

Christopher F. Dugan Esq  
James A. Wilderotter Esq  
Jones, Day, Reaves & Pogue  
51 Louisiana Avenue, NW  
Washington DC 2001-21113, USA  
By Fax: 00 1 202 626 1700

Barton Legum Esq  
Mark A. Clodfelter Esq  
Office of the Legal Adviser (L/CID)  
United States Department of State  
2430 E Street, N.W. Suite 203, South Building  
Washington DC 20047-2800, USA  
By Fax: 00 1 202 776 8388

25<sup>th</sup> September 2002

Dear Colleagues,

*Re: NAFTA Arbitration  
Methanex Corporation v United States of America*

By letter dated 28<sup>th</sup> August 2002 from Messrs Dugan & Wilderotter to the Tribunal, Methanex requested an Interpretation of the Tribunal's First Partial Award of 7<sup>th</sup> August 2002 under Article 35 of the UNCITRAL Arbitration Rules; and Methanex also requested the Tribunal's assistance in regard to Certain Further Matters.

By the Tribunal's letter dated 10<sup>th</sup> September 2002 to the Disputing Parties, the Tribunal invited written comments from the USA on Methanex's letter; these were received by the USA's letter dated 23<sup>rd</sup> September 2002; and we have taken these comments into account in preparing our response. We do not think it necessary to require Methanex to respond to the USA's comments, the reasons for the Disputing Parties' differences being self-evident.

It is convenient to deal separately with (a) Interpretation and (b) Further Matters.

*A - Interpretation*

1. By its Request for Interpretation, Methanex seeks from the Tribunal an interpretation of the Tribunal's Partial Award in respect of four matters:
  - (i) The definition of "Legally Significant Connection", cited from Paragraph 147 of the Partial Award (page 62);
  - (ii) The contents and scope of the "Fresh Pleading" ordered by the Tribunal, cited from Paragraph 172(5) of the Partial Award (page 74);
  - (iii) The requirements of the Tribunal as to the "Evidence" to be submitted by Methanex, cited from Paragraphs 163, 164 & 165 of the Partial Award (pages 70-71); and
  - (iv) The nature and timetable of the "Future Proceedings", cited from Paragraph 168 of the Partial Award (page 70).

We shall consider each of these matters in turn, subject to a general preliminary comment.

2. Methanex's Request for Interpretation is made under Article 35 of the UNCITRAL Arbitration Rules. It provides:

*"(1) Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.*

*(2) The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply [i.e. dealing with the form and effect of the award]."*

It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award. Indeed, Methanex disclaims expressly any intention of “relitigating any issue the Tribunal has already decided”: see pages 1-2 of Methanex’s letter.

3. In our view, Methanex’s Request does not fall within the scope of Article 35. Accordingly, we decline to treat it as such; and this response does not form part of the Partial Award. Nonetheless, it can do no harm and possibly some good if we were to address certain of the points raised by Methanex, albeit outwith Article 35 of the UNCITRAL Arbitration Rules.

*(i) “Legally Significant Connection”*

4. At paragraph 147 of the Partial Award (page 62), the Tribunal concluded that the phrase “relating to “ in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them. In its Request, Methanex queries this conclusion, addressing Paragraph 138 of the Partial Award (page 58). There the Tribunal decided that Methanex’s interpretation of the phrase “relating to” as “affected” would produce a surprising, if not absurd, result given that the possible consequences of human conduct are infinite; and by analogy the Tribunal noted that in a traditional legal context, both in the USA and Canada under the laws of contract and civil wrong, a limit is imposed restricting the consequence for which conduct is to be held accountable. This paragraph forms only part of the Tribunal’s reasons which, on this point, are set out in Chapter J of the Partial Award (pages 53 to 62).
5. Methanex seeks confirmation of its understanding that the Partial Award suggests that a NAFTA Party in breach of its Chapter 11 obligations will be liable only for those types of consequences that are actionable in analogous legal circumstances, such as where there is foreseeable, direct or intended injury, or competitive harm.

Alternatively Methanex seeks an interpretation of the phrase “legally significant connection”. It is said that without such an interpretation, Methanex is placed in the difficult and unfair position of marshalling evidence and arguments to meet an undefined standard. For two reasons, Methanex’s several requests are unfounded.

6. First, at Paragraphs 172(2) and (3) of the Partial Award (page 73), the Tribunal decided that Methanex’s Original Statement of Claim and its Amended Statement of Claim (as a whole) failed to meet the jurisdictional requirements of Article 1101(1) NAFTA. At paragraph 172(4), however, with respect to *part* of Methanex’s Amended Statement of Claim (as subsequently supplemented by its written and oral submissions), the Tribunal decided that certain allegations relating to the “intent” underlying the US measures could potentially meet the requirements of Article 1101(1) NAFTA.
  
