NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA")
CHAPTER 11

BETWEEN:

ETHYL CORPORATION

Claimant/Investor

- and -

GOVERNMENT OF CANADA

Respondent/Party

MEMORANDUM OF ARGUMENT OF
THE GOVERNMENT OF CANADA ON PLACE OF ARBITRATION

Material Facts

1. On April 14, 1997, Ethyl Corporation (Ethyl), a U.S. company, submitted its claim to arbitration by means of a Notice of Arbitration pursuant to the investor-state dispute provisions of the North American Free Trade Agreement (NAFTA) and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

2. Ethyl alleges that Canada has breached its obligations under Chapter 11 of the NAFTA as a result of certain measures including the introduction of Bills in Parliament

to prohibit interprovincial trade in or import for a commercial purpose of the gasoline fuel additive, *methylcyclopentadienyl manganese tricarbonyl* (MMT), and statements of Government officials in support of the Bills.

3. Ethyl claims damages in the amount of US$250 million for various losses incurred as a result of the alleged breaches, including loss of sales revenue and loss of value of its investment in Ethyl Canada, Ethyl's wholly-owned subsidiary in Canada.

4. Ethyl Canada is a corporation incorporated under the laws of Ontario and has its head office in Mississauga, Ontario. Ethyl Canada imports MMT into Canada, processes it in its blending facility in Corunna, Ontario, and then sells the processed additive to petroleum refiners across Canada.

5. Institutional facilities are available under the NAFTA to assist the parties and the arbitral tribunal in conducting the arbitration. One of these facilities is provided by the NAFTA Secretariat in Ottawa, more fully described in Tab 1. Ottawa is Canada's capital city.

6. Both counsel for the Claimant and counsel for the Respondent have offices in Canada. Ethyl's counsel has an office in Toronto, and counsel for the Government of Canada is in Ottawa.

7. The Claimant has, in its Notice of Arbitration, proposed that the arbitration be held in and that the award be rendered in either New York City or Washington D.C.

8. The Government of Canada requests the Tribunal to determine that, in the circumstances of the case, the place of arbitration and, therefore the place for rendering the award should be Ottawa, the capital of Canada. Alternatively, it is proposed that the place of arbitration could be Toronto, Ontario, Canada. In all events, the Government of Canada reserves its submissions on whether any exceptional circumstances exist for holding hearings at any location other than the place of arbitration.

Issues and the Law

The Tribunal must determine the place of arbitration

9. Paragraph 1 of Article 16 of the UNCITRAL Rules provides:

> "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, *having regard to the circumstances of the case*." (italics added)

10. The disputing parties have not agreed upon the place of arbitration. Therefore, the Tribunal will need to determine the place of arbitration.

Law applicable to the Tribunal's selection of place of arbitration

11. Article 1130 of the NAFTA provides that:

a. The arbitration must be held in the territory of a NAFTA party that is also party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[1], and

b. The selection of the place of arbitration must be in accordance with the UNCITRAL Arbitration Rules.

12. According to the UNCITRAL Notes on Organizing Arbitral Proceedings (adopted in 1996 and published in UN document V.96-84935), prominent factors influencing the choice of the place of arbitration include:

(a) suitability of the law on arbitral procedure of the place of arbitration;

(b) convenience of the parties and the arbitrators;

[1] Canada, the United States and Mexico are all parties to the New York Convention.

(c) availability and cost of support services;

(d) location of the subject-matter in dispute and proximity of evidence.

13. Where Article 16.1 of the UNCITRAL Rules refers to "... having regard to the circumstances of the case", it is submitted this phrase permits the Tribunal to take into account certain general, universally applied considerations which are usually found in the doctrine of *forum conveniens*. This doctrine guides judicial decision-making where there are competing jurisdictions.

14. The doctrine of *forum conveniens* provides that the appropriate forum in which to try a matter should be the jurisdiction that has the closest connection with the action and the parties.

> Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897 (S.C.C.) at 912. [TAB 2]

15. J. Castel, in his text *Canadian Conflict of Laws*, 2nd ed, (Toronto: Butterworths, 1986) at 221 [TAB 3], succinctly states the doctrine of *forum conveniens* as follows:

> The doctrine of *forum non conveniens* is a universal doctrine that should be used in every case in which a problem of conflict of jurisdictions is present. It has the advantage of helping the court to achieve a just result especially where the plaintiff brings his action on the sole basis of the defendant's temporary presence within the jurisdiction and the merits of the dispute are totally unconnected with such jurisdiction. It also discourages forum shopping.

16. The law that has evolved in Canada in relation to *forum conveniens*, was restated by the House of Lords in *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1987] A.C. 460 (H.L.) at 478 wherein Lord Goff provided the following guidance with respect to the relevant factors that determine the appropriate forum:

> So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Credit Chimique* v. *James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

Spiliada Maritime Corp. v. *Cansulex Ltd.*, [1987] A.C. 460 (H.L.) at 478. [TAB 4]
Amchem, supra, at 915-917. [TAB 2]

Circumstances of the case that the Tribunal should consider in determining the place of arbitration

The Government of Canada proposes Ottawa as the place of arbitration not only because of factors affecting convenience or expense, but also the other factors referred to by Lord Goff. The circumstances of this case which most directly connect it to Ottawa are as follows:

17. A substantial element of the complaint made by the Claimant in these proceedings is in relation to proposed legislation introduced in the Parliament of Canada and statements made by various ministers of the Crown. Therefore, virtually the whole of the cause of action in this case relates to Canadian laws, the Canadian law-making process, the actions of the Canadian Parliament and certain ministers. It should be evident, therefore, that the witnesses to this process of law-making and policy-making are for the most part located in Ottawa.

18. The juridical regime in Canada is found, *inter alia*, in the *Commercial Arbitration Act*, Revised Statutes of Canada, 1985, Chapter 17(2d supplement) which came into force August 10, 1986. [TAB 5] This Act gives force of law to the Commercial Arbitration Code which is based on the Model Law adopted by the United Nations Commission on International Trade Law on June 21, 1985. The Commercial Arbitration Code is set out as a schedule to the *Commercial Arbitration Act*. The *Commercial*

Arbitration Act specifically provides that the phrase "commercial arbitration" as applied in the Commercial Arbitration Code includes a claim under Article 1116 or 1117 of the NAFTA.

19. Therefore, to the extent that Canada has federal legislation based on the UNCITRAL Model Law and applicable to the NAFTA proceedings which give rise to this arbitration, it is fair to say that Canada has a wholly appropriate juridical environment in which to conduct the arbitration and that it is the appropriate place of arbitration. It further follows that any consideration of ultimate enforcement of the arbitral award, in the event that the plaintiff is successful, would eventually occur in Canada and the Tribunal may be confident that such enforcement will be properly considered under this juridical regime. By way of further assurance, it should be noted that the courts of Canada have shown a strong appreciation for the principle of arbitral autonomy and have, accordingly, upheld and protected arbitral awards and tribunals in all appropriate cases. In addition, it should be noted that the Model Law, on which the Canadian Commercial Arbitration Code is based, opts firmly in favour of limited judicial control at the place of arbitration (Model Law, Article 34).

20. The dispute settlement procedures under Chapter 20 of the NAFTA provide that the hearing in those cases must be held in the capital of the party complained against (see Rule 22 of the Model Rules of Procedure for NAFTA, Chapter 20). This practise is consistent with the procedure under the Free Trade Agreement where the Model Rules of

Procedure for Chapter 18 panels (now Chapter 20 of NAFTA) provides in Part III, paragraph 1 that:

> "The Panel proceedings commenced at the request of one Party shall take place in the capital of the other Party, unless the parties otherwise agree".

21. These provisions, dealing with complaints against Canada, the United States or Mexico by one of the other parties reserve the prerogative of responding to such complaints in the responding party's own capital. *A fortiori*, where a private commercial party brings a complaint under Chapter 11, it should follow that the circumstances of the case lend themselves to the government of a sovereign country responding in its own capital.

