CT-2000/001

THE COMPETITION TRIBUNAL

Ottawa, Ontario, this day of , 2000

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Ultramar Ltd. of a petroleum product terminal facility and wholesale supply business located in Ottawa currently owned by Coastal Canada Petroleum, Inc.;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

ULTRAMAR LTD.

Respondent

DRAFT CONSENT ORDER

FURTHER TO the application of the Commissioner of Competition pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for a consent order directing the continued competitive presence of the facility and wholesale supply business encompassed by the proposed transaction (all as defined herein) and certain other remedies;

ON CONSIDERING the notice of application dated the 15th day of February, 2000, the statement of grounds and material facts, the consent order impact statement, the affidavit of Michael Dilauro dated the 15th day of February, 2000, the draft consent order and the consent of the parties, filed herein;

AND ON CONSIDERING THAT the Commissioner declares himself satisfied that, on the basis of the considerations outlined in the consent order impact statement, the remedies provided herein, if ordered, will be sufficient to eliminate the likelihood of a substantial lessening or prevention of competition in the terminalling and wholesale supply of refined petroleum products in the Ottawa region as described in the notice of application;

AND ON CONSIDERING THAT the Commissioner and the respondent are in agreement with respect to the terms of this consent order;

AND IT BEING UNDERSTOOD by the parties that the Commissioner has alleged certain material facts, and the respondent does not necessarily agree with all the facts alleged but does not contest the statement of grounds and material facts and consent order impact statement for the purposes of this application and any proceeding initiated by the Commissioner relating to this consent order, including an application to vary or rescind;

AND ON HEARING counsel for the parties in respect of this application;

THE TRIBUNAL ORDERS THAT:

Purpose

1. The purpose of this order is to maintain the continued competitive presence of a viable petroleum terminal facility and wholesale supply business, such that the proposed acquisition of that facility and wholesale supply business by Ultramar Ltd. from Coastal Canada Petroleum, Inc. will not prevent or lessen, or be likely to prevent or lessen, competition substantially in the terminalling and wholesale supply of refined petroleum products in the Ottawa region.

Definitions

2. For the purposes of this order the following definitions shall apply:

(a) "affiliate" and "affiliated" are defined in accordance with subsection 2(2) of the Act and shall include UDS;

(b) "ceases to operate" means that Ultramar is not using, at a minimum, tankage at the facility with a nominal capacity of 67,900 barrels (10.8 ML) to forty per cent (40%) capacity on a yearly average; Ultramar will be deemed not to have ceased to operate the facility if Ultramar can show, to the reasonable satisfaction of the Commissioner, that levels have fallen below those specified in this definition due to force majeure, normal maintenance requirements, rearrangement of the tankage at the facility and at the Ultramar terminal in accordance with Schedule "A" hereto, underliftings or other similar circumstances;

(c) "Coastal" means Coastal Canada Petroleum, Inc., a corporation incorporated under the laws of New Brunswick;

(d) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act;

(e) "conditional sale" means the obligation of Ultramar to offer for sale the facility pursuant to paragraph 8;

(f) "facility" means the Coastal petroleum product terminal facility located at 300 Hunt Club Road West, Nepean, Ontario, Canada;

(g) "force majeure" means any unforeseen event which is outside the control of Ultramar and could not be avoided by the exercise of reasonable diligence and shall include any legislative or regulatory change which has a significant effect on the viability of the facility, or the wholesale supply business, all of which is established to the reasonable satisfaction of the Commissioner;

(h) “fuel ethanol” means a high octane, water-free alcohol used as a blending ingredient with regular unleaded gasoline or, in the summer, low vapour pressure gasoline;

(i) “fully operational” means that Ultramar has not ceased to operate the facility, as defined herein;

(j) “independent marketers” means wholesalers, wholesale-retailers and retailers who are in the business of selling refined petroleum products in the Ottawa region, who neither own nor are affiliated with any person who owns a refinery;

