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

METHANEX CORPORATION,

Claimant/Investor,

- and -

UNITED STATES OF AMERICA,

Respondent/Party.

REQUEST FOR RECONSIDERATION OF CHAPTERS J AND K OF THE PARTIAL AWARD

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I. INTRODUCTION

1. It is well-settled under international law – which governs the resolution of this dispute – that a violation of "national treatment" does not require a finding of intent. In other words, a government measure may deny national treatment in violation of treaty obligations even if the adopting party did not *intend* to discriminate against the foreign enterprise or investor. The United States itself, in past proceedings under Chapter 12 of NAFTA, has endorsed this position. (*See infra.*)

2. In its Partial Award on Jurisdiction (the "Partial Award") in this proceeding, this Tribunal, as formerly constituted, turned that precedent on its head. It determined that Article 1101(1) of the NAFTA, which states simply that Chapter 11 applies to measures "relating to" investors or investments, actually erects an "intent" requirement that Methanex, which alleges a denial of national treatment in violation of Article 1102, must satisfy. Moreover, that intent, in the words of the Tribunal, must be a "specific intent to harm suppliers of goods and services to . . . MTBE producers." Partial Award at ¶ 154. Although Methanex is confident that it can show this specific intent, the Tribunal, in arriving at this conclusion, did not apply accepted principles of international law, treaty interpretation, and its own determination to consider the entire "context" of Chapter 11 and of NAFTA in construing Article 1101. In effect, the Partial Award creates a dramatic, new substantive requirement of proof for a national treatment claim – a requirement without any support in the text or structure of NAFTA and without precedent in international law.

3. Moreover, the Tribunal's articulated purpose behind this step – to create a "gatekeeper" that can deter unwarranted claims – is already effectively addressed through the "in like circumstances" requirement of Article 1102, similar standards embodied in

the other substantive provisions of Chapter 11, and the causation requirement of Articles 1116 and 1117. The creation of an additional gatekeeper restriction in Article 1101 that is *narrower* than the express gatekeeper restrictions that already appear in the text of Article 1102 and the remainder of the Chapter is inconsistent with international law and undermines NAFTA's protective purpose.

4. Accordingly, Methanex respectfully requests that the Tribunal reconsider and amend Chapters J and K of its Partial Award to eliminate any "intent" requirement.

II. BASIS FOR RECONSIDERATION

5. The Tribunal has the power to grant this Request. Nothing in the UNCITRAL Rules which govern this proceeding precludes reconsideration of a Partial Award, particularly where, as here, that award addressed only jurisdictional issues and the proceeding itself remains in progress. Article 15 of the Rules permits the Tribunal to conduct this proceeding, subject to the Rules, as it deems "appropriate." Article 22 expressly authorizes the Tribunal to permit additional written statements beyond the statement of claim and response as it sees fit. Because nothing in the Rules precludes this Request, the Tribunal is empowered to reconsider its prior decision. Methanex respectfully suggests that exercise of that power is appropriate here for two principal reasons.

A. The Tribunal's Decision Sets It At Odds With Accepted Precedent

6. *First,* as noted, the Tribunal's decision to require intent to harm in this case, a case where central feature alleges a violation of NAFTA Article 1102, represents a substantial departure from the accepted international understanding of national treatment obligations. The Tribunal's interpretation of Article 1101(1) was a matter of first impression under NAFTA and, as such, warrants careful review. Methanex raised

this issue in its Second Amended Statement of Claim (*see* ¶ 293, contending that, at most, the only "intent" that may be probative under Article 1101(1) is "intent to deny NAFTA's substantive protections"). The United States did not respond to that characterization in its subsequent submission, leading Methanex to submit this separate Request.

B. The Resignation Of One Member Of The Tribunal Due To An Appearance Of Partiality Warrants Reconsideration Of The Award

7. *Second*, in this instance the composition of the Tribunal has changed since the Partial Award. One of its members resigned in response to objections by Methanex of partiality toward the United States due to his and his firm's longstanding and close relationship with former California governor Gray Davis, whose actions are central to this proceeding. Since the resignation, a new arbitrator has joined the Tribunal. Accordingly, a reexamination of the Partial Award is appropriate. *See, e.g., Schmitz v. Zilveti*, 20 F.3d 1043, 1046-47 (9th Cir. 1994) (vacating an arbitration award where one of the three arbitrators was accused of evident partiality for failing to disclose a prior relationship between the arbitrator's law firm and one of the parties, notwithstanding that the other two arbitrators had joined in the award).

