The NAFTA Investment Dispute Settlement Mechanism and the Admissibility of Amicus Curiae Briefs by NGOs

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The investment dispute settlement mechanism included in Chapter 11 of the *North American Free Trade Agreement (NAFTA)* has been described by some as an innovative and progressive treaty providing maximum protection for investors abroad. Others have described it as a new instrument in the hands of multinational corporations that will have the effect of further undermining the regulatory power of States and diminishing their influence in this age of globalization. If there is disagreement on the effect of Chapter 11 provisions, all agree, however, that it is the most extensive combination of rights and remedies ever provided to foreign investors in an international agreement.[2]

NAFTA Chapter 11 is truly "revolutionary" in another aspect. It represents the *first multilateral treaty* to provide individuals and corporations direct access to a dispute settlement mechanism before a tribunal of an international nature. It should be noted that such access already exists in the context of *bilateral* investment treaties.[3]

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[2] H. Mann & K. Von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, Working paper of the International Institute for Sustainable Development, 1999, p. 13, available on the Internet site of the I.I.S.D.: <http://iisd.ca/trade/chapter11.htm>. See also this other Working Paper by the I.I.S.D.: Mann H. (2001) *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*. <http://iisd.org/trade/privaterights.htm>.

[3] *Convention on the Settlement of Investment Disputes between Stetas and Nationals of Other States*, Washington, 18 March 1965, U.N.T.S., 575, 1965, p. 159; 4 *ILM*, 1965, p. 532.

So-called State contracts, between States and investors, are also a recognized mechanism by which individuals and corporations may have direct access to an international arbitral tribunal. Since the coming into force of NAFTA Chapter 11, other *multilateral* treaties containing similar provisions have been adopted: the *Energy Charter Treaty*,[4] the *Colonia Protocol on the Reciprocal Promotion and Protection of Investments*,[5] and the *Cartagena Free Trade Agreement*.[6] NAFTA Chapter 11 is also a milestone since it is the first investment agreement between two developed countries, Canada and the United States.[7] It is also Mexico's first international agreement providing for investor-State arbitration.[8]

The purpose of this article is not to describe in length Chapter 11 provisions. This type of analysis has already been the object of many articles in recent years.[9] What it is intended to do is to give an overview

[4] The Treaty was adopted on 17 December 1994 and came into force on 16 April 1998: 34 *ILM*, 1995, p. 373. More than 40 States are parties to the Treaty, mostly from the European Union and Eastern Europe, to which should be added Canada, Japan and Australia.

[5] The Protocol was adopted on 17 January 1994 in the context of the *Ascuncion Treaty* creating MERCOSUR, but has not yet entered into to force. It can be found at: <http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp>. A similar provision exists in the context of the Protocol of Buenos Aires, which was adopted on 5 August 1994, but has not yet entered into to force, and which applies to litigation between MERCOSUR Parties and investors originating from States not party to the MERCOSUR.

[6] This Agreemant between Colombia, Mexico and Venezuela was adopted on 13 June 1994 and entered into force on 1st January 1995. It can be found at: <http://www.sice.oas.org/Trade/G3_E/G3E_TOC.asp>.

[7] R.J. Zedalis, "Claims by Individuals in International Economic Law: NAFTA Developments", 7(2) *American Rev. Int'l Arb.*, 1996, p. 266.

[8] M. Nolan & D. Lippoldt, "Obscure NAFTA Clause Empowers Private Parties: Investors Protection Clause Lets Companies Haul Signatories into Arbitration for Violation of Pact", *Nat'l L.J.*, 6 April 1998, B8. The implication of this is far reaching since it implies a repudiation of the long standing application of the "Calvo Clause" to foreign investors. Generally, on Chapter 11's consequences for Mexico, see: J. Day, "Has Mexico Crossed the Border on the State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After NAFTA", 25 *St Mary's L.J.*, 1994, pp. 1147-1193; E.E. Murphy Jr., "Access and Protection for Foreign Investment in Mexico under Mexico's New Foreign Investment Act and NAFTA", 10 *ICSID Review Foreign Invest. L.J.*, 1995, pp. 54-97; G.L. Sandrino, "The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective", 27 *Vanderbilt J. Transnational L.*, 1994, pp. 259-327.

[9] H.C. Alvarez, "Arbitration Under the NAFTA", 16(4) *Arb. Int'l.*, 2000, pp. 393-430; A. Lemaire, "Le nouveau visage de l'arbitrage entre Etat et investisseur étranger: le Chapitre 11 de l'ALENA », *Revue de l'arbitrage*, 2001, pp. 43-94; C. Lévesque, « L'affaire Desona: Réflexions sur la première sentence arbitrale rendue sur le fond sous le régime du chapitre 11 (investissement) de l'Accord de libre-échange nord-américain », *Canadian Yearbook I.L.*, 1999, p. 257; G.N. Horlick & A.L. Marti, "NAFTA Chapter 11B: A Private Right of Action to Enforce Market Access Through Investments", 14(1) *J. Int'l Arb.*, 1997, pp. 43-54; C.D. Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes", 11(4) *J. Int'l Arb.*, 1994, pp. 135-171; A.J. Vanduzer, "Investor-State Dispute Settlement under NAFTA Chapter 11: The Shape of Things to Come?", 35 *Canadian Yearbook I.L.*, 1997, pp. 263-290; Z.M. Eastman, "NAFTA's Chapter 11: For Whose Benefit ?", 16(3) *J. Int'l Arb.*, 1999, pp. 105-118; D.M. Price, "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement", 27(3) *Int'l Lawyer*, 1993, pp. 727-736; J.A. Soloway, "NAFTA's Chapter 11: The Challenge of Private Party Participation", 16(2) *J. Int'l Arb.*, 1999, pp. 1-14; R.J. Zedalis, *supra*, note 6, pp. 115-147; F. Lazar, "Investment in NAFTA: Just Cause for Walking Away", 27 *J. World Trade*, 1993, pp. 19-35.

of the relevant provision of the investment dispute settlement mechanism existing under NAFTA Chapter 11. There are currently more than 10 cases pending before arbitral tribunals established pursuant to NAFTA Chapter 11. Final awards have been rendered in already three cases.[10]