7. As appears from Chapter K of the Partial Award (pages 63 to 71), the Tribunal postponed its ruling on jurisdiction in respect of that part of Methanex’s case and ordered a fresh pleading from Methanex because the Tribunal found it impossible to make such a ruling without such a fresh pleading, accompanied by evidential materials. It follows that the difficulties raised by Methanex are illusory. The Tribunal has already decided that insofar as it may have jurisdiction in respect of Methanex’s claim, such jurisdiction can exist only in respect of that part of the claim alleging an “intent” underlying the US measures to benefit the US ethanol industry and to penalise foreign methanol producers, such as Methanex. Accordingly, in this case, Methanex’s claim is not concerned with different factual circumstances (i.e. where that intent is absent).
  
8. Second, albeit related to this first reason, the interpretation of Article 1101(1) NAFTA in the Partial Award is to be read as a whole, as applied to this particular case. It serves no purpose for Methanex to isolate one particular paragraph in order to construct an ambiguity which does not in fact exist, or if it did, is irrelevant to the circumstances of this case. In our view, the legal requirements of Article 1101(1) are clear for this case, even though one Disputing Party might disagree with our interpretation and although there may be difficulties in defining for all

cases the exact dividing line between a legally significant and insignificant connection: see Paragraph 139 of the Partial Award (page 59). Nonetheless, such difficulties do not exist in this case for the remaining part of Methanex's claim, based on "intent".

(ii) "Fresh Pleading"

9. At Paragraph 172(5) of the Partial Award (page 74), the Tribunal ordered Methanex to submit within ninety days a fresh pleading, complying with Articles 18 and 20 of the UNCITRAL Arbitration Rules and conforming to the decisions contained in the Award. At paragraph 162 of the Partial Award (page 68), the Tribunal had earlier explained:

*"Methanex's fresh pleading must take a form different from and more limited than its Amended Statement of Claim. Several material allegations made by Methanex as it developed its oral and written submissions do not appear in the Amended Statement of Claim (nor, of course in the Original Statement of Claim); and it will be for Methanex's careful consideration whether, to what extent and in what form these allegations will be formally pleaded. The fresh pleading must not exceed the limits of Methanex's existing case (pleaded and unpleaded); and we do not intend Methanex to make any new claim in its fresh pleading. It must comply with our decisions in this Award and Articles 18 and 20 of the UNCITRAL Arbitration Rules. As regards the statement of the facts supporting its claim under Article 18(2)(b), Methanex's fresh pleading must set out its specific factual allegations, including all specific inferences to be drawn from those facts."*

10. In its Request for Interpretation, Methanex now seeks clarification of the scope and content of this fresh pleading, particularly as to what aspects of the Original and Amended Statement of Claim the Tribunal considers irrelevant. Methanex also seeks confirmation that once it has satisfied Article 1101's "threshold" requirements, it may then proceed to each of its separate claims under Articles 1102, 1105 and 1110 NAFTA.
11. The Tribunal considers that the directions contained in the Partial Award are clear and unambiguous, as to both the form and content of the fresh pleading to be

served by Methanex.

12. As to form, the meaning of the term “fresh pleading” is self-evident. The phrase is indeed absent from the UNCITRAL Arbitration Rules (as Methanex rightly comments); but that can scarcely be the cause of any practical difficulty in this case. As explained in the Partial Award, it will be a pleading “more limited” than the Amended Statement of Claim because that pleading asserts claims for which (as we decided in the Partial Award) the Tribunal has no jurisdiction; and it will be “different” because, as to the intent underlying the US measures, we anticipate that it will include allegations made by Methanex orally and in written submissions subsequent to (and therefore not included in) the Amended Statement of Claim. Accordingly, it will be a new pleading of part of an existing case, partly pleaded and partly unpleaded; and the term “fresh pleading” is a convenient description for that pleading, consistent with Articles 18, 20 and 22 of the UNCITRAL Arbitration Rules. If the position were otherwise, the Tribunal might have had no alternative but to reject Methanex’s Amended Statement of Claim *in toto*.
13. As to content, subject to the outward boundaries permitted by the Tribunal in the Partial Award, it cannot be for this Tribunal to instruct Methanex what should and should not be pleaded in its fresh pleading, as explained in Paragraph 166 of the Partial Award (page 76). Nonetheless, the Tribunal is prepared to reiterate the following guidelines, taken from the Partial Award.
14. As appears from Paragraphs 46-70 of the Partial Award (pages 18 to 24), Methanex’s factual case on “intent” is only comprehensible from certain parts of the Amended Statement of Claim, Methanex’s Rejoinder of 25<sup>th</sup> May 2001, the transcript of the Jurisdictional Hearing of July 2001 and Methanex’s Reply Submission of 27<sup>th</sup> July 2001. It is therefore essential for Methanex to reduce its case into one coherent, formal document, i.e. a fresh pleading to stand as its statement of claim in these arbitration proceedings.
15. The pleading requirements of that statement of claim are set out in Article 18(2) of the UNCITRAL Arbitration Rules. These do not call for extended argument,

