

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE *NORTH AMERICAN FREE TRADE AGREEMENT*

BETWEEN:

ETHYL CORPORATION

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

PUBLIC DOCUMENTS

CONTENTS:

- 1) Notice of Intent to Submit a Claim to Arbitration dated September 10, 1996
- 2) Notice of Arbitration dated April 14, 1997
- 3) Statement of Claim dated October 2, 1997
- 4) Statement of Defence dated November 27, 1997
- 5) Procedural Orders
- 6) Preliminary Tribunal Award on jurisdiction dated June 24, 1998

APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

New York Toronto

**NOTICE OF INTENT TO
SUBMIT A CLAIM TO ARBITRATION
UNDER SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

ETHYL CORPORATION

Investor

v.

GOVERNMENT OF CANADA

Party

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement, the Investor, **ETHYL CORPORATION**, serves notice of intention to submit a claim to arbitration for breach of the Party's obligations under the North American Free Trade Agreement (NAFTA).

A. NAME AND ADDRESS OF THE DISPUTING INVESTOR

ETHYL CORPORATION
330 South Fourth Street
Richmond, VA
23219

B. BREACH OF OBLIGATIONS

The Investor alleges that the Government of Canada has breached its obligations under:

- (i) Article 1110 - Expropriation and Compensation;
- (ii) Article 1106 - Performance Requirements; and
- (iii) Article 1102 - National Treatment.

The relevant portions of the NAFTA are:

Article 1110: Expropriation and Compensation

1. 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.***

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

Article 1106: Performance Requirements

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 . . .***

Article 1102: National Treatment

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.*

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.*

C. FACTUAL BASIS FOR THE CLAIM AND ISSUES

FACTS

1. The Investor, Ethyl Corporation, is an American corporation incorporated under the laws of the State of Virginia, with its head office in Richmond, Virginia. Ethyl Corporation is the sole shareholder of Ethyl Canada Inc. ("Ethyl Canada"), a corporation incorporated under the laws of Ontario, with its head office in Mississauga, Ontario. Ethyl Canada is a distinguished corporate citizen who is an active participant in the Sarnia, Ontario community.
2. Ethyl Canada is the sole importer into Canada, and the sole distributor across Canada, of methylcyclopentadienyl manganese tricarbonyl ("MMT"). MMT is a fuel additive designed to increase the level of octane in unleaded gasoline.

3. Ethyl Canada purchases all of its supply of MMT from Ethyl Corporation. Pursuant to the terms of an MMT license agreement and a long term supply agreement, Albemarle Corporation manufactures MMT for sale to Ethyl Corporation. Ethyl Corporation sells MMT to Ethyl Canada who imports the additive into Canada in a concentrated form. Once in Canada, Ethyl Canada processes MMT in its manufacturing facility in Corunna, Ontario. After the MMT has been processed, Ethyl Canada sells the MMT to its various purchasers across Canada.
4. Ethyl Canada has been carrying on this business since 1978. While Ethyl Canada carries on other economic activity in Canada the sale of MMT is a substantial part of Ethyl Canada's business.
5. Beginning in 1993 and continuing to date, various automobile manufacturers in Canada have suggested, without convincing proof, that MMT was damaging emission control monitoring systems in new automobiles.
6. In December 1994, the then Canadian Minister of the Environment, the Honourable Sheila Copps, M.P., announced that the Government of Canada would remove MMT from use in Canada.

MMT does not pose a threat to either the environment or to human health and welfare. In fact, Health Canada has taken the position that MMT in gasoline does not represent an added health risk to the Canadian population. Not being a threat to the environment, the Government of Canada could not prohibit MMT under the *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c.10. Not being a threat to human health and welfare, the Government of Canada could not prohibit MMT through any of its health legislation.

8. To satisfy the requests of the automobile industry, the Government of Canada attempted to prohibit MMT by exercising its regulatory power over international and interprovincial trade. On May 19, 1995, the Government of Canada introduced Bill C-94, *An Act to regulate interprovincial trade in and the importation for commercial purposes of certain manganese-based substances*.
9. Bill C-94 failed to pass through the House of Commons when the Parliamentary session ended in January 1996. However, on April 22, 1996, the Government of Canada reintroduced this measure to Parliament directly to Third Reading as Bill C-29. Bill C-29 prevents the importation and interprovincial trade of certain manganese-based substances. The constraining effect of Bill C-29 hinges upon section 4 which states:

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

The controlled substances referred to in section 4 are listed in a schedule to the bill. At present, the only substance listed in the schedule to Bill C-29 is MMT. Bill C-29 provides that authorization to import MMT may be obtained when the substance will not be used in unleaded gasoline; that is in fact the principal use of MMT.

