January 28, 2004 37829.00002

VIA E-MAIL

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Re: Methanex Corporation v. United States of America
Compelling Need to Gather Additional Evidence

Dear Gentlemen:

Methanex Corporation respectfully resubmits its long-standing request that the Tribunal permit Methanex to gather additional evidence in the United States without delay. Methanex has advised the Tribunal concerning additional evidence gathering and requested an opportunity to further support its claims,[1] and the Tribunal has

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[1] *See*, *e.g.*, Methanex' Second Amended Statement of Claim at ¶ 145 ("Methanex has not yet been afforded the opportunity to take evidence pursuant to the procedures agreed upon by the parties. Thus, we also set forth below the relationship of Methanex' pending requests for additional evidence to the facts that are currently of record."); *id.* at ¶ 238 n.10 ("Methanex' request for witness testimony and additional documentary evidence directly addresses the need for more information about this unquestionably relevant issue.") (referring to details regarding the secret meeting with ADM ethanol officials and (then) Lt.

(continued...)

acknowledged Methanex' procedural rights to conduct such fact finding under 28 U.S.C. § 1782.[2] The United States contested these rights,[3] the Tribunal has delayed Methanex' exercise of those rights,[4] and, almost a year later, the Tribunal has yet to decide this issue.[5]

The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") **require** the Tribunal to order the use of evidence gathering techniques if they will produce material information. Article 3(8) of the IBA rules states that "The Arbitral Tribunal shall decide on this request [for production of documents] and **shall** take the necessary steps if in its discretion it determines that the documents would be relevant and material." Article 4(10) similarly requires the Tribunal to order testimony, "The Arbitral Panel shall decide on this request and **shall** take the necessary steps if in its discretion it determined that the testimony of that witness would be relevant and material." (Emphasis added). Methanex respectfully requests that the Tribunal decide this issue in a "timely fashion" pursuant to Article 3, Rule 6.[6]

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Governor Davis); *id.* at ¶ 280 n.15 ("Even more evidence should be obtained, however, such as that evidence requested by Methanex concerning ADM and other ethanol producers' involvement in the California decision-making process.").

[2] *See* January 17, 2003 Letter from V.V. Veeder (suggesting that Methanex proceed with its application without any further action by the Tribunal itself).

[3] *See* January 28, 2003 Letter from B. Legum (arguing that Methanex must await a decision by the Tribunal before taking affirmative steps with United States domestic courts).

[4] *See* February 3, 2003 Letter from V.V. Veeder (acknowledging safe receipt of Methanex' letter dated January 30, 2003 regarding Methanex' right to seek additional evidence and then deciding to "hear both parties' views more fully in due course").

[5] As a matter of fairness, Methanex is surprised that the Tribunal granted immediately the United States' request concerning expert discovery without even mentioning, let alone deciding, previous attempts by Methanex to obtain evidence from the United States. *See, e.g.*, Memorandum of Law In Support of Methanex' Application For Assistance Under 28 U.S.C. § 1782, March 2003 (seeking permission to request issuance of subpoenas *ducem tucem* and *ad testificandum* from United States district court), *and* Methanex Letter to Tribunal of September 24, 2001 (requesting the Tribunal to direct the United States to produce relevant portions of NAFTA negotiating history). *See also* First Partial Award (Aug. 7, 2002) at ¶¶ 80-81 (referencing Methanex' prior applications for documentary production in May, July and September 2001).

[6] IBA Rules at Article 3(6) ("The Arbitral Tribunal shall, in consultation with the Parties and in timely fashion, consider the request to Produce…").

The evidence that Methanex seeks is undoubtedly material and relevant, as is made clear in the findings of fact in the United States Supreme Court's recent decision in *McConnell v. Federal Election Commission* ("*McConnell*").[7] In its Second Amended Statement of Claim, Methanex alleged that the State of California enacted measures intended to favor and protect the United States ethanol industry, and that such measures were motivated in part by political and financial inducements offered by the United States ethanol industry.[8] The Supreme Court's factual conclusions in *McConnell* validate Methanex' claims here.

First, the Supreme Court determined that large political contributions can and do corrupt governmental decision-making processes. The Supreme Court began with the question "whether large soft-money[9] contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."[10] In answer, the Supreme Court found that "[t]he idea that large contributions … can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible."[11] In reviewing the evidence, the Court determined that campaign contributions can and do result in undue influence and corrupt governmental decisions. The Court found that "[t]he evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions … carry with them just such [risk of corruption]."[12] Second, the Court found that such corruption is not limited to overt cash-for-votes exchanges.[13] The Court expressly recognized "the broader threat from politicians too compliant with the wishes of large contributors."[14] "[U]nlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize."[15]

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[7] *McConnell v. FEC*, No. 02-1674, slip op. at 2 (U.S. Dec. 10, 2003) (attached as Exhibit A).

[8] *See* Claimant Methanex Corporation's Second Amended Statement of Claim at ¶ 143.

[9] The term "soft money" refers to contributions that are not subject to federal disclosure requirements and source and amount limitations. In other words, soft money is "non-federal money,"—money donated to political parties for activities intended to influence state or local elections. *See McConnell* at 11-12.

