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Re: Methanex Corporation v. United States of America

Dear Members of the Tribunal:

The central basis upon which Methanex Corporation ("Methanex") rests its Request for Reconsideration ("Request") is the **fact** that a key legal ruling in this proceeding was formulated with the active participation of a Tribunal member who subsequently resigned in the face of well-founded allegations of bias and conflict of interest. Under these circumstances, both Article 15(1) of the UNCITRAL Rules ("Rules") and the *lex arbitri* of the situs of this proceeding (the United States) demand consideration of Methanex' Request.

The United States' March 30, 2004 letter mischaracterizes Methanex' Request and the circumstances leading up to its submission and misconstrues the Rules and the *lex arbitri* in an effort to convince this Tribunal to ignore that single, incontestable and dispositive fact.

I. The United States Mischaracterizes Methanex' Request And The Circumstances Leading Up To Its Submission.

A. Methanex Seeks Reconsideration Of A Legal Interpretation Contained In The Partial Award, Not Of The Partial Award Itself.

Methanex has **not** asked the Tribunal to vacate the Partial Award. That award, as stated in Chapter M (the "Operative Part"), among other things, dismissed most of the United States' challenges to the admissibility of Methanex' claims, rejected Methanex' original and amended Statements of Claim based on an asserted lack of jurisdiction, and permitted Methanex to submit a new statement of claim conforming to its ruling.

Methanex' Request asks that the Tribunal reconsider the precise content of the jurisdictional standard it adopted in the course of that award – "legally significant connection" – as applied to Methanex' remaining claims. Methanex has argued in its Request that the Tribunal was mistaken in interpreting that standard to require not just specific intent to deny the benefits of national treatment, but an additional specific intent to harm Methanex or other non-U.S. methanol producers.

This is **not** tantamount to seeking reversal of the Partial Award. A "partial" award is used "to resolve a single claim or a few claims in a case when other claims need further development or evidence . . . ."[1] Partial awards have been used "to separate the merits of a case from the issue of interest and costs, to dismiss claims involving multiple respondents, and to dispose of the simpler claims in complicated cases."[2] The Tribunal did just that – it dismissed one category of claims from Methanex' case (as set forth in the original Statement of Claim) and required it to re-plead another (those contained in the first amended Statement of Claim). The "award" is contained in the Operative Part setting forth those rulings.

Methanex does not seek reconsideration of those decisions. Rather Methanex asks simply that the Tribunal revisit its interpretation of the legal standard it plans to apply when reconsidering the re-pleaded claims.

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[1] Stewart A. Baker and Mark D. Davis, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1992) at 164.

[2] *Id.*

Consequently, even if the UNCITRAL Rules are read as the United States (mistakenly) contends,[3] nothing precludes the Tribunal's consideration of the substance of Methanex' Request – namely, that the Tribunal revisit the appropriate meaning of the "legally significant connection" standard, and, specifically, what sort of "intent" should be required.

B. Methanex Did Not Wait 18 Months, As The United States Asserts.

Methanex did not wait nearly 18 months to seek reinterpretation of the "legally significant connection" standard, as the United States incorrectly asserts. Rather, in its Second Amended Statement of Claim, submitted within three months after the issuance of the Partial Award and fewer than six weeks after the Tribunal's interpretive letter, Methanex again took issue with the Tribunal's intent requirement. In particular, Methanex stated:

> [The Tribunal] concluded that Article 1101 must act as the "gatekeeper" for Chapter 11 claims. Methanex does not seek to relitigate that decision. However, it is equally a matter of common sense that the "gatekeeper" function of Article 1101 cannot reduce or narrow the substantive protections established in Chapter 11 itself. In particular, with respect to NAFTA violations that are intentional in nature, such as discrimination or a denial of national treatment, the relevant "gatekeeping" intent should be an intent to deny NAFTA's substantive protections. Put differently, if a credible claim of discrimination in violation of Article 1102 is stated, and if a particular claimant is within the class of enterprises protected by Article 1102, that should be sufficient to establish a "legally significant connection" for purposes of Article 1101.[4]

In short, if improper intent is the limiting principle under Article 1101, then the operative intent for purposes of Article 1102 must be intent to deny national treatment ('discriminatory intent'), not intent to otherwise harm foreign investors or their investments.[5]

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[3] Methanex addresses the United States' interpretation of Articles 15 and 32 of the Rules in Section II, *infra*.

