IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER 11 OF THE NORTH AMERICAN
FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

B E T W E E N :

METHANEX CORPORATION

Claimant/Investor

and

UNITED STATES OF AMERICA

Respondent/Party

**DECISION OF THE TRIBUNAL ON
PETITIONS FROM THIRD PERSONS
TO INTERVENE AS "AMICI CURIAE"**

THE TRIBUNAL:

William Rowley QC;

Warren Christopher Esq;

V.V. Veeder QC (Chairman).

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THE TRIBUNAL'S DECISION ON PETITIONS FROM THIRD PERSONS TO INTERVENE AS "AMICI CURIAE"

I - INTRODUCTION

1. On 25th August 2000, a petition was submitted to the Tribunal by the International Institute for Sustainable Development requesting permission to submit an *amicus curiae* brief to the Tribunal (the "Institute Petition"). On 6th September 2000, a joint Petition was submitted to the Tribunal by (i) Communities for a Better Environment and (ii) the Earth Island Institute for permission to appear as *amici curiae* (the "Communities/Earth Island Petition").

2. On 7th September 2000, the requests contained in these petitions were addressed by the Claimant and the Respondent at the Second Procedural Hearing, which was also attended by the legal representative from Mexico. At this point, only the Claimant had filed written submissions on the issue of intervention (on 31st August 2000), and these were directed to the Institute Petition only. The Tribunal decided not to rule upon the Petitions at the Hearing. Under Item 3 of the Minutes of Order of that Hearing, as modified on 10th October 2000, the Tribunal laid down a timetable for written submissions on the issue of intervention by third persons as *amicus curiae*, to be decided by the Tribunal as a general principle.

3. The Tribunal's timetable provided as follows:

   (1) 16th October 2000: Further written submissions of Petitioners for *amicus curiae* status.

   (2) 27th October 2000: Written submissions from the Claimant and the Respondent in respect of (1).

(3) 10th November 2000: Written submissions from Canada and Mexico as Non-Disputing State Parties as provided for by Article 1128 of NAFTA.

(4) 22nd November 2000: Written submissions from the Claimant and the Respondent in respect of (3).

An "Amended Petition" was duly submitted on 13th October 2000 by (i) Communities for a Better Environment, (ii) the Bluewater Network of Earth Island Institute and (iii) the Center for International Environmental Law (the "Communities/Bluewater/Center Petition"); on 16th October 2000, "Final Submissions" were submitted by the International Institute for Sustainable Development (the "Institute Final Petition"); on 27th October 2000, the Claimant and the Respondent filed their written submissions; on 10th November 2000, Canada and Mexico each filed written submissions; and on 22nd November 2000, the Claimant and the Respondent filed their further written submissions.

4. In accordance with the procedure envisaged at the Second Procedural Meeting and agreed with the Disputing Parties, the Tribunal has been able to decide this issue on the basis of these written submissions, without the need for an oral hearing. At the outset, the Tribunal expresses its thanks to all those responsible for researching and drafting these submissions, which touch upon important general principles directly affecting the future conduct of these arbitration proceedings and the potential effect, direct and indirect, of any award on the Disputing Parties' substantive dispute.

II - SUMMARY OF THE PETITIONERS' REQUESTS

5. *The Institute:* The Institute Petition contained requests for permission (i) to file an *amicus* brief (preferably after reading the parties' written pleadings), (ii) to make oral submissions, (iii) to have observer status at oral hearings. Permission was sought on the basis of the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region. It was also contended that the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable development; and that the Institute could assist the Tribunal in this respect. A further point was made that participation of an *amicus* would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA. As to jurisdiction, it was argued that the Tribunal could grant the Petition under its general procedural powers contained in Article 15 of the UNCITRAL Arbitration Rules, and that there was nothing in Chapter 11 to prevent the granting of the permission requested by the Institute. Reference was also made to the practice of the WTO Appellate Body and courts in Canada and the United States.

