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**Award  
on Jurisdiction**

in the

NAFTA / UNCITRAL Case

between

Ethyl Corporation (Claimant)

and

The Government of Canada (Respondent)

before

the Tribunal consisting of

Prof. Dr. Karl-Heinz Böckstiegel (Chairman)

Mr. Charles N. Brower (Arbitrator)

Mr. Marc Lalonde (Arbitrator)

Date of Award: 24 June 1998

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I The Parties

1. The Claimant

ETHYL CORPORATION  
330 South Fourth Street  
Richmond, VA 23219

The Claimant, Ethyl Corporation, is a corporation incorporated under the laws of the State of Virginia, one of the United States of America, and has its head office in Richmond, Virginia. It manufactures and distributes, *inter alia*, methylcyclopentadienyl manganese tricarbonyl ("MMT"), a fuel additive used at the refinery level to provide octane enhancement for unleaded gasoline. According to the Claimant, it is the sole shareholder of Ethyl Canada Inc. ("Ethyl Canada"), a company incorporated under the laws of Ontario in Canada, having its head office in Mississauga, Ontario, and blending or processing facilities near Carunna, Ontario.

In these proceedings, the Claimant is represented by:

Mr. Barry Appleton  
Appleton & Associates  
Royal Trust Tower  
Suite 4400  
Box 95  
Toronto, Ontario M5K 1G8  
Canada

and

Mr. Christopher R. Wall  
Winthrop, Stimson, Putnam & Roberts  
1133 Connecticut Avenue, N.W.  
Washington, D.C. 20038  
U.S.A.

The Claimant is referred to hereinafter as "Ethyl".

2      The Respondent

GOVERNMENT OF CANADA  
Office of the Deputy Attorney General of Canada  
Justice Building  
239 Wellington Street  
Ottawa, Ontario K1A 0H8

In these proceedings the Respondent is represented by:

Ms. Valerie Hughes  
General Counsel  
Trade Law Division  
Department of Foreign Affairs and International Trade  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada

The Respondent is referred to hereinafter as "Canada".

II      Summary Description of the Dispute and the Proceedings

3.      This is an arbitration under Chapter 11 of the North American Free Trade Agreement ("NAFTA") for the settlement of a dispute between Canada as a NAFTA Party and an investor of another NAFTA Party, in this case Ethyl.

4.      Ethyl claims that Canada has breached certain of its substantive obligations in relation to investments set forth in Section A of Chapter 11 and has submitted its claim to arbitration as provided in Section B of Chapter 11.

5.      The substance of the dispute is briefly described:

Ethyl essentially complains of Canada's Manganese-based Fuel Additives Act, S.C. 1997, c. 11 ("MMT Act"), which was first introduced in Parliament on 19 May 1995 as Bill C-94, was reintroduced on 22 April 1996 as Bill C-29 (following prorogation of the previous

Parliament), and, after receiving Royal Assent on 25 April 1997, came into force on 24 June 1997. It provides in Section 4

*No person shall engage in interprovincial trade in or import for commercial purpose a controlled substance except under an authorization referred to in section 5.*

The “controlled substance[s]” to which Section 4 refers are listed in a schedule to the MMT Act. That schedule lists no substance other than MMT. Section 5 of the MMT Act expressly precludes any authorization for additions to unleaded gasoline. Ethyl avers that whereas prior to the MMT Act its MMT was blended into more than 95 percent by volume of unleaded gasoline sold in Canada<sup>1</sup>, the MMT Act deprived it of that business as of 24 June 1997.<sup>2</sup>

6. Ethyl notes that production and sale of MMT in Canada is not itself banned. Ethyl could continue marketing MMT for use in unleaded gasoline throughout Canada, however, only by establishing a manufacturing plant and distribution facility in each of Canada’s provinces.

7. Ethyl claims that the MMT Act breaches three separate obligations of Canada under Chapter 11 of NAFTA.

(i) Article 1102 – National Treatment,

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<sup>1</sup> Ethyl states that it was the sole importer into Canada of MMT and also the sole distributor of it across Canada.

<sup>2</sup> Ethyl also produces a second product, known as “Greenburn,” a fuel additive which contains MMT but is designed for use in products other than unleaded gasoline, such as home heating, commercial boiler, and various diesel fuels. Ethyl asserts in its Statement of Claim that it was dissuaded from implementing earlier plans to market this product in Canada starting in 1996 by the introduction of the draft legislation that became the MMT Act.

- (ii) Article 1106 — Performance Requirements; and
- (iii) Article 1110 — Expropriation and Compensation

NAFTA Article 1102 states in pertinent part.

1. *Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

2. *Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

The relevant portions of NAFTA Article 1106 provide:

1. *No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:*

- .....*
- (b) *to achieve a given level or percentage of domestic content;*
- (c) *to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory. . . .*

NAFTA Article 1110(1) mandates.

*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*

- (a) *for a public purpose;*
- (b) *on a non-discriminatory basis;*
- (c) *in accordance with due process of law and Article 1105(1); and*

*(d) on payment of compensation in accordance with paragraphs 2 through 6.*

8. Ethyl asserts (in Paragraph 51 of its Statement of Claim) that in consequence of the MMT Act it has suffered the following losses:

*Lost profits since the date of introduction of Bill C-94;*

*Loss of value of its investment in Ethyl Canada;*

*Loss of world-wide sales due to other countries relying on those measures taken by the Government of Canada which are inconsistent with its NAFTA obligations;*

*The cost of reducing operations in Canada;*

*Fees and expenses incurred to oppose Bills C-94 and C-29 and the MMT Act,  
and*

*Tax consequences of the award to maintain the integrity of the award.*

9. In defense, Canada states that the Tribunal is without jurisdiction to entertain Ethyl's claim and that, in any event, Canada has complied fully with its obligations under Chapter 11 of NAFTA as the MMT Act is a law of general application and represents legitimate regulation.

10. The proceedings to date in this arbitration likewise are briefly described:

Article 1120 of NAFTA provides three alternatives for the arbitration of investment disputes: (1) the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre") pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, Mar. 18, 1965, 575 U.N.T.S. 159, ICSID Basic Documents 7 (Jan. 1985) ("ICSID Convention" or "Convention"); (2) the ICSID Additional Facility Rules; or (3) the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules"). In this case, Ethyl, by its Notice of

Arbitration delivered 14 April 1997, has submitted its claim under the UNCITRAL Arbitration Rules, which, therefore, govern this arbitration except to the extent modified by Section B of Chapter 11 (*see* Article 1120(2) at note 6, *infra*).

11. As Arbitrators in this case Ethyl appointed The Honorable Charles N. Brower and Canada appointed The Honorable Marc Lalonde, P.C., O.C., Q.C. The Secretary-General of ICSID appointed as Presiding Arbitrator of the Arbitral Tribunal in this case Prof. Dr. Karl-Heinz Bockstiegel, after first ascertaining that neither Party would have any objection to such appointment.

12. Canada asserts that Ethyl's claim is outside the scope of Chapter 11, and that in any event Ethyl has failed to fulfill certain requirements of Section B of Chapter 11, so that the Tribunal is without jurisdiction over Ethyl's claim.

13. As to the scope of Chapter 11, Canada urges (paraphrasing Paragraphs 6(a) of its Memorial on Jurisdiction):

- (i) at the time the Claimant submitted its Notice of Arbitration there was no measure adopted or maintained by Canada within the meaning of that phrase in NAFTA Article 1101(1);
- (ii) the alleged measures of which Ethyl complains do not relate to an investment or an investor within the meaning of Article 1101(1); and
- (iii) the Claimant's claim in respect of expropriation and loss or damage outside Canada is not contemplated by Chapter 11.

14. As regards the requirements of Section B of Chapter 11, Canada asserts (paraphrasing Paragraph 6(b) of its Memorial on Jurisdiction):

- (i) the Claimant failed to comply with the six-month waiting period from the date of the alleged events giving rise to a claim before submitting a claim to arbitration, as required by Article 1120;
- (ii) the Claimant did not deliver written consent and waivers required as conditions precedent to submission of a claim to arbitration under Article 1121; and

- (iii) the Claimant introduced new claims in its Statement of Claim not contained in its Notice of Arbitration (or in the Notice of Intent that preceded it under Article 1119).