[4] Second Amended Statement of Claim at ¶ 293 (emphasis added).

[5] *See id.* (quoting language from heading section in pleading).

A more straightforward objection to the Tribunal's formulation of the "legally significant connection" standard is difficult to imagine.[6] Methanex' recent Request merely restates and elaborates this same position. The Request does not challenge the Tribunal's characterization of Article 1101 as "gatekeeper," nor the Tribunal's adoption of the "legally significant connection" threshold. Instead, in its November 2002 Second Amended Statement of Claim, and again in its Request, Methanex questions the type and level of intent that should be required.

Unfortunately, the Tribunal did not respond to Methanex' November 2002 objection (just as it did not respond to Methanex' many requests for additional evidence).[7] Similarly, the United States failed to respond to this objection in its Amended Statement of Defense. Faced with the silence of both the Tribunal and the United States, Methanex was compelled to resubmit its objection in the form of the Request in February 2004. Methanex raised this issue **prior to** its Reply. The failure of the United States to respond to this in its Amended Statement of Defense waives any objection it now asserts to the Tribunal's review.

II. The UNCITRAL Rules And *Lex Arbitri* Demand Reconsideration In These Circumstances.

Even **if** Methanex' Request can be construed to require reconsideration of the Partial Award itself, and even **if** the United States' silence in its Amended Statement of Defense is overlooked, the United States' opposition should still be ignored. The United States cannot seriously contest that it would suffer any prejudice from reconsideration, nor can it dispute that reconsideration would further important principles of fairness and equity between the parties. Indeed, the United States does not even endorse or otherwise embrace the merits of the "specific intent to harm" pronouncement.[8]

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[6] Methanex did not caption the relevant section of its pleading "request for reconsideration" or words to that effect. Yet it is difficult to understand how else the cited language could have been construed. Disregarding its inclusion based on the caption would elevate form over substance. *Cf., e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000) (considering on appeal an issue that was briefed by the parties at the trial court level, even though "neither the parties nor the district court paid much attention to it" and issue was apparently not even included in appellate briefs); *MCI Telecomm. Corp. v. Fed. Communication Comm'n*, 917 F.2d 30, 40 n.8 (D.C. Cir. 1990) (similar).

[7] *See* Letter from Methanex dated April 7, 2004 (detailing Methanex' attempts to gain additional evidence and noting the Tribunal's failure and delay in ruling on such requests).

[8] Methanex addresses this issue in greater detail *infra*.

Perhaps recognizing the weakness of its position on these points, the United States focuses on two arguments: (1) that Article 32(2) of the Rules precludes application of Article 15(1) in this instance; and (2) that the *lex arbitri* requires that the Request have been submitted within three months of issuance of the Partial Award. Both of these contentions are wrong.

A. Article 32 Does Not Preclude Review In The Event Of Partiality Or Bias.

The United States first points to Article 32(2)'s instruction that "[t]he award shall be made in writing and shall be final and binding on the parties" as preclusive of Methanex' request. This provision, the United States contends, "reflect[s] the general principle" that the award "is entitled to *res judicata* effect."[9]

First, Article 32 refers to "the" award, not "all" or "any" awards. The use of the definite article connotes the final award in the entire proceeding, not interim or partial awards.