6. These submissions were expanded in the Institute Final Petition. It was argued that there was an increased urgency in the need for *amicus* participation in the light of the award dated 30th August 2000 in *Metalclad Corporation v. United Mexican States* and an alleged failure to consider environmental and sustainable development goals in that NAFTA arbitration. It was contended that there was no danger of the Tribunal opening the "floodgates" to other persons seeking to appear as *amici* in future NAFTA arbitrations; and that there was no overriding principle of confidentiality in arbitration that should exclude *amici*. Further, in this respect, the Institute would be entitled eventually to copies of the parties' written pleadings under the US Freedom of Information Act. The Institute would satisfy the special interest tests under both Canadian and US law to enable it to appear as *amicus* in equivalent court proceedings in

those jurisdictions. Finally, it was argued that the absence of any right of appeal from the Tribunal's arbitration award made it all the more important that there should be no errors resulting from the lack of a fresh and relevant perspective which the Institute could provide to the Tribunal.

7. *Communities/Bluewater/Center:* The Communities/Earth Island Petition was in effect superseded by the Communities/ Bluewater/Center Petition (as explained at paragraph 1 of the later submission). This petition requested permission to participate in the proceedings as *amici curiae*, which participation was to include the opportunity to review the parties' written pleadings, to attend hearings and to make written and oral submissions. For practical purposes, the scope of this intervention is the same sought by the Institute.

8. This petition stressed the widespread public support for the participation of *amici* in this arbitration. It argued that the case raised issues of constitutional importance, concerning the balance between (a) governmental authority to implement environmental regulations and (b) property rights. It contended that the outcome in this case might affect the willingness of governments at all levels in the NAFTA States (including the State of California) to implement measures to protect the environment and human health. As with the Institute Petition, it asserted that intervention was consistent with Canadian and US domestic law; and that the Tribunal had jurisdiction to allow the petition under Article 15 of the UNCITRAL Arbitration Rules. It was again contended that there was support for a decision by the Tribunal to allow the petition in the form of various decisions of the WTO Appellate Body. Further, the point was made that the United States had recognised the value of *amicus* participation in cases before the WTO Appellate Body.

III - SUMMARY OF SUBMISSIONS BY MEXICO AND CANADA

9. *Mexico:* Mexico stressed that Chapter 11 of NAFTA did not provide for the involvement of persons other than the Disputing Parties and NAFTA Parties on questions of the interpretation of NAFTA pursuant to Article 1128. It contended that if *amicus curiae* submissions were allowed, the *amici* would have greater rights than the NAFTA Parties themselves because of the limited scope of Article 1128 submissions. Such a result was clearly never intended by the NAFTA Parties; and it could lead to the abrogation of Article 1128 by NAFTA Parties submitting *amicus* briefs where they wished to make submissions on issues other than the interpretation of NAFTA. Mexico argued that the Tribunal's authority to appoint experts was limited by Article 1133 of NAFTA (i.e. subject to the disapproval of the Disputing Parties). In any event, *amici* were not to be confused with independent experts. In addition, Mexico noted that the there was no power under Mexican law for its domestic courts to receive *amicus* briefs. The Chapter 11 dispute settlement mechanism established a careful balance between the procedures of common law states, Canada (at least in part) and the United States, on the one hand and on the other a civil law state, Mexico. The existence of a specific procedure in one Party's domestic state court procedure did not mean that it could be transported to a transnational NAFTA arbitration.

10. *Canada:* Canada adopted a different approach from Mexico. In its written submissions, Canada stated its support for greater openness in arbitration proceedings under Chapter 11 of NAFTA. Although mindful of the confidentiality obligations imposed by Article 25(4) of the UNCITRAL Arbitration Rules, Canada supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible. Canada contended that in this case, without prejudice to its position in other arbitrations under NAFTA Chapter 11, the Tribunal should accept the written submissions of the Petitioners, notwithstanding that only NAFTA Parties have the right to make submissions on questions of the interpretation of NAFTA. Canada also stated that it would be asking its

NAFTA partners to work together on the issue of *amicus curiae* participation as a matter of urgency in order to provide guidance to arbitration tribunals under Chapter 11.

IV - SUMMARY OF SUBMISSIONS BY THE DISPUTING PARTIES

11. The Disputing Parties responded differently to the Petitioner's requests for intervention. The Respondent, as summarised later below, requested the Tribunal to accept part of the Petitioner's requests. The Claimant sought the dismissal of these petitions under three principal headings: (i) confidentiality, (ii) jurisdiction, (iii) fairness of process.