### III Relief Sought

#### I As Regards the Dispute Over Jurisdiction.

15. As regards the dispute over jurisdiction the Parties seek the following relief, respectively.

Canada requests (in Paragraph 18 of its Memorial on Jurisdiction) that:

*... [T]he Tribunal should, as a preliminary matter, determine that it does not have jurisdiction to hear the claim or any part of the claim.*

*If however, the Tribunal determines that it has jurisdiction to hear any part of the claim, the Tribunal must limit its jurisdiction as follows . . . :*

*(a) the Tribunal should consider only that part of the claim relating to expropriation or loss or damage in Canada and should not consider claims respecting matters beyond the geographic scope of Chapter Eleven and Canada's territorial jurisdiction; and*

*(b) the Tribunal should consider only the claim as submitted in the Notice of Arbitration and should not consider new claims or alleged facts advanced in the Statement of Claim.*

16. Canada also requests:

*an order that the Claimant pay all costs of the proceedings, including all fees and expenses incurred by Canada.*

17. Ethyl requests (in Paragraph 103 of its Counter-Memorial on Jurisdiction) that:

*the Tribunal adjudge and declare that it has full jurisdiction to consider the merits of the . . . claim as submitted in [Ethyl's] Notice of Arbitration and Statement of Claim. The Tribunal should also award to [Ethyl] the costs of defending against this jurisdictional proceeding, including but not limited to arbitrators' costs and attorneys' fees.*

2. As Regards the Dispute on the Merits:

18 In the event the Tribunal should determine that it has jurisdiction in this case, the parties request relief as to the merits of the case as follows:

Ethyl claims (at D of its Statement of Claim):

1. *[Damages in the amount of not] less than US\$251,000,000 (TWO HUNDRED AND FIFTY-ONE MILLION UNITED STATES DOLLARS) arising out of the Government of Canada's breach of its NAFTA obligations;*
2. *Costs associated with these proceedings, including all professional fees and disbursements;*
3. *Pre-award and post-award interest at a rate to be fixed by the Tribunal; and*
4. *Such further relief that the Tribunal may deem appropriate.*

19. Canada requests (in Paragraph 104 of its Statement of Defence) that the claim:

*be dismissed and that the Tribunal order Ethyl to pay all costs, disbursements and expenses incurred by Canada in the defence of this claim including, but not restricted to: legal, consulting and witness fees; travel and administrative expenses.*

IV Chronology of the Dispute and of the Arbitral Proceedings

20. In this case, and particularly as regards the dispute on jurisdiction, the chronology of events must be understood in order to appreciate fully the factual and legal arguments presented. Set forth below, therefore, in a single chronology, are all major events to which the Parties have referred, as respects both jurisdiction and the merits, without prejudice as to whether or not the Tribunal considers them relevant to its consideration of the issues on jurisdiction or as to whether the brief description of any event is sufficient in the context of the Tribunal's deliberations on jurisdiction. (The description of each event is taken virtually verbatim from the chronologies submitted, respectively, by Canada in Figure 5 in its Memorial on Jurisdiction and by

Ethyl at page 29 of its Counter-Memorial on Jurisdiction. As to each event, the source of the description is noted at the end )

21 The chronology of events follows:

Date	Event
12 October 1994	[Environment] Minister Copps states that MMT must be removed from Canadian gasoline before August 1995. (Ethyl)
17 February 1995	Environment Canada press release stating that the Government will be taking action on MMT. (Ethyl)
24 February 1995	Industry Canada advises Environment Canada that Ethyl Canada would lose "a few tens of millions of dollars per year" — "some 50% of Ethyl Canada's total sales revenue" — if it loses the MMT business. (Ethyl)
5 April 1995	Environment Canada issues a press release that the Government has approved plans to draft legislation to prohibit the importation of and interprovincial trade in MMT. (Ethyl)
19 May 1995	Bill C-94 introduced (First Reading) (House of Commons). (Canada)
19 May 1995	Minister Copps holds a press conference detailing the Government's policy of banning the importation of and interprovincial trade in MMT. (Ethyl)
19 May 1995	Environment Canada issues a press release detailing the Government's policy of banning the importation of and interprovincial trade in MMT. (Ethyl)
2 October 1995	Bill C-94 given second reading and referred to committee (House of Commons). (Canada)
2 February 1996	Parliament prorogued. (Ethyl) Bill C-94 dies on the order paper. (Canada)
23 February 1996	The Minister for International Trade warns the Minister of the Environment that " <i>[a]n import prohibition on MMT would be inconsistent with Canada's obligations under the WTO and the NAFTA.</i> " (Ethyl)
18 April 1996	Environment Canada issues a press release announcing that the Minister of the Environment will reintroduce Bill C-94 at the third reading stage (Ethyl)
22 April 1996	Bill C-94 reinstated as Bill C-29 (Third Reading)(House of Commons) (Canada)

<u>Date</u>	<u>Event</u>
10 September 1996	Notice of [Ethyl's] Intent to Submit a Claim (Article 1119 of NAFTA). (Canada)
16 September 1996	The Ottawa Citizen publishes a letter of the Minister of the Environment in which the Minister implies that MMT endangers " <i>our children's health,</i> " " <i>the air we breathe and the water we drink.</i> " (Ethyl)
10 October 1996	The Parliamentary Secretary to the Minister of the Environment states that banning and replacing MMT will benefit Canadians, as opposed to " <i>giving all of the money to an American firm.</i> " (Ethyl)
2 December 1996	Bill C-29 passed by the House [of Commons] (Third Reading). (Canada)
3 December 1996	Bill C-29 introduced (Senate)(First Reading). (Canada)
16 – 17 December 1996	Bill C-29 given second reading and referred to committee (Senate)(Second Reading) (Canada)
9 April 1997	Bill C-29 passed by Senate (Third Reading). (Canada)
14 April 1997	[Ethyl's] Notice of Arbitration (Articles 1120(1)(c) and 1137(1)(c) of NAFTA). (Canada)
25 April 1997	Royal Assent — Enactment of Bill C-29. (Canada)
24 June 1997	Coming into force of [MMT] Act. (Canada)
2 October 1997	[Ethyl's] Statement of Claim (Articles 3 and 18 UNCITRAL Rules) and purported Consent and Waivers (Article 1121 of NAFTA). (Canada)

22. The major steps of the arbitral proceedings have been as follows:

In its Notice of Arbitration dated 14 April 1997 Ethyl appointed The Honorable Charles N. Brower as Arbitrator.

23. In a letter dated 14 July 1997 to counsel for Ethyl, Canada confirmed that it had appointed The Honorable Marc Lalonde as Arbitrator.

24. After Ethyl, by letter dated 30 June 1997, and Canada, by letter dated 29 August 1997, had informed ICSID that they had no objection to Prof. Karl-Heinz Böckstiegel being

appointed as Presiding Arbitrator, and after Prof. Böckstiegel had accepted such appointment, his appointment was confirmed by ICSID by letter dated 2 September 1997 to both Parties.

25. Having thus been constituted, the Tribunal issued a first Procedural Order on 22 September 1997 regarding certain details of the arbitral procedure and suggesting, in particular, that a Procedural Meeting of the Parties and the members of the Tribunal should be held as soon as possible.

26. With the agreement of the Parties, and without prejudice to the selection of the official place of arbitration, such a Procedural Meeting was held in New York, N.Y., U.S.A., on 2 October 1997. At that meeting, Ethyl submitted its Statement of Claim.

27. Following that Procedural Meeting, a further Procedural Order was issued by the Tribunal on 13 October 1997. Since the Parties had not been able to agree on the official place of arbitration, the Procedural Order of 13 October 1997 set forth a timetable for the filing of further submissions regarding both the place of arbitration and jurisdiction. That Procedural Order also recorded the Parties' agreement that a Hearing on jurisdiction be held on 24 and 25 February 1998.

28. On the basis of oral arguments presented at the 2 October 1997 Procedural Meeting and of written submissions filed by the Parties either at that Meeting or thereafter regarding the official place of arbitration, the Tribunal, by a Decision Regarding the Place of Arbitration dated 28 November 1997 and setting out in detail the reasons for its conclusions, designated Toronto, Canada, as the place of arbitration in this case.

29. In accordance with the timetable established in the Procedural Order of 13 October 1997, the following further principal submissions were filed by the Parties on the dates indicated:

On 27 November 1997 Canada's Statement of Defence.

On 29 December 1997 Canada's Memorial on Jurisdiction together with a volume of documents

On 30 January 1998 Ethyl's Counter-Memorial on Jurisdiction together with a volume of documents.

