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Re: *Methanex Corporation v. United States of America*

Gentlemen:

Methanex has received and carefully reviewed the Tribunal's Award of August 7, 2002, which provided Methanex an opportunity to restate its claim. As we begin the task of preparing the "fresh Statement of Claim" called for by the Award, it has become apparent that our efforts would be significantly assisted, and the future burden on the Tribunal and the United States potentially reduced, if certain aspects of that decision are clarified. Accordingly, pursuant to Article 35 of the UNCITRAL Arbitration Rules, and with no intention of relitigating any issue

the Tribunal has already decided, Methanex respectfully requests interpretation and clarification concerning the matters specified below.

I. REQUEST FOR INTERPRETATION

1. Definition of "Legally Significant Connection"

The Tribunal has accepted the United States' argument that the term "relating to" in NAFTA Article 1101 "requires a legally significant connection between" a measure and an investor or investment. (Aug. 7, 2002 Award ¶ 147.) Although the Award makes clear that a challenged measure need not "be primarily directed at the [relevant investor or] investment" (*id.* ¶ 142), it also indicates a need for "restricting the consequences for which [government] conduct is to be held accountable." (*Id.* ¶ 138.) The Award then suggests that the line dividing those consequences for which a NAFTA respondent will and will not be held accountable is to be drawn from principles developed in tort, contract and other traditional legal contexts. (*Id.*) Thus, the Award suggests that a NAFTA Party in breach of its Chapter 11 obligations will be liable only for those types of consequences that are actionable in analogous legal circumstances, such as, for example, where there is foreseeable, direct, or intended injury, or competitive harm, etc. Methanex respectfully requests that the Tribunal confirm this reading of its August 7, 2002 Award, or, if necessary, further clarify the meaning of a "legally significant connection." Methanex further submits that, without such confirmation or clarification, it will be placed in the difficult and unfair position of marshalling evidence and arguments to meet an undefined standard.

2. Contents and Scope of the "Fresh Pleading"

The Tribunal has directed Methanex to "submit a fresh pleading, complying with Articles 18 and 20 of the UNCITRAL Arbitration Rules and conforming to the decisions contained in" the August 7, 2002 Award. (*Id.* ¶ 172(5).) The Tribunal has further indicated that "Methanex's fresh pleading must take a form different from and more limited than its Amended Statement of Claim." (*Id.* ¶ 162.) Methanex understands that this new pleading is to incorporate certain facts and allegations contained in Methanex's written and oral submissions, but not found in its Original or Amended Statement of Claim. Methanex further understands that the contents of its fresh pleading "must not *exceed* the limits of Methanex's existing case." (*Id.* (emphasis added).) But the Award gives no indication of how the "fresh pleading" (a term not found in the UNCITRAL Arbitration Rules) is to be in a "a form different from" and "more limited than" the Amended Statement of Claim. (*Id.*) Accordingly, Methanex respectfully requests that the Tribunal provide additional guidance concerning the expected scope and content of its "fresh pleading," particularly which aspects of the Original and Amended Statement of Claim the Tribunal considers irrelevant.

Additionally, those portions of the Award concerned with the proper role and interpretation of Article 1101 indicate that the provision's function is that of a "gateway" — i.e, it establishes the threshold requirements that a claimant must satisfy before a NAFTA Tribunal may take jurisdiction over its claims. (*Id.* ¶¶ 106, 137.) As such, Article 1101 does not go to the merits of a claimant's individual Chapter 11 claims. Accordingly, Methanex respectfully asks

the Tribunal to confirm that, once it is established Methanex has satisfied Article 1101's threshold requirements, it will then be able to proceed on each of its separate claims under Articles 1102, 1105 and 1110.