This article analyzes in particular a recent award rendered by a NAFTA Chapter 11 Arbitral tribunal on 15 January 2001 in the case of *Methanex Corporation v. United States of America,* where it was decided that the Tribunal had the power under Article 15(1) of the *UNCITRAL Arbitration Rules* and under NAFTA Chapter 11 to accept *amicus curiae* briefs submitted by several Non-Governmental Organizations (NGOs).[11] This award is of great importance to international law practitioners. Thus, never before has a NAFTA Chapter 11 arbitral tribunal accepted *amicus curiae* briefs by NGOs or any other non-State actors. It is also the first time that an arbitral tribunal established under the *UNCITRAL Arbitration Rules* has granted such permission. The author is not aware of any other case where an arbitral tribunal has allowed the status of *amicus* to a NGO or any other non-state actors in an investor-State arbitration dispute.[12]

This article will in a first part survey the different relevant provisions of NAFTA Chapter 11. The second part will examine in detail the reasoning of the Arbitral tribunal in the *Methanex* Case. Finally, in a concluding part, few comments will be made on the likely impact of this landmark case on NAFTA Chapter 11 arbitration and other Investor-States dispute settlement mechanisms.

[10] For an analysis of these three cases, as well as all past and pending cases, see: Patrick Dumberry, "The NAFTA Investment Dispute Settlement Mechanism: A Review of the Latest Case Law", 2(1) *Journal of World Investment*, 2001, pp. 151-195. The most complete and up-to-date source of NAFTA Chapter 11 cases, which includes the relevant documents and awards, is the Internet site of Todd Weiler: <http://www.cyberus.ca/~tweiler/naftaclaims.html>. Other valuable information on the cases involving Canada are found on the Internet site of the Department of Foreign Affairs and International Trade: <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp>. Useful information on cases proceeded under the ICSID AFR is available on the ICSID Internet site: <http://www.worldbank.org/icsid/cases/cases.htm>.

[11] *Methanex Corporation v. United States of America*, Decision on Petitions from Third Persons to Intervene as *Amicus Curiae*, 15 January 2001.

[12] For instance, no such case exists in the context of the ICSID Convention, *supra*, note 2.

1. GENERAL OVERVIEW OF NAFTA INVESTMENT DISPUTE SETTLEMENT MECHANISM

NAFTA was signed by Canada, Mexico and the United States of America on 17 December 1992 and came into force on 1 January 1994.[13] This multilateral treaty is based in part on a previous bilateral treaty between the United States and Canada, the Free Trade Agreement.[14] NAFTA's aim is to eliminate most tariff and non-tariff barriers on the trade of goods and services between the three countries within a period of ten years. The Agreement is a complex legal framework consisting of 22 Chapters, several Annexes, and two "side agreements".

A. NAFTA's different dispute resolution mechanisms

The peculiarity of the Agreement is that it includes not only one, but three different sets of dispute resolution provisions. First, it includes a general State-to-State dispute resolution mechanism for controversies concerning the interpretation, application or breach of the Agreement (Chapter 20). It also includes two specific mechanisms: one to resolve antidumping and countervailing duty disputes between NAFTA Parties (Chapter 19), and the other for investor-State investment disputes (Chapter 11). In addition to these three mechanisms, NAFTA also involves two "side agreement": one on labor (the North American Agreement on Labour Cooperation (NAALC)[15]) and one on the protection of the environment (the North American Agreement on Environmental Cooperation (NAAEC)[16]). Each "side agreement" contains its own dispute resolution mechanism, which is linked to the general dispute settlement mechanism.

[13] See: 32 *ILM*, 1993, p. 605.

[14] The Free Trade Agreement was signed on 2 January 1988, in: 27 *ILM*, 1988, p. 281.

[15] See: 32 *ILM* 1993, p. 1499. The Agreement created the Commission for Labor Cooperation, see the Internet site: <http://www.naalc.org/>.

[16] See: 32 *ILM* 1993, p. 1480. The Agreement created the Commission for Environmental Cooperation, see the Internet site: <http://www.cec.org/>. On the question of the impact of Chapter 11 on the environment, see: Mann and Von Moltke, *supra*, note 1; D.A. Gantz, "Potential Conflicts Between Investors Rights and Environmental Regulation Under NAFTA's Chapter 11", *Geo. Wash. L. Rev.* (forthcoming 2001); A. Rugman, J. Kirton & J. Soloway, *Environmental Regulation and Corporate Strategy: A NAFTA Perspective*, Oxford, Oxford Univ. Press, 1999.

B. The purpose of Chapter 11

One of the ultimate aims of NAFTA is to promote and increase cross-border investment opportunities between the three countries and to ensure their successful implementation (Article 102(1)). Another purpose is to establish equal treatment among investors in accordance with the principle of international reciprocity. The Agreement has therefore established a mechanism for investor-State settlement of disputes allowing an investor to file a direct claim against a Party before an arbitral tribunal (Article 1115).[17]

Chapter 11 is divided into three different sections. Part A deals with the principles and obligations of the Parties with respect to treatment and protection of investments and investors. Part B is concerned with the mechanism for the settlement of disputes. Part C defines the terms used in the Chapter. In addition, number of Annexes deal with specific issues.

C. Who can claim

Chapter 11 can be invoked by any "investor of a Party" (Article 1116) who has incurred a loss or damage.[18] According to Article 201 a "national" of a Party includes the citizens as well as the permanent residents of that Party. A non-national of a Party can therefore submit a claim, provided that he/she has the status of a "permanent resident" on the territory of a contracting Party.[19] An investor who has incurred a loss or damage may directly submit a claim. An investor may also submit a claim on behalf of another "enterprise", provided that it owns or controls it "directly or indirectly", and that the "enterprise" is incorporated in the jurisdiction of a NAFTA Party (Article 1117). Finally, an enterprise not incorporated in the territory of a NAFTA Party, may nevertheless submit a claim through its subsidiary, provided that the

[17] The establishment of Chapter 11 was also dictated by the need to protect Canadian and American investors against eventual measures of expropriation taken by the Mexican government: Nolan & Lippoldt, *supra*, note 7; Soloway, *supra*, note 8, p. 4.

[18] According to Article 1138, an "investor" includes enterprises (e.g. natural persons or corporations) "constituted or organized under the law and regulations" of a Party (Article 201(1)). It also includes Parties and State enterprises.

