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By Facsimile & E-Mail

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Re: *Methanex Corporation v. United States of America*

Dear Members of the Tribunal:

On behalf of respondent United States of America and as requested by the Tribunal's second procedural order of March 16, 2004, we respectfully respond to Methanex's assertion that the UNCITRAL Arbitration Rules authorize the Tribunal to reconsider its First Partial Award. As demonstrated below, Methanex's assertion lacks support.

A. Article 15(1) Does Not Permit Deviation From The Specific Terms Of Article 32(2) Of The UNICTRAL Rules

Contrary to Methanex's suggestion, Article 15(1) does not authorize the Tribunal to reconsider a partial award. That article reads as follows:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.¹

¹ UNICTRAL Arbitration Rules art. 15(1) (1976) (emphasis added).

As its introductory clause indicates, Article 15(1) is a gap-filling provision. It is the UNCITRAL rules that “govern the arbitration.”² Where, however, the rules are silent – “[s]ubject to the[] Rules” – Article 15(1) allows for “flexibility during the proceedings and reliance on the expertise of the arbitrators.”³

Conversely, where other provisions of the UNCITRAL rules address a topic, Article 15(1) does not authorize deviation from those provisions. The Tribunal recognized this important limitation on the operation of Article 15(1) in its January 15, 2001 Decision on Petitions from Third Persons to Intervene as “Amici Curiae.”⁴ Methanex argued that the Tribunal should reject the request of the petitioners to attend oral hearings in the case, noting that Article 25(4) specifically addressed the subject.⁵ The Tribunal agreed. It found that its authority under Article 15(1) did not extend to matters addressed by other provisions of the UNCITRAL rules: “The Tribunal must therefore apply Article 25(4); and it has no power (or inclination) to undermine the effect of its terms.”⁶

Similarly, here specific provisions address the issue at hand. Most notably, Article 32(2) of the UNCITRAL rules provides in pertinent part as follows:

The award shall be made in writing and shall be *final and binding* on the parties.⁷

Article 32(2) can be seen as reflecting the general principle that a judgment of a court of competent jurisdiction is entitled to *res judicata* effect. Thus, similarly, an award by a competent tribunal is “final and binding” and is, therefore, necessarily, not one that can be reconsidered. Because the First Partial Award is such an award, it is final and binding and thus not subject to reconsideration. To borrow from the Tribunal’s January 15, 2001 Decision, the Tribunal must apply Article 32(2)’s mandate that the award shall be final; it has no power to undermine the effect of that article’s terms by invoking Article 15(1) to reconsider the award.

² *Id.* art. 1(2) (“These Rules shall govern the arbitration”); *see also* NAFTA art. 1120(2) (“The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”).

³ JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 102 (1991) (quoting *travaux préparatoires* to rules, A/CN.9/112/Add. 1 (1975), 7 U.Y.B. at 172).

⁴ *Methanex Corp. v. United States of America*, 13:3 WORLD TRADE & ARB. MAT’L 97 (June 2001).

⁵ *See id.* at 115-16 ¶ 41.

⁶ *Id.* at 116 ¶ 42; *see also id.* at 115 ¶ 40 (finding, on the subject of acceptance of written submissions from *amici*, that “there are no further provisions under the UNCITRAL Arbitration Rules that modify the application of [the Tribunal’s] general power under Article 15(1) to allow the Petitioners to make such submissions in this arbitration.”).

⁷ UNCITRAL Arbitration Rules art. 32(2) (emphasis added).

B. The First Partial Award Is “Final And Binding” Within The Meaning Of Article 32(2)

Indeed, Methanex does not contend that the Tribunal may reconsider an award that is “final and binding” within the meaning of Article 32(2). Instead, it suggests, in a footnote, that Article 32(2) does not apply to a partial award.⁸ Methanex’s suggestion is without support.

First, the plain language of Article 32 does not support this suggestion. While Article 32(1) separately references the “final award” and “interim, interlocutory, or partial awards,” the rest of the UNCITRAL rules do not. By using the generic term “[t]he award,” Article 32(2) makes clear that its terms encompass each of the species of award referred to in Article 32(1). Indeed, Methanex recognized that the First Partial Award was an “award” within the meaning of the UNCITRAL rules by requesting interpretation of it under Article 35(1). Methanex’s current position would ascribe a different meaning to the same word – “award” – in different articles of the same rules. Elemental principles of textual interpretation do not support such an approach.

