

**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

JOINT MOTION TO THE TRIBUNAL

**REGARDING THE PETITIONS
FOR
AMICUS CURIAE STATUS**

BY THE

INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT

AND

**COMMUNITIES FOR A BETTER ENVIRONMENT
BLUEWATER NETWORK
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**

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Introduction

1. By this motion, Petitioners seek an order of this Tribunal setting out the modalities for their participation as *amici curiae* in further proceedings in this arbitration. The Petitioners seek to maintain their status as two separate groups, one consisting of the International Institute for Sustainable Development; and the other of Communities for a Better Environment, Bluewater Network, and the Center for International Environmental Law. Although we intend to make our substantive submissions separately, we have joined in the present motion for the convenience of the Tribunal and the parties to this dispute.
2. Given the current status of the proceedings, including the Preliminary Award of 7 August 2002 and Methanex's Second Amended Statement of Claim, we believe that this is an appropriate time for our participation and therefore request that the Tribunal authorize and establish modalities for such participation.

Background

3. On 25 August 2000, the International Institute for Sustainable Development (IISD) initiated a Petition to this Tribunal seeking status as *amicus curiae* in the arbitration proceedings before it.
4. On 6 September 2000, the Communities for a Better Environment and the Bluewater Network of Earth Island Institute¹ filed a similar joint petition with this Tribunal.
5. In its Decision of 7 September 2000, the Tribunal sought written submissions from the Parties to the arbitration on the issue of interventions by third parties as *amici curiae*. Written submissions were received from the Parties to the arbitration, the NAFTA parties and from the Petitioners.
6. On 13 October 2000, during the submissions process noted above, the Center for International Environmental Law joined the Communities for a Better Environment and Bluewater Network as a petitioner.
7. On 15 January 2001, the Tribunal issued a decision with respect to the *amicus* Petitions:

¹ Bluewater Network has since become independent of Earth Island Institute.

- Accepting in principle its jurisdiction to allow written submissions by the above noted Petitioners and indicating it is minded to act on this jurisdiction;
- Indicating it wished to establish appropriate modalities for the *amicus* submissions;
- Rejecting a request of the Petitioners for access to the oral hearings;
- Rejecting the request of the Petitioners to be permitted to make oral submissions; and
- Rejecting a formal request to access the memorial and counter-memorial submissions of the arbitrating Parties prior to making written submissions.

8. The relevant elements of this decision are reviewed below.

9. In the substantive proceedings, the Tribunal bifurcated the jurisdiction and merits phases of the arbitration. On 7 August 2002, the Tribunal issued its Preliminary Award on Jurisdiction and Admissibility. In this award, it dismissed most of the claims of Methanex as outside its jurisdiction. At the same time, the Tribunal allowed Methanex to make additional submissions on narrower grounds.

10. Following additional communications between the Parties and the Tribunal, Methanex submitted its Second Amended Statement of Claim on 5 November 2002.

11. In so far as the Petitioners are aware, the arbitrating Parties are now awaiting further instructions and decisions from the Tribunal.

The Key Elements of the Tribunal's Decision of 15 January 2001 on the Participation of *Amici Curiae*

12. In the absence of any express provisions in NAFTA or in the UNCITRAL Arbitration Rules, the Tribunal based its jurisdiction to accept *amicus curiae* submissions on its general power to manage the arbitral proceedings, under S. 15(1) of the Rules. The Tribunal also noted that

the [NAFTA] Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm. (Para. 49.)

13. On the basic issue of accepting the Petitioners as *amici*, through written submissions, the Tribunal concluded that:

- (a) It had the power to do so for written submissions (para. 47);
- (b) In exercising its discretion whether or not to allow such submissions, it was minded to do so at a later stage of the proceedings (paras. 52 and 53), but that it was premature to do so at the time of the January 2001 decision (para. 52).

(c) There was a need to address the procedural issues such as timing, form and content of the Petitioners' submissions (para. 52).

14. The Tribunal ruled it had no power to accept the request for access to the materials generated within the arbitration, which the Petitioners had sought in order to be in the best possible position in making their arguments.²

15. The Tribunal ruled, based on the *in camera* rules, that it had no power to allow attendance at the oral hearings, and by extension oral arguments by the petitioners (para. 47). Petitioners return to this issue in part below, but not in the form of a challenge to the legal ruling of the Tribunal.

16. The Tribunal noted that the credentials of both sets of Petitioners "are impressive," and expressed its assumption that "the Petitioners' [substantive] submissions *could* assist the Tribunal." (Para. 48.)

Requests of the Petitioners in this Joint Motion

17. Given the understanding of the decision of this Tribunal of 15 January 2001 set out above, the Petitioners in this Joint Motion hereby request the following be considered by this Tribunal and addressed in a further, formal decision.