22. Related Proceedings:

The Tribunal should be aware that several related proceedings are currently occurring within Canada concerning the legislation which is complained of in relation to this arbitration. In particular, two courses of action are noted:

(a) On June 24, 1997 Ethyl Canada Ltd., the wholly owned subsidiary of the Claimant in this arbitral proceeding, caused a Statement of Claim and Notice of Constitutional Question to be issued in the Ontario Court (General Division) against the Attorney General of Canada and the Minister of the

Environment seeking, *inter alia*, a declaration pursuant to Subsection 52(1) of the *Constitutional Act*, 1982, that the *Manganese-based Fuel Additives Act*, S.C. 1997 c.11 (the "Act") is *ultra vires* the Parliament of Canada insofar as it is inconsistent with the provisions of the *Constitution Act*, 1867 and, to the extent of that inconsistency is of no legal force and effect together with certain consequential relief including seeking an interlocutory and permanent injunction. The Government of Canada has been notified that other persons claiming to be interested parties are seeking status as intervenors in the case. Applications for recognition as intervening parties are pending by the Canadian Vehicle Manufacturers Association, headquartered in Toronto, Ontario, Canada, the Association of International Auto Manufacturers of Canada ("AIAMC") headquartered in Toronto, Ontario, and by representatives of Pollution Probe, also with offices in Toronto.

(b) On July 18, 1994, the Federal Government of Canada entered into an Agreement on Internal Trade with each of the ten provinces and two territories of Canada. The Agreement on Internal Trade provides for dispute resolution procedures involving consultation and, ultimately, the establishment of a panel to deal with questions of whether measures taken by a party are consistent with the Agreement. By correspondence commencing April 28, 1997, the Province of Alberta, supported by other provinces in Canada, initiated the dispute resolution process of Chapter 15

of the Agreement on Internal Trade with respect to the *Manganese-based Fuel Additives Act.* The Province of Alberta and Canada have held consultations concerning Alberta's complaint against the Government of Canada. Alberta recently notified Canada that the consultations failed to resolve the issue, and as a result, Alberta will be requesting that a panel be established to consider whether the Act is consistent with the Agreement on Internal Trade.

23. The related proceedings commenced in Canada involving Canadian parties and provinces are additional factors that point to Canada as the appropriate place of arbitration for the NAFTA proceedings.

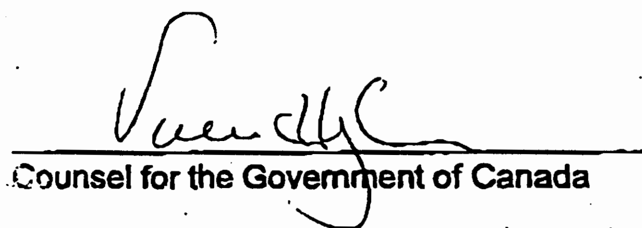
24. With respect generally to the convenience of the parties, while the Tribunal may elect to hold specific hearings from time to time in places other than the place of arbitration, it is particularly convenient to hold this arbitration in Ottawa not only as the capital of Canada, (and the location of numerous potential witnesses), but also because of the presence of the NAFTA Secretariat facilities which are described in detail in TAB 1 attached to these submissions.

25. It is also noted that the offices of the counsel for the Claimant and the Government of Canada are both located in Canada. Mr. Appleton has offices in the City of Toronto and the lead counsel for the Government of Canada is located in Ottawa.

26. The investment which Ethyl Corporation alleges has been damaged is the wholly owned subsidiary, Ethyl Canada, which has its head office in Mississauga, adjoining the City of Toronto, in the Province of Ontario. Its blending facility, where it processes MMT, is in Corunna, in the Province of Ontario.

Based on all of the above considerations, the Tribunal is requested to determine that the place of arbitration should be Ottawa, or alternatively, could be Toronto, Ontario, Canada. In regard to places suitable for hearing, other than the place of arbitration, the Government of Canada reserves its position.

Submitted this 2nd day of October, 1997, at Ottawa, Ontario, Canada.



Counsel for the Government of Canada

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