Second, the *travaux préparatoires* to the UNCITRAL rules make clear that the term “award” was meant to include partial awards:

Although the preliminary draft did not define the term “award”, it was meant to include interim, interlocutory or partial award, as well as final awards. After a suggestion at the Commission’s deliberation, an explicit provision to this effect was included in this article, the present para. 1.⁹

Finally, the jurisprudence of the Iran-United States Claims Tribunal, which Methanex references, also recognizes that “‘awards’, which include ‘interlocutory or partial awards’, ‘shall be final and binding on the parties.’ Hence the Full Tribunal’s Interlocutory Award on jurisdiction in this case must be respected as binding law.”¹⁰

In sum, the First Partial Award is, under the UNCITRAL rules, an “award” that “shall be final and binding.” Article 15(1)’s proviso that it is “[s]ubject to these Rules” prohibits use of that article to undermine the effect of Article 32(2)’s plain terms.

⁸ See Letter from Methanex to Tribunal (Mar. 8, 2004) at 2 n.1 (“The Partial Award was not a ‘final’ award within the meaning of the Rules. By its nature, a Partial Award is subject to revision or reconsideration as a proceeding continues.”).

⁹ JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 218 (1991) (footnote omitted) (citing *travaux préparatoires* to rules, A/CN.9/97 (1974), 6 U.Y.B. at 177; A/CN.9/112/Add. 1 (1975), 7 U.Y.B. at 177-78).

¹⁰ *Ford Aerospace & Comm. Corp. v. Air Force of Islamic Republic of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 104, 109 (June 4, 1984) (Award No. ITM 39-159-3) (citing Tribunal Rule 32).

C. Methanex's Suggestion That An Arbitrator's Withdrawal Impairs The Award's Finality Is Without Merit

Methanex's attempt to draw negative conclusions concerning the finality of the First Partial Award from the withdrawal of Mr. Christopher is without merit.

The UNCITRAL rules provide no exception to the finality of awards mandated by Article 32(2) for instances where an arbitrator withdraws after being challenged. It is notable that, although the rules modify the finality of awards to a limited extent by permitting interpretation, correction and supplementation of awards on specified grounds, none of those articles permits such action based on the withdrawal of an arbitrator after a challenge.¹¹ And, as the Tribunal itself has recognized, the rules' provision for interpretation of the award does not allow reconsideration such as that requested by Methanex here.¹²

Moreover, the UNCITRAL rules do not permit the negative conclusion that Methanex urges. To the contrary, Article 11(3) specifies that the withdrawal of an arbitrator after challenge does *not* "imply acceptance of the validity of the grounds for the challenge." And the record before this Tribunal establishes no basis whatsoever to question Mr. Christopher's impartiality or independence in any event.¹³

Finally, it is noteworthy that the *lex arbitri* empowers the federal courts to vacate an award on the ground of actual bias on the part of an arbitrator.¹⁴ However, a motion to vacate must be filed "within three months after the award is filed or delivered."¹⁵ Methanex had the opportunity in 2002, should it have so desired, to seek to vacate the First Partial Award on the ground it advances now. Methanex did not do so. It has forfeited its right to challenge the award on this ground in the courts of the place of arbitration. Its belated attempt to shoehorn a similar challenge into the UNCITRAL rules cannot be sustained.

Thus, Mr. Christopher's withdrawal as arbitrator has no bearing on the finality of the First Partial Award.

¹¹ See UNCITRAL Arbitration Rules arts. 35, 36 & 37.

¹² See Letter from Tribunal to Parties (Sept. 25, 2002) at 3 ¶ 2 ("It is well settled that such a request [under Article 35] 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."); see also UNCITRAL Arbitration Rules arts. 36-37 (providing for correction or supplementation of award on limited grounds).

¹³ See Response of Arbitrator Warren Christopher to Notice of Challenge at 3-4 (Sept. 20, 2002); U.S. Letter to Tribunal on Withdrawal of Arbitrator Christopher (Sept. 25, 2002).

¹⁴ See Federal Arbitration Act, 9 U.S.C. § 10(a) (West supp. 2003) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -- . . . (2) where there was evident partiality or corruption in the arbitrators, or either of them; . . .").

¹⁵ *Id.* § 12; see *Int'l Tech. Integration, Inc. v. Palestine Liberation Org.*, 66 F. Supp. 2d 3, 14 (D.D.C. 1999).

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In sum, the UNCITRAL rules provide no authority for the Tribunal to reconsider its First Partial Award. Indeed, as the Tribunal has noted, in 2002 “Methanex disclaim[ed] expressly any intention of ‘relitigating any issue the Tribunal has already decided.’”¹⁶ Methanex’s ill-considered change of heart eighteen months later is without support.

For these reasons, the United States respectfully submits that the Tribunal lacks authority to reconsider its First Partial Award.

Respectfully submitted,

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¹⁶ Letter from Tribunal to Parties (Sept. 25, 2002) at 3 ¶ 2.