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

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

AMENDED PETITION OF
COMMUNITIES FOR A BETTER ENVIRONMENT,
THE BLUEWATER NETWORK OF EARTH ISLAND INSTITUTE,
AND THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
TO APPEAR JOINTLY AS *AMICI CURIAE*

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INTRODUCTION

1. This amended petition supersedes the petition submitted to the Tribunal on September 6, 2000. By this petition, Communities for a Better Environment ("CBE"), the Bluewater Network of Earth Island Institute ("Bluewater") and the Center for International Environmental Law[1] ("CIEL"; together with CBE and Bluewater, "Petitioners"), request permission to participate jointly in this arbitration as *amici curiae*. Petitioners request that, for all stages of this arbitration, such participation include the opportunity to review memorials of the parties and any other submissions or orders in the proceedings, as well as to attend the Tribunal's hearings, and to make oral and written submissions according to a schedule determined by the Tribunal.

2. As non-governmental environmental and international law organizations with substantial expertise concerning the matters underlying Methanex's claim under NAFTA's Chapter 11, Petitioners' participation would be of significant assistance to the

Tribunal. Moreover, as representatives of serious public environmental and human health concerns, Petitioners' participation is important as a safeguard of democratic processes and will help to ensure the legitimacy of the Tribunal's decision. Finally, this Tribunal has the authority to grant this petition.

3. Support for the participation of *amici* in this case is widespread. Numerous representatives of civil society in the United States, Canada and Mexico that have expressed their position on the matter. Over 80 public interest organizations from all three countries have written to the Tribunal to express their concerns and urge the participation of *amici*, as well as to indicate that Petitioners' participation will help ensure that their concerns are represented to the Tribunal. *See* Letter from Nongovernmental Organizations, Oct. 13, 2000, Appendix at Tab 1 (hereafter "App. #"). Five members of the Senate of the State of California have written to urge the Tribunal to allow *amicus* participation. *See* Letter from Senator Tom Hayden, *et al.*, Oct. 12, 2000, App. 2. Should further expressions of public concern regarding these proceedings come to our attention, we will make them available to the Tribunal.

BY VIRTUE OF THEIR EXPERIENCE AND EXPERTISE, PETITIONERS ARE APPROPRIATE *AMICI CURIAE*

4. Petitioners' qualifications to participate in this proceeding as *amici* are unquestionable. CBE is a California non-profit, community-based organization dedicated to protecting the environmental health and justice interests of the citizens of California. Bluewater is a project of Earth Island Institute, a national environmental organization that develops and supports projects to protect the biological diversity that sustains the environment. Bluewater's mission is to protect public waters, lands and ecosystems throughout the United States from damage caused by motorized recreation, oil and shipping industry practices and other types of marine pollution. CIEL was founded in 1989 to strengthen international and national environmental law and policy around the world. In particular, CIEL's Trade and Environment program seeks to reform the global framework of economic law, policy and institutions in order to create a more balanced

[1] The Center for International Environmental Law has been added as one of the Petitioners in this Amended Petition.

global economy that is environmentally sustainable and benefits all people in a more equitable way.

5. Petitioners have significant experience and expertise in the issues that are at the heart of this dispute. Since 1991 and 1997 respectively, CBE and Bluewater have worked to educate the public concerning the environmental and health risks posed by MTBE and to require the removal of MTBE from California gasoline, efforts that culminated with the Executive Order that Methanex cites as the basis for its claim. Both CBE and Bluewater have testified frequently before and provided written comments to the California legislature and executive agencies concerning the risks posed by MTBE. *See* "CBE's Work to Ban MTBE," App. 3; Letters from Bluewater Network to California Legislators, App. 4. In addition, CBE has brought suit against oil companies to obtain redress for the health and environmental harm resulting from the use of MTBE in their reformulated gasoline. App. 3. Bluewater has also worked extensively the US Congress concerning the risks of MTBE, bringing the issue to national attention. *See* Bluewater Network Press Releases, App. 5.

