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Re: Methanex Corporation v. United States of America

Gentlemen:

Methanex Corporation writes to advise the Tribunal that, in accordance with the Tribunal's March 16, 2004 letter (designated by the Tribunal as "the First Letter"), Methanex filed applications pursuant to 28 U.S.C. § 1782 with the U.S. district courts in California (a copy of which was forwarded to ICSID). Methanex fully expects that the United States will oppose this effort, as it has so indicated to the Tribunal,[1] and that, as a result, it will almost certainly be impossible to obtain the resulting evidence in the two short months before the evidentiary hearing.

Methanex is very disappointed with the timing and content of the Tribunal's decision on obtaining additional evidence. As is set forth below, Methanex has been extremely diligent in its attempts to obtain such additional

[1] *See*, *e.g.*, March 31, 2003, Hearing Transcript ("Tr.") at 44–52 (B. Legum) (attached hereto as Exhibit 29).

evidence, but, regrettably, the Tribunal has not responded in an expeditious and efficient manner. Set forth below is a comprehensive chronology of Methanex' attempts to obtain evidence in this case from both the United States and third parties.

1. Attempts to Obtain Evidence from the United States.

Methanex sought to obtain evidence from the United States on numerous occasions.

As early as May 2001, Methanex sought certain NAFTA Chapter 11 pleadings.[2] The United States repeatedly refused to disclose NAFTA submissions filed by Canada and Mexico in other NAFTA proceedings, claiming that such submissions were "provided by Canada and Mexico with the expectation of confidentiality."[3] Although the July 31, 2001, NAFTA Free Trade Commission ("FTC") Interpretation, which makes NAFTA proceedings much more transparent, eliminates any such "expectation of confidentiality," even after the FTC interpretation the United States continued to refuse to disclose documents requested by Methanex on the basis of confidentiality.[4]

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[2] *See* Letter from Methanex dated May 1, 2001 (noting that Methanex filed with various U.S. agencies numerous FOIA requests for Party filings in other NAFTA proceedings but that, at the time of the letter, the U.S. had produced only "a small fraction" of the Party filings in its possession) (attached hereto as Exhibit 1). *See also* Jurisdictional Hearing of July 2001 (Hearing Transcript, Day 1) at 138. ("If the United States has these pleadings in its possession … I think you [the Tribunal] have the power to order the United States, as a party to this proceeding, to request that those other tribunals waive the confidentiality provision with respect to those pleadings so that they can be used, if necessary in [confidence], in this proceeding.") (attached hereto as Exhibit 2).

[3] Letter from United States dated May 14, 2001 (attached hereto as Exhibit 3).

[4] *See*, *e.g.*, Letter from the United States dated September 7, 2001 (refusing to provide Methanex documents that were "provided to the United States by Canada or Mexico with the expectation of confidentiality.") (attached hereto at Exhibit 4).

Methanex raised this issue with the Tribunal.[5] The Tribunal has never responded to Methanex' request.[6]

On September 24, 2001, Methanex sought "[a]ll documents in the possession of the United States relating to the negotiating history of Chapter Eleven of NAFTA."[7] On August 7, 2002, in its First Partial Award, the Tribunal confirmed that it had made no order for the requested documentary production but suggested that Methanex could renew its application if still relevant to the proceedings.[8] Methanex promptly did so on August 28, 2002,[9] and confirmed on September 30, 2002, focusing on aspects of the negotiating history relevant to the intent that the Tribunal adopted, that these documents remain "highly relevant" to this proceeding.[10] Again, the Tribunal has yet to issue an order.

Thus, Methanex has been seeking relevant evidence from the United States for almost three years without any decision from the Tribunal.

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[5] *See* Letter from Methanex dated September 24, 2001 (requesting that "if the United States continues to assert that [NAFTA Party filings] cannot be disclosed because Canada and Mexico provided them to the United States with an 'expectation of confidentiality,' the Tribunal require the United States to provide statements from Canada and Mexico attesting to that fact.") (attached hereto as Exhibit 5).

[6] *See* First Partial Award (Aug. 7, 2002) at ¶ 80 ("In the light of the decisions made in the Award, we do not think it necessary here to make any order on Methanex' application for documentary production") (attached hereto as Exhibit 6).

[7] Letter from Methanex dated September 24, 2001 Exhibit 5 at 2.

[8] *See* First Partial Award (Aug. 7, 2002) Exhibit 6 at ¶ 80 (noting that "if relevant" Methanex' application "can be renewed").

