has no affiliation with any disputing party. Outside of the affiliations noted between IISD and the governments of Canada and Manitoba noted above, IISD does receive some project funding from different government departments in Canada, as it does from many other governments. No government officials, however, have been involved in any way in the preparation of this application or the attached submissions.

9. IISD has not received any other support, financial or otherwise, in the course of the preparation of this Application and Submission. Counsel for IISD has, as the Tribunal is aware, collaborated with counsel for Earthjustice on a number of letters and brief submissions concerning the *amicus* process. However, we have not collaborated or coordinated or advised each other in the preparation of our respective applications and submissions. IISD's submissions reflect solely the particular perspectives of IISD and the expertise it has brought to bear in this arbitration.

THE INTEREST OF THE IISD IN THE PRESENT ARBITRATION

10. IISD has, in its initial Petition, set out its interest in this proceeding. We noted that the Methanex claim goes to the heart of the limits placed by NAFTA on governmental authority, and the capacity of governments, under Chapter 11 in particular, to ensure that economic development and sustainable development are integrated rather than hierarchical legal and policy objectives. It was noted in the original Petition that this approach was consistent with, and not in opposition to, NAFTA's overall objectives as set out in the Preamble to the Agreement.

11. IISD wishes to be clear from the outset: This Tribunal does not face the political issue raised by many civil society and many governmental observers that NAFTA and other trade agreements are generating a frontal attack on state sovereignty. IISD understands and appreciates that international agreements are designed, in many cases, to limit sovereign governmental activity. Indeed, in many fields such as human rights and environmental protection, this is precisely what IISD and many other groups seek. It is no different in the economic sphere.

12. Nor is IISD interested in making an attack on foreign investment. Again, IISD has stated on numerous occasions that vast amounts of investment, including foreign investment,

are needed if unsustainable energy, industrial and resource use practices are to be turned into sustainable practices. Without large amounts of foreign investment, this goal will not be achieved and we will all be the poorer for it.

13. Both of the preceding starting points, however, raise the critical issue that is confronted in this case: What is the nature and extent of the limits created by Chapter 11 of NAFTA (not all of NAFTA and not the WTO as suggested by Methanex) on the capacity of national, state and provincial, and local governments to act in the environmental and sustainable development field.

14. IISD's interest and perspective in relation to this central and critical public interest issue was stated in its original petition of August, 2000: *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 optimal 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.*

15. Global flows of capital are a growing reality and play an ever larger role in pursuing the widely recognized right of states to development. However, international law and policy has also recognized that the right to development and right to move capital themselves are not unfettered. Both are conjoined at the hip with the requirements for governments, acting internationally, nationally and locally to protect the environment and other aspects of the public welfare. This arbitration brings the need to see these issues as the same side of a single coin into relief.

ISSUES OF FACT AND LAW RAISED BY THE APPLICANT

16. IISD makes no submissions on the facts in dispute in the present arbitration.

17. IISD makes a number of submissions on the law. These include submissions on:

- a. the inherent limits of arbitration under Chapter 11;
- b. why the application of trade law approaches would be an incorrect *approach* to the present case, looking at this through a direct textual comparison between trade law and Chapter 11 as well as due to the very practical and pragmatic differences in the relationship between goods and governments and investments and governments;
- c. the burden of proof ;
- d. the role of intent in these proceedings;
- e. the concept and place of "impermissible intent", language used repeatedly by all counsel at the April 2003 Tribunal hearing;

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

- f. the application of the above issues in the context of NAFTA Articles 1102 and 1110 in particular; and
- g. costs in the present arbitration. (Not IISD's costs!)

18. The perspective IISD brings to these submissions is discussed below.

WHY SHOULD THE IISD SUBMISSIONS BE ACCEPTED BY THE TRIBUNAL?

19. Pursuant to paragraph 2(h) of the procedures set out by the FTC, IISD is to indicate by reference to four factors set out in paragraph 6 of those procedures why it believes the submissions attached to this application will assist the Tribunal in its deliberations.