3. Evidence

Methanex's need to fully understand the Tribunal's expectations concerning the scope and content of its "fresh pleading" is heightened by the Tribunal's further direction that Methanex file with that pleading "copies of all evidential documents on which it relies," as well as fact-witness statements and expert reports. (*Id.* ¶¶ 163-65.) As the Tribunal has acknowledged, the tendering of evidence and witnesses is normally reserved for the merits phase of an arbitral proceeding. (*See id.* ¶ 110 (noting that because this arbitration "has only reached the jurisdictional phase[, t]he Disputing Parties have not adduced any factual evidence on disputed issues (nor have they been entitled to do so)").) The unusual procedure outlined in the Award of requiring the submission of factual evidence and expert reports before jurisdiction has been decided raises several important questions.

As a threshold matter, Methanex is uncertain whether the Tribunal is merely requiring it to provide sufficient evidence to demonstrate a factual basis for its allegations, to prove its case on the merits, or something in between. For instance, while Article 18 of the UNCITRAL Arbitration Rules, which governs the contents of a statement of claim, permits a pleading to annex evidentiary documents the claimant deems relevant, or refer to documents or other evidence he will submit, it does not require the claimant to do so. But because the Tribunal now

requires Methanex to file specific "evidential documents" with its next submission, it is unclear whether the Award requires Methanex to submit only an initial pleading (as that term is commonly used and as UNCITRAL Article 18 generally reflects), or what, in fact, would essentially be a memorial on the merits of its case, or something in between.

Whether Methanex's filing is to be more like a pleading or more like a memorial, the scope of the evidence required to be filed with Methanex's next submission is also unclear. At times, the Award suggests that the Tribunal is looking only for "*some* evidence from the Disputing Parties." (*Id.* ¶ 167 (emphasis added).) At others, the Award directs Methanex to annex "copies of *all* evidential documents on which it relies (unless identified as documents previously filed with the Tribunal), together with factual witness statements and expert witness reports of any person intended by Methanex to provide testimony at an oral hearing on the merits." (*Id.* ¶ 163 (emphasis added).) Accordingly, Methanex asks the Tribunal to confirm that it is not being required to produce — at this still-preliminary phase of the proceedings — *all* evidence on which the presentation of its case on the merits will and may rely, thereby foreclosing the development and presentation of additional evidence at a later stage.

If the Tribunal is requiring that Methanex submit all its evidence at this stage, Methanex respectfully observes that ninety days would be an extraordinarily short period in which to develop and present a case on the merits of a central issue in any case. The Tribunal's Award appears to suggest that Methanex's fresh pleading must be accompanied by factual evidence proving the intent of the government and private actors responsible for the measures at issue.

Full proof on the merits of this issue (*see, e.g.*, *id.* ¶ 158) will likely involve the marshalling of evidence from third parties, which will in turn require substantial time and energy. In addition, that marshalling of evidence may require additional orders from this Tribunal, and possibly from U.S. courts, which have authority to assist international tribunals in this regard. *See* 28 U.S.C. § 1782. Indeed, even if only "some" such evidence is required, gathering and assimilating any such evidence may require more than the ninety days currently provided.

Methanex also respectfully requests clarification concerning the requirement in the Award regarding "expert witness reports." While identifying, retaining, and briefing potential experts within the ninety days allotted might be achievable, the Award appears to require more — *i.e.*, that Methanex not only designate but also obtain essentially final reports from all its experts within that very limited period of time. (*See id.* ¶ 165.) Doing so, however, would be very difficult if not impossible in the time provided.

It thus bears noting that Article 15 of the UNCITRAL Arbitration Rules requires that, however the Tribunal decides to conduct the arbitration, "at any stage of the proceedings each party" must be "given a full opportunity of presenting his case." Methanex will be substantially prejudiced if it is required to present its case without the opportunity for marshalling evidence. Naturally, the degree to which such procedures are required will depend on the character of the proceeding for which the resulting evidence is being produced. The scope of the evidence identified in the Award could be read as indicating an intention to proceed directly to a hearing on the merits of Methanex's claims. The Tribunal has made clear, however, that it envisions the

next phase of this arbitration to have a more limited form, potentially restricted to "one or more threshold or other determinative issues." (*Id.* ¶ 168.) Accordingly, Methanex asks the Tribunal to confirm that it is not planning to proceed directly to a hearing on the merits, and requests an interpretation providing further guidance concerning the quantity and quality of the evidence Methanex is required to develop and provide in conjunction with its "fresh pleading."

