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March 8, 2004

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V.V. Veeder, QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3ED
England

J. William Rowley, QC
McMillan Binch
Royal Bank Plaza
Suite 3800, South Tower
Toronto, Ontario M5J 2J7
Canada

Professor W. Michael Reisman
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215

Re: Methanex Corporation v. United States of America

Gentlemen:

Methanex respectfully submits the following response to the Tribunal's invitation to draft the specific terms of the order sought from the Tribunal regarding Methanex' procedural rights under 28 U.S.C. § 1782.

As a preliminary matter, Methanex notes that the Tribunal referenced Methanex' January 28 correspondence as a "renewed application" regarding additional evidence.¹ Presumably this is in response to the recent correspondence by the U.S., which incorrectly states that the Tribunal "rejected" Methanex' previous efforts to seek evidence on its own through procedures available under U.S. law, namely 28 U.C.S. § 1782.² The Tribunal has done no such thing.³

¹ Letter from V.V. Veeder to the parties, dated February 20, 2004 at 2.

² See Letter from B. Legum to the Tribunal, dated February 12, 2004 ("the Tribunal rejected Methanex' request for approval of [an application under section 1782].").

V.V. Veeder, QC
J. William Rowley, QC
Professor W. Michael Reisman
March 8, 2004
Page 2

On March 17, 2003, almost a year ago, Methanex submitted a supplemental letter on this issue and even included a draft application for evidence that Methanex wanted to file – and would still like to file even though the hearing is roughly three months away⁴ – with the District Court for the Central District of California.⁵

At the March 31 hearing, contrary to the recent U.S. characterization, the Tribunal did not reject Methanex' position. It stated explicitly:

(...continued)

³ On January 17, 2003, the Tribunal acknowledged Methanex' procedural rights under § 1782, offered no objection to Methanex' exercise of those rights, and suggested that Methanex proceed with its application without any further action by the Tribunal itself. The United States argued that Methanex must await a decision by the Tribunal before taking affirmative steps with United States domestic courts, and it requested that the Tribunal rescind its acknowledgment of Methanex' procedural rights. The Tribunal did not do so prior to the March 31 hearing, it did not do so at the hearing, it has not done so since, nor would it be proper for the Tribunal to do so now.

⁴ See Letter from C. Dugan to the Tribunal, dated June 16, 2003 (“Methanex is anxious to begin the process of collecting a very limited range of additional evidence, and is willing to work with both the U.S. and the Tribunal on the scope of the evidence sought. However, it is possible that this process could be impacted by delays in the U.S. courts, and it is for that reason that Methanex reserves the right to request schedule revisions.”); see also, Transcript of Hearing, dated March 31, 2003 (C. Dugan) (“if [the U.S. intends to object to Methanex' right to use § 1782 all the way up through the U.S. appellate system], I would hope to have that resolved in three or four months and then to have two or three months of intensive evidence gathering in California and possibly in Illinois, where Archer Daniels Midland is headquartered.”)

⁵ See Letter from C. Dugan to the Tribunal, dated March 17, 2003 (providing Memorandum of Law in Support of Methanex' Application for Assistance Under 28 U.S.C. §1782). See *id.* at 2 (“Methanex expects the United States to vigorously contest Methanex' right to discovery, and it is very concerned that that dispute will further delay these proceedings. While Methanex recognizes that some of the delay is attributable to its amendment in 2001, it nevertheless seeks to have this arbitration proceed expeditiously, and thus is anxious to begin the discovery process as soon as possible.”).

V.V. Veeder, QC
J. William Rowley, QC
Professor W. Michael Reisman
March 8, 2004
Page 3

As regards Article 1782, again, **we're going to deliberate a little bit more about this**, and we'll have a paragraph about that in our letter, I hope at the end of next week. We are not minded at the moment to give the blessing requested by Methanex for its proposed application to the U.S. district courts for reasons which we'll elaborate.⁶

Moreover, on June 2, 2003, the Tribunal acknowledged that this was clearly an undecided issue when it stated that “the Tribunal has still to address certain other matters raised by the Disputing Parties relating to 28 U.S.C. § 1782 ... It will do so as soon as practicable.”⁷ Even the United States admits as much in correspondence dated September 22, 2003: “we respectfully write to update the Tribunal on certain developments relevant to certain issues debated at the March 31, 2003 procedural hearing **and reserved for decision by the Tribunal.**”⁸

On January 28, 2004, a year to-the-day since the United States' letter arguing that Methanex must await a decision by the Tribunal before taking affirmative steps with United States domestic courts, Methanex still had not received guidance on this issue. Accordingly, Methanex resubmitted its long-standing request that the Tribunal permit Methanex to gather additional evidence in the United States.⁹ Moreover, Methanex noted that the Tribunal must decide this issue “in a ‘timely fashion’ pursuant to Article 3, Rule 6 [of the IBA Rules],”¹⁰ and it also noted that, as a matter of fairness, the Tribunal granted immediately a United States request concerning expert discovery without even

⁶ Transcript of Hearing, dated March 31, 2003 (statement of V.V. Veeder) (emphasis added).