(i) The Claimant

12. *Confidentiality:* As to confidentiality, the Claimant relied on Article 25(4) of the UNCITRAL Arbitration Rules to the effect that hearings are to be held *in camera*. It argued that this obligation carried with it the requirement that documents prepared for the arbitration be confidential. The authority for this proposition was to be found in the reasoning of the English Commercial Court in *Hassneh Insurance Co. of Israel v. Steuart J. Mew* [1993] 2 Lloyd's Rep 243. Further, the Disputing Parties had come to an agreement on confidentiality by the Consent Order regarding Disclosure and Confidentiality (made by the Tribunal at the Second Procedural Meeting on 7th September 2000); and it was thereby agreed that transcripts, written submissions, witness statements, reports, etc be kept confidential. The Order did not allow for disclosure of material to non-governmental organisations or public interest groups, such as the Petitioners.

13. *Jurisdiction:* As to jurisdiction, the Claimant argued that the Tribunal had no jurisdiction to add a party to the proceedings without the agreement of the parties. The ability to appear in the arbitration was limited by Chapter 11 of NAFTA to the Disputing Parties and NAFTA Parties, whereas granting the Petitioners the status of *amicus curiae* would be equivalent to adding them as parties. No such jurisdiction was created by Article 15

of the UNCITRAL Arbitration Rules. That rule was concerned merely with procedural matters and not the substantive issue of who were the parties to the arbitration. There was also no question of jurisdiction under Article 27 of the UNCITRAL Arbitration Rules, as that power to receive expert evidence had been specifically removed from the Tribunal. Further, after a careful search the Claimant stated that it had been unable to find any precedent where a tribunal had granted *amicus curiae* status to non-parties in an arbitration under the UNCITRAL Arbitration Rules.

14. *Fairness:* As to fairness, the Claimant contended that the protection of the public interest was ensured by Article 1128 of NAFTA. Private interest groups wishing to put their views before an arbitration tribunal could convey their information to the NAFTA Parties, who had the right to intervene where there was a question of interpretation of NAFTA. Further, any of the Disputing Parties would be in a position to call upon the Petitioners to offer their testimony as evidence in the proceedings, whereas if the Petitioners were to appear as *amici curiae*, the Disputing Parties would have no opportunity to test by cross-examination (in particular) the factual basis of their contentions. In addition, granting to the Petitioners *amici* status would substantially increase the costs of proceedings and require the Claimant to respond to the submissions of others in a way not contemplated by NAFTA. An undesirable precedent would be set and other groups might be encouraged to seek to appear as *amici* in arbitrations under Chapter 11 of NAFTA.

15. Like Mexico, the Claimant also argued that reliance on the practice relating to *amici* in the domestic courts of certain jurisdictions was inappropriate to these arbitration proceedings. *Amicus* briefs were not permitted in one of the NAFTA States, namely Mexico. The court processes of one NAFTA State should not be preferred over another; and the international rules governing foreign investment should not be made to give way to domestic practices. The Claimant also considered that WTO practice was irrelevant and should be disregarded by the Tribunal. Further, insofar as it was aware, no WTO panel or Appellate Body had accepted for consideration an unsolicited *amicus* brief. Briefs had been filed in each case, but the WTO Panel or Appellate Body had always

determined that these briefs should not be considered, and the power under Article 13 of the Dispute Settlement Understanding to seek information from outside sources had not been used in this respect. Further, in the order of 16th November 2000 in *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, all seventeen applications for *amicus* status were rejected by the WTO.

(ii) The Respondent

16. The Respondent contended (i) that the procedural rules governing the arbitration permitted the acceptance of *amicus* submissions, and (ii) that *amicus* submissions were suitable when likely to assist the Tribunal and should then be allowed by the Tribunal.

17. *Power:* The Respondent argued that there was an inherent flexibility in the UNCITRAL Arbitration Rules, to be applied in the context of the particular dispute. The powers under the UNCITRAL Arbitration Rules should be exercised in a manner commensurate with the public international law aspects of the case and the fact that it implicated substantial public interests. The NAFTA Parties' view that the UNCITRAL Arbitration Rules were sufficiently flexible in such instances reflected a presumption that arbitration tribunals would use the discretion granted to them in a manner appropriate to the nature of the dispute. In this respect, the current dispute was to be distinguished from a typical commercial arbitration on the basis that a State was the Respondent, the issues had to be decided in accordance with a treaty and the principles of public international law and a decision on that dispute could have a significant effect extending beyond the two Disputing Parties.

