

**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

**FURTHER SUBMISSIONS OF THE CLAIMANT TO THE PETITION OF
THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT
and
SUBMISSIONS OF THE CLAIMANT RESPECTING THE JOINT PETITION OF
COMMUNITIES FOR A BETTER ENVIRONMENT, THE BLUE WATER
NETWORK OF EARTH ISLAND INSTITUTE, AND THE CENTER FOR
INTERNATIONAL ENVIRONMENTAL LAW (COLLECTIVELY REFERRED
TO HEREIN AS THE "ENVIRONMENTALISTS")**

October 27, 2000

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BETWEEN:

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FURTHER SUBMISSIONS OF THE CLAIMANT TO THE PETITION OF
THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT
("IISD")

and

SUBMISSIONS OF THE CLAIMANT RESPECTING THE JOINT PETITION OF
COMMUNITIES FOR A BETTER ENVIRONMENT, THE BLUE WATER
NETWORK OF EARTH ISLAND INSTITUTE, AND THE CENTER FOR
INTERNATIONAL ENVIRONMENTAL LAW
(COLLECTIVELY, THE "ENVIRONMENTALISTS")

1. The Claimant repeats and relies on its submissions filed on August 31, 2000
(attached hereto at Tab 2).

Jurisdiction

2. The Tribunal would exceed its jurisdiction if the *amicus curiae* petitions are
granted without the express consent of the parties to this arbitration. The

Claimant has not provided such consent. In the circumstances, there is no jurisdiction in this Tribunal to grant these petitions.

3. To permit non-parties to make submissions in a private arbitration proceeding is a substantive matter, not merely a procedural issue falling within the ambit of the Tribunal's authority to conduct the arbitration in such a manner as it considers appropriate. Unlike judicial proceedings, the admission of non-parties to a privately contracted arbitral agreement is a substantive interference with the rights of the parties. Further, as previously noted (Tab 2), this Tribunal has no authority pursuant to Article 27 of the UNCITRAL Arbitration Rules to consider the *amicus curiae* submissions as expert evidence.
4. It is not within the purview of this Tribunal to remedy any perceived shortcomings of the NAFTA treaty or the UNCITRAL Rules. If the settlement disputes process outlined in Chapter 11 Section B is to be given greater transparency, it is for the NAFTA Parties to effect the necessary changes to the treaty. It is not the task of arbitration panels constituted for the purposes of determining liability for damages to broaden or enhance access to the dispute resolution process. It is the task of this Tribunal to deal with applications within the UNCITRAL Rules. After careful search, the Claimant is not aware of any arbitral tribunal having granted *amicus curiae* status in an arbitration conducted under the UNCITRAL Rules.

Fairness of Process

5. Private interest groups wishing to have their views placed before the Tribunal may convey their information to any one of the three NAFTA Parties who, by Article 1128, have the right to make submissions to a Tribunal in respect of a question of interpretation of NAFTA. This is consistent with fundamental principles of international law wherein the executive branch of a government speaks for and on behalf of the country and its citizens.

6. If the evidence to be offered is relevant, either party to the arbitration is well within its rights to call upon IISD and/or the Environmentalists to offer their testimony as evidence in the proceedings and be cross-examined thereon. To permit the IISD or the Environmentalists to appear as *amicus curiae* would effectively vault these entities to a position of greater standing than the parties to the arbitration as there are no means by which to cross-examine an *amicus curiae* on its submissions.

7. Throughout their submissions, it is apparent that IISD and the Environmentalists misapprehend both the factual underpinnings and the legal implications of these proceedings. As pleaded in paragraph 12 of the Claimant's Reply, "there is not a shred of clinical or epidemiological evidence to support the notion that MTBE has caused or will cause any human cancer. Moreover, there is no meaningful evidence that MTBE is causally related to any definitive human disease." Further, the measures giving rise to this action specifically excluded health as a justification for the action being taken. Nonetheless, the Environmentalists

repeatedly refer to health as a relevant matter, as has the Respondent. Fairness would require that the Claimant be given the opportunity to cross-examine the Environmentalists as to the assumptions upon which they have formulated their opinions. This cannot be effected if the Environmentalists are permitted to participate in the arbitration as *amicus curiae*.