[19] These issues were dealt with in: *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case no. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, para. 35, in: 40 *ILM*, 2001, p. 615.

subsidiary is incorporated in the territory of a Party. This possibility is however subject to certain limitations.[20]

D. The scope of Chapter 11: grounds of complaints

One of Chapter 11's most striking features is the broad character of its definition, which aim to achieve maximum protection for investments. This aspect has become one of the most controversial aspects of the Agreement. Generally speaking, Chapter 11 applies to "measures" "adopted or maintained" by a "Party" relating to an "investment" made by an investor of another Party (Article 1101). The wide scope of these four phrases will be the focus of this section.

The "measures" taken by a Party include "any law, regulation, procedure, requirement or practice" (Article 201(1)).[21] However, all measures adopted or maintained by a Party cannot ground arbitration proceeding pursuant to Chapter 11 provisions.[22] The claimant needs to prove that such measures breach a provision of Part A of Chapter 11 (Articles 1102 to 1114).

Part A lists all obligations that the Parties must comply with regarding investors of other Parties in their territory.[23] A Party shall grant investors from NAFTA Parties treatment which is not less favorable than the best treatment any Party grants to investors from non-NAFTA States (the most-favored nation clause, Article 1103). The treatment accorded must not be less favorable than the one it accords, in like circumstances, to its own investors (national treatment clause, Article 1102).[24] This treatment must always meet the minimum standard reserved to investors in accordance with international law (Article

[20] Under Article 1113, a Party may thus refuse to go to arbitration in the event that this subsidiary has no "substantial business activities" in the territory of the Party under whose law it is organized. A Party may also refuse arbitration when it does not maintain diplomatic relations with the non-NAFTA country from which the investor who controls the subsidiary originated. That would prevent, for instance, a subsidiary of a Cuban corporation to submit a claim against the United States; see Vanduzer, *supra*, note 8, pp. 268-269.

[21] The term "law" would include judicial decisions by national courts: *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID Case no. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para. 40.

[22] *Robert Azinian and Others v. United Mexican States*, ICSID Case no. ARB(AF)/97/2, Final Award, 1 November 1999, para. 82-84, in: 39 *ILM*, 2000, p. 537; 14(2) *ICSID Rev. Foreign Invest. L.J.*, 1999, p. 535; 121 *ILR* 2001.

[23] For an overview of these provisions, see: Eklund, *supra*, note 8, pp. 136-139.

[24] An analysis of Article 1102 can be found in: Zedalis, *supra*, note 6, pp. 128-130.

[25] Article 1105 states that investments must be treated "in accordance with international law, including fair and equitable treatment and full protection and security". An analysis of Article 1105 can be found in; *S.D. Myers Inc. v. Government of Canada*, Partial Award, 13 November 2000, para. 259, 260, in: 121 *ILR*, 2001.

1105).[25] It must not have the effect of imposing performance requirement on investors (Article 1106).[26] Finally, the Agreement provides investors with protection against direct and indirect nationalization or expropriation, as well as with "measures tantamount to nationalization or expropriation". Such protection is offered when the measure has not been taken for "public purpose", is discriminatory or is not in accordance with due process of law and when no compensation was allowed (Article 1110).[27] The Agreement also includes other more specific requirements.[28]

The Parties have made some general reservations and exceptions to their obligations contained in Part A of Chapter 11 (Article 1108).[29] In a limited number of exceptional circumstances, "measures" adopted or maintained by a Party in breach of a Part A provision have been excluded by the Parties from arbitration under Chapter 11.[30]

See also in: *Metalclad Corp. v. United Mexican States*, ICSID Case no. ARB(AF)/97/1, Final Award, 25 August 2000, para. 99 (in: 40 *ILM*, 2001, p. 35; 119 *ILR*, 2001) and the revision of this award by the Supreme Court of British Columbia, *infra*, note 64, para. 72, 75, 78. In a Note of Interpretation delivered on 31 July 2001 by the NAFTA Free Trade Commission, which is binding on Chapter 11 arbitral tribunals (Article 1131(2)), it was stated that Article 1105(1) "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party". It also mentioned that "the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens". The Note can be found at the Internet site of Canada's Department of Foreign Affairs and International Trade, *supra*, note 9.

[26] For an analysis of Article 1106, see: *S.D. Myers Inc., supra*, note 24, para. 264, 299; *Pope & Talbot Inc. v. Government of Canada*, Interim Award, 26 June 2000, para. 75, in: 122 *ILR* 2001. See also: Zedalis, *supra*, note 6, pp. 125-128.

[27] The issue of expropriation has been the object of three decisions by arbitral tribunals: *Pope & Talbot, supra*, note 25; *Metalclad Corp., supra*, note 24; *S.D. Myers Inc., supra*, note 24. On this question, see: Patrick Dumberry, "Expropriation under NAFTA Chapter 11 Investment Dispute Settlement Mechanism: Some Comments on the Latest Case Law", 4(3) *International Arbitration Law Review*, 2001, pp. 90-99; R.G. Dearden, "Arbitration of Expropriation Disputes Between an Investor and the State under the NAFTA", 29(1) *J. World Trade*, 1995, pp. 113-127; J.M. Wagner, "International Investment, Expropriation and Environmental Protection", 29 *Golden Gate U.L.Rev.*, 1999, p. 465; D. Schneiderman, "NAFTA's Taking Rule: American Constitutionalism Comes to Canada", 46 *Univ. Toronto L.J.*, 1996, pp. 499-537.

[28] Some Articles deal with issues such as the imposition of nationality requirement for the appointment of senior management and board of directors (Article 1107) and the free circulation of transfers and international payments (Article 1109).

[29] According to Article 1132, a Party who uses these reservations and exceptions as a defense may request the tribunal to demand a binding interpretation on this question from the NAFTA Free Trade Commission: Horlick & Marti, *supra*, note 8, pp. 50-52.

[30] Measures related to financial services are one example. They are dealt with in Chapter 14 of NAFTA, and are, with some limited exceptions, excluded from arbitration under Chapter 11 (Article 1101(3)). Other exclusions also exists: decisions taken by Parties to prohibit or restrict the acquisition of an investment on their territory for reasons of "national security" (Article 1138(1)); decisions taken by Canada under the Investment Canada Act and those teken by Mexico's National Commission on Foreign Investment (Article 1138(2), Annex 1138.2). Finally, Mexico has reserved its right to refuse investments in the areas of petroleum exploration, supply of electricity, nuclear power and others. (Article 1101(2), Annex III).