18. The Respondent contended that pursuant to Article 15(1) of the UNCITRAL Arbitration Rules the Tribunal had the authority to conduct the proceedings as it deemed appropriate subject to the proviso that the parties be treated with equality and given a full opportunity of presenting their cases. This rule was sufficiently broad to encompass the authority to accept *amicus* briefs. The Respondent cited comments on the application of the UNCITRAL Arbitration Rules by the Iran-US Claims Tribunal in *Baker & Davis, The*

UNCITRAL Arbitration Rules in Practice, 1992, pp. 76 and 98. The Respondent also relied on the practice of the Appellate Body of the WTO in finding that it had broad authority to adopt procedural rules that did not conflict with the express rules of the WTO Dispute Settlement Understanding, therefore allowing *amicus* submissions: see *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, paragraph 39, [WT/DS138/AB/R], adopted on 7th June 2000.

19. The Respondent considered that there was nothing in the UNCITRAL Arbitration Rules that prohibited acceptance of *amicus* submissions. Article 25(4) of the Rules limited the persons who could attend a hearing, not those who could submit written briefs. In this respect, the Respondent relied on the Australian case of *Esso Australia Resources Ltd. v. Plowman* (1995) 183 CLR 10 at paragraphs 30-32, in which *Hassneh Insurance Co. of Israel v. Stewart J. Mew* was considered but not followed by the High Court of Australia. It also relied on the recent application of the *Esso* case by the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Finance Inc* (27.x.2000); and a finding in that case that a party in an international commercial arbitration in Sweden was not bound by a duty of confidentiality unless it had agreed to that duty, and that the presence of an *in camera* rule in an arbitration agreement did not amount to such an agreement. In any event, rules of confidentiality could have no bearing on whether the Tribunal could receive written submissions from *amici*. Further, the Tribunal's discretion was not limited by Article 22 of the UNCITRAL Arbitration Rules, which did deal with written submissions.

20. Similarly, the Respondent contended that there was nothing in Chapter 11 of NAFTA to prohibit the acceptance of *amicus* submissions. Article 1128 of NAFTA gave rights to Non-Disputing Parties, leaving untouched the question of how the Tribunal might exercise its discretion to permit submissions from other non-parties. There was therefore no question of *amici* being granted greater rights than the NAFTA's State Parties. In this respect, the Respondent referred to the rejection of a similar argument in the WTO context: *Hot-Rolled Lead and Carbon Steel*, paragraph 41 [WT/DS138/AB/R]. In

addition, it was contended that Articles 1126(10) and 1137(4) of NAFTA recognised the public interest involved in NAFTA arbitrations in demonstrating that the NAFTA Parties expected the substance of each Chapter 11 dispute and most awards to be made publicly available. Responding to the argument raised by Mexico that the Tribunal's authority to appoint experts was limited to Article 1133 of NAFTA, the Respondent maintained that *amici* did not fulfil the same function as Tribunal appointed experts; and Article 1133 was therefore irrelevant.

21. Finally, under this heading, the Respondent argued that the Petitioners were not seeking the status of parties so the Claimant's comments in this respect were misconceived. A burden would be added if the Tribunal accepted an *amicus* submission, but this would be justified where the Tribunal had made a determination that the *amicus* submission would be helpful. The Consent Order regarding Disclosure and Confidentiality did not address the question of *amicus* briefs, and specifically envisaged that important documents generated during the course of the arbitration would be released to the public, whilst the remainder would be subject to release under the US Freedom of Information Act.

22. *Discretion:* As to the second of its principal contentions, the Respondent argued that a third person might have knowledge or expertise of value to the Tribunal, and that on a showing that the submission would be both relevant and helpful, it should be allowed by the Tribunal. In this respect, the Claimant suggested procedures by which the Tribunal could assess the value of a potential *amicus* submission before deciding to grant leave. Specific reference was made to the procedures adopted in the order of 8th November 2000 adopted in *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* [WT/DS135/9]. By contrast, failure to allow any *amicus* submissions would reinforce the growing perception that Chapter 11 dispute resolution was an exclusionary and secretive process. Moreover, there was no reason to fear a deluge of petitions for *amicus* status - as was clear from what had happened both in this case as well as experience in the WTO.

