

**IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION A  
OF THE NORTH AMERICAN FREE TRADE AGREEMENT  
and  
IN THE MATTER OF AN ARBITRATION UNDER  
UNCITRAL ARBITRATION RULES**

**B E T W E E N:**

**METHANEX CORPORATION**

**Claimant**

**and**

**THE UNITED STATES OF AMERICA  
as represented by the DEPARTMENT OF STATE**

**Respondent**

**SUBMISSIONS OF THE CLAIMANT RESPECTING PETITION OF THE  
INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT**

1. The following are the Claimant's submissions respecting the petition of the International Institute for Sustainable Development ("IISD") to submit an *amicus curiae* brief to the Tribunal in this proceeding.
2. The Claimant respectfully requests the Tribunal consider and adjudicate on this matter based on the written submissions in accordance with the Tribunal's First Procedural Order. In fairness to IISD and the parties, it is also requested that, if possible, a decision on this issue be rendered prior to the second procedural hearing, scheduled for September 7, 2000.

**CONFIDENTIAL NATURE OF THE PROCEEDINGS**

3. Under Article 25.4 of the UNCITRAL Rules, hearings shall be held "in camera" unless the parties agree otherwise. Blacks Law Dictionary defines "in camera" as in the judges' private chambers or in the courtroom with all spectators excluded.
4. At common-law, the requirement that arbitration be held in camera carries with it the implied term that the documents created for the purpose of that hearing are also private and confidential. The disclosure to a third party of such documents

would be almost equivalent to opening the door of the arbitration room to that third party.

5. The reasoning has been stated in the case of *Hassneh Insurance Co. of Isreal and others v. Stuart J. Mew*<sup>1</sup> as follows:

If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.

6. The parties negotiated at some length and ultimately came to an agreement respecting the terms of a Confidentiality Order in the form delivered to the Tribunal by joint submission dated August 23, 2000. In particular, the parties agreed that transcripts of hearings and submissions by the parties, such as memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal shall be kept confidential and may only be disclosed on a need to know basis to employees, agents, officials and representatives (including counsel) of the parties, unless disclosure is otherwise permitted by the order. Nowhere in the order do the parties permit disclosure to non-governmental organizations or public interest groups. Further, the parties did not agree in the Confidentiality Order to waive or amend the provisions of Article 25.4 of the UNCITRAL Rules, requiring the hearings to be held in camera.

## **PARTIES TO THE ARBITRAL AGREEMENT**

7. Each signatory State to NAFTA (a "Party") has consented to the submission of a claim to arbitration only in accordance with the procedures set out in NAFTA. When a disputing investor makes a claim for arbitration, that submission, together with the Party's consent to arbitration in Article 1112, satisfies the requirement of an agreement in writing under Article II of the New York Convention. Accordingly, the parties to this arbitration agreement, are the United States of America and Methanex Corporation.
8. Article 1128 of NAFTA provides that on written notice to the disputing parties, a Party may make submissions to the Tribunal on a question of interpretation of NAFTA. Accordingly, Canada and Mexico may make submissions in accordance with this Article.

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<sup>1</sup> [1993] 2 Lloyds Rep. 243 (Q.B. Commercial Court)

9. There is no other provision in Chapter 11 for any other entity to make submissions or participate in the arbitral proceedings. The drafters of NAFTA had clearly turned their attention to who, other than a disputing investor, might make submissions. Article 1128 clearly sets out that it is only the other signatory Parties.

#### **JURISDICTION OF THE ARBITRAL TRIBUNAL TO ADD PARTIES TO THE PROCEEDINGS**

10. There is no jurisdiction in this Tribunal to add parties. The petition of IISD is akin to a third party claim. In the absence of the consent of all parties, an arbitrator has no power to order that a dispute referred to arbitration be heard or determined with a stranger to an arbitration agreement.
11. The common-law is quite clear that neither the arbitrator nor the courts has the power to compel a party to arbitrate with a non-party. The English case of the *Eastern Saga*<sup>2</sup> stands for the proposition that in the absence of the consent of all parties an arbitrator has no power to order that a dispute referred to arbitration under an arbitral agreement be heard or determined with any other dispute involving a stranger even in circumstances where the disputes are closely related and a consolidated hearing would be convenient.
12. Similarly, United States law is clear that there is no jurisdiction under the *Federal Arbitration Act* to order the consolidation of arbitration proceedings absent the parties agreement, even in situations where there is a common party to both proceedings and they arise out of the same set of facts.<sup>3</sup>
13. The same reasoning applies here where, as a purported *amicus curiae*, the petitioner wishes to join issue with the claimant and force it to arbitrate issues which the petitioner wishes to raise. The effect of granting such standing to the petitioner is to require the Claimant to arbitrate with a third party with whom it has no arbitration agreement.
14. The reference in the IISD material to Article 15 of the UNCITRAL Arbitration Rules respecting the Tribunal's jurisdiction to conduct the arbitration "in such manner as it considers appropriate" is not applicable. Article 15 deals with procedural matters, not the substantive matter of who may be parties to the arbitration.
15. The analogy drawn to the Tribunal's authority to receive expert evidence pursuant to Article 27 of the UNCITRAL Arbitration Rules also has no application as this

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<sup>2</sup> *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha*, [1984] 3 All. E.R. 835 (Q.B.)

<sup>3</sup> *The Government of the United Kingdom of Great Britain and Northern Ireland v. The Boeing Company* (1993), 998 F. 2d 68 (2<sup>nd</sup> Cir. 1993)

authority was specifically removed from the Tribunal by the terms of the First Procedural Order.

### **EQUALITY AND FAIRNESS**

16. Even if the arbitral tribunal had jurisdiction to permit a third party to file material, there is no justification in giving IISD that privilege. The protection of the public interest is assured by Article 1128 which gives not only the United States, but also Canada and Mexico the right to make submissions. The IISD, as a private interest group, does not represent the public interest in these proceedings.
17. The prosecution of a private arbitration against a Party by an investor is burdensome in terms of both corporate resources and substantial cost. That burden will be greatly increased if third parties are permitted intervenor status. To permit the IISD to participate in these proceedings will set a precedent, which may well cause other groups to seek the same status. Equality and fairness in the proceedings will be compromised if the Claimant has to respond not only to the submissions of the Respondent, but also to the submissions and petitions of others not contemplated by NAFTA.

### **ORDER SOUGHT**

18. The Claimant respectfully submits the Petition to the Arbitral Tribunal by IISD be dismissed and the IISD be advised the Tribunal has no jurisdiction to permit the submission of an *amicus curiae* brief.

Respectfully submitted this 31st day of August, 2000.

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