Second, the United States offers no basis for its *res judicata* argument. As the Tribunal is well aware, "*res judicata*" is an established principle of U.S. and other countries' law that refers to an attempt by the same or different parties to relitigate an issue **finally decided** in a previous litigation or other action. It has no bearing in this context, where a proceeding is continuing with no final disposition. For example, the textbook definition provides that:

> The doctrine of *res judicata* is composed of two parts: claim preclusion and issue preclusion. Claim preclusion prohibits a party from relitigating a previously adjudicated cause of action, and entirely bars **a new lawsuit** on the same cause of action. Issue preclusion, or collateral estoppel, applies to **a subsequent suit** between the parties on a different cause of action. Collateral estoppel prevents the parties from relitigating any issue that was actually litigated and **finally decided** in the **earlier action**. The issue decided in the earlier action must be identical to the one presented in the subsequent action. The most important criterion in determining whether two suits concern the same controversy is whether they both arose from the same transactional nucleus of facts. If so, the judgment in the first action is deemed to adjudicate, for purposes of the second action, every matter that was

[9] *See* Letter from the United States dated March 30, 2004 at 2.

> urged, and every matter that might have been urged, in support of the cause of action or claim in litigation.[10]

In short, *res judicata* presumes the existence of two actions: the first in which the issue or claim is raised, and the second in which the issue or claim is precluded. Here, Methanex is not raising an issue or claim from a previous litigation or arbitration, nor raising an issue or claim in "a new lawsuit" or "a subsequent suit." Rather Methanex raises an issue disputed throughout **this proceeding**. The United States' characterization of the Tribunal's specific intent test as being "finally decided" is misleading and wrong. The specific intent test will only be finally decided when this proceeding is concluded and a final arbitration award issued. Accordingly, the United States reliance on the doctrine of *res judicata* is misplaced.

The Tribunal should refer, instead, to the "law of the case" doctrine:

> Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case … [L]aw of the case doctrine was understandably crafted with the course of ordinary litigation in mind. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which after appeal, the binding finality of *res judicata* and collateral estoppel will attach.[11]

Importantly, the "law of the case" doctrine only "expresses common judicial practice [and] does not limit the courts' power" to reconsider earlier conclusions.[12] Clearly the "law of the case" doctrine is applicable here – the litigation has proceeded through the preliminary stages, but indisputably has not even reached the merits stage, let alone produced a judgment to which the "binding finality of *res judicata* and collateral estoppel will attach."[13]

The law of the case doctrine does not "pose an insurmountable obstacle" to the reconsideration of earlier conclusions, such as the Tribunal's incorrect specific intent

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[10] 46 Am. Jur. 2d Judgments § 516 (2003) (footnotes omitted) (emphasis added).

[11] *Ariz. v. Cal.*, 460 U.S. 605, 618-19 (1983) (citations omitted).

[12] *Castro v. U.S.*, 124 S.Ct. 786, 793 (2003) (quotations omitted).

[13] *Ariz.*, 460 U.S. at 618-19 (citations omitted).

test.[14] Indeed, as the Supreme Court noted: "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."[15] Here, it was clearly erroneous for the Tribunal to adopt a narrow interpretation of NAFTA Article 1101 that has no basis in law or logic. Moreover, adhering to this incorrect decision in light of the Tribunal's delay in ruling on Methanex' continuous attempts to gather additional evidence would constitute a manifest injustice.[16]

The U.S. characterization of the award as "binding" as an additional basis to preclude reconsideration similarly is unavailing. It is a commonplace that a judgment issued by a tribunal pursuant to the Rules is intended to be "binding." Article 32(2) here simply means that awards may not be treated as advisory or voluntary. UNCITRAL arbitration is not mediation; an award by a duly constituted tribunal under those Rules cannot be ignored by the parties. That provision should not – and, when understood in light of Article 15(1)'s mandate to ensure fairness and equity between the parties, cannot – be read in the sweeping manner proposed by the United States, *i.e.,* to preclude all reconsideration.

B. The United States Concedes The Importance Of The *Lex Arbitri* But Misconstrues Its Import.

The United States, in its March 30 letter, acknowledges the "noteworth[iness]" of the *lex arbitri* but misconstrues what that *lex* provides.[17]

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[14] *Castro,* 124 S.Ct. at 793 (2003) (quotations omitted).

[15] *Ariz.,* 460 U.S. at 618 n.8.