10. At the time of introduction of Bill C-29, the Minister of the Environment, the Honourable Sergio Marchi, M.P., publicly stated that the impact of MMT on car emissions systems was such as to pose a threat to human health and welfare:

*"The bottom line for me, as Minister of the Environment, is the potential negative effect on the health of Canadians caused by possible interference of MMT on automobile computer systems which monitor tailpipe emissions."*¹

Due to the Minister's statements, several public health and environmental interest groups began voicing disapproval over the continued use of MMT in gasoline. The Minister's statement above and other statements created public distrust towards MMT.

11. While the intent behind Bill C-29 is purportedly to protect human health, there is no evidence that MMT harms human health. Indeed, Health Canada concluded in 1994 that:

*all analysis indicates that the combustion products of MMT in gasoline do not represent an added health risk to the Canadian population.*²

Expropriation

Expropriation of Enterprise

12. Once Bill C-29 is proclaimed into force, the Government of Canada will have ended Ethyl Canada's operations of selling MMT for use in unleaded gasoline. This constitutes a substantial interference with Ethyl Corporation's control and enjoyment of its investment in Ethyl Canada. This interference is a measure tantamount to the expropriation of Ethyl Canada.
13. Having expropriated the investment of Ethyl Corporation, the Government of Canada must pay compensation. Compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. The valuation criteria include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

¹ Environment Canada News Release, Ottawa - April 18, 1996.

² *Risk Assessment for the Combustion Products of Methylcyclopentadienyl Manganese Tricarbonyl (MMT) in Gasoline.* Environmental Health Directorate, Health Canada, December 6, 1994 at 69.

14. As of the date of filing this Notice of Intent, the Government of Canada has not offered to pay, nor has it paid, any compensation to Ethyl Corporation or to Ethyl Canada on account of its actions regarding MMT.
15. The Government of Canada knew that Bill C-29 would interfere with Ethyl Corporation's operations. In a background note prepared on July 14, 1993, Environment Canada officials stated that Ethyl Corporation was the sole producer of MMT.³ On February 24, 1995, an Industry Canada official confirmed to Environment Canada that the government measure would have the effect of causing a loss of substantial sales revenues. The note speculated that Ethyl Corporation might be forced to close its operations in Canada. The Industry Canada document concludes:

The sale of MMT represents some 50% of Ethyl Canada's total sales revenue. Loss of this business would result in a loss of a few tens of millions of dollars per year. The Corunna plant employs approximately 40 people. [...] The loss of 50% of sales revenues is a major loss and could cause the parent company to re-evaluate maintaining a Canadian operation.⁴

Expropriation of Goodwill

16. A great deal of media interest has surrounded Bill C-29 and its predecessor, Bill C-94. Media attention has focussed on the Government of Canada's contention that MMT is harmful to the environment and that it may contribute to brain damage in humans. With the Government's repeated assertion of these unfounded claims, and the resulting public fear and uncertainty, the product MMT has unjustifiably become known as a substance to be avoided.
17. In the media reports regarding MMT, Ethyl Corporation and Ethyl Canada have been identified as the only manufacturers and distributors of this product. As such, Ethyl Corporation and Ethyl Canada have become identified by the public as the only suppliers of a supposedly harmful substance. This unfounded negative commentary has substantially interfered with the corporate reputations, images and goodwill associated with Ethyl Corporation and Ethyl Canada.
18. The definition of the term "investment" in Article 1139 establishes that government measures that harm an investor's intangible property can constitute a measure tantamount to expropriation.

³ Background Note: Use of MMT in Gasoline. Prepared by Chandra Prakash, July 14, 1993.

⁴ Memorandum from David Head, Industry Canada to Frank Vena, Environment Canada. Subject: Business impact of loss of MMT use. Dated February 24, 1995. (Letter obtained under Access to Information request.)

