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Re: Methanex Corporation v. United States of America

Gentlemen:

On January 28, 2004, Methanex Corporation submitted its Request for Reconsideration of Chapters J and K of the Partial Award in this proceeding (the "Request"). In accordance with the Tribunal's February 20 request, this letter submission elaborates on the "procedural grounds on which [Methanex' Request] is advanced" and "the specific powers which could allow the Tribunal to re-visit" the Partial Award.

As set forth below, the UNCITRAL Rules under which this proceeding is conducted grant the Tribunal broad discretion to determine the type and number of briefs and hearings it wishes to conduct. As discussed extensively in the Request, the question of how Article 1101(1) should be construed and its interaction with the substantive provisions of the Chapter raise fundamental issues that strike at the core of what Chapter 11 is intended to protect. The fact that the Partial Award was rendered by the Tribunal in its former composition, which included one member who subsequently was compelled to withdraw due to allegations of conflict-of-interest and favoritism toward the United States, mandates that the Tribunal now entertain Methanex' Request. Simply put, in order to afford Methanex the "full opportunity" contemplated by the UNCITRAL Rules to present its case before an unbiased and impartial arbiter, this Tribunal must exercise

its discretion to revisit its past decision and revise Chapters J and K of its Partial Award as set forth in Methanex' Request.

I. The UNCITRAL Rules Grant The Tribunal Discretion To Entertain The Request.

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 establishes the basic framework for these proceedings. The Article instructs:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided 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.

Article 22 expressly authorizes the Tribunal to "decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements."[1]

Inherent in the concept of a "full opportunity" is that the opportunity be "fair" as well. As the United States Supreme Court has stated,

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

[1] This is **not** a case where a party is asking the Tribunal to revisit an award on the merits, or to reopen a factual question – contexts where, absent "extraordinary" circumstances, tribunals governed by the UNCITRAL Rules have declined to act. *See, e.g., Ram Int'l Industries v. Air Force of the Islamic Republic of Iran*, Iran Dec. 118-148-1 (Dec. 28, 1993) at ¶ 16 (nevertheless deciding that, in such circumstances, a tribunal does have the authority to reconsider). The Partial Award was not a "final" award within the meaning of the Rules. By its nature, a Partial Award is subject to revision or reconsideration as a proceeding continues.

In re Murchison, 349 U.S. 133, 136 (1955) (quoted in *Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988), in which the court applied the principle of *Murchison* to disqualify a special master who failed to disclose his representation of a client in a proceeding where appellant's lawyer was opposing counsel).[2]

As discussed below, the opportunity provided to Methanex by the Tribunal was neither "full" nor "fair."

II. Reconsideration Of The Challenged Chapters Of The Partial Award Is Necessary To Grant Methanex A "Full Opportunity" To Present Its Case Before A Neutral And Fair Body.

The Partial Award established an unprecedented interpretation of NAFTA Article 1101(1) and its interaction with Article 1102 that will dramatically diminish the rights of investors under Chapter 11 if applied by other, future NAFTA tribunals. That fact alone should give the Tribunal pause and cause it to reconsider the substance of Methanex' contentions advanced in its Request.

However, Methanex does not base its Request solely on the importance of the Tribunal's decision. Article 15 of the UNCITRAL Rules **requires** the Tribunal to grant the parties a "full opportunity" to present their positions. That obligation cannot be met where, as here, one of the members of the Tribunal responsible for the Partial Award harbored an apparent conflict of interest that, shortly after the Partial Award was issued, caused him to resign from this case. The fact that no such taint attached to the two remaining members is immaterial. Neither party was privy to the Tribunal's internal deliberations so as to assess the relative roles of the three members in fashioning the Tribunal's decision. Moreover, Methanex respectfully suggests that no one, not even the Tribunal members themselves, fairly may judge to what degree they may have been influenced by Mr. Christopher. His presence on the Tribunal during its deliberations and formulation of the Partial Award creates an inescapable appearance of unfairness that only reconsideration can erase.

This conclusion is firmly grounded in caselaw and precedent. Courts repeatedly have vacated arbitral awards made by multiple-arbitrator panels in instances where allegations of bias attached only to one of the panels' members. As the U.S. Supreme Court has warned,

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[2] U.S. precedent on this procedural issue is relevant here. As the parties acknowledged at the March 31, 2003, hearing before the Tribunal, the *lex arbitri* of the situs of this proceeding (the United States) applies.

> [W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149 (1968) (vacating an arbitral award where the designated neutral arbitrator had an ongoing relationship with one of the parties, despite having "no reason" to suspect actual bias); *see also, e.g., Schmitz v. Zilveti*, 20 F.3d 1043, 1046-47 (9th Cir. 1994) (also vacating an arbitration award, in case 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).

Importantly, the fact that the Partial Award may have been unanimous in its issuance cannot cure the taint. *E.g., id.*

III. Grant Of Methanex' Request Would Not Cause Prejudice To The United States.

The UNCITRAL Rules' mandate to provide a full and fair opportunity for the parties to assert their positions trumps any concerns of prejudice that may be raised by the lapse of time between issuance of the Partial Award and submission of the Request. Methanex has **not** waited idly and silently between the time of the Partial Award and the submission of the Request. After first seeking and receiving clarification of the Partial Award from the Tribunal in September 2002, Methanex submitted its Second Amended Statement of Claim in November. As the United States itself acknowledged in its February 12, 2004, letter to the Tribunal, the assertions raised in the Request are not new or unexpected – they are "closely tied to Methanex's positions on the merits of the case" as set forth in that Second Amended Statement of Claim. *See, e.g.,* ¶ 293 (making similar assertions). It was the United States' failure to respond to this issue in its response to that Second Amended Statement that triggered the Request.

Nevertheless, even if the Tribunal were to consider possible prejudice that might be caused to the parties should it entertain the Request, there is no such prejudice here. The Tribunal instructed the parties in the Partial Award to submit an amended claim and

subsequent pleadings that set forth the entire evidentiary bases for their claims.[3] A revision to the threshold requirements contained in Article 1101(1) would have no bearing on those pleadings and would not require any further supplementation. In addition, revisiting the Partial Award now would allow the parties ample time to incorporate any change into their preparations for the anticipated June hearing. Indeed, the United States already has offered to respond to the Request in its next submission. Moreover, Methanex' consistency and persistence in raising this issue, beginning in August 2002 with its request for clarification of the Partial Award, and continuing with its Second Amended Statement of Claim and its more recent Request, belies any suggestion that the United States might be prejudiced by the timing of the Request.

CONCLUSION

The question of what level of "legally significant connection" is required by NAFTA Article 1101(1) in a case alleging denial of national treatment under Article 1102 is one of first impression in the NAFTA jurisprudence. The Tribunal's decision in the Partial Award will have significant ramifications for U.S., Canadian, and Mexican investors beyond Methanex. On an issue of such importance, where one of the original Tribunal members who rendered that decision since has resigned in the face of allegations of bias and where there can be no credible claim of prejudice, Methanex respectfully submits that the Tribunal must consider its Request.

Respectfully submitted,

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for PAUL, HASTINGS, JANOFSKY & WALKER LLP

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

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[3] As the Tribunal recognized in its February 20, 2004, letter, Methanex separately has asked that the Tribunal authorize Methanex to obtain additional evidence relating to its case. That submission is unrelated to the issues addressed herein and will remain necessary regardless of how the Tribunal rules on the Request.