[9] *See* Letter from Methanex dated August 28, 2002 ("Methanex respectfully renews its request for an order compelling the United States to produce any potentially relevant segments of NAFTA's negotiating history.") (attached hereto as Exhibit 7); *see also* Letter from the Tribunal dated September 10, 2002 (acknowledging safe receipt of Methanex' letter dated August 28, 2002) (attached hereto as Exhibit 8).

[10] Letter from Methanex dated September 30, 2002 (confirming that "the request for NAFTA's negotiating history" is what Methanex "renewed" in its August 28 letter) (attached hereto as Exhibit 9).

In contrast, the United States requested that the Tribunal order Methanex to supply certain materials on August 27, 2003.[11] The Tribunal responded promptly to the United States' request, ordering production of some of the evidence requested by the United States.[12]

2. Attempts to Obtain Evidence from Third Parties.

- *October 4, 2002*. Methanex' First Request for Additional Evidence.[13]

  Methanex "respectfully requests that the Tribunal promptly issue an order enabling Methanex to obtain the additional evidence identified in the attached Annex of Requested Evidence." Noting that the governing procedure for obtaining additional evidence is 28 U.S.C. § 1782, Methanex notes, in footnote one, that "Methanex seeks the Tribunal's assistance in obtaining the requested additional evidence even though, under section 1782, the appropriate district court may issue an order to produce such evidence 'upon the application of any interested person.' 28 U.S.C. § 1782(a). **Although courts have held that it may not be necessary for a litigant to obtain the permission of the Tribunal**

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[11] *See* Letter from the United States dated August 27, 2003 (requesting an order issue from the Tribunal compelling Methanex to produce documents) (attached hereto as Exhibit 10); *see also* Letter from Methanex dated September 3, 2003 (attached hereto as Exhibit 11) (disagreeing that there was any obligation on Methanex to provide the requested documents); and Letter from the United States dated September 4, 2003 (attached hereto as Exhibit 12) (responding to Methanex' letter). *See also* Letter from the United States dated August 22, 2003 (attached hereto as Exhibit 13) (providing advance notice that the United States may ask the Tribunal to act quickly to resolve a dispute between the parties concerning certain documents).

[12] *See* Letter from the Tribunal dated October 10, 2003 (attached hereto as Exhibit 14) (requiring Methanex to "undertake" certain steps "promptly"); *see also* Letter from Methanex dated October 17, 2003 (attached hereto as Exhibit 15) (noting that "Methanex will, of course, promptly comply with the Tribunal's October 10, 2003 Order with respect to experts); and, Letters from Methanex dated October 21 and 24, 2003 (responding promptly and confirming compliance with the Tribunal's Order) (attached hereto as Exhibits 16 and 17, respectively).

[13] Attached hereto as Exhibit 18 (emphasis added); *see also* Methanex' Annex of Requested Evidence dated October 4, 2002 (attached hereto as Exhibit 19).

before seeking an order in district court, [citation omitted], **Methanex wishes to avoid any dispute as to whether it was first required to obtain a Tribunal order.**"

- *October 21, 2002*. Letter from the Tribunal.[14]

  "The Tribunal is at present minded to address Claimant's First Request for Additional Evidence [pursuant to § 1782] and the further time-table upon receipt and study of the Claimant's materials on 5th November 2002, after giving both Disputing Parties an opportunity to make further submissions, in writing or at a procedural hearing."

- *November 12, 2002*. Letter from the Tribunal.[15]

  "It will take a certain time for the Tribunal to study [Methanex' Second Amended Statement of Claim dated 5th November 2002]; and after such study, the Tribunal intends to address with the Disputing Parties certain procedural matters, including Methanex's First Request for Additional Evidence dated 4th October 2002."

- *January 17, 2003*. Letter from the Tribunal.[16]

  "In its letters dated 21st October & 12th November 2002, the Tribunal indicated that it was minded to address Methanex's First Request for Additional Evidence upon receipt and study of Methanex's fresh pleading and evidential materials and after consulting with both Disputing Parties. In the Tribunal's present view, it would be appropriate to address this request at the proposed Spring Meeting [held March 31, 2003], particularly after receipt of any fresh pleading from the USA. Nonetheless, **the Tribunal notes that, procedurally, Methanex could make any application to the relevant US district court(s) under 28**

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[14] Attached hereto as Exhibit 20.

[15] Attached hereto as Exhibit 21.

[16] Attached hereto as Exhibit 22 (emphasis added).

U.S.C. § 1782 without awaiting that Spring Meeting (or indeed any fresh pleading or other materials from the USA)."