23. As to the Petitioners' requests that they be allowed to attend hearings and receive copies of all documents filed in the arbitration, the Respondent's position was that the Tribunal's jurisdiction was effectively restricted by Article 25(4) of the UNCITRAL Arbitration Rules and the Consent Order regarding Disclosure and Confidentiality. It nonetheless was in favour of giving public access to the greatest extent possible, and therefore gave its consent to the open and public hearing of all hearings before the Tribunal, supporting disclosure consistent with the Consent Order.

V - THE TRIBUNAL'S REASONS AND DECISION

24. Pursuant to Articles 1120(1)(c) and 1120(2) of NAFTA and the agreement of the Disputing Parties, this arbitration is governed by the UNCITRAL Arbitration Rules save insofar as such Rules are modified by Chapter 11, Section B, of NAFTA. In the Tribunal's view, there is nothing in either the UNCITRAL Arbitration Rules or Chapter 11, Section B, that either expressly confers upon the Tribunal the power to accept *amicus* submissions or expressly provides that the Tribunal shall have no such power.

25. It follows that the Tribunal's powers in this respect must be inferred, if at all, from its more general procedural powers. In the Tribunal's view, the Petitioners' requests must be considered against Article 15(1) of the UNCITRAL Arbitration Rules; and it is not possible or appropriate to look elsewhere for any broader power or jurisdiction.

26. Article 15(1) of the UNCITRAL Arbitration Rules grants to the Tribunal a broad discretion as to the conduct of this arbitration, subject always to the requirements of procedural equality and fairness towards the Disputing Parties. It provides, broken down into numbered sub-paragraphs for ease of reference below, as follows:

> *"[1] Subject to these Rules, [2] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, [3] provided that the parties are*

treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting its case."

This provision constitutes one of the essential "hallmarks" of an international arbitration under the UNCITRAL Arbitration Rules, according to the *travaux préparatoires*. Article 15 has also been described as the "heart" of the UNCITRAL Arbitration Rules; and its terms have since been adopted in Articles 18 and 19(2)of the UNCITRAL Model Law on International Commercial Arbitration, where these provisions were considered as the procedural *"Magna Carta"* of international commercial arbitration. Article 15(1) is plainly a very important provision.

27. Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. As a procedural provision, however, it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA. The issue is whether Article 15(1) grants the Tribunal any lesser procedural power in regard to non-party third persons, such as the Petitioners here.

28. In addressing this issue, there are four principal matters to be considered:

(i) whether the Tribunal's acceptance of *amicus* submissions falls within the general scope of the sub-paragraph numbered [2] of Article 15(1);

(ii) if so, whether the acceptance of *amicus* submissions could affect the equal treatment of the Disputing Parties and the opportunity of each fully to present its case, under the sub-paragraph numbered [3] of Article 15(1);

(iii) whether there are any provisions in Chapter 11, Section B, of NAFTA that modify the application of Article 15(1) for present purposes; and

(iv) whether other provisions of the UNCITRAL Arbitration Rules likewise modify the application of Article 15(1) in regard to this particular case, given the introductory words of the sub-paragraph numbered [1] of Article 15(1).

It is convenient to consider each matter in turn.

(i) The General Scope of Article 15(1) of the UNCITRAL Arbitration Rules

29. The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules.

30. However, in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 of NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged.

31. The Tribunal considers that allowing a third person to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules. The wording of the sub-

paragraph numbered [2] of Article 15(1) suffices, in the Tribunal's view, to support its conclusion: but its approach is supported by the practice of the Iran-US Claims Tribunal and the World Trade Organisation.

32. *Iran-US Claims Tribunal*: Note 5 of the Iran-US Claims Tribunal Notes to Article 15(1), of the UNCITRAL Arbitration Rules states:

> *"5. The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments - or, under special circumstances, any other person - who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements."*

This provision was specifically drafted for the Iran-US Claims Tribunal as a supplementary guide. Although (so it appears from published commentaries) it was invoked by Iran or the US as non-arbitrating parties, it was also invoked by non-state third persons (albeit infrequently), such as the foreign banks submitting their own memorial to the Tribunal in *Iran v United States, Case A/15*: see the Award No 63-A/15-FT made by the Full Tribunal (President Böckstiegel and Judges Briner, Virally, Bahrami, Holtzmann, Mostafavi, Aldrich, Ansari and Brower) 2 Iran-US C.T.R. 40, at p.43. For present purposes, the authoritative guide to the exercise of the Iran-US Claim Tribunal's discretion under Article 15(1) and this award demonstrate that the receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving states and non-state parties.