[16] S*ee* Letter from Methanex dated April 7, 2004 (detailing Methanex' attempts to gain additional evidence and noting the Tribunal's delay in ruling on such requests).

[17] See Letter from the United States dated March 30, 2004 at 4. The United States' acknowledgment of the *lex arbitri* as "noteworthy" presumably is intended to recognize that, where that *lex* so provides, reconsideration would be appropriate. The United States instead simply appears to contest whether the conditions for reconsideration have been met. Methanex addresses those objections herein.

1. A Showing Of "Actual Bias" Is Not Required.

The United States characterizes U.S. law as "empower[ing] the federal courts to vacate an award on the ground of actual bias on the part of the arbitrator."[18] True. But as set forth in the Request and again in Methanex' March 8, 2004 submission, U.S. law also **requires** reconsideration in cases where an undisclosed relationship between an arbitrator and a party exists.[19] Here, Methanex demonstrated that Mr. Christopher had an undisclosed relationship with Governor Davis.[20]

The United States' vigorous protest that Methanex failed to provide evidence of actual bias on the part of Mr. Christopher is wrong. The undisputed fact is that Mr. Christopher withdrew. Mr. Christopher **himself** evidently viewed the questions relating to his relationships with California to be of sufficient concern to warrant withdrawal.[21] And it is not hard to see why. Mr. Christopher, who received a share of his firm's profits, personally pitched a case to Governor Davis **after** this action had already commenced, and Governor Davis personally decided, **over the objections of his Attorney-General**, to award a lucrative representation of the State of California to Mr. Christopher's law firm.[22] It is difficult to imagine a clearer example of bias or conflict of interest.

It is a basic principle of domestic and international law that an arbitrator must not, in either fact or appearance, profit in any way from a party to an arbitration subject to his or her review. To accept the United States' argument here would be to decide otherwise. After Mr. Christopher solicited and then received business from Governor Davis and the

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[18] *Id.*

[19] *See, e.g., Schmitz v. Zilveti*, 20 F.3d 1043, 1046-47 (9th Cir. 1994); *Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988).

[20] *See* Methanex Notice of Challenge (Aug. 28, 2002) ("Methanex recently became aware of a specific relationship between Mr. Christopher and his law firm, O'Melveny & Myers, and California Governor Gray Davis, which gives rise to this challenge.").

[21] Methanex notes that it had no opportunity or occasion to engage in discovery, cross-examination or any of the other tools by which actual bias could be conclusively demonstrated. That is almost always the case in claims of this nature, which is why proof of "actual bias" is unnecessary. The existence of the relationship alone is enough.

[22] *See* Notice of Challenge, at 1-4; *see also, e.g.,* Nanette Asimov & Lance Williams, *Gov. Davis v. Schoolkids; High Price Legal Team Browbeats Youths about Shoddy Schools,* S.F. Chronicle, Sept. 2, 2001, at A1 ("Davis' office [] selected O'Melveny after a pitch [from] Warren Christopher."); Alan Bonsteel, *Children Are Waiting: State Won't Admit Blame for Schools*, The Daily News of L.A., Dec. 16, 2001, at V1 ("**At the direction of Gray Davis**, the state struck back by hiring $325-per hour lawyers of the Los Angeles firm of O'Melveny & Myers…") (emphasis added).

State of California, he helped create the odd "specific intent to harm" standard now at issue, a standard not endorsed by either party and which has no precedence in international jurisprudence. To decline review of this overreaching standard would conflict with fundamental notions of fairness and equity, and it would undermine investor-confidence in the arbitral process.