III. THE PARTIAL AWARD

8. Article 1101 states that Chapter 11 "applies [*inter alia*] to measures adopted or maintained by a Party relating to . . . investors of another party [and] investments of investors of another Party in the territory of the Party . . ." The Tribunal, in its Partial Award, rejected Methanex' position that "relating to," as used in Article 1101, means "affecting." Instead, the Tribunal agreed with the United States that a "legally significant connection" between the measure and the investor or investment is required. Partial Award at ¶ 139.

9. The Tribunal did not clearly define what a "legally significant connection" entails, noting instead that "it is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day. Nonetheless, whilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie." *Id.*

10. The Tribunal discussed at some length its concern that Methanex' interpretation of the article would "impose[] no practical limitation" to Chapter 11 claims, resulting in "no significant threshold to a NAFTA arbitration." *Id.* at ¶¶ 137-139. Ultimately, the Tribunal reached its decision, "[p]ursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention," based on "the ordinary meaning of this phrase ["relating to"] within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11." *Id.* at ¶ 147. The Tribunal emphasized that it was not reaching the United States' arguments based on Article 31(3) of the Vienna Convention. *Id.*

A. The Tribunal Interpreted "Legally Significant Connection" To Require Intent

11. For purposes of this proceeding, however, the Tribunal did issue a clear and unequivocal decision – in order to establish a denial of national treatment, expropriation and Methanex' other claims, Methanex must establish that the measures were intended not simply to deny the protections of the treaty but specifically "to harm suppliers of goods and services to . . . MTBE producers." *Id.* at ¶ 154.

12. In response to a request from Methanex for clarification of its decision, the Tribunal purported to disclaim any position that intent is always required under Article 1101, stating that intent is necessary here because, "in this case, Methanex' claim is not concerned

with different factual circumstances (i.e., where that intent is absent)." September 24, 2002, Letter at ¶ 7. The Tribunal did not explain precisely of what those hypothetical "different factual circumstances" might consist.

13. Methanex has alleged, *inter alia*, denial of national treatment. Certainly, Methanex also has alleged, in support of that claim, that California Governor Davis and the California legislature intended to deny national treatment. However, as described below, the absence of illicit intent cannot excuse a measure that, in fact, does violate Article 1102's proscription. The Tribunal's September 24, 2002 explanation of its intent requirement confuses the distinction between a *helpful fact* and a *jurisdictional prerequisite*.

B. Methanex Seeks Review Only Of The "Intent" Requirement

14. Methanex does not seek modification of the bulk of the Partial Award, nor even of the entirety of Chapters J and K of that award. Indeed, Methanex accepts the Tribunal's conclusion that Article 1101(1) requires a "legally significant connection" between a challenged measure and an investor or investment. Instead, the difficulty with the Tribunal's decision is its assertion that, here, in the context of a claim alleging denial of national treatment, Methanex can only have its claim heard if it can show a specific intent *to harm Methanex* (or other foreign methanol producers). This creates a jurisdictional requirement not found in international law or in the text of NAFTA. Accordingly, Methanex submits that a "claimant-specific" intent standard requires reconsideration.

IV. ARGUMENT

A. Denial Of National Treatment Under NAFTA And International Law Does Not Require Intent

15. A central component of Methanex' challenge to the measures at issue in this case rests on an alleged violation of Article 1102 of the NAFTA. That Article requires each Party, *inter alia*, to "accord to investors of another Party" treatment "no less favorable than the most favorable treatment accorded, in like circumstances," to its own investors and their investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." This provision, known as the "national treatment" requirement, forms a key part of Methanex' claim in this proceeding. Nothing in the text of Article 1102 explicitly or implicitly requires a showing of specific intent to harm a foreign investor or its investments. [1]

16. No NAFTA tribunal has squarely addressed the question of whether an investor claim under Article 1102 alleging denial of "national treatment" requires a showing of intent to discriminate on the part of the governmental party enacting the measure. However, the NAFTA precedent under the analogous provision in Chapter 12 demonstrates that intent is not necessary to claims of denial of national treatment under other chapters of the NAFTA.