whether factual or legal. Moreover, as to legal argument, only brief cross-references need be made to Methanex's existing legal materials. It is Methanex's factual case which needs to be pleaded, however succinctly. Inevitably, it will be an important pleading; possibly it may be difficult to draft; but given that it will plead a case Methanex has already advanced in these proceedings, the task should be relatively uncomplicated and achievable within a relatively short time. (It may be noted that the period of ninety days exceeds the maximum period of 45 days usually allowable under Article 23 of the UNCITRAL Arbitration Rules).

16. As to the "threshold matter" raised by Methanex, there seems to be a curious misunderstanding. As already noted above, the Tribunal decided in the Partial Award that one part of Methanex's Amended Statement of Claim (as subsequently supplemented), relating to the alleged "intent" underlying the US measures, could potentially meet the requirements of Article 1101(1) NAFTA. The Tribunal decided that it has no jurisdiction in respect of Methanex's other claims. It follows that, insofar as the fresh pleading is concerned, the Tribunal can have no jurisdiction to consider any allegation originally found in Methanex's Original or Amended Statement of Claim advancing any claim other than the claim based on "intent".
17. Accordingly, these jurisdictional limits apply to the breaches of the substantive provisions of Chapter 11 NAFTA, as alleged by Methanex (i.e. Articles 1102, 1105 and 1110). It cannot be open to a claimant to establish jurisdiction by reference to a specific claim under Article 1101 and then allege breaches of the substantive provisions of Chapter 11 unrelated to that claim and in respect of which the Tribunal would not otherwise have any jurisdiction. In other words, Methanex may now only allege breaches of Articles 1102, 1105 and 1110 NAFTA (as it chooses) insofar as these alleged breaches are related to the alleged "intent" underlying the US measures to favour the US ethanol industry and to penalise foreign methanol producers, such as Methanex.

(iii) "Evidence"

18. At paragraph 172(5) of the Partial Award (page 74), the Tribunal decided that Methanex's fresh pleading should be accompanied by the evidential materials described in the Award, particularly in Paragraphs 163-165 (page 69).
19. At paragraph 163, the Partial Award stated:

*"As regards the USA's alleged liability, Methanex must file with that pleading copies of all evidential documents on which it relies (unless identified as documents previously filed with the Tribunal), together with factual witness statements and expert witness reports of any person intended by Methanex to provide testimony at an oral hearing on the merits. For the time being, we exclude evidential materials relating to the alleged quantum of the USA's liability."*

At paragraphs 164 and 165, the Partial Award set out further requirements for such factual witness statements and expert reports.

20. In its Request for Interpretation, Methanex seeks confirmation that it is not now required to produce all evidence on which the presentation of its case on the merits will rely, thereby foreclosing the development and presentation of additional evidence at a later stage. Methanex also seeks clarification as to whether it is required to produce "essentially final reports from all its experts" within the ninety day time limit imposed by the Tribunal; and it seeks confirmation now that the Tribunal is not planning to proceed directly to a hearing on the merits.
21. It is difficult for the Tribunal to follow Methanex's apparent difficulties. As the Partial Award states in Paragraph 163 (page 69), Methanex must file with its fresh pleading copies of all evidential documents on which it relies. This direction is clear both as to the ambit of the evidence required ("as regards the USA's alleged liability"; but "we exclude evidential materials relating to the alleged quantum") and the extent ("all evidential documents"). Similarly, there is no ambiguity with respect to the Tribunal's direction on the submission of expert reports, and there is no suggestion that these should be draft reports or reports that are otherwise

incomplete: see Paragraphs 163 and 165 of the Partial Award (pages 69 & 70).