33. *WTO:* The distinction between parties to an arbitration and their right to make submissions and a third person having no such right was adopted by the WTO Appellate Body in *Hot-Rolled Lead and Carbon Steel*, paragraph 41: *"Individuals and organisations, which are not Members of the WTO, have no legal 'right' to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal 'duty' to accept or consider unsolicited amicus curiae briefs submitted by individuals or organisations, not Members of the WTO ...."*. Further, the Appellate Body there found

that it had power to accept *amicus* submissions under Article 17.9 of the Dispute Settlement Understanding to draw up working procedures. That procedural power is significantly less broad than the power accorded to this Tribunal under Article 15(1) to conduct the arbitration in such manner as it considers appropriate. For present purposes, this WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-party third persons, even in a juridical procedure affecting the rights and obligations of state parties; and further it also demonstrates that the receipt of such submissions confers no rights, procedural or substantive, on such persons.

34. *ICJ:* The Tribunal notes, however, that there has been a traditional reluctance on the part of the International Court of Justice to accept *amicus* submissions from non-parties, although Article 62 of the ICJ Statutes allows an interested non-party state to request intervention. As observed by Rosenne, *The Law and Practice of the International Court 1920-1996* (1997), at pp. 653-654, the ICJ does not admit non-governmental organisations (which are treated as individuals); and in regard to individual petitioners, the author states: "The practice of the Court also does not envisage the legal representatives of an individual appearing at the bar of the Court, holding a watching brief, receiving copies of the pleadings, and being allowed - perhaps as *amicus curiae* - to present its own case." The ICJ Registrar refused such a request in the *Namibia* Case, II Pleadings, 636, 638. Nonetheless, more recently, it appears that written submissions were received by the ICJ, unofficially, in *Case Concerning the Gabcikovo-Nagymaros Project*, ICJ Reports, 1997. In the Tribunal's view, the ICJ's practices provides little assistance to this case. Its jurisdiction in contentious cases is limited solely to disputes between States; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene.

(ii) Safeguarding Equal Treatment

35. The Tribunal notes the argument raised by the Claimant to the effect that a burden will be added if *amicus* submissions are presented to the Tribunal and the Disputing Parties seek to make submissions in response. That burden is indeed a potential risk. It is inherent in any adversarial procedure which admits representations by a non-party third person.

36. However, at least initially, the burden in meeting the Petitioners' written submissions would be shared by both Disputing Parties; and moreover, that burden cannot be regarded as inevitably excessive for either Disputing Party. As envisaged by the Tribunal, the Petitioners would make their submissions in writing, in a form and subject to limitations decided by the Tribunal. The Petitioners could not adduce the evidence of any factual or expert witness; and it would not therefore be necessary for either Disputing Party to cross-examine a witness proffered by the Petitioners: there could be no such witness. As to the contents of the Petitioners' written submissions; it would always be for the Tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of those submissions were arguably to constitute written "evidence", the Tribunal would still retain a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight. Of course, if either Disputing Party adopted a Petitioner's written submissions, the other Disputing Party could not then complain at that burden: it was always required to meet its opponent's case; and that case, however supplemented, can form no extra unfair burden or unequal treatment.

37. It would always be the Tribunal's task, assisted by the Disputing Parties, to adopt procedures whereby any burden in meeting written submissions from a Petitioner was mitigated or extinguished. In theory, a difficulty could remain if a point was advanced by a Petitioner to which both Disputing Parties were opposed; but in practice, that risk appears small in this arbitration. In any case, it is not a risk the size or nature of which should swallow the general principle permitting written submissions from third persons.

Accordingly, whilst there is a possible risk of unfair treatment as raised by the Claimant, the Tribunal is aware of that risk and considers that it must be addressed as and when it may arise. There is no immediate risk of unfair or unequal treatment for any Disputing Party or Party.

(iii) Relevant Provisions in Chapter 11, Section B, of NAFTA

38. As already noted by the Tribunal, there are no provisions in Chapter 11 of NAFTA that touch directly on the question of whether a tribunal has the power to accept *amicus* submissions. Of the provisions that have been considered in the submissions received by the Tribunal, neither Article 1128 nor Article 1133 of NAFTA has any bearing on that question. The first is concerned with a right on the part of NAFTA Parties; and the second is concerned solely with a tribunal's authority to appoint experts. *Amici* are not experts; such third persons are advocates (in the non-pejorative sense) and not "independent" in that they advance a particular case to a tribunal.