- *January 23, 2003*. Letter from the United States.[17]

"*Second*, the United States respectfully requests that the Tribunal correct a statement in its January 17 letter that could be viewed as being inconsistent with the rule that the parties agreed would govern these proceedings and with applicable law. That statement, made without the benefit of the views of the parties, is as follows: 'that, procedurally, Methanex could make any application to the relevant U.S. district court(s) under 28 U.S.C. § 1782 without awaiting that Spring Meeting (or indeed any fresh pleading or other material from the USA).' Tribunal Jan. 17 Letter at 2. We request correction of this statement for two reasons."

"First, the parties have agreed on the rules governing the gathering of evidence from non-parties, and those rules require *the Tribunal* to decide whether the evidence is relevant and material *before* any application is made to a court.… Under the applicable rules, **Methanex must await a decision by the Tribunal on its request before any legally available steps are taken.** The United States respectfully requests the Tribunal to clarify that, notwithstanding the statement in its January 17 letter, the terms of the agreed rules on this question must and will be respected."

"Second, while the question has not been extensively litigated – because 28 U.S.C. § 1782 has been held not to apply to international commercial arbitrations at all – what authority does exist is consistent with the approach of the IBA Rules: **recourse under the statute is permissible only if the arbitrators have first decided that the request for evidence is appropriate**.… The United States therefore respectfully submits that applicable authority also does not

[17] Attached hereto as Exhibit 23 (emphasis added in bold).

support the statement in the letter, and requests that the Tribunal correct its statement."

- *January 28, 2003*. Letter from the Tribunal.[18]

  "I acknowledge safe receipt of the USA's letter dated 23rd January 2003 in response to the Tribunal's letter dated 17th January 2003, requesting a modification to the Tribunal's proposed procedural time-table. (**The second point in the USA's letter raises a different matter on which the Tribunal will wish to hear both parties' views in due course**)."

- *January 30, 2003*. Letter from Methanex.[19]

  "Methanex can indeed acquire the documents on its own under § 1782 without resorting to the Tribunal for assistance. While the Tribunal's aid would be welcome, such aid is not required unless and until Methanex fails in its efforts to obtain this evidence itself.… If Methanex fails to obtain the witness evidence it requires, it may seek the assistance of the Tribunal in the matter.…" [This is the second point in Methanex' letter.]

- *February 3, 2003*. Letter from the Tribunal.[20]

  "First, I acknowledge safe receipt of Methanex's letter dated 30th January 2003 in response to the Tribunal's letter dated 17th January 2003 and the USA's letter of 28th January 2003, requesting a modification to the Tribunal's proposed procedural time-table. **(As with the USA's letter, the second point in Methanex's letter [*i.e.*, the request for additional evidence] raises a different matter on which the Tribunal will hear both parties' views more fully in due course.")**

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[18] Attached hereto as Exhibit 24 (emphasis added).

[19] Attached hereto as Exhibit 25.

[20] Attached hereto as Exhibit 26 (emphasis added).

- *March 17, 2003*. Letter from Methanex.[21]

  "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. In response, 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 has not done so nor does Methanex believe it would be appropriate to do so.…"

  "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.… [Methanex] is anxious to begin the discovery process as soon as possible. In order to facilitate the resolution of any legal disputes in the U.S. courts, Methanex has limited this first proposed request to testimony and documents from Richard Vind and Regent International, both of whom were heavily involved in lobbying efforts in California and who undoubtedly have probative evidence bearing on California's intent. By limiting this first request to evidence that is unquestionably relevant, it should be possible for the U.S. court to quickly resolve any legal objections raised by the United States."

  "Accordingly, we provide for your information the application for evidence that we would like to file as soon as possible with the District Court for the Central District of California. **We respectfully request that the Tribunal resolve this issue at the March 31 hearing, or, if it has no objection, we are prepared to file the application immediately**." [This is the last paragraph, page 2 of Methanex' letter.]

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[21] Attached hereto as Exhibit 27 (emphasis added).

- *March 20, 2003*. Letter from the Tribunal.[22]

  "The Tribunal acknowledge's [sic] safe receipt of the letter dated 17th March 2003 from Methanex, with enclosure. It appears that **the immediate decision required of the Tribunal is whether to authorise in any way Methanex's intended filing** of the draft application to the District Court for the Central District of California *before* the procedural meeting on 31st March 2003 (see last paragraph, page 2 of the letter and page 6, para B of the enclosed draft application)."

  "Given the issues already raised in correspondence by the USA, **The Tribunal would prefer not to make any decision** one way or the other, nor to express any views on Methanex's application **before hearing the parties further at the procedural meeting**. The agenda for that meeting will, of course, include all matters raised by the USA and Methanex in regard to 28 U.S.C § 1782, including Methanex's letter and draft application."