19. The term "measure" is defined by Article 201 to include "any law, regulation, procedure, requirement or practice." The recurring unsubstantiated statements made by officials of the Government of Canada, including the Ministers of the Environment, against the safety and environmental soundness of MMT, constitutes such a measure.
20. These governmental measures have resulted in harm to Ethyl Corporation's property - most notably its substantial goodwill concerning the use of MMT in unleaded gasoline. The damage to the commercial reputations of Ethyl Corporation and Ethyl Canada by the defamatory and reckless statements of Canadian officials constitutes a measure tantamount to the expropriation of the goodwill of Ethyl Corporation and Ethyl Canada.
21. Ethyl Corporation operates globally and its goodwill has value on a worldwide basis. The defamatory statements and reckless behaviour of the Government of Canada have negatively interfered with the company's goodwill both inside and outside Canada.
22. There is no reservation or exception contained in the NAFTA that would justify the Government of Canada's failure to pay compensation for its expropriation of the goodwill of Ethyl Corporation and Ethyl Canada.

Performance Requirements

23. The Government of Canada has chosen to restrict MMT in a peculiar fashion. It has not banned the use of MMT in unleaded gasoline explicitly or directly; rather, the Government of Canada seeks to prevent its importation and interprovincial trade. A domestic manufacturer, if there were any, could manufacture and distribute MMT for use in unleaded gasoline entirely within a province and not violate Bill C-29. Bill C-29 effectively creates a requirement that MMT be manufactured and distributed in each Canadian province.
24. The Government of Canada's measure was introduced to provide an incentive for the local production of MMT for use in unleaded gasoline. This measure was applied in a manner inconsistent with the provisions of Article 1106 of the NAFTA and has nullified or impaired benefits accruing to the investor under that provision.

Domestic Production of MMT

25. The Government of Canada's measure was explicitly aimed at advantaging domestically produced MMT for use in unleaded gasoline. The Minister of the Environment specifically addressed the issue of a performance requirement in a press conference on the introduction of Bill C-94. The Minister was asked:

Q: You've just banned the import in trade, what's to prevent Ethanol [Ethyl] Canada from simply building an MMT plant in Ontario?

A: There is nothing preventing them from building a plant domestically.⁵

26. The Government of Canada recognized that Bill C-29 implicitly requires investors to establish facilities within provincial boundaries if those investors wish to continue operating as MMT suppliers in Canada. To be able to engage in commerce across Canada, Bill C-29 requires Ethyl Corporation to establish facilities in each of the provinces and territories in Canada. This local content preference violates Canada's NAFTA obligations.

Preference for Domestic Ethanol

27. The Government of Canada proposes that ethanol be used as a substitute for MMT to increase the octane levels of gasoline. Among the barriers to widespread use of ethanol are its high cost and low quantity levels in Canada. Despite the fact that there is a synergistic environmental benefit to using MMT in combination with ethanol, as long as MMT continues to be a cheaper safe alternative to increase octane levels, gasoline companies will continue to use MMT.
28. While the cost and environmental effectiveness of ethanol remains an unanswered question, the Government of Canada is promoting its use.⁶ Presumably, the reason for this policy preference is that ethanol provides a greater economic benefit to Canada than MMT. MMT is manufactured in the United States and distributed by an American corporation, while ethanol is, and would be, manufactured in Canada by Canadians.
29. The Government of Canada's preference for domestic ethanol production is revealed in a government report. On October 5, 1994, the Liberal Caucus Task Force on Ethanol was submitted to the Minister of the Environment. The resolutions of the Task Force advocate a moratorium on the use of MMT in gasoline to provide a benefit for the domestic production of ethanol. The resolutions of the Task Force state:
- 1. That a formal environmental/health risk assessment be conducted on the Neurotoxicity of Manganese and MMT. The assessment should be a shared responsibility of Environment Canada and Health Canada.*
 - 2. That Canada move forward to initiate a moratorium on the use of MMT as an octane enhancer in Canadian gasolines.*

⁵ Press Conference clipping provided by MH Media Monitoring Limited. Date May 19, 1995.

⁶ See letter from the Minister of Finance Paul Martin, M.P., to Mr. Donald Ceparis, President, Elgin County Corn Producers, dated November 17, 1994 where the Minister of Finance outlines certain tax incentives for ethanol production and commits his government to the maintenance of these tax incentives through the government's mandate. (Letter obtained through Access to Information requests.)

3. *That Transport Canada and Environment Canada encourage the availability of gasoline with alternative additives, such as ethanol, across Canada.*

4. *The Minister of the Environment shall have the prerogative to set regulations declaring that a certain proportion of the total market of gasoline additives shall consist of renewable fuels (ethanol). The proportion should be based on the availability of domestically produced renewable fuels.*⁷ (Emphasis added)

30. The Task Force report advocates the sole use of domestically produced ethanol. In response to this report, the Minister of the Environment stated on December 21, 1994:

Since the release of your task force's report my Cabinet colleagues and I have met to discuss ways to promote the introduction of ethanol-blended gasoline that will, in turn, encourage the development of ethanol plants. We are still actively pursuing the matter.

