SECRETARÍA DE COMERCIO Y FOMENTO INDUSTRIAL

SUBSECRETARÍA DE NEGOCIACIONES COMERCIALES INTERNACIONALES
Dirección General de Consultoría Jurídica de Negociaciones

México, D.F. a 24 de febrero de 1998

Anne McLellan
Procurador General del Canadá
Departamento de Justicia
239 Wellington Street
Ottawa, Ontario K1A 0H8
Canadá

Asunto: **Ethyl Corporation c. Gobierno de Canadá**

He tenido la oportunidad de revisar los alegatos del caso de referencia que le fueron presentados al gobierno de México de conformidad con el artículo 1127 del Tratado de Libre Comercio de América del Norte (TLCAN). Al respecto, me permito informar a las Partes en el TLCAN, que México desea ejercer su derecho de acuerdo con el Artículo 1128 del tratado, para presentar al Tribunal Arbitral una comunicación sobre cuestiones relativas a la interpretación del TLCAN que han sido señaladas en los argumentos del caso.

Agradeceré que, por conducto del gobierno del Canadá, se informe al Tribunal que México presentará comentarios escritos dentro de los siguientes 15 días.

Atentamente,
El Consultor Jurídico

Hugo Perezcano Díaz

c.c.p. Dr. Jaime Zabludovsky Kuper.- Subsecretario de Negociaciones Comerciales Internacionales.- SECOFI. México, D.F.
Oficina del Asesor Legal.- Departamento de Estado de los Estados Unidos.
Sra. Valoris Hughes.- Ministerio de Comercio Internacional de Canadá.
Sr. Kenneth Freiberg.- Oficina del Representante Comercial de los Estados Unidos
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UNOFFICIAL TRANSLATION

SUBSECRETARIA DE NEGOCIACIONES
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Direccion General de Consultoria
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Mexico, D.F. a 24 de febrero de 1998

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Subject: Ethyl Corporation v. Government of Canada

I have had the opportunity to review the allegations of the referenced case that were provided to the Government of Mexico in conformity with Article 1127 of the North American Free Trade Agreement. In this regard permit me to inform the NAFTA Parties that Mexico desires to exercise its right, in accordance with Article 1128 of the 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.

Yours truly,

Juridicial Advisor
Hugo Perezcano Diaz

(Courtesy Translation)

Mexico City, March 11, 1998
Official Letter No. GDCJN.511.01.34.98

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RE: Ethyl Corporation v. Government of Canada

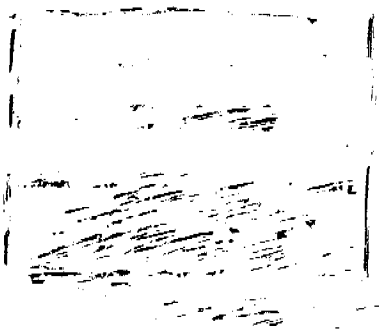
Pursuant to my letter of February 24 of the current month and the Arbitration Tribunal's instructions that were transmitted to me by Ms. Valerie Hughes, General Counsel of the Trade Law Division of Canada's Department of Foreign Affairs and International Trade, I enclose the document in English containing the submissions of the United Mexican States in the above referenced proceeding, under Article 1128 of the North American Free Trade Agreement.

Attentively,
The General Counsel

Hugo Perezcano Díaz

(copies)

SECRETARÍA DE COMERCIO Y FOMENTO INDUSTRIAL



SUBSECRETARÍA DE NEGOCIACIONES COMERCIALES INTERNACIONALES
Dirección General de Consultoría Jurídica de Negociaciones

México, D.F. a 11 de marzo de 1998

Oficio No. DGCJN.511.01.34.98

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Asunto: Ethyl Corporation v. Gobierno del Canadá

Conforme a lo manifestado en mi carta del 24 de febrero del presente y las instrucciones del Tribunal Arbitral que me fueron comunicadas mediante carta de fecha 27 de febrero de la Sra. Valerie Hughes, Consultora General Jurídica de la División de Derecho Comercial del Ministerio de Relaciones Exteriores y Comercio Internacional del Canadá, anexo el documento en inglés que contiene los comentarios de los Estados Unidos Mexicanos en el procedimiento de referencia, al amparo del artículo *1128 del* Tratado de Libre Comercio de América del Norte.

Atentamente
El Consultor Jurídico

Hugo Perezcano Díaz

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In exercise of its right under Article 1128 of the NAFTA, the United Mexican States (hereinafter Mexico) wish to make submissions to the Tribunal on certain questions relating to the interpretation of the Agreement. As one of the three Parties to the Agreement, Mexico has an interest in ensuring that it is interpreted by arbitral tribunals in keeping with the Parties' intentions.

Mexico will limit its intervention to three major questions raised in the pleadings. This should not be taken as disinterest or acquiescence in any of the other issues or arguments made by the disputing parties. Rather, Mexico will focus on what it regards as issues that transcend the merits of this particular case and are of broader interest to the interpretation and application of the Agreement.