39. The Respondent referred to Articles 1126(10) and 1137(4) of NAFTA. In the Tribunal's view, there is nothing relevant in these provisions for present purposes. As the Tribunal has already concluded, there is no provision in Chapter 11 that expressly prohibits the acceptance of *amicus* submissions, but likewise nothing that expressly encourages them.

(iv) Other UNCITRAL Arbitration Rules

40. The Claimant's reliance on Article 25(4) of the UNCITRAL Arbitration Rules to the effect that hearings are to be held *in camera* is not relevant to the Petitioners' request to serve written submissions to the Tribunal. In the Tribunal's view, there are no further provisions under the UNCITRAL Arbitration Rules that modify the application of its general power under Article 15(1) to allow the Petitioners to make such submissions in this arbitration.

41. However, the Claimant's reliance on Article 25(4) is relevant to the Petitioners' request

to attend hearings and to receive copies of all submissions and materials adduced before the Tribunal. Article 25(4) provides that: "*[Oral] Hearings shall be held in camera unless the parties agree otherwise ...*" . The phrase "in camera" is clearly intended to exclude members of the public, i.e. non-party third persons such as the Petitioners. As the *travaux préparatoires* disclose, the UNCITRAL drafting committee deleted a different provision in an earlier draft which could have allowed the arbitration tribunal to admit into an oral hearing persons other than the parties. However, as discussed further below, Article 25(4) relates to the privacy of the oral hearings of the arbitration; and it does not in like terms address the confidentiality of the arbitration.

42. As to privacy, the Respondent has accepted that, as a result of Article 25(4), hearings are to be held *in camera* unless both Disputing Parties consent otherwise. The Respondent has given such consent. The Claimant has given no such consent. The Tribunal must therefore apply Article 25(4); and it has no power (or inclination) to undermine the effect of its terms. It follows that the Tribunal must reject the Petitioners' requests to attend oral hearings of the arbitration.

43. As to confidentiality, the Tribunal notes the conflicting legal materials as to whether Article 25(4) of the UNCITRAL Arbitration Rules imposes upon the Disputing Parties a further duty of confidentiality (beyond privacy) in regard to materials generated by the parties within the arbitration. The most recent decision of the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Finance Inc* (27.x.2000) suggests that a privacy rule in an arbitration agreement does not give rise under Swedish law to a separate duty of confidentiality, at least as regards the award. That approach is strongly supported by the decision of the High Court of Australia in *Esso/BHP v Plowman* (1993) 183 CLR 10 distinguishing between confidentiality and privacy, particularly as subsequently applied by the New South Wales Court in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 involving a public corporation (per Kirby J: "*Can it be seriously suggested that [the] parties' private agreement can, endorsed by a procedural direction of an arbitrator, exclude from the public domain matters of legitimate concern ...*").

44. The English legal materials generally point in the other direction, as invoked by the Claimant, with the high water mark being the Court of Appeal's decision in *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyd's Rep 643. Even in England, however, the present position is arguably equivocal in regard to public authorities (including a state party), particularly given the absence of any statutory rule in the English Arbitration Act 1996 - for reasons explained at length in the official commentary contained in the Departmental Advisory Committee's 1996 Report on the Arbitration Bill (paragraphs 10-17). It is perhaps significant that English law on strict confidentiality is a recent innovation, dating essentially from the decision in *The Eastern Saga* [1983] 2 Lloyd's Rep 373, cited by the Claimant. For example, as the DAC Report noted, the arbitration tribunal in *Lena Goldfields v USSR* (1930) decided in the public interest to publish its procedural orders and final award in the London "Times", without any critical comment at the time (as to publication).

45. The Tribunal has also considered the position on confidentiality in the USA, insofar as it may be relevant as the law of the place of the arbitration, Washington DC. The Federal Arbitration Act is silent on the point; but like Australia and Sweden, US law maintains a distinction between privacy and confidentiality. Indeed Professor Hans Smit's expert report on US law was adduced before the Australian Courts in *Esso/BP v Plowman*. He relied on the decision of United States District Court for the District of Delaware in *USA v Panhandle Eastern Corp* 118 FRD 346, 10 Fed R Serv 3rd 686 (D Del 1988), concerning the non-confidentiality of documentation disclosed by a party in an ICC arbitration. Professor Smit also stressed the significance of a public interest, such as the Petitioners suggest in this case: "*In determining to what extent arbitration is confidential, proper consideration must also be given to the public interest in knowing how disputes are settled ...*" (*see* [1995] *Arbitration International* 297 & 299 at 300).