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[1] As noted, Methanex is confident it can meet the Tribunal's specific intent test. *See* Methanex' Second Amended Statement of Claim at ¶¶ 25-66. California's discriminatory intent can be inferred from: the foreseen disparate impact of the California measures on Methanex and its investments (¶¶ 166-173); the United States' protection of the ethanol industry (¶¶ 174-190); the fact that MTBE was banned while other dangerous chemicals were not (¶¶ 191-201); the role played by Archer Daniels Midland Company in securing the ban on its competitors (¶¶ 202-238); analogous cases in which states have disguised economic protectionism as environmental regulation (¶¶ 239-259); and nationalistic bias in the United States against the "foreign" methanol/MTBE industry (¶¶ 260-280).

17. In *Cross-Border Trucking Services* (USA-MEX-98-2008-01), Final Report of the Panel (Feb. 6, 2001), the United States itself argued that it was not necessary to prove intent to establish a national treatment violation. *Id.* at ¶ 191. The Tribunal accepted that argument and, in interpreting Article 1202, concluded that "the Panel declines to examine the motivation for the U.S. decision . . . it confines its analysis to the consistency or inconsistency of that action with NAFTA." *Id.* at ¶¶ 214. The operative language of both Article 1102 and Article 1202 – other than the fact that the former deals with investors and investments and the latter with service providers – is identical. There is no basis to infer an intent requirement as to one provision and not the other.

18. Moreover, other sources of international law addressing the scope and nature of obligations of national treatment are equally clear: a governmental measure can violate that government's national treatment obligation irrespective of whether the measure was intended to discriminate against foreign entities.[2] Two examples make this plain:

- The WTO Appellate Body has dismissed the relevance of legislative or regulatory intent in determining whether a measure violates the requirements of GATT's Article III national treatment obligation. As the Appellate Body has stated, "[t]his is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and

[2] Article 1131 requires that, in interpreting the provisions of Chapter 11, the Tribunal look to "applicable rules of international law." *See also* Opinion of Sir Robert Jennings, Exhibit C to Second Amended Statement of Claim ("Jennings Opinion") at 7-11 (noting the relevance of international law and particularly "[e]xisting WTO/GATT and competition law decisions" which "are too much directly on point to be ignored.").

regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent." *Japan – Taxes on Alcoholic Beverages*, (WT/DS8, DS10, DS11/AB/R) (4 Oct. 1996) (Adopted 1 Nov. 1996), pp. 27-28; *see also, e.g., Chile – Taxes on Alcoholic Beverages,* (WT/DS87, DS110/AB/R) (13 Dec. 1999) (Adopted 12 Jan. 2000) at ¶ 62 ("The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry … [unless] they are given *objective* expression in the statute itself[.]") (emphasis original).

- Arbitral tribunals convened under the predecessor to the NAFTA, the Canadian-United States Free Trade Agreement (CUSFTA), earlier reached the same conclusion. *See, e.g., In The Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Panel Report (Oct. 16, 1989) at ¶ 7.08 (stating that "the Panel considered that it must examine the objective factors that go into a decision to adopt such a measure[.]").

B. Nothing In The Text, Structure Or Purpose Of Chapter 11 Supports An "Intent" Requirement

19. Of course, the fact that an intent requirement is without precedent in the context of a national treatment obligation would not have precluded the drafters of NAFTA from imposing one. But nothing in the text, structure, or purpose of Chapter 11 supports such a finding. Indeed, as explained below, the "gatekeeping" function the Tribunal sought to affix solely upon Article 1101 is found in other provisions of the

Chapter, making implausible the yet-to-be-realized endless parade of potential Chapter 11 claims imagined by the Tribunal.

1. The Text Of Article 1101 Is Simple And Straightforward

20. Article 1101(1) itself – the provision on which the Tribunal based its determination – is silent as to the question of intent. As already noted, it requires only that a measure "relate to" an investor or investment. Moreover, other limitations contained elsewhere in Article 1101 are set out expressly and unequivocally.

- Article 1101(2) reserves for Parties the right to "perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities."
- Article 1101(3) excludes from the scope of Chapter 11 measures that are covered by Chapter 14 (financial services).
- Article 1101(4) warns that nothing in Chapter 11 "shall be construed to prevent a Party from providing a service or performing a function . . . in a manner that is not inconsistent with this Chapter."