The three issues are the following:

- The need to ensure that the subject-matter of arbitrable investor-State disputes is in keeping with the Parties' intentions.
- The fact that Chapter Eleven applies only to "measures adopted or maintained" by a Party and does not apply to acts that have not produced legal effects at the time that a Claimant initiates an arbitration proceeding.
- The need to ensure that claimants comply with the requirements for the initiation of arbitration proceedings under Chapter Eleven.

Each will be addressed in turn.

The rights and obligations of Chapter Eleven of the NAFTA must be interpreted in light of the overall structure and content of the Agreement. In particular, the Tribunal should be mindful of the fact that the Agreement contains different dispute settlement mechanisms for different purposes and involving different types of parties.

NAFTA Chapter Twenty establishes the general dispute settlement mechanism, which is available only to the Parties to the Agreement. As an international agreement between sovereign States, it is right and proper that the Parties should have the broadest rights to negotiate, consult and otherwise resolve disputes that may arise under Agreement as a whole. Thus, Article 2004 provides that the chapter's dispute settlement provisions "shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement" and permits a Party to commence general dispute settlement proceedings in respect of an "actual or proposed measure of another Party [that it considers] is or would be inconsistent with the obligations" of the Agreement.

In addition to the general dispute settlement mechanisms of Chapter Twenty, the Parties agreed to two limited forms of dispute settlement that could be invoked by private

parties without the need to enlist the diplomatic intervention of their respective governments. Chapter Nineteen allows a private party to invoke a special binational dispute settlement mechanism in anti-dumping and countervailing duty cases in order for a binational panel to determine whether the anti-dumping or countervailing duty law of another Party was properly applied on the facts of a particular case. Chapter Eleven both sets out the substantive obligations applicable to the treatment of NAFTA investors and their investments in Section A, while Section B confers the right upon such investors to commence investor-State arbitral proceedings against a Party in respect of alleged breaches of obligations contained in Section A.

1. The Subject Matter of Disputes Must Be Limited in Accordance with *Chapter Eleven*

NAFTA Article 1101 provides that Chapter Eleven applies to measures related to investors or investments of investors of another Party[1]. A claim under Section B must, therefore, be with respect to a measure that directly relates to such investors or investments. Measures that relate to other Chapters of the NAFTA, such as those regarding trade in goods or to the temporary movement of business persons do not fall within the scope of arbitrable subject-matters, although they may incidentally or indirectly affect investments. NAFTA investors have not been given the right to enforce provisions contained in other chapters of the Agreement through Chapter Eleven.

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.

2. Chapter Eleven Applies only to Existing Measures

Throughout the text of the NAFTA, the Parties were careful to distinguish which measures could be the subject of dispute settlement proceedings. Article 2004 permits a

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1. Article 1101 also provides that Chapter Eleven applies to all investments in the territory of a Party with respect to Articles 1106 and 1114. Treatment of investments of investors of a non-Party, however, are irrelevant to the present case, as investors of a non-Party have no right of action under Section B.

Party to consult and, if necessary, commence dispute settlement proceedings in respect of an actual or a proposed measure. Similarly, Article 1902(2)(c) gives a Party the right to consult with another Party about proposed amendments to the latter's anti-dumping or countervailing duty law "prior to the enactment of the amending statute". Also in Chapter Nineteen, although a proceeding before a binational panel may not commence unless a final determination has been issued by the competent authorities, Article 1904(4) expressly provides that, where a provisional measure has been imposed, a Party may provide notice of its intention to request a panel.

No such similar language is present in Chapter Eleven. To the contrary, the 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.

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. Contrary to Chapter Twenty, which provides that the its dispute settlement provisions shall apply with respect to the avoidance or settlement of disputes (Article 2004), Chapter Eleven provides that an alleged breach must have already occurred and that a disputing investor must have incurred loss or damage by reason of, or arising out of, the alleged breach (Articles 1116, 1117 and 119). The same principle is illustrated in Chapter Nineteen. A binational panel established under Chapter Nineteen may not commence a review with respect to a determination imposing provisional measures, since such determination may be subject to change in the course of an investigation.

Mexico shares Canada's concern that the clear limiting language of Article 1101 (in comparison to the broader language of Article 2004) be respected. Otherwise, the NAFTA Parties face the prospect of defending many claims for damages regardless of whether such damages have in fact originated. Given the number of legislative and administrative proposals in all three NAFTA Parties that are made but never enacted or adopted, and the likelihood that, as in this case, claimants would seek to attribute adverse effects to such "non-measures" by alleging that the mere prospect of their being enacted had caused them damages, this would vastly expand the scope and coverage of Chapter Eleven to something far beyond what the NAFTA Parties had contemplated.

In Mexico's submission, therefore, when reference is made to the definition of a "measure" in Article 201 for the purposes of determining the scope of arbitrable acts under Chapter Eleven, it must be interpreted as meaning a measure which is in force, not one which is merely contemplated.

3. Claimants Must Comply with the Requirements for the Initiation of an Arbitration under Section B

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 into 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.

Mexico City, Mexico, March 11, 1998.

Hugo Perezcano Díaz
Counsel for the United Mexican States