[10] *Id.* at 1.

[11] *Id.* at 34-35.

[12] *Id.* at 44.

[13] *Id.* at 43-44.

[14] *Id.* at 34 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000); *see also FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) ("*Colorado II*")

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Next, the Court found that campaign contributions were directly linked to political favors. "Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest."[16] After reviewing ample evidence, including "the fact that, in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to both major national parties,"[17] the Court recognized the link between contributions and political favoritism.

Citing as an example evidence that political contributions were connected to "manipulations of the legislative calendar," the Court made it clear that no one can pretend that the two were not linked: "To claim that such actions do not change legislative outcomes surely misunderstands the legislative process. More importantly, plaintiffs conceive of corruption too narrowly . . . Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment."[18]

The Supreme Court relied upon extensive evidence that contributors expect to influence government decisions. The Court noted that "[f]or their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums … not on ideological grounds, but for the express purpose of securing influence over federal officials."[19] The Court also found extensive evidence in the record that political parties regularly sold access to federal candidates and officeholders, and that "[i]mplicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence. It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence."[20]

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(acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment.").

15 *McConnell at* 44.

16 *Id.* at 43.

17 *Id.* at 38.

18 *Id.* at 40-41.

19 *Id.* at 37-38.

20 *Id.* at 44-45.

The Court quoted an Ernst & Young lobbyist to illustrate this finding of fact, "For example, a former lobbyist and partner at a lobbying firm in Washington, D.C., stated in his declaration:

> You are doing a favor for somebody by making a large [soft-money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone—that is, write a larger check—and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings."

(Internal citations omitted.)

The Supreme Court also considered the same type of evidence from members of Congress: "The evidence from the federal officeholders' perspective is similar. For example, one former Senator described the influence purchased by nonfederal donations as follows: 'Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.'" (Internal citations omitted.)

Finally, the Supreme Court found that it is "likely" that contributions create a sense of obligation. It found "that contributions to a federal candidate's party in aid of that candidate's campaign threaten to create—no less than would a direct contribution to the candidate—a sense of obligation."[21] The Court acknowledged that the many "deeply disturbing examples of corruption . . . were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high level government officials." In summary, the Court concluded simply that "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude."[22]

In light of these statements, the United States can no longer assert that Methanex' claim is some type of paranoid conspiracy fantasy. Large political contributions corrupt government decision-making, and the United States should stop defending what the Supreme Court has condemned.

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[21] *Id.* at 35.

[22] *Id.* at 36.

McConnell is relevant to this case because it demonstrates that Methanex seeks highly material evidence. The Supreme Court recognized the "close connection and alignment of interests" between large contributions and the "actual or apparent indebtedness on the part of federal officeholders."[23] Methanex has argued in its submissions to the Tribunal that a similar alignment of interests was the moving force behind California's MTBE ban. Moreover, the latest U.S. submission shows that it was Governor Davis who solicited money from Richard Vind and Archer Daniels Midland Company, which makes the inference of undue influence and corruption only stronger.[24] Methanex now seeks its opportunity to further prove the kind of corrupt relationship the Supreme Court found "not only plausible, but likely"[25] in *McConnell*.

Indeed, the evidence Methanex seeks is precisely of the type found relevant by the Tribunal in the S.D. Myers case.[26] For the Tribunal's reference, Methanex attaches four documents from that case.[27] The documents show that the Canadian industry lobbied for protection and that the relevant government officials listened, *e.g.*, one document says, "I don't want to put the commitment [to protect two Canadian companies] down on paper." Methanex believes that it is similarly entitled to gather such relevant documents in this case.

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[23] *Id.* at 46.

[24] *See, e.g.,* Witness Statement of Richard Vind at ¶ 6 (attested Nov. 21, 2003) (explaining that, "at Gray Davis's urging," Vind assisted in "raising money, hosting fundraising events and introducing [Davis] to potential contributors and supporters … [including] ADM officials[.]"); *see also id.* at ¶ 7 (confirming that the secret meeting was arranged "[i]n response to Gray Davis's request" because "Mr. Davis wished to meet with [senior ADM officials, officials who were aware] … that Mr. Davis had, at that time, won the Democratic nomination for Governor, and that the polls … showed … with a lead.").

[25] *McConnell* at 36.

[26] *See* Final Award on the Merits, (Nov. 13, 2000) at ¶¶ 241-42 (finding Canada's claim that its environmental measure established a uniform regulatory regime to be "one dimensional and does not take into account the basis on which the different interests in the industry were organized to undertake their business."); *see also id.* at ¶ 255 (finding Canada wanted to maintain the economic strength of the Canadian industry).

[27] *See* Exhibits B-E, attached.

United States' law allows and encourages this type of evidence gathering, and the IBA Rules require the Tribunal to commence the process. Accordingly, Methanex respectfully requests that the Tribunal grant Methanex' long-standing requests to obtain additional evidence from the United States.

Very truly yours,

Christopher F. Dugan
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Barton Legum, Esq.
Margrete Stevens, Esq.

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