⁷ Letter from V.V. Veeder to the parties, dated June 2, 2003 at 4.

⁸ Letter from B. Legum to the Tribunal, dated September 22, 2003 (emphasis added). *See id.* (forwarding offer by the California Environmental Protection Agency to release documents pursuant to the California Public Records Act).

⁹ *See* Letter from C. Dugan to the Tribunal, dated January 28, 2004 (resubmitting request on issue of compelling need to gather additional evidence).

¹⁰ *Id.* at 2 n.6.

V.V. Veeder, QC
J. William Rowley, QC
Professor W. Michael Reisman
March 8, 2004
Page 4

mentioning, let alone deciding, previous attempts by Methanex to obtain evidence from the United States.¹¹

Methanex notes that the Tribunal has yet to decide any of Methanex' additional evidence issues, let alone elaborate specifically on the § 1782 issue. What the Tribunal has clearly **not** done, however, is reject its explicit acknowledgment of Methanex' procedural rights on the § 1782 issue, nor does Methanex believe it could do so, as the U.S. suggests it has.

Turning to the substance of the Tribunal's recent correspondence to "clarify the scope" of a Methanex § 1782 application, Methanex references its statements at the hearing on March 31, 2003. At the hearing, Methanex explained that it may be necessary to seek additional evidence from the State of California as well as other persons or entities, *e.g.*, ADM in Illinois, Regent International in California, and "[p]ossibly some other individuals, [and] certainly Mr. Vind, who's associated with Regent."¹² It is against this backdrop that Methanex understands the Tribunal now invites Methanex to draft the "specific terms of the order" from the Tribunal.¹³

¹¹ *Id.* at 2 n.5 (noting March 17, 2003, correspondence regarding § 1782; noting September 24, 2001, correspondence regarding NAFTA negotiating history; and noting First Partial Award (Aug. 7, 2002) at ¶¶ 80-81, which references Methanex's prior applications for additional evidence in May, July, and September 2001.).

¹² *See, e.g.*, Transcript of Hearing, dated March 31, 2003 (statements of C. Dugan) ("And if it came out during the course of the evidence gathering that there was a critical witness, then we would ask the right to take the evidence of that witness as well."); ("The power of the United States court to obtain relevant evidence is much broader than the power to obtain it through Freedom of Information-type procedures in California ... for example, one of the things that's typically excluded are interagency memoranda – intra-agency memoranda that set forth the deliberational process ... what we would be looking for is a difference between the public position taken by California EPA[, the California Air Resources Board, the California Energy Commission, etc.] at the time of the hearings on the UC-Davis report and their internal position ... there is a considerable body of evidence that is in the second amended claim that many of these agencies opposed an MTBE ban."). *See also, id.* (statements of V.V. Veeder and C. Dugan) (noting separate § 1782 applications may be necessary to obtain additional evidence from witnesses or entities located in different U.S. jurisdictions); *see id.* (statement of C. Dugan) ("The [§ 1782 application] for ADM would likely have to be filed in Illinois, which is where ADM is headquartered.").

¹³ Letter from V.V. Veeder to the parties, dated February 20, 2004 at 2.

V.V. Veeder, QC
J. William Rowley, QC
Professor W. Michael Reisman
March 8, 2004
Page 5

Accordingly, consistent with Methanex' position throughout these proceedings, Methanex respectfully requests that the Tribunal execute the attached form of order.

Respectfully submitted,

Christopher Dugan
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

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

PROPOSED ORDER

The Tribunal has considered the detailed submissions and testimony of the Disputing Parties regarding whether Methanex is permitted to gather additional evidence in the United States without delay pursuant to procedures available under U.S. law, namely 28 U.S.C. § 1782; it orders the following:

(1) The Tribunal reaffirms its January 17, 2003, acknowledgement of Methanex' procedural rights under 28 U.S.C. § 1782.

(2) The Tribunal has reviewed a draft memorandum of law in support of Methanex' application for assistance under 28 U.S.C. § 1782 (submitted on March 17, 2003, and attached to this order) and has no objection to Methanex exercising its procedural rights pursuant to § 1782. In this regard, the Tribunal finds that the evidence Methanex seeks is relevant and material.

(3) The evidence Methanex seeks includes testimony and documents from (a) **the Government of California**, its officers, employees, and agents, both present and former, including lobbyists or legislative consultants; (b) **Archer Daniels Midland Corporation**, its officers, employees, and agents, both present and former, including lobbyists or legislative consultants, and (c) **Regent International**, its officers, employees, and agents, both present and former, including lobbyists or legislative consultants.