18. First, that the Tribunal **issue a formal decision** accepting the Petitioners as separate groups of *amici* with standing to make two sets of submissions before this Tribunal, one in the name of the International Institute for Sustainable Development and one joint submission from Communities for a Better Environment, Bluewater Network and the Center for International Environmental Law.³

19. Second, we request that the Tribunal **set out the modalities** for the participation of the *amici* in accordance with the principles and concerns expressed by the Tribunal in its January 2001 decision, and in a manner that provides for meaningful public participation while maintaining the capacity of the Tribunal and the parties to resolve this dispute as expeditiously as possible. We respectfully make the following recommendations:

(a) **Sequence of the submissions.** As regards the sequencing of the submissions by the Petitioners, we believe it is appropriate for our submissions to follow the memorial and counter-memorial of the arbitrating Parties. This will allow both the arbitrating Parties and the NAFTA Parties, if they so choose, to comment on any issues they wish during the reply phase. We believe this is the most beneficial in terms of ensuring that the

² The Petitioners note that, although the arbitrating Parties have agreed to allow most pleadings to be made public, publication has not always been immediate, and has not included all documents generated by the parties and the Tribunal.

³ The Petitioners note that such a decision would be consistent with the United States' position that foreign investment rules like NAFTA's Chapter 11 include "a mechanism for acceptance of amicus curiae submissions from businesses, unions and nongovernmental organizations." Trade Act of 2002, § 2102(b)(3)(H)(iii).

arguments made as *amici* will not be duplicative of the arguments of the Parties, and hence be of maximum interest and assistance to the Tribunal.

(b) **Timing for the submissions.** The Petitioners request that they be afforded a period of four weeks after the initial submissions of the two arbitrating Parties in order to make their submissions. This may be within the time allowed for submissions by the NAFTA Parties as well, as commonly occurs under the procedures set forth in Article 1128 of Chapter 11. We believe a timeframe of four weeks is not unduly burdensome or delaying of the process, in particular if the Petitioners' submissions are made within the time period for the non-arbitrating NAFTA Parties' submissions, should they exercise their rights under Article 1128.

(c) **Length of submissions.** We believe that a length of 40 pages will allow us to make focused but complete arguments. Petitioners agree to limit any exhibits and appendices in addition to the (maximum) 40 pages to those directly necessary to the briefs, and understand the need to exercise considerable self-restraint in this regard.

(d) **Submission of the *amicus* briefs.** In keeping with standard practice, the *amici* would be responsible for filing their submissions to all the members of the Tribunal, to counsel for the arbitrating Parties and to the NAFTA Parties.

Supplementary Request on Public Access to the Arbitration Proceedings

20. In addition to the opportunity to make written submissions, Petitioners request that the Tribunal open the hearings in this arbitration to the public, following the precedent recently established in another arbitration under NAFTA's Chapter 11 and the UNCITRAL arbitration rules.

21. As the Tribunal is no doubt aware, the arbitrating parties in the *United Parcel Services v. Canada* arbitration, brought under NAFTA's Chapter 11 pursuant to the UNCITRAL Rules of Arbitration, set an important precedent by agreeing to allow public access to the hearing on jurisdiction, an agreement that was subsequently given effect by the Tribunal in that case.⁴ On 29-30 July 2002, hearings took place at the ICSID facilities in Washington on the jurisdiction phase of the UPS claim. As the actual room for the hearing had limited capacity, live video feed of the full hearing was organized into an adjacent room.

22. The current Methanex proceedings raise issues of at least as much interest to the public as did the UPS jurisdiction hearing. As a result, we believe that the experience and precedent set in that case should be applied in the present case. Consequently, and without re-opening the legal findings of 15 January 2002, the Petitioners request that the Tribunal allow the Petitioners and other members of the public access to any further hearings on the Methanex claim.⁵

⁴ United Parcel Service of America, Inc. v. Government of Canada NAFTA/UNCITRAL Arbitration Rules Proceeding, ICSID Press Release, <http://www.worldbank.org/icsid/ups.htm>.

⁵ Petitioners note that United States has recently expressed its position that, in the settlement of foreign investment disputes, "all hearings [should be] open to the public." Trade Act of 2002, §2102(b)(3)(H)(ii)(II).

The Opportunity Presented to this Tribunal

23. As the Petitioners have pointed out in their initial submissions and as the Tribunal recognized in its own Decision of 15 January 2001, the public credibility of the NAFTA Chapter 11 process is at a critical point. The Petitioners have individually and collectively sought an orderly process for *amicus* participation in this very important case.

24. By establishing an orderly process at this time in a decision finalizing the acceptance of the Petitioners as *amici* and setting out the modalities for their participation, the Tribunal will not only enable itself better to address the issues that are both directly and indirectly at stake in this case, but will also enhance the public credibility of the process.

25. Finally, by issuing an order finalizing and formalizing the participation of the Petitioners as *amici*, the Tribunal will help in providing guidance to other Tribunals facing similar issues at this time and in the future.

Conclusion

26. Given the current stage of the present arbitration, and advances in public access such as seen in the *UPS v. Canada* arbitration, the Petitioners respectfully request the Tribunal to:

- a) Accept the Petitioners as *amici* in this arbitration who will participate in two groups, one consisting of the International Institute for Sustainable Development and the other consisting of Communities for a Better Environment, Bluewater Network and the Center for International Environmental Law.
- b) Establish the modalities for Petitioners' participation as *amici* in the present arbitration, in line with the specific suggestions made in paragraph 17 above or on such other terms as the Tribunal deems appropriate; and
- c) Order any remaining hearings to be opened to the public.

Respectfully submitted this 29th day of January, 2003,



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