

Christopher F. Dugan Esq  
Paul Hastings,  
1299 Pennsylvania Avenue, NW  
10<sup>th</sup> Floor,  
Washington DC 20004-2400, USA  
By Fax: 00 1 202 508 9700

Mark A. Clodfelter Esq  
Barton Legum 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

2<sup>nd</sup> June 2003

Dear Colleagues,

*Re. NAFTA Arbitration  
Methanex Corporation v. Unites States of America*

The Tribunal has now concluded its deliberations on the future form of these arbitration proceedings under Article 21 of the UNCITRAL Arbitration Rules; and I set out the Tribunal's decision below:

In Paragraphs 166 to 168 of the Partial Award of August 2002 (page 70), the Tribunal indicated that the resumption of the jurisdictional stage after Methanex's fresh pleading was not an attractive option; the USA's jurisdictional challenges depended on issues intimately linked to the merits of Methanex's case; and there was a forensic need for an evidential hearing, at least in part. Nonetheless, the Tribunal was concerned to identify one or more threshold or other determinative issues on which limited testimony could be adduced at that evidential hearing, without proceeding necessarily to a full hearing of all factual and expert witnesses.

Following Methanex's fresh pleading and materials served in January 2003, the USA requested an evidential hearing limited to the issue of discriminatory "intent", namely whether California intended the relevant measures to address suppliers to MTBE producers, such as Methanex: see the USA's letter dated 21<sup>st</sup> March 2003, its enclosed Supplemental Statement of Defence on Intent and its oral submissions advanced at the procedural meeting of 31<sup>st</sup> March 2003. The USA submitted that such an evidential hearing would be appropriate for two principal reasons: (i) it would be the most efficient way for the Tribunal to proceed, given that it would not require the Tribunal at this stage to consider the bulky scientific evidence adduced by Methanex on the MTBE ban or the relative merits of MTBE and ethanol and (ii), by reference to the "general" approach required by Article 21(4) of the UNCITRAL Arbitration Rules, the Tribunal should rule on the USA's jurisdictional challenges as a preliminary

question before holding any full hearing on the merits. On this approach, the USA proposed a procedure leading to an oral hearing in September 2003, lasting not more than three days. Methanex opposed the USA's application in its written and oral submissions. In summary, Methanex contended that the most efficient way to proceed would be a full hearing on the merits, with the Tribunal ruling on the USA's jurisdictional challenges in its final award. On this approach, Methanex proposed an evidential hearing of indeterminate length (but roughly estimated at eight days), originally suggested for January 2004 but on further reflection at the procedural meeting, two or more months later.

The choice for the Tribunal and the Disputing Parties is stark; the practical difference is significant; and whilst the choice is not complicated, the decision for the Tribunal was particularly difficult in this arbitration. After much consideration, given in particular the new shape of Methanex's pleaded case, we have decided broadly in favour of the procedure suggested by Methanex, subject to certain important explanations. Accordingly, the Tribunal decides not to rule as a preliminary question on the USA's extant jurisdictional challenges but, pursuant to the exceptional procedure set out in Article 21(4), second sentence, of the UNCITRAL Arbitration Rules, to join all such jurisdictional challenges to the merits of the dispute and to proceed to a main hearing currently 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. This procedure requires the following time-table:

(1) By [30<sup>th</sup> September 2003], the USA shall complete its Fresh Pleading, together with all evidential materials adduced in support of its case, in answer to Methanex's Fresh Pleading (excluding all issues of quantum);

(2) By [31<sup>st</sup> October 2003], Canada and Mexico are invited to make any submissions pursuant to NAFTA Article 1128;

(The Tribunal invites the Disputing Parties to comment whether amici curiae should be requested to make any written submissions at this stage or at a later stage);

(3) By [1<sup>st</sup> December 2003], Methanex shall submit a Reply to the USA's Fresh Pleading, together with all further evidential materials in rebuttal of the USA's evidential materials;

(4) By [2<sup>nd</sup> February 2004], the USA shall submit a Rejoinder to Methanex's Reply, together with all further evidential materials in rebuttal of Methanex's evidential materials;

(5) As regards witness statements and expert witness reports, the Disputing Parties shall follow the requirements of Articles 4 and 5 of the IBA Rules, respectively;

(6) Depending on the differences between the expert reports adduced by the Disputing Parties, the Tribunal may make one or more orders under Article 5(3) of the IBA Rules, requesting the expert witnesses to "meet and confer" and make a joint or

supplementary report prior to the main hearing;

(7) Not later than thirty days before the start of the main hearing, Methanex and the USA shall advise the Tribunal of the identity of any witness advanced by the other which it requires to cross-examine at the hearing; and upon such notification, unless otherwise ordered by the Tribunal, that witness shall be available as an oral witness at the main hearing; and

(8) Beginning on [a date in March/April 2004], there shall be a hearing at the World Bank, Washington DC (not to exceed eight days) at which principally (i) the Disputing Parties shall address all the USA's extant jurisdictional challenges, including the USA's new challenge made in Paragraphs 109 to 113 of its Supplemental Statement of Defense on Intent (pages 35-37); (ii) the Disputing Parties shall address the merits of Methanex's Claim, excepting all issues of quantum; and (iii) the relevant factual and expert oral witnesses shall be examined by the Disputing Parties before the Tribunal.

(It may be necessary later to modify or add further items to this timetable, including a further procedural meeting).

As indicated above, this order requires three particular explanations. First, given that the Tribunal did not have an opportunity to review the timetable's specific dates with the Disputing Parties at the procedural meeting held in Washington DC on 31<sup>st</sup> March 2003, we have placed the specific dates in square brackets to allow the Disputing Parties an opportunity to comment in writing on a more appropriate timetable, such comments to be received by the Tribunal within the next 14 days. (It should be noted, however, that no further comment is requested from the Disputing Parties on the issues of principle already decided by the Tribunal).

Second, it should be self-evident that nothing should be assumed from this order as to the relative merits of the USA's jurisdictional challenges and Methanex's opposition to such challenges. Those challenges and opposition are maintained in full before the Tribunal; and the Tribunal has yet to deliberate on such challenges, still more to make any jurisdictional ruling on such challenges. It is procedurally possible for the Tribunal to rule in favour of one or much such challenges in its award, rendering any decision on the merits unnecessary; and equally, it is procedurally possible for the Tribunal to reject all such challenges.

Third, the Tribunal intends that the proposed procedure should work in a broadly neutral manner for both Disputing Parties, notwithstanding that Methanex proposes it and the USA opposes it. By virtue of Articles 38-40 of the UNCITRAL Arbitration Rules, the Tribunal has jurisdiction to award costs in its discretion; and the Tribunal's decision on jurisdictional and/or merit issues might be an important factor in the exercise of that discretion. In other words, the Tribunal is not disempowered from making an order for costs against Methanex (as a solvent claimant) if the Tribunal should decide eventually in favour of the USA's one or more jurisdictional challenges, i.e. that the Tribunal had no jurisdiction over the Disputing Parties'

dispute. If the position were otherwise (and we do not understand Methanex to so contend), the Tribunal's order would take a materially different form.

Lastly, the Tribunal has still to address certain other matters raised by the Disputing Parties relating to 28 US § 1782, 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.

Yours Sincerely,

V. V. Veeder

cc. Mr William Rowley QC: by fax: 00 1 416 865 5519; Professor Michael Reisman: by fax: 00 1 203 432 7247; Ms Margrete Stevens, ICSID: by fax: 00 1 202 522 2615.

cc. Mexico and Canada; by fax.