30. The Parties also filed a number of shorter submissions regarding various aspects of procedure and the Hearing on jurisdiction and the Tribunal issued a number of Procedural Orders. In particular, in order to enable the Parties to prepare as well as possible for the Hearing on jurisdiction, the Tribunal issued a Procedural Order on 22 January 1998 regarding procedural and logistical details of the Hearing

31. A Hearing on all issues of jurisdiction was held in Toronto, Canada, on 24 and 25 February 1998. The Parties were represented at that Hearing as follows:

Ethyl

Mr. Barry Appleton	Appleton & Associates Counsel to Ethyl Corporation
Mr. Anthony Macri	Appleton & Associates Counsel to Ethyl Corporation
Mr. Christopher R. Wall	Winthrop, Stimson, Putnam & Roberts Counsel to Ethyl Corporation
Mr. Philip Le B. Douglas	Winthrop, Stimson, Putnam & Roberts Counsel to Ethyl Corporation
Mr. Steve Mayer	Ethyl Corporation General Counsel
Mr. Pres Rowe	Ethyl Corporation

Canada

Ms. Valerie Hughes	General Counsel, Trade Law Division Department of Foreign Affairs and International Trade
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Mr. Brian Evernden	General Counsel, Civil Litigation Section Department of Justice
Mr. Mory Afshar	Counsel, Trade Law Division Department of Foreign Affairs and International Trade
Mr. Fulvio Fracassi	Legal Counsel Environment Canada Legal Services
Mr. Ian Gray	Counsel, Trade Law Division Department of Foreign Affairs and International Trade
Mr. David Haigh	Legal Adviser Burnet, Duckworth & Palmer, Calgary
Mr. Jon Johnson	Legal Adviser Goodman Phillips & Vineberg, Toronto
Ms. Lynn Pettit	Secretary, Trade Law Division Department of Foreign Affairs and International Trade
Mr. John Tyhurst	Counsel, Civil Litigation Section Department of Justice
Ms. Denyse Mackenzie	Director, Investment Trade Policy Division Department of Foreign Affairs and International Trade
Ms. Ann Ewasechko	Policy Adviser, Investment Policy Division Department of Foreign Affairs and International Trade

32. A transcript was made of that Hearing, and copies thereof were provided to the Parties and the members of the Tribunal a few hours after the end of each session of the Hearing.

33. On the second day of the Hearing, Canada informed Ethyl and the Tribunal that it had just received a letter dated 24 February 1998 from the Government of the United Mexican States ("Mexico"), copies of which (in Spanish) were provided to Ethyl and the members of the Tribunal, in which Mexico informed Canada and the United States as the other NAFTA Parties as well as Ethyl and the Tribunal that:

*Mexico desires to exercise its right, in accordance with Article 1128 of the [NAFTA] Treaty, to present to the Arbitral Tribunal a communication on questions related to the interpretation of the NAFTA which have been raised in the arguments of the case.*

*We would be grateful if the Government of Canada would inform the Tribunal that Mexico will present its written comments within the next 15 days.*

(Unofficial translation provided by Canada )

34. The Tribunal requested Canada to inform Mexico that its submission should be received by the Tribunal within 15 days and in an English text, inasmuch as English is the language of this arbitration.

35. At the same time, in order to avoid any possibility of a later similar submission by the Government of the United States causing a further delay in the proceedings, the Tribunal requested Ethyl to contact that Government and advise it of the importance of also proceeding expeditiously, in the event that it, too, should wish to avail itself of its rights under Article 1128<sup>3</sup>.

36. Mexico filed its submission in accordance with Article 1128 on 11 March 1998.

37. The United States has not sought to make any submission under Article 1128.

38. The Tribunal, by Procedural Order dated 16 March 1998, granted the Parties until 1 April 1998 to submit any comments on Mexico's submission. On that date Ethyl submitted such comments and Canada indicated it did not intend to do so.

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<sup>3</sup> **Article 1128: Participation by a Party**

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

39. This concluded the proceedings up to the point at which the Tribunal now issues this Award on Jurisdiction.

#### V Major Facts and Contentions Regarding Jurisdiction

40. In this dispute over jurisdiction, the major facts are undisputed. The Parties disagree, however, fundamentally and in many details, regarding the legal conclusions to be drawn from those facts

41. The factual side of the dispute is seen in the events that have been recounted in the chronology in Paragraph 21 above of this Award on Jurisdiction. Insofar as the Parties refer to these events and the factual side in their legal arguments, such references will be included in the summary of the major legal arguments presented by the Parties in the following Section VI of this Award on Jurisdiction. Insofar as the Tribunal considers them relevant to its conclusions on jurisdiction, the Tribunal will refer to them in Section VII of this Award on Jurisdiction

#### VI Major Legal Arguments of the Parties and Mexico on Jurisdiction

42. A brief summary of the major legal arguments presented by the Parties on jurisdiction is given below. Many further details are included in the various written submissions of both Parties, in particular, by Canada in its Statement of Defence, its Memorial on Jurisdiction and the volume of documents filed together with that Memorial; and by Ethyl in its Counter-Memorial on Jurisdiction and the volume of documents filed together with that Counter-Memorial.

##### I Arguments of Canada Objecting to Jurisdiction

43. Canada's objections to jurisdiction set forth in its Statement of Defence, as previously noted, fall into two categories. Canada first is of the view that because Ethyl had not

met certain requirements of NAFTA's Chapter 11 at the time it filed its Notice of Arbitration, *i.e.*, as of 14 April 1997, this Tribunal is absolutely barred from proceeding. In Canada's view, Claimant's only alternative would be to commence a new, separate arbitration addressed to the MMT Act (for which, it appears the Parties agree<sup>4</sup>, the requirements in issue have in the meantime been met).

44. Canada argues, second, that in any event the claims set forth in Ethyl's Notice of Arbitration (and in its Statement of Claim) are outside the scope of Canada's consent to arbitration set forth in Chapter 11. Furthermore, Canada asserts, Ethyl's Statement of Claim, in relying on final enactment of the MMT Act, to which no reference was made in its Notice of Arbitration, introduces an inadmissible new claim. It is apparent that the issues in this second category arise in good part out of the fact that at the time Ethyl submitted its Notice of Arbitration, *i.e.*, 14 April 1997, the MMT Act, while passed by the House of Commons and the Senate, had not received Royal Assent and had not come into force.

45. In order to display fully and accurately Canada's jurisdictional contentions, the Tribunal quotes below virtually verbatim paragraphs 20-23 of Canada's Statement of Defence. To facilitate understanding thereof, the Tribunal adds footnotes setting forth the portions of Chapter 11 which Canada cites. The text follows:

*Position on Jurisdictional Issues*

20. *The dispute resolution process laid down by the Parties in Chapter 11 contemplates a series of steps that must be taken before a claim is properly before a Tribunal. They include:*

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<sup>4</sup> Page 224, line 15 - page 227, line 13, of the transcript of the Hearing on jurisdiction.

(a) a Party must adopt or maintain a measure that breaches an obligation described in Article 1116(1)<sup>5</sup> of the NAFTA and the claimant must have "... incurred loss or damage by reason of, or arising out of, that breach";

(b) the claimant must wait for six months after the events giving rise to the claim before submitting the claim to arbitration under Article 1120<sup>6</sup> of the NAFTA;

(c) before submitting its claim to arbitration the claimant must submit written notice of its intention to submit the claim for arbitration. That notice must describe the provisions of NAFTA "alleged to have been breached" by the Party (Article 1119)<sup>7</sup>; and

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<sup>5</sup> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

<sup>6</sup> **Article 1120: Submission of a Claim to Arbitration**

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

<sup>7</sup> **Article 1119. Notice of Intent to Submit a Claim to Arbitration**

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

(a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;

(continued ...)

*(d) a disputing investor may submit a claim "only if" it delivers the consent and waivers described in Article 1121<sup>8</sup> "in the submission of [the] claim to arbitration", that is, when the Notice of Arbitration is received by the disputing Party (Article 1137(1)(e)).<sup>9</sup>*

(continued)

- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim; and
- (d) the relief sought and the approximate amount of damages claimed.

<sup>8</sup> **Article 1121: Conditions Precedent to Submission of a Claim to Arbitration**

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
  - (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
  - (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, *i.e.*, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:
  - (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and
  - (b) Annex 1120 1(b) shall not apply.

<sup>9</sup> **Article 1137: General**

Time when a Claim is Submitted to Arbitration

1. A claim is submitted to arbitration under this Section when

(continued ...)

21. *Canada asserts that because it had not adopted or maintained a measure within the meaning of Articles 201<sup>10</sup> and 1101<sup>11</sup> of the NAFTA when Ethyl submitted its claim to arbitration, and because Ethyl failed to comply with Articles 1119 through 1121 and 1137 of Chapter 11 of the NAFTA, the claim set out in the Statement of Claim is null and void and this Tribunal is utterly without jurisdiction to entertain it.*

22. *Without restricting the generality of the foregoing:*

*(a) Canada pleads and relies upon Articles 1121 and 1137 of the NAFTA and says that Ethyl failed to deliver the required consent and waivers with the Notice of Arbitration and is therefore barred from proceeding to arbitration.*

*(b) Canada pleads and relies upon Articles 201 (definition of the word "measure"), 1101(1), 1116(1), 1137 and 2004<sup>12</sup> (which deals with the right of a Party to challenge "an actual or proposed (emphasis added) measure") of the NAFTA and says that:*

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(...continued)

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

<sup>10</sup> **Article 201: Definitions of General Application**

1. For purposes of this Agreement, unless otherwise specified:

.....  
measure includes any law, regulation, procedure, requirement or practice .....