(k) “loading rack” and “rack” mean an apparatus that transfers refined petroleum products from a storage tank, via pipeline, to a tank truck. Loading racks/racks are equipped with arms that deliver these products to the tank truck either from above (”top loading”) or from below (“bottom loading”);

(l) “Ottawa region” for the purposes of this order refers to the area surrounding the city of Ottawa southeast to Hawkesbury and Cornwall, south to Kingston and west and north to Pembroke and Maniwaki, respectively;

(m) “proposed transaction” means the transaction by which Ultramar will acquire a facility and wholesale supply business located in Ottawa which is currently owned by Coastal;

(n) “refined petroleum product” includes gasoline and low vapour pressure blendstock gasoline, distillates and fuel ethanol, but does not include jet fuel;

(o) “refurbish” means the completion of the modifications to the Ultramar terminal in accordance with Schedule “A” to this order;

(p) “terminal” means an intermediate storage and product distribution facility which has large storage capacity for truck and pipeline receipts of refined petroleum products;

(q) “terminalling” means the business of offering terminal space to others for storage and/or throughput of refined petroleum products;

(r) “TSSA” means the Technical Standards and Safety Authority which is responsible for the administration and enforcement of the *Gasoline Handling Act*, R.S.O. 1990, c. G.4 and regulations made pursuant thereto;

(s) “UDS” means Ultramar Diamond Shamrock Corporation, a U.S. corporation incorporated under the laws of Delaware, having its head office in San Antonio, Texas;

(t) “Ultramar” means Ultramar Ltd., a Canadian corporation incorporated under the laws of Canada and having its head office in Montreal, Quebec;

(u) “viable” means the condition of the facility on the closing of the transaction, reasonable wear and tear excepted, provided that any change in the condition of the facility that may be required to avoid any environmental or safety hazard identified in Schedule “A” hereto and any material change to the facility that may be required by the TSSA during the term of this Order, non-compliance with which the TSSA is unwilling to waive, shall not be deemed to render the facility non-viable.

(v) “wholesale supply business” means the wholesale supply of refined petroleum products .

Application

3. The provisions of this order shall apply to Ultramar and its affiliates and to:

   (a) each division, subsidiary or other person controlled by them and each officer, director, employee, agent or other person acting for or on behalf of any of them with respect to any of the matters referred to in this order; and

   (b) each of their respective successors and assigns, and all other persons acting in concert or participating with any of them with respect to the matters referred to in this order who shall have received actual notice of this order.

Preservation of Facility

4. Subject to force majeure, the provisions of this order, Schedule "A" to this order and any federal and provincial laws and regulations and municipal and regional by-laws, for a period of three (3) years from the date of this order, Ultramar shall not, without seven (7) days' notice to, and the consent of, the Commissioner, take any action or cause or permit any affiliate or any other person to take any action that will materially alter, impair, dismantle, move or destroy any part of the facility or materially degrade the facility so as to inhibit or delay the conditional sale of the facility on the terms contemplated by this order.

Performance Conditions

5. During the term of this order or until the sale of the facility, Ultramar shall:

   (a) within two (2) years from the date of closing the proposed transaction, subject to force majeure, complete the refurbishing of its terminal located at 111 Bentley Road, Nepean, Ontario (the "Ultramar terminal"), which is adjacent to the facility, in accordance with Schedule "A" to this order, such that the Ultramar terminal is operational in accordance with requirements of the TSSA as prescribed by the *Gasoline Handling Act* and regulations made pursuant thereto;

(b) subject to force majeure, ensure that there is no material interruption of the operation of the facility, as the facility is operated in all material respects as at the date of the closing of the proposed transaction, with the exception of interruptions attributable to the change over of operations from the facility to the Ultramar terminal, until the refurbished Ultramar terminal is fully operational;

(c) subject to force majeure, maintain a minimum of three (3) top loading arms operational at the facility or at the refurbished Ultramar facility in accordance with all federal and provincial laws and regulations and municipal and regional by-laws;