20. ***Do the submissions provide a different perspective, knowledge or insight for the Tribunal?*** IISD believes that its submissions will assist the Tribunal in a number of areas. Perhaps the most important of these is the relationship of Chapter 11's obligations to the global requirement of sustainable economic development. This requirement is, of course, reflected and implemented in the myriad of international environmental agreements and policy statements. It is also implemented through the tens of thousands of environmental laws adopted by governments in all countries and at all levels.

21. IISD begins its submissions by briefly noting the broader legal context and inherent limits of Chapter 11. These limits relate directly to the case posited by Methanex. IISD then analyzes the specific, often technical, issues described previously and how decisions on these seemingly narrow points of law directly relate to the broader balance required between the rights of foreign investors and the rights of host governments to protect the public welfare.

22. IISD also makes targeted submissions concerning the application of trade law *approaches* to the present case. These submissions go significantly beyond the related responses of the United States on this point to develop both textual and contextual rationales as to why such a transfer between areas of international law is not appropriate. Indeed, Methanex' latest Reply submissions raise this issue as a limited area of United States' submissions.

23. On the key issues of intent, IISD draws upon the specific structure of Chapter 11 to analyze why questions of permissible and impermissible intent must both be assessed by the Tribunal. These submissions, by starting from the structure of Chapter 11, add significantly to the arguments of both Methanex and the United States. Indeed, they are quite different in nature from those submissions.

24. On expropriation, IISD seeks to set out the critical issue that divides both the parties to the arbitration and the jurisprudence to date: are public interest regulations "carved-out" of the concept of expropriation by virtue of the police powers exception, or are they covered but somehow not compensable by virtue of some exception rule on compensation? IISD considers the case law and conceptual issues facing the Tribunal in this regard in a succinct and legally rigorous way.

25. ***Matters within the arbitration:*** All of IISD's submissions are directly germane to the issues raised by Methanex and by the United States in the course of their pleadings. We adduce no external evidence on the facts, and rely upon the pleadings of the arbitrating parties to establish the legal parameters of these proceedings. While IISD brings its own

perspective and expertise to these issues, nothing in the attached submissions lies outside these *parameters*.

26. ***IISD's interest in these proceedings:*** These issues are addressed directly in paragraphs 10-15 above, as well as our original Petitions in August, September and October of 2000. These submissions apply *mutatis mutandis* to this criterion of the FTC procedures.

27. ***The public interest in this arbitration:*** In its decision of 15 January 2001, the Tribunal acknowledged the legitimate public interest in the current arbitration. This arbitration continues to raise the same issues of the relationship of the rights of international investors to the role of states in protecting and promoting the public as well as the private interest. This broadly stated concern has supported the growth in interest of government agencies around the world in the substantive and procedural dimensions of international investment obligations, and the similar growth in interest among civil society groups and academics. IISD submits that nothing has in any way diminished the legitimate public interest in this arbitration that the Tribunal recognized three years ago. Indeed, if anything, that interest has crystallized at an even higher level, as the issues argued by the parties have confirmed the link between this case and the ability of host states to meet their responsibilities towards their citizenry *within* the context of their international legal obligations.

CONCLUDING COMMENTS

28. IISD submits that the matters demonstrated through the information provided above make it a fully suitable and appropriate *amicus curiae* in the present arbitration. Our attention has been focused on the proper role of being a "friend of the court". Indeed, as we take no position on the facts and make no submissions on them, we do not believe the attached submissions take the Tribunal to one necessary conclusion or another as to how the facts relate to the law. Rather, the attached submissions on the law provide, in our view, a rigorous and practical approach for the Tribunal to apply to the facts as it determines them to be.

The above and the attached Submissions are respectfully submitted by the International Institute for Sustainable Development, this 9th day of March, 2004, by counsel for the International Institute for Sustainable Development:

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