<sup>11</sup> **Article 1101: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- .....
- (b) investments of investors of another Party in the territory of the Party; and
  - (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

<sup>12</sup> **Article 2004: Recourse to Dispute Settlement Procedures**

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

- (i) *to the extent that the claim is based on statements made in support of proposed legislation, those statements are neither "measures" nor "measures relating to" "investors" or "an investment" and cannot, therefore, be the subject of proceedings under Chapter 11 of the NAFTA;*
  - (ii) *to the extent the claim is based on the passage of a bill through the House of Commons and the Senate of Canada, passage of a bill that has not yet come into force is neither a measure, nor is it a measure relating to an investment or an investor and cannot, therefore, be the subject of proceedings under Chapter 11 of the NAFTA;*
  - (iii) *Ethyl's submission to arbitration is void in that the legislation complained of in the Statement of Claim had not been enacted or come into force at the time the claim was submitted. There was therefore no measure nor was there any measure relating to an investment or an investor in effect upon which Ethyl could found an alleged breach of any obligation under Chapter 11;*
- (c) *Canada pleads and relies upon Articles 201 (definition of the word "measure"), 1101(1), 1116(1), 1120(1) and 1137 of the NAFTA and says that Ethyl failed to comply with conditions precedent for advancing the claim set out in the Statement of Claim and is therefore barred from proceeding with this arbitration. Ethyl failed to wait six months from the date of an event giving rise to a breach before submitting the claim to arbitration and changed the basis of its claim from an attack on proposed legislation (a Bill) in its Notice of Arbitration to actual legislation (the "Act") in its Statement of Claim;*
- (d) *Canada pleads and relies upon Article 1110(1) and 1101(1) and says that Ethyl's claim in respect of expropriation of its intellectual property, reputation, and goodwill throughout the world is not within the scope of the NAFTA;*
- (e) *further, Canada pleads that the claim is not within the scope of Chapter 11 because the proposed legislation*

*complained of does not constitute a measure relating to an investment or an investor within the meaning of Article 1101(1). If it is a measure, which is denied, it relates to trade in goods within the meaning of Chapter 3 of the NAFTA; and,*

*(f) in the event that the proposed legislation relates to both trade in goods under Chapter 3 and to investment under Chapter 11, Canada pleads and relies on Article 1112(1)<sup>13</sup> of the NAFTA and says that there is an inconsistency between the two Chapters that must be resolved in favour of Chapter 3.*

23. . . . [T]he Statement of Claim refer[s] to alleged defamatory statements without describing the statements at issue. Assuming that the statements referred to . . . are the statements [of Canadian Government officials in relation to the subject-matter of Bills C-94 or C-29 set forth in Ethyl's Notice of Intent and in its Notice of Arbitration] those statements are not "measures adopted or maintained by [Canada]" within the meaning of Articles 201 and 1101 of the NAFTA, nor could they, or their alleged effects, constitute expropriation or a measure "tantamount to expropriation" "of an investor of another Party in [Canada's] territory" or of an investment "in [Canada's] territory" within Article 1110 of the NAFTA. Consequently, these claims are not the proper subject matter of a claim under Chapter 11 of NAFTA. In any event, defamation is properly the subject matter of domestic law and is not protected by international law or the NAFTA.

## 2. Arguments of Ethyl Regarding Jurisdiction

46. In response to this extensive jurisdictional attack Ethyl points out, in essence, that at least by the time of the Hearing on these issues held 24-25 February 1998 all the requirements of Chapter 11 cited by Canada, to the extent applicable, had been met. Specifically, according to Ethyl:

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<sup>13</sup> **Article 1112: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency

- (i) the MMT Act, which undoubtedly is a “measure” within the meaning of Article 201 of NAFTA, had come into force on 24 June 1997,
- (ii) although the six-month period referred to in Article 1120 was inapplicable in the circumstances, it had elapsed, and
- (iii) the express consent to arbitration and waivers required by Article 1121 had been delivered with the Statement of Claim in a form not questioned by Canada.

Ethyl contends that the fact that any of these requirements had not been fulfilled as of 14 April 1997 has no jurisdictional significance

47. As to the further issues regarding the scope of Chapter 11, Ethyl notes that:

- (i) it complains of acts against it within the territory of Canada for which it is entitled to compensation, including for damages resulting to it outside of Canada; and
- (ii) to the extent, if at all, that the acts of which it complains constitute acts regarding not only its investment in Canada, but also trade in goods subject to Chapter 3, the Tribunal nonetheless is empowered to apply Chapter 11.

### 3. Points Raised by Mexico Regarding Jurisdiction

48. In exercise of its right to participate in this arbitration pursuant to Article 1128,<sup>14</sup> Mexico submitted views.<sup>15</sup> Mexico makes three points specifically supporting the position of Canada:<sup>16</sup>

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<sup>14</sup> See note 3, *supra*.

<sup>15</sup> Because Mexico’s notice was received only on the second and last day of the Hearing on jurisdiction, Ethyl raised an issue of timeliness. In these circumstances the Tribunal finds it appropriate to underscore the importance of NAFTA Parties exercising their Article 1128 rights in a timely fashion. Indeed, Article 1127 is designed to facilitate timely intervention under Article 1128 by providing:

**Article 1127: Notice**

A disputing Party shall deliver to the other Parties

- (a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted, and

(continued...)

(i) *On the facts, this case involves a measure relating to trade in goods. The enforcement of rights that may accrue under Chapter Three accrue not to the Claimant but to the United States. If the United States is of the view that Canada has imposed a measure which constitutes an import barrier under Article 309, which cannot be justified under other provisions of the NAFTA, it is entitled to commence dispute settlement proceedings under Chapter Twenty.*

*As in other potential international trade cases, the present Claimant is fully entitled to petition the United States authorities to commence such proceedings. However, it is not open to the Claimant to use the investor-State mechanism to launch what is in reality a challenge against a trade measure in the guise of an investment dispute.*

.....

(ii) *... [T]he opening language of Article 1101(1)(a) states that the chapter "applies to measures adopted or maintained by a Party relating to ... [investors or investments]". Thus, to properly be the subject of an investor-State arbitration, the measure at issue must have been in effect at the time that the arbitral process was initiated. Given the express contemplation of proposed measures in other parts of the NAFTA, this language cannot be interpreted to reach proposed measures. In Mexico's submission, therefore, the use of the verbs "adopt" and "maintain" means that the measure complained of must already be in existence at the time that the proceeding is initiated, i.e., at the time the notice of claim is filed pursuant to Article 1119.*

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(... continued)

(b) copies of all pleadings filed in the arbitration.

The Tribunal notes, as it was informed by Canada by letter dated 2 March 1998 pursuant to the Tribunal's request, that the Government of Mexico had been informed of Canada's jurisdictional objections as early as 3 December 1997 and that on 11 December 1997 Canadian Government representatives had met in Ottawa with a Mexican Embassy officer and Mexico's legal counsel "to discuss Canada's jurisdictional arguments and the possibility of Mexico filing a submission pursuant to Article 1128." Given that Mexico filed its substantive submission within fifteen days after the Hearing on jurisdiction, however, as it had undertaken to do and as the Tribunal had requested, and given that the Parties were accorded a period of three weeks within which to comment thereon, of which opportunity Ethyl availed itself, the Tribunal perceived no prejudice to Ethyl in accepting Mexico's submission.

<sup>16</sup> The texts are quoted verbatim from Mexico's submission.

*This is particularly so in the case of Chapter Eleven, since a measure that has not yet produced legal effects cannot cause damages for which compensation or restitution may be due.*

*(iii) Mexico is also of the view that arbitral tribunals established under Chapter Eleven must adhere to the requirements of Section B for the initiation of arbitration proceedings. By entering in the Agreement, the NAFTA Parties have given a general consent to submit to all arbitrations commenced against them. Having done so, this places a special duty upon tribunals to ensure that claimants comply with the necessary requirements set out in the Chapter. With respect to this particular case, this means that the appropriate waivers must have been filed at the proper time, that the claim should have been ripe at the time that it was filed, and that the claimant not be permitted to change its claim from a non-arbitrable "non-measure" to an arbitrable measure during the process. The language of Articles 1119 and 1120 is clear. The Agreement has to have been allegedly breached at the time that the Notice of Intent is filed and six months must have elapsed "since the events giving rise to a claim". Section B of Chapter Eleven is a significant remedy from the perspective of all three NAFTA Parties, and it is one which calls for observance of such requirements by prospective claimants.*

#### 4 Points Made by Ethyl in Response to Mexico's Submission

49. Canada advised the Tribunal by letter dated 1 April 1998 that it did "not intend to make comments in respect of Mexico's submissions."

