

Case Notes

OPENING THE DOORS, AT LEAST A LITTLE: COMMENT ON THE AMICUS DECISION IN *METHANEX V. UNITED STATES*

A complete understanding of the role of non-government organizations (NGOs) in the development of international environmental law necessarily entails an examination of the role of NGOs in other areas of international law with a direct bearing on environmental management and protection. International law on foreign investment is certainly one of these areas, and one of growing importance.

This growing importance has been underscored by a series of international arbitrations under Chapter 11 of the *North American Free Trade Agreement* (NAFTA).¹ Chapter 11, as it has now become known in North America, sets out the obligations imposed on States respecting their treatment of foreign investors. Like many bilateral investment treaties that have both preceded and followed it, Chapter 11 includes several key obligations for States, which translate into enforceable rights for investors. The key obligations address:

- national treatment of foreign investors (Article 1102);
- minimum international standards of treatment (Article 1105);
- prohibitions on performance requirements (Article 1106); and
- expropriation and compensation (Article 1110).²

Chapter 11 also contains a so-called investor-state arbitration clause (Part B of Chapter 11) that allows a foreign investor from one of the three NAFTA parties to directly initiate an international arbitration against another party. It is the effort by a number of foreign

investors to use the rights they have under Chapter 11 to challenge environmental laws and administrative decision-making that has highlighted the large, and potentially dangerous, relationship between investment agreements and a basic element of sustainable development: the ability of governments to conserve, protect and enhance the environment.

The investment agreement/environmental law relationship is not just a matter for NAFTA's Chapter 11. With over 1800 bilateral investment treaties now in existence, many of which share the same substantive obligations and dispute settlement elements as Chapter 11, there is a risk of these types of challenges spilling over into the bilateral treaty domain, where no challenges to environmental laws and decisions appear to have been initiated until last year.³

What is the NGO role in this area? Clearly, environmental and other civil society groups are active in analysing the scope and role of such agreements, and in trying to influence (or prevent) future agreements in this area. The events surrounding the OECD-led negotiations on the aborted Multilateral Agreement on Investment are the best-known example of this NGO role. What about an NGO role in the resolution of disputes under the existing agreements? Given that the investor-state dispute-resolution process favoured in investor-protection agreements adopts an international law arbitration model, what opportunity is there for NGO participation in these critical cases?

This question was raised directly in the Chapter 11 case of *Methanex Corp. v. United States of America*.⁴ This case concerns a \$1 billion claim against the United States by a Canadian company that supplied key ingredients for a gasoline additive called MTBE that was banned by California. The result is a decision on

¹ North American Free Trade Agreement, available at <<http://www.nafta-sec-alena.org/english/index.htm>>. All Article numbers that follow refer, unless otherwise stated, to those found in Chapter 11 of NAFTA.

² Descriptions of each of these can be found in H. Mann and K. Von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, Working Paper (International Institute for Sustainable Development, 1999). A more up-to-date review of the breadth of Chapter 11 as interpreted by all the initial arbitral decisions it has engendered is found in H. Mann, *Private Rights, Public Problems: A Guide to the Controversy Over NAFTA's Investment* (International Institute for Sustainable Development, 2001). Both texts are available at <http://www.iisd.org/trade/investment_regime.htm>.

³ The first such bilateral treaty case appears to be *Technicas Medioambientales Tecmed, S.A. v. United Mexican States*, Case No. ARB (AF) 00/02, International Centre for the Settlement of Investment Disputes (Additional Facility). Initiated in September 2000 by a Spanish investor under the Spain-Mexico investment agreement, there is as yet no formal public indication of the factual basis or legal grounds for this arbitration that the author is aware of. Informal sources have indicated, however, that the claim closely parallels the *Metalclad v. Mexico Case* under Chapter 11 of NAFTA. (*Metalclad Corporation v. United Mexican States*, Case No. ARB (AF) 97/11, Award, International Centre for Settlement of Investment Disputes (Additional Facility) 30 August 2000.)