(d) subject to force majeure and any federal and provincial laws and regulations and municipal and regional by-laws, maintain at the facility or at the refurbished Ultramar facility, a minimum of two (2) loading arms dedicated to the blending of fuel ethanol and gasoline throughout the entire year and, in the summer months, the proper blendstock (i.e. low vapour pressure gasoline), as long as the sales of such product remains at or better than fifty percent (50%) of the average annual volume of fuel ethanol sold by Coastal in each year from 1997 to 1999, being 2.5 ML;

(e) provide six (6) months' notice to the Commissioner and the independent marketers of Ultramar's intention to cease supplying fuel ethanol;

(f) in good faith, subject to force majeure, offer to supply refined petroleum product, other than fuel ethanol, to independent marketers, at wholesale prices to be negotiated, which shall not exceed the monthly average of the domestic refiners' posted Montreal rack prices plus 0.5 cpl; provided that

Ultramar shall not be required to offer to supply any independent marketer which is in default as a result of non-payment under any supply arrangement with Ultramar;

(g) in good faith, subject to force majeure, offer to supply fuel ethanol to independent marketers at wholesale prices to be negotiated;

(h) offer for sale for relocation off site, at fair market value, any tanks at the facility which may be decommissioned;

(i) provide the Commissioner with a quarterly report on the operations of the facility and the Ultramar terminal, including the volume of all refined petroleum product sold to independent marketers, the total volume sold during that same period, the capacity utilization of the facility and the progress being made on the refurbishing of the Ultramar terminal; and,

(j) utilize the facility such that Ultramar does not cease to operate the facility.

6. The minimum volume of refined petroleum products required to be offered to independent marketers pursuant to paragraph 5(f) shall be:

(a) the average of the annual amounts sold to the independent marketers from the facility and by Ultramar in Ottawa in the previous three (3) calendar years; and

(b) Ultramar shall not be in breach of this order if in any supply year its actual sales to independent marketers fall short of the volume of refined petroleum products required to be offered pursuant to this order, if Ultramar can establish to the reasonable satisfaction of the Commissioner that the shortfall in the actual sales is attributable to force majeure, normal maintenance requirements, rearrangement of the tankage at the facility and at the Ultramar terminal in accordance with Schedule “A”, underliftings or other similar circumstances.

7. Where Ultramar seeks to invoke force majeure for any action open to it under this order, Ultramar shall give seven (7) days' prior notice to the Commissioner, if practicable, or immediately following the circumstances that lead to the invocation of force majeure.

Sale

8. If Ultramar fails to meet any of the conditions set out in paragraphs 4, 5 and 6 within the first five (5) years of the term of this order, Ultramar shall be required to offer to sell the facility, including related liabilities, at fair market value in accordance with the procedure set out in paragraphs 9 to 21 as follows:

a) with the entire facility in a viable condition if the offer to sell is required within the three (3) years after the date of this order; and

b) on an “as-is” basis if the offer to sell is required during the fourth (4^{th}) or fifth (5^{th}) year after the date of this order.

Sale Procedure

9. Ultramar shall notify the Commissioner within seven (7) days after it becomes, or should reasonably have become, aware of its failure to fulfil any of the conditions set out in paragraphs 4, 5 and 6.

10. Ultramar shall have a period of thirty (30) days from the date of the breach to remedy the breach to the satisfaction of the Commissioner. Ultramar shall notify the Commissioner on the thirtieth (30^{th}) day of any failure to remedy a breach. In the event of a failure to remedy a breach, the facility shall be offered for sale, in a

public manner, on the thirty-first (31st) day following a breach and in accordance with this order.

11. Fair market value shall be determined by an independent third party appraiser, who shall be appointed by the Commissioner within five (5) days of the Commissioner receiving notice of the failure to remedy the breach. In the event that Ultramar does not agree with the identity of the appraiser or the valuation by the appraiser, Ultramar may apply to the Competition Tribunal for appropriate relief.