In each instance, where the drafters of Chapter 11 felt a limitation to the general statement of scope in Article 1101 to be important, they spelled it out explicitly. That the NAFTA drafters might have intended a further limitation of the magnitude of the specific "intent" adopted by the Tribunal, but somehow failed to mention it in the provision at issue, is dubious.

21. That is particularly so when Article 1101 is understood in light of Article 1102, the national treatment provision. The elements of national treatment under international law – particularly, the immateriality of the intent behind an allegedly discriminatory measure – are well-established. Importing an intent requirement into

Article 1101(1) would have the effect of requiring intent as a prerequisite for a national treatment claim. As the United States has pointed out (in another context), "if the governments intended to depart from the general principles of international law, then the 'agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.'" United States April 14, 2001, Reply Memorial on Jurisdiction ("Reply") at 12 (quoting *Sambiaggo Case*, 10 R.I.A.A. 499, 521 (Italy-Venez. Mixed Cl. Comm'n of 1903)). Surely, in the face of the CUSFTA and other precedent, again in the words of the United States, "[m]ore than silence . . . is required to derogate from an established principle of international law such as this." Reply at 51.

2. The Tribunal Ignored The Role Of Other Provisions In Chapter 11 In Articulating Article 1101(1)'s "Gatekeeper" Function

22. The bulk of the Tribunal's criticism of Methanex' interpretation of Article 1101 and the basis upon which it created the intent requirement was a belief that the article should serve as a "gatekeeper" for Chapter 11 claims and that, in the absence of a "significant threshold" for applicability of the chapter, a veritable "infinity" of claims might result. Partial Award at ¶ 137. In warning of this potential deluge of actions, the Tribunal ignored the fact that in over a decade of practice under NAFTA, the frequency of Chapter 11 claims more accurately is characterized as a trickle.

23. More fundamentally, the Tribunal ignored the question of how the other provisions of Chapter 11 themselves limit prospective claims. As Sir Robert Jennings aptly explains, "[t]hose who control passage through a gateway normally need to know where one is intending to go or to do when through the gate." Jennings Opinion at 3.

Without considering what lies "inside the gates," an assessment of the adequacy of the gateway is impossible.

24. Article 31(1) of the Vienna Convention requires no less, mandating evaluation of the language's "context" and the purpose of the Chapter in construing the article's meaning. *See also S.D. Myers v. Canada* (NAFTA Chapter 11 award, concurring opinion of Arbitrator Bryan Schwartz dated Nov. 12, 2000) at ¶ 55 (commenting that "'relating to' in Article 1101" should not be read "in isolation," but instead should be understood "in conjunction with the specific provisions of NAFTA that protect investors. It would be rare that the clear purpose and scope of such provisions will be frustrated by reference to Article 1101.").

25. A review of the substantive provisions of Chapter 11 makes plain that, even without the type of intent requirement the Tribunal has ordered, claims under Chapter 11 will remain quite narrowly conscribed. In the case of claims of denial of national treatment under Article 1102, for example, claimants will still need to establish "like circumstances" in order to substantiate their assertions. This is *not* a limitless standard, notwithstanding what the Partial Award may suggest. *See* Methanex' Second Amended Statement of Claim at ¶¶ 304-307 and Exhibit D thereto (expert opinion of Dr. Claus Dieter-Ehlermann) (providing discussion of the methodology and criteria for determining "likeness" under WTO law and NAFTA). The "in like circumstances" test requires a claimant to establish a likeness between the investor or investment at issue and the U.S. counterpart. As Methanex has argued in its briefing to the Tribunal, the "in like circumstances" standard looks principally to the competitive relationship among the

investments, the investors, and the products. "Cleopatra's nose," in the words of the Tribunal (Partial Award at ¶ 137), this is not.

26. Moreover, Articles 1116 and 1117 expressly require claimants to establish a connection between the acts of which they complain and the injuries they allegedly have suffered – those injuries must be "by reason of, or aris[e] out of" the claimed breach. Parties with only attenuated or remote involvement will not be able to sustain that burden.[3] These provisions must be considered in evaluating any interpretation of Article 1101. A construction that requires that a measure affect an investor and that the claimant demonstrate that its injuries "arise out of" that measure is far from the "chaos" scenario that the Tribunal feared. Partial Award at ¶ 137.