- *March 31, 2003*. The Procedural Meeting (V.V. Veeder).[23]

  "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. **We don't consider that such an application at this particular stage of the proceedings is timely.**"

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[22] Attached hereto as Exhibit 28 (emphasis added in bold).

[23] Attached hereto as Exhibit 29 (Tr. at 117); *see also* Tr. at 25-26 (C. Dugan) and Tr. at 97-98 (B. Legum).

- *June 2, 2003*. Letter from the Tribunal.[24]

  The Tribunal decided to join the jurisdictional challenges of the United States to the merits of the dispute and to proceed to a main hearing intended to address all such issues (excluding issues of quantum), resulting in an award in which the Tribunal may rule on both jurisdictional and merit issues. The Tribunal then proposed a time-table for consideration by the Parties.[25]

  In the last paragraph of the letter, the Tribunal noted that it "still has to address certain other matters raised by the Disputing Parties relating to 28 US § 1782, [sic] the role of the amici curiae and other procedural issues. **It will do so as soon as practicable, after resolving the specific dates required for this new timetable**."

- *June 16, 2003*. Letter from Methanex.[26]

  In responding to the Tribunal's request for comments on the procedural schedule, Methanex explained that, "As set forth in prior submissions and as contemplated in the IBA rules, **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,

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[24] Attached hereto as Exhibit 30 (emphasis added).

[25] *See* Letter from the Tribunal dated February 12, 2003 (providing background and briefing schedule regarding whether it is possible to separate out the issue of 'intent' from the jurisdictional issues argued by the United States) (attached hereto as Exhibit 31).

[26] Attached hereto as Exhibit 32 (emphasis added). *See also* Letter from the United States dated June 16, 2003 (providing comments on draft schedule) (attached hereto as Exhibit 33); Letter from the Tribunal dated June 18, 2003 (inviting Methanex comments regarding the United States letter of June 16, 2003) (attached hereto as Exhibit 34); and Letter from Methanex dated June 19, 2003 (providing requested comments) (attached hereto as Exhibit 35).

and it is for this reason that Methanex reserves the right to request schedule revisions."

- *June 30, 2003*. Letter from the Tribunal.[27]

  After considering the comments of the Disputing Parties, the Tribunal resolved the specific dates proposed in its June 2, 2003 correspondence and issued its scheduling order. There was no mention of the § 1782 issue.

- *September 22, 2003*. Letter from the United States.[28]

  The United States wrote "to update the Tribunal on certain developments relevant to certain issues [*i.e.*, the § 1782 issue] debated at the March 31, 2003 procedural hearing **and reserved for decision by the Tribunal**. By letter dated July 17, 2003, counsel for Methanex requested that the California Environmental Protection Agency ("CalEPA") release certain documents pursuant to California's Public Records Act. CalEPA recently provided to Methanex's counsel 4,734 pages of documents responsive to this request, and has offered to provide an additional 845 pages of documents upon payment for copying costs, in accordance with California's Public Records Act. We attach the correspondence in question for the Tribunal's consideration."

- *January 28, 2004*. Letter from Methanex.[29]

  "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

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[27] Attached hereto as Exhibit 36.

[28] Attached hereto as Exhibit 37 (emphasis added).

[29] Attached hereto as Exhibit 38 (emphasis added; select footnotes omitted). A copy of Exhibits B-E to the original letter are included with this submission collectively attached hereto as Exhibit 39.

additional evidence gathering and requested an opportunity to further support its claims, and the Tribunal has acknowledged Methanex' procedural rights to conduct such fact finding under 28 U.S.C. § 1782. **The United States contested these rights, the Tribunal has delayed Methanex' exercise of those rights, and, almost a year later, the Tribunal has yet to decide this issue.**[5]…"

[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)."

"United States' law allows and encourages this type of evidence gathering [pursuant to § 1782], 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."

- *February 12, 2004*. Letter from the United States.[30]

"Methanex errs in suggesting that 'the Tribunal has delayed Methanex's exercise of [its] rights' under 28 U.S.C. § 1782 and that 'the Tribunal has yet to decide this issue.' At the March 31, 2003 procedural hearing, after its members raised questions about the time needed for an application to the courts for discovery under section 1782, **the Tribunal**

[30] Attached hereto as Exhibit 40 (emphasis added; citations omitted).

stated that it did not consider such an application to be 'timely.' On that basis, the Tribunal rejected Methanex's request for approval of such an application: '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.' Methanex fails to identify any prejudice resulting from the Tribunal's further deliberation before further elaborating the reasons for its decision. Nor does Methanex offer any reason why an application under section 1782 that the Tribunal found untimely last March would be more timely even closer to the due date for Methanex's Reply and the hearing on the merits."