The use of the words "adopted and maintained" at Article 1101 refer to positive action taken by a Party; "inaction", such as the non-enforcement of a law, is therefore not sufficient to enable the filing of a claim.[31]

The measures adopted and maintained by a "Party" are those taken by the Federal government, by State (or Provincial) governments, local governments (such as municipalities) and publicly held monopolies.[32]

Chapter 11 can be used by an investor who "seeks to make, is making or has made an investment". The term investment is defined in a very board way (Article 1139) and includes *inter alia*: debt and equity security, certain types of loans, real estate and other property (tangible or intangible) as well as certain types of interests in an enterprise that entitles the owner to share in income or profits or which arise out of commitments of capital or other resources.[33]

Although not determined by any specific provision, the *ratione temporis* jurisdiction of an arbitral tribunal does not extend to acts committed before 1 January 1994, when the Agreement came into force.[34]

E. The conditions to submit a claim to arbitration

There are two general conditions for submitting a claim to arbitration: a Party must have breached a provision of Part A of Chapter 11 and an investor must have incurred a loss or damage by reason of the commission of that breach (Article 1116(1)).[35] In addition to those requirements, there also exist six *preconditions* to the submission of a valid claim under Chapter 11.[36]

[31] On this question, see: Vanduzer, *supra*, note 8, pp. 275-276.
[32] Articles 105 and 201(2). See also the observations made in the *Metalclad* case, *supra*, note 24, para. 73.
[33] "Investment" does not include claims arising solely from commercial contracts for the sale of goods or services or from a credit extension in connection with a commercial transaction. On this question, see: Zedalis, *supra*, note 6, pp. 122-125; Vanduzer, *supra*, footnote 8, pp. 269-271.
[34] This issue was dealt with in the *Feldman Karpa* case, *supra*, note 18, para. 62.
[35] Articles 1502(3)(a) or 1503(2) on monopoly or a State enterprise are also valid grounds to submit a claim to arbitration.
[36] G.N. Horlick and F.A DeBusk, "Dispute Resolution under NAFTA: Building on the U.S.-Canada F.T.A., GATT and ICSID", 27(1) *J. World Trade*, 1993, p. 23.

—The investor's claim must be lodged within three years from the date on which the investor knew, or should have known, of the breach and the damage (Article 1116(2)).[37]

—Before the submission of its claim, the aggrieved investor must have attempted consultations and negotiations with the Party allegedly in breach of NAFTA (Article 1118).

—In order to favor consultations and negotiations, the claim must be submitted to arbitration when six months have elapsed since the event giving rise to the claim (Article 1120(1)).[38]

—The investor must give written "Notice of Intent to Submit a Claim to Arbitration" to a Party at least 90 days before the claim is actually submitted by a "Notice of Arbitration" (Article 1119).[39]

—The investor must consent in writing to arbitration in accordance with the provisions of Chapter 11 (Article 1121). The three Members States have committed themselves to arbitration with foreign investors and their specific consent is therefore not required (Article 1122).[40]

—The investor must waive in writing its right to "initiate or continue" any proceedings before administrative tribunals or courts under the domestic law of any Party concerning the measure taken by a Party that constitutes the basis of the dispute (Article 1121).[41] The absence of such waiver is fatal to the valid submission of a claim.[42] The

[37] In the *Feldman Karpa* case, *supra*, note 18, para. 44, it was decided that the three-year limitation period must be calculated back from the submission of the Notice of Arbitration, not from the submission of the Notice of Intent.

[38] In *Ethyl Corporation v. Government of Canada*, Award on Jurisdiction, 24 June 1998, para. 74-88 (in: 38 *ILM*, 1999, p. 700; 16(3) *J. Int'l Arb.*, 1999, p. 139), it was decided that the non respect of this time limitation was not fatal to the submission of a valid claim.

[39] In the *Feldman Karpa* case, *supra*, note 18, para. 46, it was decided that this 90 day period was concurrent with the above-mentioned six month period. Article 1119 also mentions that the Notice of Intent must specify the provisions allegedly breached as well as any other relevant provisions, the issues and the factual basis for the claim, the relief sought and the approximate amount of damages claimed.

[40] In the words of Alvarez, *supra*, note 8, p. 408, the "consent is not simultaneous and is only completed at the option of a disputing investor when it submits a claim".

[41] For internal constitutional reasons, Mexico obtained a "double protection" with the inclusion of Annex 1120.1. A detailed analysis of this Annex can be found in the dissenting opinion of Arbitrator Highlet in: *Waste Management, Inc. v. United Mexican States*, ICSID Case no. ARB(AF)/98/2, Final Award, 26 May 2000, para. 37-39, 47-48, 64-69; in: 15 *ICSID Rev. Foreign Invest. L.J.*, 2000, p. 214; 40 *ILM*, 2001, 55; 121 *ILR*, 2001.

[42] The *Waste Management* case, *supra*, note 40, para. 13 *et seq.*, provides a detailed analysis of the scope and content of the waiver requirement. According to the Tribunal, the waiver requirement is a "conditions precedent" to the submission of a valid claim under Chapter 11. In the *Ethyl* case, *supra*, note 37, para. 90-

requirement of a waiver does not apply to "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the domestic law of the disputing Party" (Article 1121(1)(b)).[43]

F. The choice between different sets of arbitration rules

The Chapter 11 mechanism does not establish a new procedural regime; the investors can seek arbitration for violations of NAFTA under one the following three arbitration rules of proceedings (Article 1120(1)):

—the ICSID Convention;[44]
—the ICSID *Additional Facility Rules* (AFR);[45] or
-an *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[46]

In theory, the claimant investor is free to choose between one of these three options.[47] However, pursuant to Article 25 of the ICSID Convention, the latter only applies when both the investor's State of origin and the State hosting the investment are Parties to the Convention. At present, only the United States is a Party to the Convention. Pending further ratification of the ICSID Convention, it cannot be chosen by investors as the arbitration rules governing their disputes. The ICSID AFR, which were created especially for cases where

92, the Tribunal adopted a very flexible position. In accordance with its own interpretation of Article 1121, the Tribunal decided that the waiver could be submitted by the claimant in its Statement of Claim, and not in its initial Notice of Arbitration. The approach seems inconsistent with other Chapter 11 provisions. Thus Article 1137(1)c provides that arbitration proceedings are deemed to commence on the date on which the Notice of Arbitration is received by the respondent. The Tribunal's interpretation in the *Ethyl* case would lead to a situation where the arbitration proceedings could start without the waiver requirement being fulfilled by the claimant: Alvarez, *supra*, note 8, p. 426. The solution adopted in the *Ethyl* case is also contrary to the one adopted by the Tribunal in the *Waste Management* case, *supra*, note 40, para. 19, where it was noted that the waiver comes into full effect from the date on which the Notice of Arbitration is filed and not at a later stage of the proceedings.