46. This is however a difficult area; and for present purposes, the Tribunal does not have to decide the point. Confidentiality is determined by the agreement of the Disputing Parties as recorded in the Consent Order regarding Disclosure and Confidentiality, forming part of the Minutes of Order of the Second Procedural meeting of 7th September 2000. As *amici* have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any rights at all), they are to be treated by the Tribunal as any other members of the public. Accordingly materials may be disclosed only as allowed in the Consent Order. Of course, pursuant to paragraph 3 of that Order, either party is at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain (subject to redaction of Trade Secret Information). That is however a matter for the Disputing Parties and not the Tribunal.

(v) The Tribunal's Conclusion

47. *Power:* The Tribunal concludes that by Article 15(1) of the UNCITRAL Arbitration Rules it has the power to accept *amicus* submissions (in writing) from each of the Petitioners, to be copied simultaneously to the legal representatives of the Disputing Parties, Canada and Mexico. In coming to this conclusion, the Tribunal has not relied on the fact that *amicus* submissions feature in the domestic procedures of the courts in two, but not three, NAFTA Parties. The Tribunal also concludes that it has no power to accept the Petitioners' requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration. Such materials may however be derived from the public domain or disclosed into the public domain within the terms of the Consent Order regarding Disclosure and Confidentiality, or otherwise lawfully; but that is a quite separate matter outwith the scope of this decision.

48. *Discretion:* The next issue is whether, in the particular circumstances of this arbitration, the Tribunal should decide that it is "appropriate" to accept *amicus* submissions from the Petitioners in the exercise of the discretion under Article 15(1) of the UNCITRAL Arbitration Rules. At this early stage, the Tribunal cannot decide definitively that it *would*

be assisted by these submissions on the Disputing Parties' substantive dispute. The Petitions set out the credentials of the Petitioners, which are impressive; but for now, the Tribunal must assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute. At the least, however, the Tribunal must also assume that the Petitioners' submissions *could* assist the Tribunal. The Tribunal must look to other factors for the exercise of its discretion.

49. There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the 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.

50. There are other competing factors to consider: the acceptance of *amicus* submissions might add significantly to the overall cost of the arbitration and, as considered above, there is a possible risk of imposing an extra burden on one or both the Disputing Parties. In this regard, as appears from the Petitions, any *amicus* submissions from these Petitioners are more likely to run counter to the Claimant's position and eventually to support the Respondent's case. This factor has weighed heavily with the Tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary.

51. These are all relevant circumstances under Article 15(1) of the UNCITRAL Arbitration Rules. Less important is the factor raised by the Claimant as to the danger of setting a precedent. This Tribunal can set no legal precedent, in general or at all. It has no power

to determine for other arbitration tribunals how to interpret Article 15(1); and in a later arbitration, there may be other circumstances leading that tribunal to exercise its discretion differently. For each arbitration, the decision must be made by its tribunal in the particular circumstances of that arbitration only.

52. Weighing all the relevant factors, the Tribunal considers that it could be appropriate to allow *amicus* written submissions from these Petitioners. Whilst the Tribunal is at present minded to allow the Petitioners to make such submissions at a later stage of these arbitration proceedings, it is premature now for the Tribunal finally to decide the question at this relatively early stage. The Tribunal intends first to consider with the Disputing Parties procedural limitations as to the timing, form and content of the Petitioners' submissions. For example, the Tribunal may wish to impose a page-limit on such submissions (including exhibits).

VI - THE TRIBUNAL'S ORDER

53. For the reasons set out above, pursuant to Article 15(1) of the UNCITRAL Arbitration Rules, the Tribunal declares that it has the power to accept *amicus* written submissions from the Petitioners; whilst it is at present minded to receive such submissions subject to procedural limitations still to be determined by the Tribunal (to be considered with the Disputing Parties), it will make a final decision whether or not to receive them at a later stage of these arbitration proceedings; and accordingly the Petitions are accepted by the Tribunal to this extent, but otherwise rejected.

Made by the Tribunal on 15th January 2001, as at Washington DC, USA.