3. The Tribunal's Ruling Impermissibly Superimposes An Additional Requirement On The Substantive Provisions Of Chapter 11

27. The Tribunal not only discounted the express textual limitations on the ability of investors to bring claims found in the substantive provisions of Chapter 11, it also failed to consider the impact of its construction of Article 1101(1) on those other provisions. The Tribunal has required that Methanex, in order to assert denial of national treatment under Article 1102, show that California *specifically intended* to harm it or other foreign methanol producers. What the NAFTA drafters failed to require in the text of Article 1102 itself, the Tribunal now has imposed through the two simple words "relating to" in Article 1101(1).

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[3] To take just one example hypothesized by the Tribunal (in ¶ 137): the Tribunal's imagined supplier to a supplier "towards infinity" would have no ability to establish causation between injury and breach under any reasonable legal formulation. The parties may dispute the precise application of the causation requirement in Articles 1116 and 1117; that the two articles require some form of legally cognizable causation is not in question.

28. This approach violates the settled maxim of treaty interpretation that a specific provision controls a more general one as to the same subject matter. The United States itself has trumpeted this "well-established principle of *generalia specialbus non derogant*" in this proceeding. United States Amended Statement of Defense at ¶ 364.

> The "generalia" principle can have a number of applications. It does not merely involve that general principles do not *derogate* from specific ones, but also, or perhaps as an alternative method of statement, that a matter governed by a specific provision, dealing with it as such, is thereby taken out of the scope of a general provision dealing with the *category* of subject to which that matter belongs, and which therefore might otherwise govern it as part of that category.

Fitzmaurice, Sir Gerald, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 Brit. Y.B. Int. 203, 236 (1957).

29. The International Court of Justice ("ICJ") invoked this principle of treaty interpretation as far back as 1948, in rejecting an approach quite similar to that adopted by the Tribunal in the Partial Award. In *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57 (May 28), the ICJ considered whether a U.N. member nation could base a decision on a state application for U.N. membership on factors other than those set forth in Article 4 of the United Nations Charter. As understood by the ICJ, Article 4 delineates four substantive requirements for membership and empowers the General Assembly to admit members meeting those requirements upon "recommendation by the Security Council." *Id.* at 64. Those arguing in favor of the ability to reject prospective members for reasons other than as stated in Article 4 pointed to the "recommending" (in effect, the gatekeeper) role of the Security Council and to

Article 24 of the Charter, which grants the Security Council additional powers to maintain "international peace and security."

30. The ICJ found no basis in either source to add to or amend the requirements for membership explicitly set forth in Article 4. *Id.* Having addressed the specific subject matter of membership eligibility in Article 4, no other article of the Charter could add to or derogate from those requirements.

31. In this case, only Article 1102 directly addresses the requirement of national treatment for investors and their investments. That article expressly sets forth the parameters of the national treatment obligation, limiting the requirement of not-less-favorable treatment to foreign investors or investments that are "in like circumstances" to their domestic counterparts. Article 1102's specific focus removes the "matter" of national treatment and what it requires from the purview of Article 1101. Put another way, any further limitation on the national treatment obligation owed to investors that is not specified in Article 1102 represents an impermissible additional condition on the scope of that obligation and is "equivalent, not to interpreting the [chapter], but to reconstructing it." *Maritime Delimitation in the Area between Greenland and Jan Mayen*, 1993 I.C.J. 38 (June 14) (internal citation omitted).

32. The wisdom of this well-established principle is readily apparent in this case. The Tribunal's approach, if not reconsidered, employs an unjustified inference from the more general Article 1101 to undermine the protections specifically created for investors and investments and expressly delineated in Article 1101 – protections that embody a core purpose of Chapter 11 of NAFTA.

V. CONCLUSION

33. Article 1101 serves several important purposes. It explains that the rights established under Chapter 11 apply to investors, sets out several express and clearly delineated limitations to the scope of the Chapter, and notes which provisions confer rights on investors from countries not party to the NAFTA and which confer rights only on investors from one NAFTA Party in the territory of another. What it does not and cannot do, however, is create additional elements to the substantive protections enumerated in the chapter, most notably, Article 1102 and the requirement of national treatment. Chapters J and K of the Tribunal's Partial Award do just that. By reading Article 1101 in isolation from the remainder of the Chapter and without regard for the nature of Methanex' claims, the Tribunal has created a new requirement for proof of a national treatment violation that heretofore was unknown under NAFTA and other international legal jurisprudence. Methanex respectfully requests that this reconstituted Tribunal reconsider and correct that precipitous step.

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Respectfully submitted,

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