12. The appraiser appointed pursuant to paragraph 11 shall have thirty (30) days from the date of appointment to submit a valuation of the facility to Ultramar and the Commissioner.

13. The Commissioner shall be responsible for the costs of the remuneration and expenses of the independent appraiser.

14. A sale, if required, shall be:

    (a) conducted in such a manner as will allow an opportunity for one or more *bona fide* prospective purchasers to receive written notice of the proposed sale and to make an offer to acquire the facility; and

    (b) on usual commercial terms for transactions of the size and nature of that contemplated in this order and in the circumstances contemplated by this order.

15. Any person making a *bona fide* inquiry of Ultramar or its agent for the purposes of a possible purchase of the facility by that person or that person's principal shall be notified that the sale is being made pursuant to this order and shall be provided with a copy of this order.

16. Any *bona fide* prospective purchaser shall be furnished, subject to the execution of a customary confidentiality agreement, with all pertinent information regarding the facility being sold; such information shall be provided to the Commissioner upon request. Any *bona fide* prospective purchaser shall be permitted, subject to the execution of a customary confidentiality agreement, to make such inspection of the facility and of all financial, operational or other documents and information as may be relevant to the sale.

17. Ultramar shall, upon the written request of the Commissioner, advise the Commissioner in writing of the progress of its efforts to accomplish the sale, including a description, with all reasonable detail, of contacts or negotiations with prospective purchasers and including the identity of all prospective purchasers who have come forward.

18. Ultramar shall not, without the consent of the Commissioner, provide financing for all or any part of the sale of the facility pursuant to this order which would permit Ultramar to influence or control directly or indirectly the facility after the sale.

19. The facility must be publicly offered for sale for a minimum period of nine (9) months or until sold in accordance with the provisions of this order, whichever is earlier. Ultramar shall use its best efforts to accomplish the sale within nine (9) months. If a potential purchaser expresses an interest in the facility within the nine (9) month period, then the time period for the sale may be extended a further nine (9) months to facilitate completion of the sale, if necessary.

20. Any sale shall be completed on the following terms:

    (a) at the completion of the sale, Ultramar shall not have, either directly or indirectly, any remaining right, title, control or interest in the facility inconsistent with the intent of this order; nothing in this paragraph, however, shall preclude the exchange or sale of products or services or both, or like arrangements of a customary nature acceptable to the new owner;

(b) the facility shall be sold to an arm's length purchaser or purchasers who shall meet the following objective criteria:

(i) will likely be able to ensure the continued operation of the business of terminalling and wholesale supply of refined petroleum product;

(ii) shall have the managerial, operational and financial capability to assume the liabilities associated with the facility, without any recourse against the vendor, and to operate in the market in question; and

(iii) shall purchase the entire facility as it exists at that time.

21. Subject to paragraph 22, if, after the expiry of the nine (9) month period, no person has expressed an interest to purchase the facility, or if, thereafter, there is no potential purchaser acting in good faith who is able and willing to complete the purchase of the facility, Ultramar may close or dismantle the facility.

22. Where, in the Commissioner's opinion, Ultramar has failed to exercise reasonable diligence in relation to the sale of the facility, the Commissioner may direct Ultramar to place the facility in the hands of a trustee who will offer the facility for sale for a period of six (6) months at a price and other terms that are then most advantageous to Ultramar and consistent with accomplishing the sale, in the opinion of the trustee. Any sale conducted by the trustee shall be subject to the requirements of paragraph 20. If the facility remains unsold after the six (6) month period, Ultramar may close or dismantle the facility.

23. Ultramar shall not object to a trustee sale on any grounds other than the trustee's malfeasance, gross misconduct or breach of this order.

24. Ultramar shall hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence or bad faith by the trustee.

25. All expenses reasonably and properly incurred by the trustee in the course of the trustee sale shall be paid from the proceeds of such a sale as soon as possible.