- *February 20, 2004*. Letter from the Tribunal.[31]

  "*28 USC § 1782*: In regard to Methanex's renewed application of 28th January 2004 for an order from the Tribunal regarding "Additional Evidence," in order to clarify the scope of its application, the Tribunal invites Methanex to draft the specific terms of the order now sought from the Tribunal."

- *March 8, 2004*. Letter from Methanex.[32]

  "As a preliminary matter, Methanex notes that the Tribunal referenced Methanex' January 28 correspondence as a 'renewed application' regarding additional evidence. 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 [sic]. The Tribunal has done no such thing.…"

  "Methanex notes that the Tribunal has yet to decide any of

[31] Attached hereto as Exhibit 41.

[32] Attached hereto as Exhibit 42 (footnotes omitted).

> Methanex' additional evidence issues, let alone elaborate specifically on the § 1782 issue.…"
>
> "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.' It is against this backdrop that Methanex understands the Tribunal now invites Methanex to draft the 'specific terms of the order' from the Tribunal."
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> "Accordingly, consistent with Methanex' position throughout these proceedings, Methanex respectfully requests that the Tribunal execute the attached form of order."

- *March 16, 2004*. Letter from the Tribunal.[33]

  Among other things, noting that "Methanex's position, as understood by the Tribunal, has been that an order from the Tribunal is not necessary to any application by Methanex to a court of competent jurisdiction under 28 USC § 1782 directed at third persons," the Tribunal stated that, "it remains unclear to the Tribunal why it is necessary for the Tribunal to make any order in the form sought by Methanex." Consequently, the Tribunal stated, "Whilst the Tribunal does not encourage (nor discourage) an application under 28 USC § 1782, it remains open to Methanex to make any [§ 1782] application as, when and where it sees fit, as indicated by the Tribunal (inter alia) in its letter of 17th January 2003 to the Disputing Parties."

This chronology of events raises a number of troubling issues, addressed below.

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[33] Attached hereto as Exhibit 43.

3. In 18 Months Of Communications, The Tribunal Never Ruled On the U.S. Objection.

In its March 16, 2004 letter, the Tribunal quotes from just one communication in an 18-month string of correspondence for the proposition that Methanex has been free since October 2002 "when and where it sees fit" to file a § 1782 application. With all due respect, that one quote does not accurately reflect the entire record. It has always been Methanex' position that it **has** that right to proceed independently, and it has always been the United States' position that Methanex does **not** have that right. Until March 16, 2004, the Tribunal had deferred any decision on the U.S. objection.

a) The Initial Request And The Tribunal's First Response.

The record is clear. Methanex sought to obtain additional evidence pursuant to § 1782 in early October 2002. Although the Tribunal initially recognized Methanex' procedural rights in its letter dated January 17, 2003, the United States immediately objected that "Methanex must await a decision by the Tribunal on its request before any legally available steps are taken."[34] The United States argued that "the parties have agreed on the rules governing the gathering of evidence from non-parties, and those rules require *the Tribunal* to decide whether the evidence is relevant and material *before* any application is made to a court."[35] In the strongest words possible, the United States proclaimed that "the agreed rules on this question **must** and **will be** respected."[36] To further underscore its point, the United States stated that "recourse under the statute is permissible only if the arbitrators have first decided that the request for evidence is appropriate."[37]

The Tribunal listened. Eleven days after granting Methanex permission to proceed, it issued a new directive stating that it would "hear both parties' views" on the § 1782 issue "in due course."[38] The Tribunal reiterated that

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[34] Letter from the United States dated January 23, 2003 at Exhibit 23.

[35] *Id.*

[36] *Id.* (Emphasis added).

[37] *Id.*

[38] *See* Letter from the Tribunal dated January 28, 2003 at Exhibit 24 ("the Tribunal will wish to hear both parties' views in due course").

position despite protest by Methanex that no Tribunal approval was needed.[39] Clearly, as of January 28, 2003 (and as underscored again on February 3, 2003), the Tribunal had acknowledged the U.S. objection and retreated from its January 17th position.

Thus, as of February 2003, Methanex understood that, following the guidance of the Tribunal, it could **not** have filed a § 1782 application without Tribunal approval, but instead was required to await the Tribunal's further deliberation. Indeed, had Methanex ignored the Tribunal and filed a request at that time, the U.S. would quickly have pointed out to the U.S. court that the Tribunal was in the process of deciding the U.S.' objection, and would have asked the Court to delay any decision. The U.S. court would almost certainly have deferred any resolution, waiting for the Tribunal decision regarding the U.S. objection.

b) Methanex Tries Again To Obtain A Tribunal Ruling.