6. Similarly, CIEL provides special expertise in international environmental law and comparative national environmental law. Its work in these fields includes policy research and publication, advice and advocacy, education and training, and institution building. CIEL's writings on the intersection of investment rules and environmental regulation include: "Investment Agreement of the Americas: Environmental, Economic, and Social Perspectives," "International Environmental Law and Foreign Direct Investment" in Legal Aspects of Foreign Direct Investment (Kluwer, 1999); and "Case Studies on the Multilateral Agreement on Investment's Potential Impact on Environmental Law in Developing Countries." CIEL has prepared and submitted *amicus* briefs to the WTO dispute settlement process. CIEL also hold consultative status with the United Nations, which indicates that CIEL is "of representative character and of recognized international standing," has special competence in the area of its expertise and is an organization from whom the United Nations can "secure expert information or advice" on these subjects. *See Arrangements for Consultation with Non-governmental Organizations,* ECOSOC Res. 1296 (XLIV), at ¶¶ 4 and 14 (23 May 1968), App. 6.

7. In addition to Petitioners' expertise, counsel for Petitioners, Earthjustice Legal Defense Fund, has substantial litigation expertise in international trade law and its nexus with environmental protection. Earthjustice lawyers have litigated, taught, written and spoken extensively on these matters, as well as on the relationship between international investment protections and environmental measures. *See, e.g.*, J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465 (1999). Earthjustice lawyers also wrote and submitted the first, and several subsequent, *amicus* submissions to the World Trade Organization. Like CIEL, Earthjustice has been granted consultative status with the United Nations.

8. Petitioners and their counsel are thus among the foremost experts on the environmental and health risks posed by MTBE and the international legal issues raised by Methanex's claim. CBE, Bluewater and CIEL's participation in this arbitration as *amici* will provide a valuable perspective and help to ensure full consideration of important issues of public concern that might otherwise be omitted.

FUNDAMENTAL PRINCIPLES OF DEMOCRACY SUPPORT PETITIONERS' PARTICIPATION IN THIS ARBITRATION

9. *Amici curiae* should be allowed to participate in the arbitration of Methanex's challenge under NAFTA's Chapter 11 for several reasons. First, the arbitration implicates issues of constitutional importance, as well as fundamental democratic principles. Second, the outcome of this arbitration may affect not only the ability of California to maintain the phase-out, but the willingness and ability of governments at all levels in Canada, Mexico and the United States to implement measures to protect the environment or human health in the future. Finally, these concerns bring into issue the legitimacy of the proceedings and of the Tribunal's award.

10. The significance of the legal questions at issue in this dispute reinforces the need for *amicus* participation. In each of the NAFTA countries, the careful balance between governmental authority to regulate for the public interest and private property rights is an issue of constitutional importance. In these countries, this balance may only be challenged in judicial fora that are open to public scrutiny and participation by

interested and affected citizens. Methanex's claim in this case requires this Tribunal to decide how NAFTA's Article 1110 affects the balance of governmental authority to implement environmental regulations and property rights. The importance of public participation – at least through *amici* – is at least as great in this proceeding as in the analogous domestic proceedings.

11. This arbitration also implicates fundamental democratic principles. The California MTBE phase-out was developed through an open and democratic process that gave members of the public – including environmental and health organizations, as well as individual and corporate proponents and opponents of the measure – the opportunity to express their opinions orally and in writing. The Tribunal's award could jeopardize that publicly-adopted measure by creating a major disincentive for California to maintain the phase-out. A decision with such implications for a democratically-developed environmental measure should not be made in a proceeding that excludes public participation.

12. This case is unlike most private commercial arbitration proceedings, in which the matters at issue are of primary, if not exclusive, concern to the immediate parties to the proceeding. The Tribunal's decision in this case could alter the legal obligations that apply to governments when they regulate to protect the environment or human health, as well as the economic and other factors they take into account when deciding whether to do so.[2] For this reason, as well as those noted above, the Tribunal's award will have broad implications for the general public, the environment, and for the authority and capacity of governments to regulate in the future. The broad impact of these proceedings mitigate in favor of *amicus* participation.

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[2] Although the Tribunal's interpretation of NAFTA will not be binding on panels considering other government regulations, NAFTA tribunals have recognized decisions of other arbitral tribunals as "persuasive." *See, e.g., In the Arbitration under Chapter 11 of NAFTA and the ICSID Arbitration Rules between Metalclad Corporation and the United Mexican States,* States, *Case No. ARB(AF)/97/1*, ¶ 108 (Aug. 30, 2000), App. 7. Moreover, as the first tribunal to address directly whether an otherwise legitimate environmental regulation creates an obligation for a government to compensate for future profits lost due to the regulation, this Tribunal's decision may have particularly persuasive weight. Governments are thus likely to consider the Tribunal's interpretation

13. Because of the significance of all of these issues, the proceedings in this case and the Tribunal's award will be the subject of great public scrutiny. Petitioners' work on these matters has brought them recognition as representatives of the public's environmental and health concerns regarding MTBE. Giving Petitioners the opportunity formally to represent the public's environmental and health concerns regarding MTBE during the arbitration process may help assuage public apprehension that the arbitration process is a secretive one in which private interests are given priority over public concerns.