4. Future Proceedings

In its Award, the Tribunal indicated that it has not yet decided "how to proceed further." (*Id.* ¶ 168.) Although it has already been more than two-and-a-half years since Methanex filed its original claim, Methanex also recognizes that the necessity of subsequently amending that claim, coupled with other intervening events such as the Free Trade Commission's July 31, 2001 Interpretation, have complicated these proceedings to an unforeseen extent. Nevertheless, Methanex is concerned that without a more concrete plan for the number, form and content of future pleadings and/or proceedings, this arbitration could become unnecessarily extended. Accordingly, Methanex respectfully requests that the Tribunal clarify the nature and timetable for future proceedings.

II. FURTHER MATTERS

1. The Relevant Negotiating History of NAFTA

In its August 7, 2002 Award, the Tribunal declined to rule on Methanex's Application for Documentary Disclosure, preserving Methanex's right to re-submit its "application after serving its fresh pleading (if relevant)." (*Id.* ¶ 172(8).) Methanex respectfully submits that its prior

application for discovery remains highly relevant at this stage of the proceedings. Despite the United States' failure to produce any documents relating to the negotiating history of NAFTA, and despite the absence of the term "legally significant connection" in NAFTA itself, the Tribunal has accepted the United States' claim that Chapter 11 requires that relationship between the challenged measure and the investor or investment. Again, however, the Tribunal has left the term "legally significant connection" open for further consideration and clarification. Consequently, NAFTA's legislative history is very likely to be highly relevant to what exactly Article 1101 requires.

In fact, given the Parties' detailed documentation of their negotiations, it is hard to believe that none of those documents are at all relevant to the intended scope of Article 1101. As the *Pope & Talbot* Tribunal recently learned — after much delay and denial — the NAFTA Parties have been less than forthcoming where NAFTA's negotiating history is concerned. *See Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages (May 31, 2002), ¶¶ 25-42. There, as here, "having the documents" Methanex seeks would make the Tribunal's efforts "less difficult and more focused on the issues before it." *Id.* ¶ 39. Indeed, it would be fundamentally unfair to accept the United States' argument that Article 1101 requires a "legally significant connection" while simultaneously allowing it to withhold evidence that very likely would shed important light on the proper meaning of that term. Accordingly, Methanex respectfully renews its request for an order compelling the United States to produce any potentially relevant segments of NAFTA's negotiating history.

2. Expedited Telephonic Conference

Article 35 of the UNCITRAL Arbitration Rules states that the Tribunal should issue the guidance Methanex requests within forty-five days of receiving this request. By that point, of course, more than half the time currently allotted for Methanex to develop and present its "fresh pleading" and further "evidential materials" will have elapsed. Accordingly, Methanex respectfully requests an expedited telephonic conference to address the issues set forth in this letter and, depending on the ultimate resolution of those foregoing issues, to address whether ninety days provides a realistic opportunity for Methanex to present its case.

3. Tolling

Finally, Methanex notes that whatever further clarification the Tribunal ultimately provides, the process of requesting and obtaining it will have consumed a considerable amount of time. Accordingly, Methanex respectfully requests that the time allotted for the preparation of its "fresh pleading" and additional "evidential materials" be tolled until such interpretations and clarifications are obtained. Stated more precisely, Methanex requests that whatever time is ultimately allotted for preparation of its fresh pleading and accompanying evidence — whether

ninety days or something more — that time not begin to run until the formal interpretations contemplated by Article 35 of the UNCITRAL rules are provided by the Tribunal.

Respectfully submitted,

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Christopher F. Dugan

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James A. Wilderotter

cc: Mr. Mark Clodfelter, Esq.
Barton Legum, Esq.
Margrete Stevens, Esq.