Ethyl commented briefly as follows:

(i) As regards the "trade in goods" issue, it called attention to a statement by counsel for Canada at the Hearing on jurisdiction that Canada "didn't think it was an issue that was absolutely critical to be disposed of at this hearing."<sup>17</sup>

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<sup>17</sup> Page 298, lines 12-14, of the transcript of the Hearing on jurisdiction

(ii) "Even Canada concedes that a measure was adopted no later than April 25, 1997 when the MMT Act received Royal Assent," and therefore the "only question presently before the Tribunal is whether Ethyl violated a requirement to wait six months after the 'events giving rise to the claim' and, if so, what is the proper remedy for this alleged procedural breach." Thus "the Tribunal may never need to decide what a measure is," and, indeed, "should avoid" doing so.

(iii) "... Ethyl is not asserting that these procedures [of Section B] should be ignored." The question instead is "whether a procedural error may be remedied," an issue on which "Mexico's submission takes no position . . . ."

## VII. Conclusions of the Tribunal

### 1. General Considerations for the Interpretation of the Relevant NAFTA Provisions

#### (a) Applicable Law

50. The Tribunal finds it useful to set out here the rules it is required to apply in interpreting and applying NAFTA. Article 1131 of NAFTA is the first guide:

#### *Article 1131: Governing Law*

1. *A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*

2. *An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.*

No Party has argued, and the Tribunal is not otherwise informed, that the NAFTA Commission has provided any interpretation here relevant. The Tribunal therefore looks to NAFTA itself and "applicable rules of international law."

51. The applicable rules of international law include the Vienna Convention on the Law of Treaties ("Vienna Convention"), done at Vienna, May 23, 1969, entered into force,

January 27, 1980, 1155 U N T S 331, reprinted in 8 I.L.M. 679 (1969), in particular, Articles 31 and 32.

*Article 31. General Rule of Interpretation*

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

- (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
- (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

3. *There shall be taken into account, together with the context:*

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
- (c) Any relevant rules of international law applicable in the relations between the parties.*

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

*Article 32. Supplementary Means of Interpretation*

*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

- (a) Leaves the meaning ambiguous or obscure; or*

(b) *Leads to a result which is manifestly absurd or unreasonable.*

52 Canada is a party to the Vienna Convention, having acceded to it on 14 October 1970, and the United States accepts it as a correct statement of customary international law<sup>18</sup> Moreover, given that 84 States are parties to the Vienna Convention (as of 15 April 1998), and that Articles 31 and 32 “were adopted without a dissenting vote,” these Articles clearly “may be considered as declaratory of existing law”<sup>19</sup>

53. On the procedural level, Article 1120(2) of NAFTA provides that:

*The applicable arbitration rules [here the UNCITRAL Arbitration Rules] shall govern the arbitration except to the extent modified by this Section [B].*

(b) Determination of Jurisdiction as a Preliminary Question

54 Article 21(4) of the UNCITRAL Arbitration Rules, which is not modified by any provision of Section B, provides:

*In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.*

The present jurisdictional phase takes place in adherence to Article 21(4).

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<sup>18</sup> See *The Islamic Republic of Iran v. The United States of America*, Doc. No. 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. Cl. Trib. Rep. 251, 259 (1984). U.S. courts look to the Convention when interpreting the text of a treaty. See, e.g., *Kreimerman v. Casa Veerkamp, A.S. de C.V.*, 22 F.3d 634, 638 (5<sup>th</sup> Cir. 1994), cert. den'd., 115 S.Ct. 577 (1994); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975), cert. den'd., 429 U.S. 890 (1976)

<sup>19</sup> De Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 42 (1978) (“Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law”).

(c) Particular Considerations Relevant to the Determination of Jurisdiction

55 The Tribunal considers it appropriate first to dispense with any notion that Section B of Chapter 11 is to be construed “strictly.”<sup>20</sup> The erstwhile notion that “in case of doubt a limitation of sovereignty must be construed restrictively”<sup>21</sup> has long since been displaced by Articles 31 and 32 of the Vienna Convention.<sup>22</sup> As was so aptly stated by the Tribunal in *Amco Asia Corporation v. Indonesia (Jurisdiction)*, ICSID Case No. ARB/81/1 (Award of 25 Sept. 1983), *reprinted in* 23 I.L.M. 351, 359 (1983) and 1 ICSID Rep. 389 (1993).

*“[L]ike any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law.*

(Emphasis in original.)

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<sup>20</sup> Canada’s statement at Paragraph 23 of its Memorial on Jurisdiction that “these procedures [of Section B] must be strictly adhered to for a Tribunal to have jurisdiction to hear a claim under Chapter Eleven” appears at least to hint at such a principle. Canada’s Memorial on Jurisdiction later quite clearly urges this principle in stating (in the heading prefacing Paragraph 49) that “Jurisdiction Must Be Strictly Interpreted. . . .”

<sup>21</sup> *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J., ser. A/B, No. 46, at 167 (Judgment of 7 June).

<sup>22</sup> *The Vienna Convention resolved past debates concerning the wisdom of pronouncements by international tribunals that limitations of sovereignty must be strictly construed.*

*United States-Iran, Case No. A17, Decision No. DEC 37-A17-FT (May 13, 1985)(Brower, J., concurring), reprinted in* 8 Iran-U.S. Cl. Trib. Rep. 189, 207 (1989).

56. Given the relevance under Article 31(1) of the Vienna Convention of NAFTA's "object and purpose," it is necessary to take note of NAFTA Article 102, particularly its (1)(c) and (e):

**Article 102: Objectives**

1. *The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:*

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;*
- (b) promote conditions of fair competition in the free trade area;*
- (c) increase substantially investment opportunities in the territories of the Parties;*
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
- (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and*
- (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.*

2. *The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*

The Tribunal reads Article 102(2) as specifying that the "object and purpose" of NAFTA within the meaning of those terms in Article 31(1) of the Vienna Convention are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the Vienna Convention

## 2. The Distinction Between Jurisdictional Provisions and Procedural Rules

58. It is important to distinguish between jurisdictional provisions, *i.e.*, the limits set to the authority of this Tribunal to act at all on the merits of the dispute, and procedural rules that must be satisfied by Claimant, but the failure to satisfy which results not in an absence of jurisdiction *ab initio*, but rather in a possible delay of proceedings, followed ultimately, should such non-compliance persist, by dismissal of the claim. Canada argues that all of its objections fall into the first category, whereas Ethyl is of the view that such objections as may have been valid at one point fall into the second category and have since been obviated.

59. The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties. Unlike ICSID and its Additional Facility Rules, there exist under the UNCITRAL Rules no other jurisdictional criteria.<sup>23</sup> It is clear that Ethyl has consented to this arbitration by the very act of commencing it. Normally such act is taken as consent to the arbitration thereby initiated.<sup>24</sup>

60. The fundamental jurisdictional issue here, therefore, is whether Canada has consented to this arbitration. It has two aspects, as the jurisdictional proceedings have underscored. One aspect is that of scope: Is Ethyl's claim within the types of claims that Canada

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<sup>23</sup> For a discussion of ICSID's objective criteria see *Vacuum Salt Products Limited v. The Government of the Republic of Ghana*, ICSID Case No. ARB/92/1 (Award of 16 Feb. 1994), reprinted in 9 ICSID Rev.-F.I.L.J. 72 (1994)

<sup>24</sup> See, e.g., Christoph Schreuer, *Commentary on the ICSID Convention*, 11 ICSID Rev.-F.I.L.J. 318, para. 277 (1996) (In the context of ICSID, jurisdiction may be established by virtue of an offer to arbitrate by a host State contained in its legislation or in a treaty, which may be accepted by an investor. The time of mutual consent is determined by the investor's acceptance of the offer. This offer may be accepted through bringing a request for arbitration to the Centre.)

has consented in Chapter 11 to arbitrate? The other aspect is that of conditions to consent. To what extent, if any, is Canada's consent to arbitration in Chapter 11 conditioned absolutely on the fulfillment of specified procedural requirements at a given time?