14. Furthermore, allowing Petitioners to participate in this arbitration is consistent with the fundamental democratic laws and processes of both the United States and Canada. In both countries, affected and concerned citizens have the opportunity to participate, either as intervenors or *amici*, when, as here, a tribunal is to decide matters of serious public concern. As a result, the participation of Petitioners as *amici* should neither come as a surprise, nor be an unacceptable burden, to either party to this dispute.

THE TRIBUNAL HAS THE AUTHORITY TO GRANT THIS REQUEST

15. This arbitration is to be conducted according to the rules of UNCITRAL, as modified by Section B of NAFTA Chapter 11. *See* NAFTA Article 1120.2. Nothing in the applicable rules precludes Petitioners' participation as *amici*. Rather, Article 15.1 of the UNCITRAL rules explicitly allows the Tribunal to "conduct the arbitration in such manner as it considers appropriate." This provision is intended to "give[] the arbitrators the power to regulate the conduct of the proceedings," because "flexibility during the proceedings and reliance on the expertise of the arbitrators are two of the hallmarks of arbitration." *Report of the Secretary General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade: commentary on the draft UNCITRAL Arbitration Rules,* U.N. Doc. A/CN.9/112/Add.1 (1975), *reprinted in* [1976] 7 Y.B. Comm'n Int'l Trade L. 166, App. 8. *See also* UNCITRAL Notes on Organizing Arbitral Proceedings (1996), ¶ 4, App. 9. The power to conduct the

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of NAFTA as, at the very least, the most likely interpretation that will apply to their regulatory efforts.

arbitration as the Tribunal considers appropriate includes the authority to allow the participation of *amici curiae*.

16. The practice of the WTO Appellate Body supports this Tribunal's authority to allow Petitioners to participate as *amici curiae*. The Appellate Body has affirmed that it and WTO dispute settlement panels have the authority to accept and consider *amicus* submissions (and has in fact accepted such a submission from one of Bluewater's sister programs at Earth Island Institute), despite the absence of any explicit provision for such submissions in the WTO Dispute Settlement Understanding (DSU). *See United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), ¶¶ 83, 110, App. 10; *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, ¶¶ 38-42 (May 10, 2000), App. 11.

17. The reasoning underlying the Appellate Body's acceptance of *amicus* submissions in the *Hot-Rolled Lead* dispute applies equally to this arbitration. The Appellate Body noted that nothing in the applicable rules explicitly permitted it to or prohibited it from accepting or considering submissions from non-parties to the appeal. *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at ¶ 39. Those rules did, however, give the Appellate Body "broad authority to adopt procedural rules which do not conflict with" any of the applicable rules.[3] *Id.* On this basis, the Appellate Body concluded that it had legal authority "to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so." *Id*. ¶ 42.

18. The same analysis applies to Petitioners' request to participate as *amici* in the present arbitration. There are no provisions of NAFTA or UNCITRAL that specifically

[3] The Appellate Body cited Article 17.9 of the WTO's Dispute Settlement Understanding, which gives the Body authority to establish its working procedures. It also cited Article 16.1 of the Working Procedures, which gives the particular panel hearing an appeal authority "to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the *Working Procedure*s." *United States – Imposition of Countervailing Duties on Certain Hot-Rolled*

address *amicus* submissions. Like the WTO's DSU and the Appellate Body's Working Procedures, Article 15.1 gives this Tribunal broad authority to conduct the arbitration in such a manner as it considers appropriate, as long as it does not conflict with any applicable rule. As the Appellate Body determined in the *Hot-Rolled Lead* case, the question of *amicus* participation is a procedural issue.[4] The Tribunal therefore has the authority to permit such *amicus* participation as it considers pertinent and useful.[5]

19. The Appellate Body has also noted the importance of broad authority that allows a tribunal to consider *amicus* submissions. In the *Shrimp* case, the Appellate Body noted that

> ample and extensive authority to undertake and to control the process by which [a panel] informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts . . . is indispensably necessary to enable a panel to discharge its duty . . . to make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements.*

United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), ¶ 106 (quotation omitted; emphasis added by the Appellate Body).