[43] No waiver requirement is needed when a Party has deprived an investor of "control of an enterprise" (Article 1121(4)).

[44] *Supra*, note 2.

[45] ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, created in 1978.

[46] These Arbitration Rules were approved by the United Nations General Assembly on 15 December 1976, U.N. GAOR, 31st Session, Supp. No. 17, at 46, Ch. V, Sec. C, UN Doc. A/31/17, 1976.

[47] Eklund, *supra*, note 8, pp. 145-146, 159-171, provides a very well-documented comparison of the three different arbitration rules available under NAFTA which highlights the advantagas and the inconveniences of each.

only one of the disputing parties is a Member State of the ICSID Convention, can be chosen by investors, provided that the dispute involves an American claimant or the United States as the respondent.[48]

G. The conduct of arbitral proceedings

The arbitration rules chosen by the investor will govern the proceedings, except when modified by Chapter 11 provisions (Article 1120(2)).[49] Several Chapter 11 provisions must be mentioned as they differ from the above-mentioned sets of arbitration rules. For instance, Article 1123 governs the numbers of arbitrators and their method of appointment,[50] and Article 1126 provides that an investor or a Party may request the Secretary-General of ICSID to establish a special arbitral tribunal to hear a request for the consolidation of claims.[51] Another unique provision is Article 1128, according to which a Party that is not directly involved in an arbitration has the right to make a submission to the arbitral tribunal regarding the interpretation of Chapter 11.[52] Unless the disputing parties agree otherwise, the arbitral tribunal will have its seat in the territory of a State Party to the New York Convention (Article 1130).[53] The arbitral tribunal will decide the

[48] The *ICSID Additional Facility Rules* were used for the very first time in the *Azinian* case, *supra*, note 21.
[49] This issue arose, for example, on the question whether claimants have the right to present incidental or additional claims. Tribunals have decided that this issue was governed by the arbitration rules chosen by the investor, since this question remains untouched by Chapter 11: *Feldman Karpa* case, *supra*, note 18, para. 54; *Metalclad* case, *supra*, note 24, para. 67; *Ethyl* case, *supra*, note 37, para. 95; *Pope & Talbot* case, *supra*, note 26, para. 22-29.
[50] According to Article 1123, unless the disputing parties agree otherwise, the arbitral tribunal will consist of three arbitrators, one being appointed by each of the disputing parties and the third, the presiding arbitrator, by agreement of the disputing parties. In the event that the tribunal has not been constituted within 90 days from the date of the claim submission, at the request of either disputing party, the Secretary-General of ICSID will appoint the arbitrator(s) not yet appointed (Article 1124). On this, see: Vanduzer, *supra*, note 8, pp. 278-280; J.C. Thomas, "The Position of the International Arbitrator in Chapter 11 Proceedings under the NAFTA: Perils and Glories", 16(2) *J. Int'l Arb.*, 1999, pp. 111-117.
[51] In such a case the constitution of the arbitral tribunal is not governed by Articles 1123 and 1124 but by Article 1126. On this question, see: Alvarez, *supra*, note 8, pp. 413-415.
[52] Third Parties to the arbitration have delivered submissions on interpretation to arbitral tribunals in almost all Chapter 11 cases. Article 1127 provides that once a Party complained against has received a claim from an investor, the Notice of Arbitration must be delivered within 30 days to the other NAFTA States. These third Parties are also entitled to copies of the pleading filed in the arbitration (Article 1127) as well as the evidence and the written arguments from the disputing parties (Article 1129).
[53] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York on 10 June 1958, UN Doc. No. E/Conf. 26/9 Rev. 1; 330 UNTS 3. The criteria to be taken into account in the determination of the place of arbitration have been examined in detail in the *Ethyl* case, *supra*, note 37. See also in: *ADF Group Inc. v. the United States of America*, ICSID Case no. ARB(AF)/00/1, Procedural Order of 11 July 2001.

issue in dispute in accordance with the provisions of NAFTA and "applicable rules of international law" (Article 1131).

Article 1131(2) also indicates that statement of interpretation given by the NAFTA Free Trade Commission on any subject are binding on arbitral tribunals established under Chapter 11. One such statement (Note of Interpretation) was delivered by the Commission on 31 July 2001 on the question of access to documents.[54] It was decided that "nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties" and that nothing "precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal".[55] Accordingly, NAFTA's Parties agreed to make available to the public "in a timely manner" all documents submitted to, or issued by, a Chapter 11 tribunal.[56]

H. The arbitral award and its enforcement

Unlike State-to-State trade disputes before WTO Panels, the arbitral tribunal may not recommend that a government change its laws, regulations or policies. A final judgement may award monetary damages (and interests) and restitution of property (Article 1135(1)).[57]

According to Article 1136, an award made by a tribunal is binding on the disputing parties with respect to the particular case. Parties must abide by and comply with the award without delay and must undertake to provide for the enforcement of the award on their territory. The prevailing party may seek enforcement of an award under the ICSID Convention,[58] the New York Convention[59] or the Inter-American Convention.[60] If a Party fails to abide by or comply with the terms of a final award, the NAFTA Free Trade Commission will establish a Panel

[54] The Note of Interpretation also dealt with Article 1105, see: *supra*, note 24.
[55] The Note of Interpretation, 31 July 2001, can be found at the Internet site of Canada's Department of Foreign Affairs and International Trade, *supra*, note 9.
[56] An exception being made for confidential business information, information privileged or otherwise protected from disclosure under the Party's domestic law and finally information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
[57] In case the tribunal decidas the latter, a Party has the right to pay monetary damages (and interests) in lieu of restitution. An arbitral tribunal may also award costs, depending on the arbitration rules applied. However, a tribunal may not order a Party to pay punitive damages (Articla 1135(3)).
[58] *Supra*, note 2.
[59] *Supra*, note 52.
[60] Done at Panama on 30 January 1975, OASTS, no. 42; 14 *ILM* p. 336. The New York Convention has so far been ratified by the three NAFTA Member States while only Mexico is a Party to the Inter-American Convention.

upon request of a Party, whose investor is involved in the dispute (Article 1136(5)).[61]

Chapter 11 does not contain any provision for the appeal of an award, its revision or its nullity. Different solutions will therefore prevail depending on the arbitration rules chosen by an investor.[62] A good example of that is the case of *Metalclad Corp.*[63] On 27 October 2000, Mexico asked for the nullification of the Final Award rendered by the Arbitral tribunal (presided over by Sir Elihu Lauterpacht Q.C.,) on 25 August 2000. The request was made before the Supreme Court of British Columbia based on the ground that Vancouver was the place of arbitration of the Tribunal.[64] The Supreme Court rendered its Decision on 2 May 2001, and held that the Arbitral tribunal had decided matters relating to Articles 1105 and 1110 beyond the scope of the submission to arbitration.[65] The Court decided however not to set aside the Award in its entirety, but only partially in so far as it ordered a cut to the amount of the interests on the US$ 16.685 million Award.