3. Does Ethyl Claim a Breach Under Chapter 11?

(a) Claim for Breach of Section A

61. On the face of the Notice of Arbitration and the Statement of Claim, Ethyl states claims for alleged breaches by Canada of its obligations under Article 1102 (National Treatment), Article 1106 (Performance Requirements) and Article 1110 (Expropriation and Compensation). The Claimant indisputably is an "investor of a Party," namely the United States, and alleges that it has "incurred loss or damage by reason of, or arising out of," such breaches, all as required by Article 1116(1). It likewise is beyond doubt that Claimant has acted within three years of the time when it "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] incurred loss or damage" as stipulated in Article 1116(2). Claimant's Statement of Claim satisfies *prima facie* the requirements of Article 1116 to establish the jurisdiction of this Tribunal. As was stated in Administrative Decision No. II (1922), Decisions and Opinions, Mixed Claims Commission, United States and Germany (1925) 6-7, quoted in K.S. Carlston, *The Process of International Arbitration* 77 (1946): "When the allegations in a petition . . . bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches." See also *Ambatielos Case (Greece v. United Kingdom)*, merits: *obligation to arbitrate*, 1953 I.C.J. Rep. 10, 11-12 (Judgment of May 19) ("[T]he words 'claims . . . based on the provisions of the . . . Treaty of 1886' . . . can only mean claims depending for support on the provisions of the Treaty of 1886 . . . The fact that a claim purporting to be based on the Treaty may eventually be

found by the Commission of Arbitration to be unsupportable under the Treaty, does not of itself remove the claim from the category of claims which, for the purpose of arbitration, should be regarded as falling within the terms of the Declaration of 1926.”), and *United States of America ex rel. Albert Flegenheimer v. The Italian Republic*, Case No. 20, Decision No. 182, 5 Decisions Italian-United States Conciliation Commission 18-19 (Sept. 20, 1958).

(b) Relation to Investment or Trade in Goods

62. Canada asserts that since the MMT Act excludes MMT from importation into Canada, and prohibits inter-provincial trade in MMT, it should be viewed as affecting trade in goods and therefore falling within NAFTA Chapter 3, which covers “National Treatment and Market Access for Goods” within a broader Part 2 on “Trade In Goods” (which embraces Chapters 3 – 8). The argument made is that issues of trade in goods under Chapter 3 give rise to government-to-government dispute settlement procedures under Section B of Chapter 20, and, it is contended, thereby necessarily exclude the possibility of investor-State arbitration under Chapter 11.

63. Canada cites no authority, and does not elaborate any argument, however, as to why the two necessarily are incompatible. Canada confines itself in this regard to a reference to Article 1112, which simply requires that “In the event of any inconsistency between this Chapter [11] and another Chapter [e.g., 3], the other Chapter shall prevail to the extent of the inconsistency.”

64. As Ethyl has pointed out, Canada indicated at the Hearing on jurisdiction that this was not “an issue that was absolutely critical to be disposed of at [that] hearing.” In the

circumstances, further treatment of this issue, if any, must abide another day. The Tribunal cannot presently exclude Ethyl's claim on this basis.

(c) Requirement of a "Measure"

65. The bulk of the written and oral proceedings have been devoted to what constitutes a "measure" within the meaning of Article 1101, which stipulates that Chapter 11 (including, therefore, Articles 1102, 1106 and 1110, all of which Ethyl claims Canada has breached) "applies to measures adopted or maintained by a Party." ("Measure" appears also several times in Article 1106<sup>25</sup>, and Article 1110 addresses specifically "a measure tantamount to nationalization or expropriation.") Succinctly, Canada has argued that no legislative action short of a statute that has passed both the House of Commons and the Senate and has received Royal Assent constitutes a "measure" subject to arbitration under Chapter 11. Since at the time Ethyl's claim was "submitted to arbitration," *i.e.*, 14 April 1997, by delivery of its Notice of Arbitration

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<sup>25</sup> Specifically, Article 1106(2) and (6):

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.
  
6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:
  - (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
  - (b) necessary to protect human, animal or plant life or health; or
  - (c) necessary for the conservation of living or non-living exhaustible natural resources.

(*see* Article 1137(1)(c) at note 9, *supra*), the MMT Act had not yet received Royal Assent (which was forthcoming eleven days later), Canada argues that jurisdiction fails

66. In addressing what constitutes a measure the Tribunal notes that Canada's *Statement on Implementation of the North American Free Trade Agreement*, Can. Gaz. Part IC(1), Jan 1994 (hereinafter *Canadian Statement on Implementation of NAFTA*) (at 80) states that:

*The term "measure" is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions.*

This is borne out by Article 201(1), which provides that:

*measure includes any law, regulation, procedure, requirement or practice.*

Clearly something other than a "law," even something in the nature of a "practice," which may not even amount to a legal stricture, may qualify.

67. Nonetheless, Canada argues, not without effect, that an unenacted legislative proposal, which is unlikely to have resulted even in a "practice," cannot constitute a measure. It is reinforced in this connection by the fact that Articles 1803(1) and (2) employ the term "proposed or actual measure:"

1. *To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.*

2. *On request of another Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not that other Party has been previously notified of that measure.*

Canada draws further strength from the reference to “an actual or proposed measure” in Article 2004, which provides “Recourse to Dispute Settlement Procedures” by the three NAFTA Parties themselves. The implication is that whereas any of these may complain of a “proposed measure,” an investor cannot.

68. In the end, however, the MMT Act did come into force 24 June 1997, after having received Royal Assent on 25 April 1997, just eleven days following Claimant’s delivery of its Notice of Arbitration. The MMT Act is, Canada concedes, a measure within the meaning of Article 1101(1)<sup>26</sup>. Canada’s objection, then, is that Ethyl “jumped the gun,” and, having done so, should be required to commence an entirely new arbitration, which, it is conceded, it can (subject to any scope limitations).

69. The Tribunal notes that the MMT Act, according to the allegations of Claimant’s Notice of Intent, Notice of Arbitration, and Statement of Claim, was the realization of a legislative program of the Canadian Government, sustained over a period of time. As of the date on which Claimant delivered its Notice of Intent pursuant to Article 1119, on 10 September 1996, Bill C-94, the original proposal that resulted in the MMT Act and that had died after it had had a second reading (and been reported back by committee without amendment) due to the prorogation of Parliament, had been reinstated as Bill C-29 and deemed to have been read the second time, reported out of committee without amendment and subject to third reading. In other words, the new Parliament was persuaded by the Government to pick up where the previous one had left off. Within the 90-day minimum period Ethyl was then required by Article 1119 to wait before

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<sup>26</sup> See note 28, *infra*

commencing arbitration, C-29 had passed the House of Commons and been introduced in the Senate, which, the Tribunal understands from Canada's legislative expert witnesses, generally concurs in House action<sup>27</sup> As already noted, by the time Claimant's Notice of Arbitration was delivered on 14 April 1997, Bill C-29 had in fact passed the Senate, five days earlier on 9 April 1997, and only awaited Royal Assent, which, the Tribunal is given to understand, is granted as a matter of course once the Government has requested it<sup>28</sup>

In any event, the MMT Act is, as of 24 June 1997, a reality, and therefore the Tribunal is now presented with a claim based on a "measure" which has been "adopted or maintained" within the meaning of Article 1101.

(d) Limitation of Claims to the Territory of Canada

70. Canada asserts that "Ethyl's claim in respect of expropriation of its intellectual property, reputation, and goodwill throughout the world is not within the scope of NAFTA," since Article 1101(1)(b) applies Chapter 11 only to "investments of investors of another [NAFTA] Party *in the territory of the Party*,"<sup>29</sup> and Article 1110, one of the three provisions alleged to have been breached by Canada, likewise addresses nationalizations or expropriations by

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<sup>27</sup> Canada's three witnesses all dealt with the legislative process. They were Raymond L. du Plessis, for 20 years Law Clerk and Parliamentary Counsel to the Senate of Canada; Ilona Nickels, a Congressional Consultant in the United States with, *inter alia*, 13 years service in the Congressional Research Service; and Professor Alexander Wayne MacKay, an expert on Canadian constitutional law.

<sup>28</sup> Canada concedes that a Bill becomes a "measure" upon the giving of Royal Assent, even though the Act may not come into force in accordance with its terms for some time, *e.g.*, 60 days as in the case of the MMT Act. Pages 184 (line 17-185 (line 18) of the transcript of the Hearing on jurisdiction.

<sup>29</sup> Article 1101(c) applies Article 1106 specifically to "all investments *in the territory of the Party*." (Emphasis added)

a NAFTA Party of “an investment of an investor of another Party *in its territory*” (Emphasis added )

71. A distinction must be made, however, between the locus of the Claimant’s breach and that of the damages suffered. It is beyond doubt that the MMT Act was adopted, and purports to have, and in fact has, legal force only in Canada. It bans MMT from importation into Canada and prevents its movement between provinces. Ethyl’s claim is premised on the legal force the MMT Act has in relation to its investment in Canada, *i.e.*, Ethyl Canada.