22. Nonetheless, insofar as Methanex may find insuperable difficulty in complying with the ninety day limit imposed by the Partial Award, it remains open to Methanex to seek an extension of that deadline from the Tribunal. Moreover, if for good cause shown, Methanex is unable timeously to complete its filing of all relevant evidential materials, it remains equally open to Methanex to seek dispensation from the Tribunal in regard to missing materials; e.g. an outstanding application against a third person under 28 U.S.C. § 1782 (if applicable), as raised at page 6 of Methanex's letter.
23. It is the Tribunal's intention, both in the Partial Award and now, that Methanex and its legal advisers should have the best opportunity to advance Methanex's best case. It is not the Tribunal's intention to deprive either Disputing Party of its procedural rights under Article 15(1) of the UNCITRAL Arbitration Rules, or otherwise. However, as regards Methanex's present exercise, given the long history of this arbitration (on which Methanex rightly comments at page 7 of its letter), that can only be a reasonable opportunity. There must therefore be a reasonable deadline. In all the circumstances, from the Tribunal's current perspective, ninety days is a reasonable period of time. It could be extended by the Tribunal if necessary; but an extension should be sought by means of a reasoned application to the Tribunal and not by a request for interpretation of the Partial Award.
24. There is no suggestion in the Partial Award that if, at a later stage Methanex sought to submit further relevant evidence, it would be debarred automatically from doing so - nor could there be. This would be a matter for consideration by the Tribunal in the future, if and when that issue arose and after hearing both Disputing Parties.
25. As to Methanex's request for confirmation that the Tribunal is not planning to proceed directly to a hearing on the merits, the answer is obvious from the Partial Award. At Paragraph 168 (page 70), the Tribunal stated that after considering Methanex's fresh pleading and accompanying evidential materials, and subject to

consultation with the Disputing Parties, its present intention is to decide *then* how to proceed further. It follows that the Tribunal has so far made no decision as to the future procedure for the arbitration and is awaiting Methanex's pleading and evidential materials; and that the Tribunal does not intend to make any decision on future procedure without also hearing both Disputing Parties. It may be that Methanex and the USA will then wish to argue that the claim should (or should not) proceed directly to a hearing on the merits; but all that lies in the future.

*(iv) "Future Proceedings"*

26. In its Request for Interpretation, Methanex expresses its concern that without a more concrete plan for the number, form and content of future pleadings and/or proceedings, the arbitration could become unnecessarily extended. It requests that the Tribunal clarify the nature and timetable for future proceedings.
27. This is not a request for interpretation of the Partial Award but a request that the Tribunal now make an order that it has not yet made - for good reason. As stated in the Partial Award and as here re-stated above, the future procedure in this arbitration cannot be decided by the Tribunal before Methanex's fresh pleading and evidential materials and a procedural hearing with the Disputing Parties. That too lies in the future.

*B - Certain Further Matters*

28. *NAFTA Documentation:* In the Partial Award, we made no order regarding Methanex's application for documentary production of NAFTA negotiations relating to Article 1105 NAFTA: see Chapter G (page 31). Methanex now makes an application for similar documentation relating to Article 1101 NAFTA. We invite Methanex to clarify two matters.
29. First, is it correct for Methanex to describe its current application as the re-submission of its earlier application, given that these requests are apparently different? Second, after the Tribunal's decisions in the Partial Award on the

meaning of Article 1101, what is the relevance of these documents to any outstanding issue in these arbitration proceedings?

30. The Tribunal, at present, is not minded to decide this application before a procedural hearing with the Disputing Parties. Accordingly, it should not delay Methanex's compliance with the deadline for its fresh pleading and accompanying materials.
31. *Expedited Telephone Conference:* If necessary, the Tribunal will hold an expedited hearing with the Disputing Parties. Its necessity and usefulness may depend, however, on the deadline to be met by Methanex, a point to which we return below
32. *Tolling:* In the Tribunal's view, there should be no tolling. The solution is much more simple: Methanex should make, as soon as practicable, a reasoned application for an extension of time beyond the ninety day deadline. Subject of course to hearing the USA, the Tribunal would receive such an application from Methanex's legal representatives with measured sympathy.

In conclusion, it follows that for the time being the deadline of ninety days imposed on Methanex under the Partial Award stands, expiring on 5<sup>th</sup> November 2002. If Methanex requires any extension of that deadline for any part of its fresh pleading and accompanying materials, the Tribunal invites it to make a reasoned application in writing as soon as possible. The USA will then be asked to comment in writing on Methanex's application; and thereafter the Tribunal will decide whether it can rule on Methanex's application on paper or with a procedural hearing, whether by telephone conference-call or a meeting in Washington D.C.

This decision was made by the two members of the Tribunal signing this letter. Mr Christopher resigned as arbitrator on 20<sup>th</sup> September 2002; he played no part in making this decision; and he is not a party to it.

Yours Sincerely,

V.V.Veeder

William Rowley

cc Ms Margrete Stevens: by fax 00 1 202 522 2615.

cc Canada and Mexico.