Bill C-94 was introduced five months after Minister Copps' letter.

31. It is evident that the Canadian measure was not aimed at stimulating demand for MMT but at switching demand to achieve an increase in local production of alternate octane fuel enhancers (ethanol). A preference for ethanol would result in stimulated domestic production. This measure thus constitutes a local content preference which violates Canada's NAFTA obligations regarding performance requirements. This preference stands in conflict with Article 1106(c) which prohibits government measures that require any preference for domestic goods.
32. Furthermore, Bill C-29 is a violation of Article 1106 in that the prohibition of MMT and the encouragement of ethanol interferes unreasonably with the management, operation and conduct of Ethyl Corporation's business. The encouragement of ethanol as an octane enhancer effectively requires Ethyl Corporation to move into the ethanol manufacturing business if it wishes to maintain its position in the petroleum products industry. This would not be an easy transition since the present distribution system of Ethyl Corporation is not suited for, and cannot be accommodated to, ethanol.
33. The Government of Canada has not taken any reservations in Annex I or II that would justify the taking of this measure in contravention of Article 1106.

⁷ Liberal Caucus Task Force on Ethanol at page 2.

National Treatment

34. The NAFTA guarantees that each party will provide treatment to investors of other NAFTA countries no less favourable than it accords, in like circumstances, to its own investors. When read substantively, the national treatment obligation was intended to ensure that all companies, whether domestic or foreign, were treated equally and without discrimination. On the surface, Bill C-29 purports to treat all equally as the measure applies generally to ban the importation of MMT for use in unleaded gasoline by all.
35. In a background note prepared on July 14, 1993, Environment Canada officials noted that Ethyl Corporation was the sole producer of MMT.⁸ It was clear that a measure to block the importation of MMT for use in unleaded gasoline would discriminate against the existing Canadian market participant, Ethyl Corporation.
36. There is no reasonable nor plausible explanation of why domestically produced MMT is permitted for sale in Canada while imported MMT is not. Simply put, the Canadian measure gives unfair marketing and promotion advantage to a Canadian investment over an American investment selling the same product. Thus, Bill C-29 constitutes disguised discrimination, aimed at Ethyl Corporation, and its investment, Ethyl Canada. This measure constitutes a violation of the Government of Canada's national treatment obligation to NAFTA investors as set out in Article 1102.
37. The Government of Canada has not taken any reservations in Annex I or II that would justify the taking of this measure in contravention of Article 1102.

ISSUES

1. Has the Government of Canada taken measures inconsistent with its obligations under Article 1110 of the NAFTA?
2. Has the Government of Canada taken measures inconsistent with its obligations under Article 1106 of the NAFTA?
3. Has the Government of Canada taken measures inconsistent with its obligations under Article 1102 of the NAFTA?
4. If the answer to any of issues 1, 2, or 3 is yes, on what date did the Government of Canada take actions which were inconsistent with its obligations under the NAFTA?
5. If the answer to any of issues 1, 2, or 3 is yes, should compensation be paid to Ethyl Corporation due to the Government of Canada's inconsistency with its NAFTA obligations?

⁸ Background Note: Use of MMT in Gasoline. Prepared by Chandra Prakash, July 14, 1993.

5. If the answer to issue 5 is yes, what is the quantum of the compensation to be paid?

3. RELIEF SOUGHT AND DAMAGES CLAIMED

The Investor claims damages for the following:

1. Damages in the amount of US\$201,000,000 (TWO HUNDRED AND ONE MILLION DOLLARS) arising out of the Government of Canada's breach of its NAFTA obligations;
2. Costs associated with its efforts to prevent the Government of Canada's breach of its NAFTA obligations;
3. Costs associated with these proceedings, including all professional fees and disbursements;
4. Prejudgement and post-judgement interest at a rate to be fixed by the tribunal; and
5. Such further relief that this tribunal may deem appropriate.

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Appleton & Associates
950 Third Avenue
Suite 1700
New York, N.Y.
10022

Ph: (212) 935-9558 (416) 966-8800
Fax: (212) 371-3215 (416) 966-8801

BARRY APPLETON
Counsel for the Investor and Enterprise

RECEIVED TO:

Office of the Deputy
Attorney General of Canada
Justice Building
39 Wellington Street
Ottawa, Ontario
K1A 0H8