2. THE METHANEX CORPORATION CASE AND THE ADMISSIBILITY OF AMICUS CURIAE BRIEFS BY NGO'S

A. The facts of the Methanex case

The claim was introduced on 3 December 1999 under the *UNCITRAL Arbitration Rules* by a Canadian company, Methanex Corporation, acting on its own behalf and on behalf of its American subsidiary against the United States, claiming US$ 970 million in compensation.[66]

[61] This Panel will be established pursuant to Article 2008(1) of the general State-to-State dispute settlement mechanism of Chapter 20.

[62] On this question, see: Eklund., *supra*, note 8, pp. 153-155; Vanduzer, *supra*, note 8, pp. 285-287.

[63] *Metalclad Corp., supra*, note 24.

[64] Mexico submitted to the Court that the Arbitral tribunal exceeded its jurisdiction by arrogating to itself a wider jurisdiction than granted by Articles 1105 and 1110. Canada, a third party in the arbitration proceedings which was granted the right to intervene before the Court, was also of the opinion that the Tribunal failed to distinguish between real cases of indirect expropriation, and cases of mere governmental interference, which are not compensable.

[65] *Reasons for Judgment of the Honourable Mr. Justice Tysoe*, 2 May 2001, case no. 2001 BCSC 664, in : 119 *ILR*, 2001. The Decision can be found on the Internet site of the Department of Foreign Affairs and International Trade of Canada, *supra*, note 9. The proceedings transcript of the case is available at the Internet site of Todd Weiler, *supra*, note 9.

[66] The Disputing Parties' respective submissions, all Parties and third Parties' submissions with respect to the *amicus curiae* request, and the Decision on Petitions from Third Persons to Intervene as *Amicus Curiae*, are available on the Internet site of Todd Weiler, *supra*, note 9.

The dispute arises from the passage of an Executive Order in March 1999 by the governor of the State of California for the removal of the gas additive MTBE from gasoline before the end of 2002. The ban was implemented based on a study by the University of California that indicated that leaks from underground storage tanks might contaminate groundwater and pose health risk to humans. Methanex is a producer of methanol, a key ingredient in the production of MTBE, and believes that the ban is arbitrary, unfair and not based on credible scientific evidence. Methanex also argues that the ban failed to consider alternatives measures to mitigate the effects of gasoline releases into the environment.

The manner in which the legislative measure was applied and implemented by the State of California is alleged to be contrary to the fair and equitable treatment, required by NAFTA Article 1105. Furthermore, it is alleged that the ban has caused (and *will* cause) losses in Methanex's market capitalization and its potential profits. According to Methanex, the ban is in breach of NAFTA Article 1110, since it *will* have the effect of ending its business. The Tribunal has not yet rendered its final award on the merits of the case.

On 25 August 2000, a NGO, the International Institute for Sustainable Development (IISD), formally petitioned the Tribunal to be granted the permission to submit an *amicus curiae* brief on "critical legal issues of public concern" arising out of this case. The IISD also requested the Tribunal to be granted an observer status at the oral hearings and the right to make oral submissions. On 6 September 2000, two other NGOs, submitted a distinct joint Petition for leave to file an *amicus curiae* brief and to be granted rights similar to those requested by the IISD.[67]

B. The arguments of the parties

The IISD intended to participate in the arbitration proceedings on the basis of the great importance of the case and its possible impact on the limits imposed on NAFTA governments' ability to enact environmental and public welfare laws. It also wanted to intervene

[67] The Petition was originally filed by the Communities for a Better Environment and the Earth Island Institute. It was amended on 13 October 2001 with the addition of a third NGO, the Center for International Environmental Law, and a modification to the designation of another one: Bluewater Network Earth Island Institute.

to comment on the need for NAFTA to better reflect legal principles such as environmental protection and the commitment to promote sustainable development, which are both stated in its preamble.[68] The IISD believed that one of the advantages of granting *amicus* status to NGOs was to reduce the public perception of Chapter 11 arbitration proceedings as being "closed, secretive, non-transparent and one-sided".[69] Finally, the IISD maintained that the Tribunal had jurisdiction to accept the Petition under its general procedural powers contained in Article 15(1) of the *UNCITRAL Arbitration Rules* and that nothing in NAFTA Chapter 11 prevented the Tribunal from using such discretion.

Methanex opposed the Petitions for reason of confidentially of Chapter 11 arbitration conducted under the *UNCITRAL Arbitration Rules*. In particular, Methanex alleged that according to Article 25(4) of the *UNCITRAL Arbitration Rules*, the hearing must be held *in camera* and that the documents prepared for the arbitration should remain confidential. Methanex also objected to the Petitions on the grounds that under Chapter 11, only NAFTA Parties are allowed to make submissions or participate in the arbitration (Article 1128); granting the status of *amicus* to a NGO would therefore be the equivalent of adding a party to the proceedings. Without the agreement of the Disputing Parties to do so, the Tribunal would exceed its procedural power under Article 15(1) of the *UNCITRAL Arbitration Rules*.

Methanex also alleged that the protection of the public interest was already ensured in Chapter 11, and that private interest groups wishing to put their views before the Arbitral Tribunal could convey their requests to NAFTA Parties who could intervene under NAFTA Article 1128. According to Methanex, the equality and fairness in the proceedings would be compromised if it had to respond to both the submissions of the United States and those of third persons. In addition, Methanex maintained that there were no precedent under the *UNCITRAL Arbitration Rules* where an arbitral tribunal had granted the *amicus* status to third persons. To accept these Petitions would set an undesirable precedent.