72. Ethyl has argued, however, that the damages resulting to it in consequence of the MMT Act include losses suffered outside of Canada. As Ethyl itself succinctly notes (at Paragraph 97 of its Counter-Memorial on Jurisdiction), “the Investor [Ethyl] claims that an expropriation occurred inside Canada, but the Investor’s resulting losses were suffered both inside and outside Canada.”

73. Determination of the extent to which the damages claimed by Ethyl are in fact compensable under Chapter 11 is an issue that can be considered by the Tribunal only in the context of the merits. At this stage detailed allegations regarding damages have not been advanced, as is reflected in the Tribunal’s Procedural Order dated 13 October 1997, which expressly provided that in the submission of Canada’s Statement of Defence “no detailed response to issues of damages is required.” Indeed, at the Hearing on jurisdiction held 24-25 February 1998 the Parties appeared to concur that if the Tribunal would find that it has jurisdiction, they would favor bifurcation of liability and damages, each to be addressed in a separate stage

The Tribunal therefore decides that it cannot at this time exclude any portion of the claim due to considerations of territoriality.<sup>30</sup>

4 Procedural Requirements

74. It remains to determine whether our jurisdiction fails due to lack of fulfillment by Ethyl of any of the several procedural requirements to which Canada points.

There is no doubt that Chapter 11 embodies certain requirements that an arbitrating investor must meet before a Tribunal can proceed to consider its claim. The question rather is whether the NAFTA Parties intended that any of these conditions must be fulfilled prior to or simultaneously with delivery of a Notice of Arbitration in order for a Tribunal's jurisdiction to attach.

75. Canada argues that such is the case. Ethyl, noting that by now all of the requirements cited by Canada have been fulfilled, urges the contrary. In effect, it takes the view that their fulfillment was a prerequisite to its claim being admissible, and thus impliedly accepts that a prolonged absence of compliance with them would have justified dismissal of the claim. It contends, however, that our jurisdiction *ab initio* cannot be denied. Ethyl adds the quite practical points that Canada has in no way been prejudiced, that Canada concedes Ethyl could now commence a new arbitration addressed to the MMT Act with all conditions fulfilled, and hence

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<sup>30</sup> Accordingly, the Tribunal does not decide what significance, if any, is to be attributed to the fact that Article 1106, like Article 1110, includes the phrase "in its territory," whereas Article 1102 does not.

that the sole result of a dismissal for lack of jurisdiction on these grounds would be the inefficiency, and, as Ethyl sees it, the injustice, of having to “start all over again.”

(a) The Requirement of Consultation or Negotiation

76. While Canada does not raise the point directly, it could be understood as implying that Ethyl failed to heed Article 1118, styled “Settlement of a Claim through Consultation and Negotiation:”

*The disputing parties should first attempt to settle a claim through consultation or negotiation.*

77. It is difficult to credit the possibility, however, that Canada would through consultation or negotiation desist from a course which, according to Claimant’s allegations, was determined on and persisted in by the Canadian Government through two Parliaments as a matter of important national policy. Certainly, Canada has given no indication that it would have relented and the Tribunal discerns none.

78. In any event, Claimant’s undisputed proof in this phase of the arbitration is that it in fact approached Canada as urged by Article 1118 and was rebuffed. Through a witness affidavit of Mr. Jeffrey Paul Smith, Vice President, Public Affairs, and Deputy General Manager, Marketing, of the Ottawa office of Hill and Knowlton Canada, sworn to 28 January 1998, Ethyl details attempts at high levels to achieve a mutually satisfactory solution, beginning with the introduction of Bill C-94. In particular, Mr. Smith confirms that at a meeting held with Canadian Government officials on 12 November 1996, two months following delivery of Ethyl’s Notice of Intent, “[n]one . . . claimed to have authority to consult or negotiate.” He specifically identified “Mr. [John] Gero, the senior representative from the International Trade Branch,” with whom counsel for Ethyl had exchanged three letters dated 5 and 8 (two) November 1996 in his capacity

as Director General, Trade Policy Bureau II, Department of Foreign Affairs and International Trade. It is noteworthy that on 12 November 1996, apparently just moments prior to that meeting, counsel for Ethyl received a telefaxed message from Mr. Steve Brereton, Investment Trade Policy Division, stating that “apparently it needs to be clarified that, in our view, today’s meeting is not a consultation.”<sup>34</sup>

(b) Notice of Intent to Arbitrate and The Six-Month Rule of Article 1120

79. Claimant’s Notice of Intent to Submit a Claim to Arbitration pursuant to Article 1119 was delivered 10 September 1996. More than seven months elapsed from then until 14 April 1997, when Claimant delivered its Notice of Arbitration and thereby submitted its claim to arbitrate pursuant to Article 1137(1)(c). Thus the former was delivered “at least 90 days before” the latter as required by Article 1119.

80. Canada’s only objection as regards Article 1119 is that it appears to question the effectiveness of the Notice of Intent when, in its view, neither at the date of its delivery, nor at the time of the subsequent delivery of the Notice of Arbitration, could Canada have “breached an obligation” under Section A of Chapter 11, which is the basis of its consent to arbitration in Article 1116, because no “measure” was in effect as required by Article 1101.

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<sup>34</sup> It is possible that the Canadian officials feared that admitting a “consultation” might compromise the position that Bill C-94, then pending third reading in the House of Commons, was not a “measure.”

81. Similarly, Canada argues forcefully that Claimant failed to comply with the requirement of Article 1120 that it is only “provided that six months have elapsed since the events giving rise to a claim [that] a disputing investor may submit the claim to arbitration.”

82. A claim is “submitted to arbitration” under the UNCITRAL Arbitration Rules, according to Article 1137(1)(c), when “the Notice of Arbitration . . . is received by the disputing Party.” Claimant’s Notice of Arbitration was received 14 April 1997. Therefore, according to Canada, as of six months earlier, namely 14 October 1996, “events giving rise to a claim” must have existed. Canada maintains that since as of 14 October 1996 Bill C-29 was still awaiting third reading in the House of Commons, hence had not even been introduced in the Senate, and Royal Assent lay more than six months in the future, no “measure” existed to be breached and hence no “events giving rise to a claim” existed.

83. Initially, there is an issue as to whether the phrase “events giving rise to a claim” is intended to include all events (or elements) required to constitute a claim, or instead some, at least, of the events leading to crystallization of a claim. The argument is made that the object and purpose of NAFTA, set forth in its Article 102(1)(c) and (e), to “increase substantially investment opportunities” and at the same time to “create effective procedures . . . for the resolution of disputes” would not be best served by a rule absolutely mandating a six-month respite following the final effectiveness of a measure until the investor may proceed to arbitration. Had the NAFTA Parties desired such rigidity, it is contended, they explicitly could have required passage of six months “since the adoption or maintenance of a measure giving rise to a claim.” It nonetheless remains debatable, we are told, whether as of 14 October 1996 the status of Bill C-29 was sufficient to constitute “events giving rise to a claim.”

84 There also is an issue as to whether a six-month “cooling off period” should be applicable at all in this case, given the events discussed above. The Tribunal has been given no reason to believe that any “consultation or negotiation” pursuant to Article 1118, which Canada confirms the six-month provision in Article 1120 was designed to encourage,<sup>32</sup> was even possible. It is argued, therefore, that no purpose would be served by any further suspension of Claimant’s right to proceed. This rule is analogized to the international law requirement of exhaustion of remedies, which is disregarded when it is demonstrated that in fact no remedy was available and any attempt at exhaustion would have been futile.<sup>33</sup>

85. The Tribunal finds no need to address these arguments as to Articles 1119 and 1120 since the fact is that in any event six months and more have passed following Royal Assent to Bill C-29 and the coming into force of the MMT Act. It is not doubted that today Claimant could resubmit the very claim advanced here (subject to any scope limitations). No disposition is evident on the part of Canada to repeal the MMT Act or amend it. Indeed, it could hardly be expected. Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA.

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<sup>32</sup> The *Canadian Statement on Implementation of NAFTA* (at page 154) expressly states that the six-month rule “is intended to permit time to resolve the matter amicably.”

<sup>33</sup> *Finnish Ships Arbitration (Finland v. U.K.)*, (Award of 9 May 1934) (Bagge, sole arb.), reprinted in 3 R.I.A.A. 1479 (1934) (Finland’s failure to appeal to the Court of Appeal did not mean that it had not exhausted local remedies. Such an appeal would have been “obviously futile” because the Court of Appeal could not have reversed the Boards’ finding of fact); *Panevezys-Saldutiskis Railway Case*, (Estonia v. Lithuania), P.C.I.J. Rep., Ser. A/B, No. 76, p. 18 (1939) (“There can be no need to resort to the municipal court if . . . the result must be a repetition of a decision already given.”).