⁴ *Methanex Corp. v. United States of America*, In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Notice of Arbitration and Statement of Claim, 2000.

public participation that is of groundbreaking relevance to all future investor-state arbitrations.⁵

THE 'PETITIONS' FOR *AMICUS* STANDING IN *METHANEX V. UNITED STATES*

Most investment agreements concluded in the 1990s include mandatory investor-state dispute resolution processes. Under Chapter 11, an investor has the right to use the international arbitration in the place of domestic litigation in disputes relating to the investment obligations.⁶ Once triggered by an investor, the arbitration then proceeds under the rules of one of three international arbitration bodies: the United Nations Commission on International Trade Law (UNCITRAL), the International Centre for the Settlement of Investment Disputes (ICSID) and the ICSID Additional Facility.⁷ After the arbitral tribunal is constituted, it seizes the case and, effectively, becomes master of its own process, subject to the rules of procedure and any special rules set out in NAFTA.

The public participation issue was first raised in August 2000 through a submission, formulated as a 'Petition', seeking *amicus* status for the International Institute for Sustainable Development (IISD). The IISD is a Canadian-based NGO.⁸ This was followed in September by a submission from Earthjustice, an American legal NGO, on behalf of other California-based environmental groups. Both groups sought *amicus* standing to make written and oral arguments to the Tribunal.

The first critical question for the petitioners was whether the Tribunal had the authority to accept *amicus* submissions. The secondary questions would arise only after a positive ruling on this threshold question: if the Tribunal does have the authority to accept *amicus* participation, in what circumstances and to what extent?

⁵ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions From Third Persons to Intervene as '*Amici Curiae*', 15 January, 2001. This decision and all the petitions and other relevant documents leading to it are available on the Internet at <http://www.iisd.org/trade/investment_regime.htm> or <<http://www.naftaclaims.com>>.

⁶ The rights to initiate the process are found in Articles 1116–1120.

⁷ As per NAFTA, Article 1120. Some bilateral investment treaties use the International Chamber of Commerce Arbitration process or other similar bodies.

⁸ There is a total of five separate submissions by what became known as the 'Petitioners' for *amicus* status, as well as three responses from Methanex Corp., two from the United States, one each from Canada and Mexico, and, finally, the decision of the Tribunal on this issue. Each of these is available at the IISD website, n. 5 above.

The central argument of the NGO petitioners was that the authority of the Tribunal to accept *amicus* participation arose from the broad language of, in this case, Article 15(1) of the UNCITRAL Arbitration Rules:

Subject to the Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.⁹

Based on this broad power, the NGO petitioners asked the Tribunal to accept written *amicus* submissions, permission to attend the hearings and to make oral arguments, and for ensured access to the arbitration documents, such as the memorials and counter-memorials, affidavit evidence, and so on.

THE DECISION OF THE TRIBUNAL

After Methanex made submissions opposing the Petition of the IISD,¹⁰ the Tribunal issued an order on 7 September seeking more input from the Petitioners, the US and Methanex as disputing parties, and Mexico and Canada as NAFTA parties entitled to exercise their rights to make submissions on legal questions in any Chapter 11 case.¹¹ In these additional submissions, the United States provided extensive reasons in support of the authority of the Tribunal to accept *amicus* written briefs, but considered that oral arguments required the consent of both arbitrating parties. It provided such consent in its second set of submissions. Methanex continued to oppose the Petitions on all counts, arguing that privacy and confidentiality of the process was inherent in the rules and would be breached by allowing any form of public participation. It also argued such participation would unduly burden the arbitrating parties, and could disadvantage one side more than the other, especially if new arguments are raised against the position of only one side.

Canada, after considerable internal negotiations and deliberations, supported the Petitions in a brief submission to the Tribunal. Mexico opposed the Petitions.

⁹ Similar language can be found in Article 28 of the Arbitration Rules, International Centre for the Settlement of Investment Rules (Additional facility), Schedule C; and Rule 19, International Centre for the Settlement of Investment Rules, Arbitration Rules.

¹⁰ Submissions of the Claimant Respecting Petition of the International Institute for Sustainable Development, 31 August 2000. IISD responded to this on 6 September 2000. Petitioner's Response to the Submission of the Claimant, Methanex Corp.. In the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal. The Earthjustice submissions followed.