Approval of the Sale

26. Ultramar shall provide a notice (the “sale notice”) to the Commissioner of any binding agreement reached for the sale. The sale notice shall set forth the details of the proposed sale including the identity of the proposed purchaser.

27. The sale, by Ultramar or a trustee, is subject to the approval of the Commissioner, who shall, *inter alia*, take into account the competitive impact of the acquisition by the proposed purchaser, and approval (except for a sale by the trustee) shall be obtained in accordance with the procedure set out in paragraphs 26 to 31 of this order.

28. Within fifteen (15) days after receipt of the sale notice, the Commissioner may request additional information concerning the proposed sale. Ultramar shall furnish the additional information within fifteen (15) days of the receipt of the request unless the Commissioner agrees in writing to extend the time.

29. Within fifteen (15) days after receipt of the sale notice or, if additional information is requested by the Commissioner within the time specified in paragraph 27, within fifteen (15) days after receipt of the additional information, the Commissioner shall

notify Ultramar in writing of any objections he may have to the proposed sale, on the ground that it does not conform to the terms of this order and shall give detailed reasons therefor.

30. If the Commissioner does not object within the period specified in paragraph 29 the sale may be completed.

31. Where the Commissioner objects to the proposed sale pursuant to paragraph 29, the proposed sale shall not be completed without the approval of the Competition Tribunal.

Compliance Inspection

32. For the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request on reasonable notice to Ultramar, Ultramar shall permit any duly authorized representative of the Competition Bureau:

(a) access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents relating to the facility and the wholesale supply business in the possession or under the control of Ultramar and its affiliates; and

(b) upon five (5) days' notice to Ultramar and without restraint or interference from it, to interview directors, officers or employees of Ultramar concerning the facility and wholesale supply business. Such directors, officers or employees may have counsel present at these interviews.

33. Within three (3) months after receipt of a quarterly report by Ultramar pursuant to paragraph 5(i), the Commissioner shall notify Ultramar in writing of any objections he may have with regard to any information contained in the report. If the Commissioner does not object within the three (3) month period after receipt of the

report, Ultramar shall be deemed to be in compliance with this order as it applies to the matters contained in the report.

General

34. Notices, reports or other communications required or permitted by this order shall be in writing and shall be given by personal delivery to the party to whom such notice is given or by registered mail or by facsimile to the address or facsimile number below:

D. Martin Low, Q.C.
Donna Blois
Elspeth Gullen
Counsel to the Commissioner
of Competition
Department of Justice
Competition Law Division
Industry Canada, Legal Services
Place du Portage, Phase I, 22nd Fl.
50 Victoria Street
Hull, Quebec
K1A 0C9

Telephone: (819) 997-3325
Facsimile: (819) 953-9267

Jennifer Overend
Ultramar Ltd.
2200 McGill College Avenue
Montreal, Quebec
H3A 3L3

Telephone: (514) 499-6003
Facsimile: (514) 499-9927

35. The Competition Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or Ultramar to rescind or vary any of the provisions of this order in the event of a change of circumstances or otherwise.

36. In the event of a dispute as to the interpretation or application of this order, including any decision by the Commissioner pursuant to this order or breach of this order by Ultramar, the Commissioner or Ultramar shall be at liberty to apply to the Competition Tribunal for a further order.

Duration of Consent Order

36. This order shall remain in effect for a period of seven (7) years, or until Ultramar sells the facility to an independent third party or until further order of the Competition Tribunal, whichever is earlier, provided that this order shall cease to have effect at the end of five years if, in the fifth (5^{th}) year of this order, by reason of underliftings at the facility and Ultramar terminal, the total volume of refined petroleum product sales to independent marketers does not amount to at least twenty five percent (25%) of the average annual sales of Coastal and Ultramar to independent marketers from terminals in the National Capital Region during 1997, 1998 and 1999, being 2 147 540 barrels (341 265 654 litres).

DATED at the City of Ottawa in the Province of Ontario,
this day of 2000.

Chairman