Concerned at the passage of time (then five months) since its initial request, Methanex wrote to the Tribunal again on March 17, 2003, and forwarded a copy of its draft § 1782 application. Methanex stated: "if [the Tribunal] has no objection, we are prepared to file the application immediately."[40] The Tribunal did object, however, acknowledging that:

> the immediate decision required of the Tribunal is whether to **authorise in any way** Methanex's intended filing of the draft application to the District Court for the Central District of California *before* the procedural meeting on 31st March 2003.…
>
> **Given the issues already raised in correspondence by the USA, the Tribunal would prefer not to** make any decision one way or the other, nor to **express any views**

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[39] *See* Letter from Methanex dated January 30, 2003 at Exhibit 25 (noting that the IBA Rules allow Methanex to seek evidence on its own through the § 1782 procedures and that "it is very likely that U.S. courts will grant any petition by Methanex to use § 1782"). *See* Letter from the Tribunal dated February 3, 2003 at Exhibit 26 (acknowledging safe receipt of Methanex' letter and yet noting "the Tribunal will hear both parties' views more fully in due course").

[40] Letter from Methanex dated March 17, 2003 at Exhibit 27.

> **on Methanex's application before hearing the parties further at the procedural meeting.** The agenda for that meeting, will, of course, include **all matters** raised by the USA and Methanex in regard to § 1782, including Methanex's letter and draft application.[41]

The Tribunal thus confirmed that the issue before it was whether, prior to the hearing, to "authorise in any way" Methanex' intended filing. Methanex understood this to mean that until the Tribunal ruled on the U.S. objection, it was not yet "authorised in any way" to make its filing in U.S. court.

After framing the issue as such, the Tribunal decided ultimately not to resolve the U.S. objection prior to the hearing (and gave no indication to the contrary that Methanex was free to proceed independently). Instead, it decided that "all matters raised by the USA … in regard to § 1782," *i.e.*, the U.S. objection, would be considered at the hearing.

At the hearing the Tribunal advised:

> 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. **We don't consider that such an application at this particular stage of the proceedings is timely**.[42]

Unfortunately, the Tribunal remained silent on the critical question of whether Methanex could proceed without the Tribunal's permission, *i.e.*, the U.S. objection. Although the Tribunal decided at that time not to grant Methanex' request for an affirmative order, it did not rule on the U.S. objection. The decision "to deliberate a little bit more" on the issue prevented Methanex from submitting its § 1782 application to the U.S. courts.

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[41] Letter from the Tribunal dated March 20, 2003 at Exhibit 28 (emphasis added in bold).

[42] Tr. at 117 (V.V. Veeder) (emphasis added) at Exhibit 29.

c) Time Passes After The March 31 Hearing With No Tribunal Decision, And Methanex Tries Again.

The Tribunal had indicated that it hoped to publish its decision on the § 1782 question by mid-April 2003. However, on April 12 the Tribunal advised "it is not possible to do so" and that its "deliberations continue."[43]

On May 5, 2003, five weeks after the hearing and almost seven months after its initial request, Methanex inquired when the decision might issue.[44] In June 2003, the Tribunal, as part of a larger ruling, deferred on the § 1782 question yet again, stating that it would address the matter "as soon as practicable, after resolving the specific dates required for this new timetable."[45] Once again, the Tribunal did not state that Methanex could proceed independently with its § 1782 application, again sending a clear signal that Methanex should not proceed with a § 1782 application because the Tribunal had reserved the issue for decision.

So Methanex continued to wait. In September, the United States in correspondence with the Tribunal noted that the § 1782 issue remained "reserved for decision by the Tribunal."[46] Further delay ensued.

d) Methanex Makes A Fourth Request For Tribunal Attention.

On January 28, 15 months after Methanex' initial request to the Tribunal, Methanex for the fourth time requested guidance from the Tribunal regarding this critical issue. It resubmitted its long-standing request, explaining the compelling need to gather additional evidence. That in turn led to the Tribunal's February and then March communications, culminating in the Tribunal's letter of March 16, 2004. Until the letter dated March 16, 2004, when the Tribunal definitively overruled the U.S. objection, Methanex was not "free" to go to the U.S. courts.

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[43] Letter from the Tribunal dated April 12, 2003 attached hereto as Exhibit 44.

[44] Letter from Methanex dated May 5, 2003 attached hereto as Exhibit 45.