[68] This argument was put forward by the IISD in the light of the alleged failure of another arbitral tribunal established pursuant to NAFTA Chapter 11 to consider environmental protection issues: *Metalclad Corp.*, *supra*, note 24.

[69] The IISD's Petition (25 August 2000), para. 3.7.

On the contrary, the United States, respondent in the arbitration, argued that the flexibility of both NAFTA Chapter 11 and the *UNCITRAL Arbitration Rules* authorized the Tribunal to accept *amicus* submissions if deemed appropriate. The United States did not rebut Methanex's allegation that NAFTA Article 1128 grants the right to make submissions only to NAFTA Parties. However, the United States alleged that this provision leaves untouched the question whether the Tribunal may exercise its discretion to accept, as a matter of permission, submissions by third persons.

According to the United States, this case is not a typical commercial arbitration dispute: it involves a State as respondent, it has to be decided on the basis of public international law, and the decision will have a significant effect extending beyond the two Disputing Parties. The United States believes that in the present case, the Petitioners would provide insight, experience, knowledge and expertise on issues before the Tribunal.

In accordance with Article 1128, Canada submitted a brief, adopting a similar position to that of the United States in supporting a greater openness of Chapter 11 arbitration proceedings. Mexico, on the contrary, expressed the opinion that leave to file an *amicus* brief should be denied. The Tribunal should thus prevent the *amici* to have greater rights then third Party NAFTA States under Article 1128. Mexico also opposed the importation of the concept of *amicus curiae* into the NAFTA dispute settlement mechanism on the ground that it is not recognized under Mexican law.

C. The decision of the Arbitral Tribunal

The Tribunal first indicated that:

> "[T]here 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 power." (para. 24).[70]

[70] The Tribunal was presided by V.V. Veeder QC, assisted by William Rowley QC and Warren Christopher.

The Tribunal therefore inferred its power in this respect from its "more general procedural powers" included in Article 15(1) of the *UNCITRAL Arbitration Rules* (para. 25).

The Tribunal divided its analysis in four different questions.

a) Does the Tribunal's Acceptance of *Amicus* Submission Falls Within the Scope of Article 15(1) of the *UNCITRAL Arbitration Rules*?

The Tribunal first described Article 15(1) as an "essential hallmark of an international arbitration under the *UNCITRAL Arbitration Rules*" and as one of the few provisions which are considered as the "procedural *Magna Carta* of international commercial arbitration" (para. 26). According to the Tribunal, this Article grants it "a broad discretion as to the conduct of this arbitration, subject always to the requirements of procedural equality and fairness towards the Disputing Parties" (para. 26). The broadness of this provision would not however confer to the Tribunal, without consent, any power to add a person as a party to the dispute nor to accord to this person rights and privileges of a Disputing Party (para. 27, 29).

The Tribunal considered that the reception of written submissions from a person other than the Disputing Parties was "not equivalent to adding that person as a party to the arbitration" and that "the third person acquires no rights at all" by its inclusion in the arbitration (para. 30). The legal nature of the arbitration would therefore remain entirely unchanged.

According to the Tribunal, the discretion to allow written submissions from a third person would fall within its procedural powers over the conduct of the arbitration as conferred by Article 15(1) of the *UNCITRAL Arbitration Rules* (para. 31). The Arbitral Tribunal indicated that this approach was supported by the practice of other international tribunals. Thus, in the context of the Iran-United States Claims Tribunal, "under special circumstances" a third person may be permitted to assist the tribunal.[71] The Arbitral Tribunal made specific reference to one decision rendered by the Iran-United States Claims Tribunal, where a third person was given

[71] This position was adopted by the Iran-United States Claims Tribunal in its Interpretation Note no. 5 to Article 15(1) of the *UNCITRAL Arbitration Rules*.

this opportunity.[72] According to the Tribunal, this feature of the Iran-United States Claims Tribunal demonstrates that the "receipt of written submissions from non-party third person does not offend the philosophy of international arbitration involving States and non-States parties" (para. 32).

The Tribunal also made reference to a similar position adopted by the World Trade Organization (WTO) Appellate Body, whereby NGOs were accorded the status of *amicus*. The Tribunal referred specifically to one case which, according to the Tribunal, demonstrates that the receipt of such submissions confers no rights, procedural or substantive, to the third person (para. 33).[73] Finally, the Tribunal mentioned that the International Court of Justice (ICJ) does not accept requests from NGOs. According to the Tribunal, however, this practice "provides little assistance" to the present case since the ICJ's jurisdiction is limited solely to disputes between States and that its Statute provides only for intervention by States.[74]

b) Does the Tribunal's acceptance of *Amicus* submission affect the equal treatment of the disputing parties under article 15(1) of the *UNCITRAL Arbitration Rules*?

On Methanex's allegation, that it would suffer an extra burden in the arbitration from the admission of *amicus* briefs, the Tribunal indicated that this "potential risk" was "inherent in any adversarial procedure which admits representations by a non-party third person" (para. 35). However, the Tribunal decided that "at least initially", such burden

[72] *Iran v. United States*, Case A/15, Award no. 63-A/15-FT, *in*: 2 Iran-US C.T.R. 40, at p. 43. To this finding of the Arbitral tribunal should be add that S.A. Baker, & M.D. Davis, *The UNCITRAL Arbitration Rules in Practice: the Experience of the Iran-US Claims Tribunal*, Deventer, Kluwer, 1992, pp. 76, 98, mention other similar cases decided by the Iran-United States Claims Tribunal. See also: J.J. Van Hof, *Commentary on the UNCITRAL Arbitration Rules: the Application by the Iran-US Claims Tribunal*, Deventer, Kluwer, 1991, p. 108; M. Pellonpaa, & D.D. Caron, *UNCITRAL Arbitration Rules as Interpreted and Applied: Selected Problems in Light of the Practice of the Iran-US Claims Tribunal*, Helsinki, Finnish Lawyers Publ., 1994, p. 36.

[73] *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/8 (10 May 2000). For a critical analysis of this decision, see: A.E. Appleton, "Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?", 3(4) *Journal of International Economic Law*, 2000, pp. 691-699. It should be added that the principle of accepting *amicus* briefs was first recognized by the WTO Appellate Body in the Shrimp Case: *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Preliminary Ruling, 6 November 1998). Since then, *amicus* briefs have been submitted in several other WTO dispute settlement cases. In the *Asbestos* Case (*European Communities-Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/9, 7 November 2000), the Appellate Body published the procedure to be followed by NGOs for being granted the right to submit *amicus* briefs.