20. The United States itself has argued that the general authority to develop and manage the arbitration procedures includes the authority to accept *amicus curiae* submissions. *See United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R (May 10, 2000), ¶ 38. The United States has also recognized the value of amicus participation in international dispute resolution. In urging that the Appellate

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Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R at ¶ 39, fn. 33.

[4] The Appellate Body determined that its authority to adopt procedural rules included authority to accept and consider *amicus* submissions. *See id*. ¶¶ 39, 42.

[5] The Tribunal's authority to regulate the arbitration proceedings as it considers appropriate does not depend on the consent of the parties. *See, e.g.*, *Dadras Int'l v. Iran*, Iran-U.S. Cl. Trib., 1995 Iran Award 567-213, 1995 WL 1132818, ¶¶ 59-61, App. 12 (allowing the submission of an affidavit over Iran's objection that it would not be able to cross-examine the affiant).

Body consider *amicus* submissions in the *Shrimp* case, the United States explained that it should do so because the nongovernmental organization *amici*

> "have a great interest, and specialized expertise, in [the environmental matters at issue in the case]. It is appropriate therefore that the Appellate Body be informed of those organizations' views."

United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), ¶ 86 (quoting U.S. statement dated 13 Aug. 1998).

21. As noted above, the Tribunal must exercise its authority to adopt procedural rules granted under Article 15.1 without conflicting with any of the other applicable rules. Permitting *amicus* participation would not conflict with any of the rules applicable to this arbitration.

22. One such rule is set forth in the continuation of Article 15.1 of the UNCITRAL rules, which requires that the Tribunal exercise its procedural authority in a manner that ensures that "the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." UNCITRAL Arbitration Rules, Article 15.1. Allowing Petitioners to participate as *amici curiae* in no way jeopardizes the ability of the Tribunal to treat the parties equally or to give each a full opportunity to present his case. As demonstrated by the Tribunal in establishing a procedure to address these petitions concerning participation by *amici curiae*, this Tribunal is capable of establishing procedures that permit such participation while treating the parties fairly and giving each full opportunity to present his case, as well as to address assertions made by the *amici*. This is consistent with the position previously taken by the United States, which indicated to the WTO Appellate Body that accepting *amicus* submissions would not interfere with the equality of the proceedings or compromise their confidentiality. *See United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R (May 10, 2000), ¶ 38.

23. Judicial practice in the United States also supports the authority of the Tribunal to permit *amicus* participation. The U.S. Supreme Court has noted that federal courts have the power "to appoint *amici* to represent the public interest in the

administration of justice." *United States v. Barnett*, 376 U.S. 681, 738 (1964), App. 13. In U.S. courts,

> [t]he privilege of being heard amicus rests solely with the discretion of the court. Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence. There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to other otherwise desirable to the court.

In re Roxford Foods Litigation, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (quotation and citations omitted), App. 14. *See also Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) ("The district court has broad discretion to appoint amici curiae."), App. 15.

24. The frequent participation of *amici curiae* in U.S. legal proceedings highlights the importance of *amicus* participation and demonstrates that such participation neither jeopardizes fair treatment of the parties nor unduly burdens the courts. Between 1969 and 1981, *amici curiae* participated in 64% of the Supreme Court's "noncommercial" cases, *see* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. OF INT'L L. 611, 618 (1994), App. 16, and the Court cited *amicus* briefs in 18% of its decisions. *See* Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group* Amici Curiae *in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187, 192 (1991), App. 17. *Amicus* participation has been even higher in cases of general public concern. For example, *amici* participated in 86% of the environmental cases heard by the Supreme Court in the 1980s. *See id*.

25. In sum, this panel has authority under Article 15.1 of the UNCITRAL rules to allow Petitioners to participate in this arbitration as *amici curiae*.

PETITION

26. For the foregoing reasons, Petitioners respectfully request permission to participate in the arbitration proceeding as *amici curiae*. Petitioners request that, for all stages of this arbitration, such participation include the opportunity to review memorials of the parties and any other submissions or orders in the proceedings, as well as to attend

the Tribunal's hearings, and to make oral and written submissions according to a schedule determined by the Tribunal.

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