[45] Letter from the Tribunal dated June 2, 2003 Exhibit 30 at 4.

[46] Letter from the United States dated September 22, 2003 Exhibit 37 at 1.

In sum, the obvious barrier to Methanex' evidence gathering has been the Tribunal's long delay in ruling on the U.S. objection. Other than for a short eleven-day period after its January 17, 2003 correspondence, at no time can the Tribunal have been said to have expressed agreement with Methanex' position that it could move forward with a § 1782 application without Tribunal approval. It certainly did not do so at the March 2003 hearing. Even if the Tribunal truly believed that it had communicated this position to the parties, Methanex' repeated requests for a ruling and the United States' characterization of the question as "reserved" by the Tribunal for later decision surely should have alerted the Tribunal to the issue.

With all due respect, the Tribunal's delay in resolving Methanex' request and the U.S. objection, in contrast to its prompt ruling on the U.S.' request,[47] results in a gross inequality of treatment of the Parties. Further, the Tribunal's delay has seriously jeopardized, and perhaps eliminated, Methanex' ability to fully and fairly present its case regarding the Tribunal's "specific intent" test. It may also unnecessarily prolong the proceeding, increasing Methanex' costs.

4. The Tribunal's Uncertainty As To Why "It Is Necessary For The Tribunal To Make Any Order" As Requested By Methanex Is Itself Perplexing.

The Tribunal in its letter dated March 16, 2004, professes uncertainty as to why any order is necessary. The cause of the Tribunal's uncertainty is mystifying to Methanex. As already recounted, although Methanex consistently has taken the position that no order is required, the United States vociferously objected to Methanex' contention. Among other things, the United States cited precedent under the IBA Rules indicating, in the United States' view, that recourse under § 1782 "is permissible only if the arbitrators have first decided that the request for evidence is appropriate.…"[48]

Before the March 31, 2003, hearing, Methanex had provided the Tribunal the actual draft of its § 1782 application and stated that "if [the Tribunal] has no objection, we are prepared to file the application

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[47] *See*, *e.g.*, Letter from the United States dated August 27, 2003 at Exhibit 10 (seeking production of documents from Methanex); and Letter from the Tribunal dated October 10, 2003 at Exhibit 14 (ordering Methanex to produce documents requested by the United States).

[48] Letter from the United States dated January 23, 2004 at Exhibit 23.

immediately."[49] One could hardly have expected Methanex to proceed with its § 1782 application after the Tribunal responded to this explicit request with the answer: "Given the issues already raised in correspondence by the USA, The Tribunal would prefer not to make any decision … before hearing the parties further at the procedural hearing."[50] (This was the **third** time the Tribunal noted its desire to "hear both parties' views" on the § 1782 issue.)[51]

The Tribunal then stated at the March 2003 hearing that it intended to "deliberate a little bit more about [the § 1782 issue]."[52] Its statement in June 2003 that it would "address" this issue confirmed that although the Tribunal recognized Methanex' procedural rights, it had reserved for further decision the issue of when it would be timely for Methanex to exercise those rights.[53] In other words, the Tribunal's reservation of the issue prevented Methanex from proceeding with an application in the U.S. courts pursuant to § 1782.

The Tribunal has now finally ruled on the U.S. objection by rejecting it. Accordingly, Methanex has begun the evidence gathering process in U.S. courts.

5. Methanex Has Provided Sufficient Basis To Warrant An Affirmative Order From the Tribunal.

Methanex has provided ample basis to support its request for an affirmative order from the Tribunal for additional evidence. The Tribunal rightly notes that Methanex has attempted other alternatives, including the California Public Records Act ("PRA") process. However, those alternatives have proven woefully inadequate.

As Methanex' counsel explained during the March 31, 2003 hearings, the power of the U.S. federal courts to order discovery is "much broader than the

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[49] Letter from Methanex dated March 17, 2003 at Exhibit 27.

[50] Letter from the Tribunal dated March 20, 2003 at Exhibit 28.

[51] *See* Letter from the Tribunal dated January 28, 2003 at Exhibit 24 (acknowledging the safe receipt of the January 23, 2003 objections from the United States and noting that "the Tribunal will wish to hear both parties' views in due course"); *see also* Letter from the Tribunal dated February 3, 2003 at Exhibit 26 (acknowledging the safe receipt of Methanex' January 30, 2003 letter and noting that "the Tribunal will hear both parties' views more fully in due course").

[52] Tr. at 117 (V.V. Veeder) at Exhibit 29.