In the specific circumstances of this case the Tribunal decides that neither Article 1119 nor Article 1120 should be interpreted to deprive this Tribunal of jurisdiction.<sup>34</sup>

86. The Tribunal notes, however, that Claimant could have avoided controversy over these issues by first awaiting Royal Assent to Bill C-29 on 25 April 1997 before delivering its Notice of Intent to Submit a Claim to Arbitration, and then allowing another six months to pass *i.e.*, until 25 October 1997, before commencing arbitration. It thus would have lost just over six months' delay in proceeding, and thus would be six months further away from a resolution of the dispute.

87. The Claimant may have "jumped the gun" for tactical reasons relating to the legislative process. The Tribunal notes that the House of Commons debate on Bill C-29 on third reading commenced 25 September 1996, and Claimant may have decided to file its Notice of Intent on 10 September 1996 for the purpose of affecting that debate. This is inferentially confirmed by the witness affidavit of Mr. Smith of Hill and Knowlton, which states (Paragraph 17) that:

*On February 5, 1997 [after Bill C-29 had passed the House of Commons], representatives from Ethyl Corporation appeared before the Senate Standing Committee on Energy, the Environment and Natural Resources [and] proposed as a means to resolve the dispute that Ethyl Corporation would not proceed with its*

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<sup>34</sup> Specifically, the Tribunal concludes that this results from interpreting those Articles in good faith in accordance with the ordinary meaning to be given to the terms thereof in their context and in the light of the object and purpose of NAFTA, as prescribed by Article 31 of the Vienna Convention, and that, considering particularly the circumstances of NAFTA's conclusion, any different interpretation would lead to a result which is manifestly absurd or unreasonable within the meaning of Article 32 of the Vienna Convention

*pending NAFTA claim if the Government of Canada would not pass Bill C-29.*

Certainly the Notice of Arbitration was delivered right on the heels of Senate passage of Bill C-29, *i.e.*, five days later.

88. Had Ethyl first awaited Royal Assent to Bill C-29, and then bided its time another six months, the Tribunal would not have been required to deal with this issue. The Tribunal deems it appropriate to decide, therefore, that Claimant shall bear the costs of the proceedings on jurisdiction insofar as these issues are involved.

(c) Consent and Waivers Under Article 1121

89. Canada argues that jurisdiction here is absent because the written consent of Ethyl to arbitration, and the written waivers by Ethyl and also Ethyl Canada of any rights to certain other dispute settlement procedures, which were required by Article 1121 (according to its title) as “Conditions Precedent to Submission of a Claim to Arbitration,” were provided only with the Statement of Claim, delivered 2 October 1997, and not with the Notice of Arbitration, delivered 14 April 1997, which, according to Article 1137(1)(c), is when the “claim [was] submitted to arbitration” under Section B. The sufficiency of the consent and waivers thus provided is not otherwise questioned.

90. The Tribunal has not gained any insight into the reasons for the formalities prescribed by Article 1121, which on their face seem designed to memorialize *expressis verbis* what normally is the case in any event, namely, that the initiation of arbitration constitutes consent to arbitration by the initiator, whereby access to any court or other dispute settlement mechanism is precluded (except as allowed ancillary to or in support of the arbitration). The Tribunal

likewise is uninformed as to any reasons for Ethyl's not having provided the required documentation with the Notice of Arbitration, and equally is unaware of any resulting prejudice to Canada

91. The Tribunal has little trouble deciding that Claimant's unexplained delay in complying with Article 1121 is not of significance for jurisdiction in this case. While Article 1121's title characterizes its requirements as "Conditions Precedent," it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern. Article 1121(3), instead of saying "shall be included in the submission of a claim to arbitration" — in itself a broadly encompassing concept —, could have said "shall be included with the Notice of Arbitration" if the drastically preclusive effect for which Canada argues truly were intended. The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.

92. Here, too, however, the Tribunal deems it appropriate that Claimant be responsible for the costs of the jurisdictional proceedings insofar as they have related to the issues arising in connection with Article 1121. No reason appears why the consent and waivers were not furnished with the Notice of Arbitration, which would have been the better practice. Had they been, a certain part of these proceedings would have been obviated.

(d) Has a "New Claim" Been Asserted?

93. The Tribunal finally deals with Canada's contention that reliance in the Statement of Claim on the MMT Act, which was enacted some six months following delivery of the Notice

of Arbitration, which Notice was directed at Bill C-29 (which became the MMT Act), and specific reference in the Statement of Claim for the first time to the product Greenburn,<sup>35</sup> constitute the assertion of “new claims” which the Tribunal is prohibited from considering

94 The revised and expanded terminology in the Statement of Claim is not intrinsically of such great significance. This is particularly so, bearing in mind that Article 3 of the UNICTRAL Arbitration Rules, which in this regard remains unmodified by anything in Part B, and which prescribes the form of a notice of arbitration, requires (in (3)(e)) simply that such notice include “The general nature of the claim and an indication of the amount involved, if any.” By contrast, Article 18 of those Rules, likewise unmodified by Part B, requires (at (1)(b) and (c)) that a statement of claim set forth a “statement of the facts supporting the claim” and the “points in issue.” Thus a greater elaboration of detail in the Statement of Claim is permissible, if not, indeed, required.

95 The nub of the matter, however, is that the specific inclusion of references to the MMT Act and the product Greenburn in the Statement of Claim is not, as the Tribunal sees it, to be viewed as adding “new claims,” but rather, if anything, as amending the claim previously described in the Notice of Arbitration. Article 20 of the UNCITRAL Arbitration Rules, which Part B does not modify, provides that Claimant “may” so amend “unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.” An amendment of Ethyl’s claim, if one there has been, made as early as in the Statement of Claim hardly can be regarded as involving any

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<sup>35</sup> See note 2, *supra*

“delay”<sup>36</sup> No prejudice or any other circumstances are cited by Canada which would tend to rebut Article 20’s presumption of amendability<sup>37</sup> and the Tribunal apprehends none. Therefore, to the extent, if any, that the Statement of Claim amends the claim of Ethyl, the Tribunal accepts such amendment

### VIII Award

96 For the reasons set forth above the Tribunal awards as follows

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<sup>36</sup> Normally it is a statement of claim that is itself amended at a later stage. The issue of a possible amendment made by a statement of claim to a notice of arbitration arises in the NAFTA context, however, because of the procedural strictures discussed above.

<sup>37</sup> As pointed out by Baker & Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* 91-92 (Kluwer 1992):

*Article 20 of the UNCITRAL Rules gives parties the right to amend or supplement their claims or defenses during the course of the arbitration. A tribunal may deny an amendment, but only if it is “inappropriate” because of “delay in making” the amendment, prejudice to the other party or “any other circumstances.” The amendment must be rejected if it would cause the claim to fall outside the tribunal’s jurisdiction under the arbitration clause or agreement.*

*As originally proposed, Article 20 would have required a claimant to secure the permission of the arbitrators before he could supplement or amend his claim. The drafting committee chose to omit the clause “with the permission of the arbitrators” in order to “mak[e] it clear that, in principle, the parties were entitled to amend.” Indeed, despite the seemingly broad authority to disapprove amendments in “any other circumstances,” the travaux clearly show that the tribunal’s authority is not meant to discourage legitimate amendments to claims and defenses, but rather to prevent frivolous or vexatious amendments*

(Footnotes omitted.) See also Pellonpää & Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied*, 388-410 (Finnish Lawyers’ Publishing 1994).

1. The Tribunal rejects Canada's objections to jurisdiction based on Articles 1101 (except for 1101(b) addressed in 2. below), 1116, 1119, 1120 and 1121 of NAFTA
2. The Tribunal joins to the merits Canada's objections to jurisdiction based on Articles 1110(1) and 1101(b) (as referred to in Paragraphs 70-73, *supra*), and on Articles 1112(1) and Chapter 3 of NAFTA (as referred to in Paragraphs 62-64, *supra*).
3. The costs of the Government of Canada and of the Tribunal attributable to the jurisdictional proceedings insofar as they have related to issues raised under NAFTA Articles 1119, 1120 and 1121 shall be borne by the Claimant, and will be set forth in the Final Award.

Signed by the Members of the Tribunal

Charles N. Brower:

Charles N. Brower

Marc Lalonde:

Marc Lalonde

Karl-Heinz Bockstiegel:

K. Bockstiegel

Date of last signature:

24 June 1998