2. The Purported "Three-Month" Time Frame Cited By The United States Is Inapposite.

The United States also attempts to distinguish the *lex arbitri* by arguing that the United States' Federal Arbitration Act ("FAA") requires a party to seek reconsideration within three months of the challenged award, and that Methanex' Request is, therefore, unacceptably delayed.[23] However, as already noted, Methanex first sought reconsideration of the Tribunal's interpretation of the legal standard adopted in the Partial Award in its Second Amended Claim – which was submitted just under three months after the Partial Award and fewer than six weeks after the Tribunal's subsequent elaboration of that standard.[24]

More significantly, the United States has misstated the *lex arbitri* on this issue by focusing narrowly on the FAA's statutory language and ignoring the full body of U.S. jurisprudence. The FAA's three-month time limit on motions to "vacate, modify, or correct" arbitral awards applies to motions made to the federal courts. It does not purport, nor has it been interpreted, to impose a similar time limitation on arbitral tribunals' conduct of their own proceedings. It is long-established that a request to reconsider or vacate an arbitration award "invokes the equitable jurisdiction of a [court] because legal remedies are inadequate,"[25] and requires the court to consider a variety of circumstances in determining whether the request is untimely.[26] To focus on a technical, narrowly construed, and inapplicable provision at the expense of a broader, century-old principle is unpersuasive and should be ignored by this Tribunal.

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[23] Section 12 of the FAA provides, in part, that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

[24] *See* Letter from the Tribunal dated September 25, 2002 (addressing the contours and meaning of the "legally significant connection" standard).

[25] *Maryland Central Collection Unit v. Gettes*, 584 A.2d 689, 695 (Md. 1991).

[26] *See, e.g., Baltimore &Ohio R.R. Co. v. Canton Company*, 17 A. 394, 397 (Md. 1889) (looking to "length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other").

Yet even if one were to regard Section 12 of the FAA as **directly** applicable here, the United States' interpretation of that provision would be incorrect for another reason. The three-month limitation in the FAA applies only to **final** awards, not to interim or partial rulings.[27] Moreover, courts have **disregarded** the three-month time limit where required in the interests of fairness to the parties.[28]

III. Neither Party Supports The "Specific Intent to Harm" Standard.

Importantly, the United States does not embrace or even defend the "specific intent to harm" test articulated in the Partial Award. Instead, the United States disputes only Methanex' ability to challenge the test at this stage of the proceedings. Its failure to endorse the test – in either its Amended Statement of Defense or in recent correspondence – reveals a similar uneasiness with the test's narrowing scope. The United States should not be entitled to hold Methanex to an inappropriately high burden of proof here while remaining free to argue, before other NAFTA Tribunals on behalf of its own investors, that the Tribunal here "got it wrong." If the Tribunal finds that it has the power to reconsider, as it should, then it should view the manifest silence of the United States on this issue as a concession that the "specific intent to harm" test is wrong.

IV. Conclusion.

Article 15(1) affords the Tribunal far-reaching flexibility to vindicate the principles of fairness and "full opportunity" for both parties. The *lex arbitri* – which the United States itself refers to as "noteworthy" – reinforces that mandate. The participation of Mr. Christopher in the formulation of the legal standard that continues to govern this case unavoidably impinges on those important principles. The Tribunal can remedy this

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[27] *See, e.g., Warren v. Tacher,* 114 F. Supp. 2d 600, 602 (W.D. Ky. 2000) (rejecting claim that petition was time-barred on ground that it was filed more than three months after award that dismissed some but not all of the asserted claims) *quoting Harry Hoffman Printing v. Graphic Comms. Int'l Union, Local* 261, 912 F.2d 608, 614 (2d Cir. 1990). *See also New York Typographical Union v. Volk & Huxley*, 1982 WL 2068 (S.D.N.Y. 1982) (applying New York state arbitration statute, which is interpreted identically to FAA, and refusing to confirm or vacate an interim arbitral award, instead sending the parties back to arbitration for completion of the proceedings).

[28] *See, e.g., American Guaranty Co. v. Caldwell*, 72 F.2d 209, 212 (9th Cir. 1934) (affirming district court decision vacating award based on contention that appointment of one arbitrator on a panel "was irregular and illegal and that the award of said arbitrator was evidently partial, but not corrupt or fraudulent . . ." although outside of three-month time limit).

inequity only by reconsidering the "specific intent to harm" test developed when Mr. Christopher was a member of the Tribunal.

Respectfully submitted,

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