¹¹ NAFTA, Article 1128. The Order was in the form simply of a letter to the litigating parties, which was subsequently transmitted to the Petitioners.

supporting a traditional State-based concept of representation of the public interest as a key element of its arguments. Against this comprehensive set of legal arguments, the Tribunal issued its first ruling on this issue on 15 January 2001.

THE JURISDICTION TO ACCEPT AMICI

The Tribunal ruled unequivocally in favour of having the authority to accept *amicus* briefs in writing, thereby supporting the NGO Petitions on this point. It relied on its 'broad discretion as to the conduct of this arbitration' under Article 15(1) of the UNCITRAL Arbitration Rules as the basis for this decision. The Tribunal noted that this broad authority was not in any way circumscribed by any specific provisions in either the UNCITRAL Arbitration Rules or NAFTA's Chapter 11 on the possible role of *amici*, as neither had any provisions supporting or preventing such participation.¹²

The Tribunal did limit this general authority to procedural issues. This would not, in their view, extend to adding a third party to the dispute, or to accord non-parties the rights, privileges or status of a disputing party.¹³ Indeed, it noted that a non-party to the dispute has no rights at all in the process, but that it is the Tribunal that has the discretion to allow certain forms of participation.

THE RECOGNITION OF THE PUBLIC INTEREST

In an important part of its reasons, the Tribunal noted the large distinction between the substantive issues at stake in the arbitration before it as compared to traditional international arbitrations. The present type of issues, it stated:

extend far beyond those raised by the usual transnational arbitration between commercial parties ... [t]he public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.¹⁴

This statement was accompanied by a recognition, following submissions to this effect by the United States and Canada, that the closed nature of the Chapter 11 proceedings was damaging to the public credibility of the process itself. A rejection of the Petitions, it was acknowledged, could therefore do positive harm to the process as well.

¹² *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions From Third Persons to Intervene as '*Amici Curiae*,' 15 January 2001, paras. 24–31, and again at 38–47.

¹³ *Ibid.*, paras 27, 29. The three NAFTA Parties, as noted above, have an additional right of participation under Article 1128 of NAFTA.

¹⁴ *Ibid.*, para. 49.

THE SCOPE FOR PARTICIPATION

In the context of addressing the potential for *amicus* participation to create both an additional and an unequal burden on one of the disputing parties in an arbitration – part of the requirement that any procedural ruling accord equal treatment and fairness – the Tribunal set out some factors that reflect both the requests made by the petitioners and the views of the Tribunal on the scope of such participation. The Tribunal noted that the Petitioners:

- would make their submissions in writing, in a form and with limitations set by the Tribunal;
- could not adduce their own factual or expert evidence; and
- could not present witnesses.¹⁵

The Tribunal also noted that if any part of the written arguments did constitute written evidence, it had the full capacity to determine its admissibility, weight and relevance.¹⁶ In continuing with the question of balancing the rights of the disputing parties with the issue of third party submissions, the Tribunal then made what may be one of its most important statements:

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*.¹⁷

ORAL HEARINGS

While ruling in favour of the Petitioners as regards written submissions, the Tribunal rejected the view that they had the authority to allow oral arguments by *amici*. The Tribunal rejected any relevance of the 'in camera' rule, which requires the consent of both disputing parties to allow non-parties to participate in oral hearings, to the issue of written arguments by *amici*. However, the Tribunal ruled it was applicable and binding on the Tribunal as it relates to oral hearings.¹⁸ As a result, it stated it had no power in the absence of such consent to accept the request for participation in the oral hearings.¹⁹

¹⁵ *Ibid.*, para. 36.

¹⁶ *Ibid.*, para. 36. Interestingly, the Tribunal noted here that if any disputing party adopted the full arguments of an *amicus*, it would then have the full relevance as if it were the written submissions of that party, potentially including any evidence that may be adduced.

¹⁷ *Ibid.*, para. 37, emphasis added.

¹⁸ The 'in camera' rule is found in Article 25(4) of the UNCITRAL Arbitration Rules, and in probably all other international arbitration rules of procedure.

¹⁹ N. 12 above, para. 42.