[53] Letter from the Tribunal dated June 2, 2003 at Exhibit 30.

power to obtain it through Freedom of Information-type procedures in California."[54] Among other things, the administrative process excludes records of intra-agency deliberations – the very sort of evidence that would allow Methanex to bolster its case that California intended to protect the domestic ethanol industry and to harm foreign methanol suppliers. Moreover, private persons (such as Richard Vind and Regent International) are exempt from the California PRA. Complete evidence from those sources can be compelled only through § 1782 discovery.

The types of documents sought by Methanex, if produced, will show the influence of political contributions and domestic industry interests on California's decision making with respect to ethanol, MTBE, and methanol. Indeed, as Methanex noted in its January 28, 2004 letter, "the evidence Methanex seeks is precisely of the type found relevant by the Tribunal in the S.D. Myers case."[55] Methanex even attached four documents from that case showing that the Canadian industry lobbied for protection and that the relevant government officials responded favorably to domestic constituents' requests.[56]

The Tribunal's observation that "the USA has adduced witness statements from certain of the relevant factual witnesses identified by Methanex in March 2003" and that "it will of course be possible for Methanex to cross-examine them on their written testimony"[57] falls well short of the mark. Methanex has already shown the unreliability of these witnesses, including for example, Vind's unfounded assertion that his office was burglarized.[58] Moreover, the witnesses offered, in the Tribunal's own words, are only "certain of the relevant factual witnesses" Methanex has identified, and no documents will be produced.

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[54] Tr. at 28 (C. Dugan) at Exhibit 29 .

[55] Letter from Methanex dated January 28, 2004 at Exhibit 38 *citing* S.D. Myers' 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).

[56] *See* Exhibit B-E from Letter from Methanex dated January 28, 2004 at Exhibit 39.

[57] Letter from the Tribunal dated March 16, 2004 at Exhibit 43.

[58] *See* Methanex Reply, February 19, 2004 at ¶ 63 fn. 93.

With respect to the truly critical witnesses – Governor Davis, California officials, and ADM executives – is there any rational reason for anyone to believe that, absent compulsory legal process, they will voluntarily produce relevant documents and testimony? And, as discussed below, if the Tribunal will require some record of the inevitable refusals from these witnesses, it should have said so long ago.

6. The Tribunal Should Long Ago Have Provided Guidance on the Showing Needed to Obtain an Evidentiary Order.

As the Tribunal is aware, it is required to assist the parties in obtaining otherwise unavailable evidence.[59] While, as discussed above, Methanex believes it has made the required showing to obtain an affirmative Tribunal order, we understand from the letter dated March 16, 2004, that the Tribunal does not.[60]

With all due respect, the Tribunal should have made clear long ago what were the necessary conditions for obtaining additional evidence. The result is that Methanex has suffered an 18-month delay. More significantly, the Tribunal's clarification has now come only two months before the merits hearing is set to begin. Consequently, Methanex will likely be prevented from obtaining additional evidence prior to the June hearing which may be critical to meeting the Tribunal's "specific intent" test.

7. The Prospect of Still More Delay.

At this stage, when the timing and outcome of the expected U.S. objection to Methanex' efforts to obtain additional evidence pursuant to § 1782 is unknown, Methanex cannot comment on the Tribunal's suggestion that it may hold a hearing after the June 2004 hearing on the merits. While such a hearing may be useful and necessary, Methanex respectfully notes that the elapsed time since the initial pursuit of Methanex' claim in 1999 to the June 2004 hearing goes well beyond Methanex' most pessimistic prediction of the length of these proceedings. This has resulted in unacceptably high costs and continued uncertainty for Methanex' stakeholders.

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[59] *See*, *e.g.*, IBA Rules at ¶ 3.8 (requiring the Tribunal to "take the necessary steps" to assist a Party in obtaining relevant and material documents from a non-party); *see also, e.g.*, *id.* at ¶ 4.10 (requiring the Tribunal to "take the necessary steps" to assist a Party in obtaining relevant and material testimony from a witness who will not appear voluntarily at the Party's request).

[60] *See* Exhibit 43 (attaching Letter from the Tribunal dated March 16, 2004).

Methanex urges that, to the extent possible, the Tribunal proceed in the most economic and timely means reasonable. In addition, peering beyond the confines of this proceeding, Methanex notes that further delays may actually have the wholly unintended effect of damaging the international arbitral system. Investors interested in pursuing arbitral claims will surely be deterred from doing so for fear of a long, protracted proceeding. This, in turn, could chill foreign investment in developing countries, because investors would lose confidence in what they now perceive to be the only avenue to justice, *i.e.*, arbitral proceedings as opposed to the local courts.

Respectfully submitted,

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