8. If the Tribunal attempted to set up a procedure whereby the *amici curiae* would be called upon to prove the factual basis for their contentions and be subject to cross-examination, the practical effect would be that the Claimant would end up litigating with an entity who is not a party to the Arbitration Agreement (see Tab 2).

A narrow view of justice

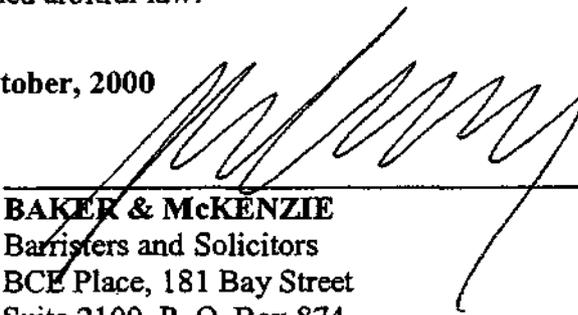
9. It is a conceit to presume that justice cannot prevail without the existence of *amicus curiae* submissions. Democratic societies exist without the judicial acceptance of *amicus curiae*. In fact, it is the Claimant's understanding that *amicus curiae* submissions are foreign to the judicial process in Mexico. It is inappropriate to suggest that constitutional principles or judicial norms of any one Party should prevail over the NAFTA dispute resolution process or those of another Party. These proceedings are by definition international and as such, domestic laws are of no application.
10. Similarly, reference to the WTO is irrelevant. In any event, the submissions of the Environmentalists are incorrect. The Claimant is unaware of any WTO panel or appellate body having ever accepted for consideration an unsolicited *amicus*

curiae brief. While briefs may have been filed in each case, the Panel or appellate body has determined they should not be considered. Only WTO members have a legal right to file materials that must be considered. While DSU Article 13 allows a Panel to seek information from outside sources, the Claimant is unaware of any WTO panel having used this provision to allow *amicus curiae* briefs.

Precedential value

11. NAFTA specifically provides in Article 1136 (1) that there is to be no precedent set by any award rendered pursuant to Chapter 11. If there is a precedent to be set, it is in the jurisdictional order which is sought and which, if granted, would change the law regarding commercial arbitration.
12. To grant standing to the IISD and the Environmentalists would not only be outside the jurisdiction of this Tribunal and unfair, but would amount to a fundamental departure from established arbitral law.

Respectfully submitted this 27th day of October, 2000



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**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. Steuart J. Mew*¹ 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.

¹ [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*² 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.³
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

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

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

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

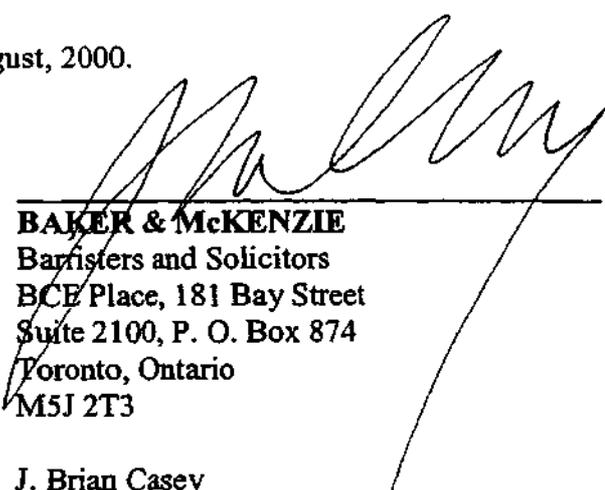
EQUALITY AND FAIRNESS

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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