[74] The Tribunal noted however that in a recent case before the ICJ, written submissions were received, unofficially, by the Court: *Case Concerning the Gabcikovo-Nagymaros Project*, ICJ Report, 1997, p. 7.

would be shared by both Disputing Parties and that it could not be regarded as "inevitably excessive" for either Party (para. 36). Furthermore, if either Party were to adopt the Petitioners' point of view, the other Disputing Party could not then complain; this situation would not create an "extra unfair burden or unequal treatment" (para. 36). Therefore, the Tribunal concluded that there was no "immediate risk" of unfair and unequal treatment and that such possible risk would have to be "addressed as and when it may arise" (para. 37).

c) Is the application of article 15(1) of the *UNCITRAL Arbitration Rules* modified by any NAFTA Chapter 11 Provision?

The Tribunal responded in the negative to this question. No NAFTA provision touches the issue of the submission of briefs by *amici*: Article 1128 deals with the rights of NAFTA Parties to intervene, while Article 1133 focuses on the Tribunal's authority to appoint independent experts (para. 38). The Tribunal indicated that *amici* are not experts since they are not "independent" and they advance a particular case to the Tribunal (para. 38). Therefore, the Tribunal concluded that "there is no provision in Chapter 11 that expressly prohibits the acceptance of *amicus* submissions, but likewise nothing that expressly encourages them" (para. 39).

d) Is the application of Article 15(1) modified by any other *UNCITRAL Arbitration Rules* provision?

The Tribunal decided that no other provision modifies the application of its general power under Article 15(1). The Tribunal also decided that Article 25(4) of the *UNCITRAL Arbitration Rules*, which provides that hearings must be held *in camera*, had to be applied in the present case. It therefore rejected the Petitioners' requests to attend the oral hearing of the arbitration (para. 42). It also rejected the request by the Petitioners to receive the materials generated within the arbitration (para. 46).

D. The conclusion of the Tribunal

Having examined these four questions, the Tribunal finally concluded that it had the power under Article 15(1) of the *UNCITRAL Arbitration Rules* to accept *amicus* submissions from each of the Petitioners. According to the Tribunal, it is one thing to determine that it has the

power to accept *amicus* submissions and another one to decide whether, "in the particular circumstances of this arbitration", it will judge "appropriate" to use its *discretion* to do so. The Tribunal noted that:

> "At this early stage, [it] cannot decide definitively that it *would* be assisted by these submissions on the Disputing Parties' substantive dispute. (...) At the least, however, the Tribunal must assume that the Petitioners' submissions *could* assist the Tribunal." (para. 48)

The Tribunal then decided to look at "other factors" for the exercise of its "discretion":

> "There is 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 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 United States 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." (para. 49)

> "There are other competing factors to consider: the acceptance of *amicus* submissions might add significantly to the overall cost of the arbitration and (...) 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 Methanex's position and eventually to support the United States' case. This factor has weighed heavily with the Tribunal; and it is concerned that Methanex should receive whatever procedural protection might be necessary". (para. 50)

The Tribunal rejected other factors, such as Mexico's argument that the Petitioners' request should be set aside since the concept of *amicus curiae* is not existing under its national law (para. 47). The Tribunal also rejected the allegation on the danger of setting a precedent by accepting *amicus* briefs. It concluded that:

> "The 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." (para. 51)

Weighing all the relevant factors, the Tribunal decided that it "could be appropriate to allow *amicus* submissions from these Petitioners". The Tribunal also said that the procedural limitation as to timing, form and content of the submissions would be decided with the Disputing Parties at a later stage in the proceedings. The Tribunal would retain complete discretion to determine the "admissibility, relevance, materiality and weight" of the Petitioners' submissions (para. 36).

In its Order, the Tribunal indicated that the present award declared that it had the power to accept the *amicus* submissions, and that:

> "[W]hilst it is at the present minded to receive such submissions subject to the procedural limitations still to be determined by the Tribunal, 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".

This award accepts in principle the submission of *amicus curiae* briefs. It therefore clears the way for another subsequent decision to be made by the Tribunal on whether to accept each of the NGOs' Petitions to submit their legal arguments before the Tribunal.

CONCLUSION

Even thought the award is not binding on other arbitral tribunals established under NAFTA Chapter 11, it sets a precedent which may be relied upon by potential petitioners in other Chapter 11 cases decided under the *UNCITRAL Arbitration Rules*. However, it is uncertain whether arbitral tribunals established pursuant to the *ICSID Convention* or the *ICSID Additional Facility Rules* (AFR) will interpret their power and discretion in the same fashion as the Tribunal in the *Methanex* Case. Undoubtedly, the long-term effect of this award is likely to be that an increasing number of NGOs will request greater participation rights in Chapter 11 proceedings. Other non-State actors, such as corporations, labor unions, trade associations, and even individuals

should also be direct beneficiaries of this new development in international arbitration under NAFTA.

As a matter of facts, since the Award was rendered, two NGOs have requested the status of *amicus* before an arbitral tribunal established under NAFTA Chapter 11 in the case of *U.P.S. v. Canada*. On 17 October 2001, the Arbitral tribunal decided that it had the power under NAFTA Chapter 11 and Article 15(1) of the *UNCITRAL Arbitration Rules* to accept *amicus* briefs from the Petitioners and that it would consider them at the merits stage of the arbitration following consultation with the Parties and exercising its discretion "in accordance with relevant judicial practice".[75] The Arbitral tribunal therefore followed the precedent sets by the *Methanex* Case.

It remains to be seen whether the award in the *Methanex* Case will have significant consequences for other types of investor-State arbitration mechanisms. The outcome however depends greatly on the position that States will adopt in future arbitration cases involving similar requests from NGOs or other non-State actors. Thus, it is feasible to assume that the Tribunal in the *Methanex* Case would probably not have taken the decision to allow *amicus* briefs without the support from both the State of the investor (Canada) and the State receiving the investment (the United States, Respondent in the arbitration proceedings). This award is in any event a formidable breakthrough which offers immense possibilities to non-State actors in future international arbitration.

[75] *United Parcel Service of America Inc. v. the Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amicus Curiae*, 17 October 2001. All the relevant document of the case can be found at the Internet site of the Canada's Department of Foreign Affairs and International Trade, *supra*, note 9.