ACCESS TO WRITTEN PLEADINGS

The Tribunal also discussed the applicability of the Article 25(4) 'in camera' rule on access to written pleadings in the arbitration. Here, it drew a sharp distinction between the privacy of the oral hearings, as noted above, and the confidentiality of the arbitration.²⁰ The Tribunal noted that existing legal materials are contradictory as to the issue of the confidentiality of the arbitral proceedings and the associated documentation. While perhaps hinting in a direction of opposing a binding rule of confidentiality of materials under the Arbitration Rules, the Tribunal did not make a final ruling on the matter. Instead it turned to a Confidentiality Order agreed to by both disputing parties and endorsed by the Tribunal, which it ruled governed, and limited, the disclosure of critical arbitration documents, such as the detailed memorial and counter-memorial evidence, etc. of the disputing parties.²¹ As *amici* were found to have no rights in the process, there was no basis on which to override this Order.

However, it may also be noted that the same order, in this particular case, also allows the disclosure of documents following proper procedures under national law, in this case the US Freedom of Information Act, a process that has been followed in the course of the case to date.²²

THE NON-EXECUTED DECISION

After making the above rulings on the applicable legal principles, the Tribunal indicated that it was minded to issue an order for *amicus* participation. However, it did not actually do so in its January decision. Rather, it held that the exercise of its discretion to issue such an order would be premature at present. There were two main reasons for this:

- there were a number of issues related to the jurisdiction of the Tribunal that were being treated in a preliminary phase of the process; and
- the Tribunal wanted to establish the appropriate procedural modalities for the interventions after consultations with the disputing parties.²³

Consequently, the decision may be seen as a decision in favour of the applicants for *amicus* status, but one that was not yet fully executed, and it is not anticipated

that it will be executed until the conclusion of the jurisdictional phase of the proceedings.²⁴

THE POTENTIAL IMPACT OF THE DECISION

Arbitral decisions do not have a legally binding status on other arbitrations, including those conducted under the same arbitration rules or under the same agreement, such as Chapter 11 of NAFTA. However, it is clear that decisions of first instance on a subject will be considered by lawyers and arbitrators dealing with that subject in a subsequent case. Given this, the decision on the threshold question of whether an arbitral Tribunal has the authority to accept *amicus* participation even in the face of opposition from one disputing party is precedent setting. The decision on the inability to allow oral arguments to be made is equally important, though obviously less favourable to civil society groups. However, it does acknowledge the potential ability to allow such participation if agreed by both disputing parties. Likewise, the issue of access to documents places a strong focus, not on the rules of arbitration, but on the agreement between a disputing State and the private party to a Confidentiality Order. Absent government agreement on confidentiality, it is clear that Tribunals will face a more difficult legal case in preventing public access to the full suite of litigation materials.

The impact of the decision on other bodies may also be considered. The 'Petition' directly to the Tribunal that was initiated by the IISD in this case was unprecedented in the context of investment agreement arbitrations.²⁵ In itself, the approach appears to have had an early impact as a model for the WTO Appellate Body to consider in developing its own petition process for possible *amicus* submission in the appeal of the so-called *Asbestos* case.²⁶ The Tribunal itself relied in part on other WTO cases in reaching its own decision, also showing a potential interplay between different regimes at the international level.²⁷ Whether the WTO, or any other trade or international dispute settlement body, will again adopt such a model waits to be seen.

²⁰ *Ibid.*, para. 41 et seq.

²¹ Procedural Order Regarding Disclosure and Confidentiality, 7 September 2000. N. 12 above, para. 46.

²² Again, see the documents available on the relevant websites, several of which, including the pleadings of Methanex, Mexico and Canada, were released following NGO or media applications under the Act. N.12 above, para. 47.

²³ *Ibid.*, paras 50–53.

²⁴ Neither Petitioner expressly sought to participate in the jurisdictional issues.

²⁵ US submissions and the Tribunal did cite the participation of banks under a special provision relating to the Iran–US Claims Tribunal that specifically did allow for this possibility. See n. 12 above, para. 32. However, this was the first known case of reliance purely of the general authority of the Tribunals.

²⁶ European Communities – Measures Affecting Asbestos And Asbestos-Containing Products, Communication from the Appellate Body, WT/DS135/9, 8 November 2000.

²⁷ See para. 33 of the Decision.

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