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Ethyl Corporation vs. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards

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Ethyl Corporation's \$251 million lawsuit against a new Canadian environmental law should set off alarm bells throughout the public interest world. The suit, brought under the terms of the North American Free Trade Agreement, demonstrates the serious danger that present and future international economic pacts could pose to environmental regulations and other laws that protect the public.

In early April, the Canadian Parliament placed public safety ahead of Ethyl's desire to sell its products in Canada by banning the import and interprovincial transport of a dangerous Ethyl product the toxic gasoline additive MMT. Ethyl, the company that put the lead in leaded gasoline, retaliated on April 14 by slapping the Canadian government with a lawsuit under NAFTA. Ethyl claims that the Canadian import ban on MMT violates various provisions of NAFTA and seeks restitution of \$251 million to cover losses resulting from the "expropriation" of both its MMT production plant and its "good reputation."

MMT is a toxic manganese-based compound that is added to gasoline to enhance octane and reduce engine "knocking." Canadian legislators are concerned that MMT emissions pose a significant public health risk. Automobile manufacturers have long argued that MMT damages emissions diagnostics and control equipment in cars, thus increasing emissions.¹ Ethyl is the product's only manufacturer.

The Environmental Defense Fund (EDF), which tracks the use of MMT, reports that the additive is used only in Canada. The United States EPA has banned its use in reformulated gasoline, which captures approximately 1/3 of the U.S. gasoline market. An EDF survey of the remaining producers reports that none use the additive.² California has imposed a total ban on MMT.

Canadian legislators wanted to ban the *use* of MMT in order to protect the Canadian public. Because they could not do so under Canadian Environmental Protection Act (CEPA) provisions, they did the next best thing: banning MMT's import and transport.³

Under NAFTA, Ethyl has been able to sue the Canadian government for compensation. The investment chapter of NAFTA, for the first time in a multilateral trade or investment agreement, confers upon corporations "private legal standing" or the ability to sue governments for

compensation in international courts. This "investor-to-state" mechanism diverges from dispute resolution systems in previous international economic agreements in two radical ways: First, in agreements like GATT, only national governments can bring suits in front of international tribunals. Second, national governments cannot sue for compensation. The most a government can do if the tribunal rules in its favor is to reimpose tariffs on the violating nation.

This lawsuit is the third, and largest, under NAFTA's investor-to-state dispute mechanism. According to an official at the International Centre for the Settlement of Investment Disputes (ICSID), the institution that arbitrates most of the world's investment complaints, the \$251 million Ethyl seeks is higher than any amount requested in an ICSID investor-to-state proceeding.⁴

The Ethyl suit raises a host of issues that should be of serious concern to policymakers particularly since the U.S. is negotiating the expansion of NAFTA as well as a new multilateral investment agreement (MAI) that would apply NAFTA standards worldwide.

- **The Ethyl case could set a precedent where, under NAFTA and similar agreements, a government would have to compensate investors when it wishes to regulate them or their products for public health or environmental reasons.** Under NAFTA, the presumed "right" of corporations to be compensated when public health regulations affect a company's bottom line is treated as the moral equivalent of the public's right not to be harmed by industrial toxins. This sends the strong message to investors that demanding compensation from the public for the inconvenience of complying with environmental regulations constitutes a legitimate and lucrative business strategy a message Ethyl has clearly heard. Thus, in pacts like NAFTA, anti-environmentalists may have found an effective mechanism for advancing the radical "takings" agenda that they have not been able to move through the democratic process. The effect on environmental regulation could be chilling.
- **The safeguard against frivolous lawsuits has been removed by giving investors the right to sue national governments on their own behalf.** When governments are the only entities that have legal standing to bring a case against a regulation or other law under an international agreement, political and diplomatic pressures reduce the likelihood that frivolous lawsuits will be initiated. The investor-to-state dispute resolution clause in NAFTA (and in the proposed MAI) removes this safeguard, allowing corporations and individual investors to sue for compensation. Any corporation can simply represent itself in a binding international proceeding. The Ethyl suit demonstrates the danger in granting investors this new power.
- **The threat of suits like Ethyl's can be used to intimidate lawmakers who are considering new regulations.** Ethyl submitted an intent to file suit *six months before the MMT ban was passed* in the Canadian legislature. Ethyl hoped that the threat of a multimillion dollar lawsuit would deter policymakers from passing the bill. While Ethyl failed in this instance, the ability of investors to use their private legal standing to credibly threaten major suits could lead to successful efforts in the future to derail the

democratic decision-making process and alter the outcome of the legislative debate. Ethyl also claims that *the legislative debate itself constituted an expropriation of its assets* because public criticism of MMT damaged the company's reputation. Thus, Ethyl is using NAFTA to file what is, in effect, a SLAPP-suit against the Canadian Parliament. Far from worrying about the implications of such actions, U.S. government negotiators have actually argued that the ability of investors to use legal threats to influence legislative debates is a healthy innovation that will prevent governments from passing laws that violate international agreements.⁵

- **The Ethyl case demonstrates how domestic courts can be bypassed for international tribunals.** No Canadian court will ever rule on whether the import/transport ban on MMT violated NAFTA. NAFTA has allowed Ethyl to pursue its case before an international tribunal, where the proceedings are conducted in secret and the records are not publicly accessible. In addition, claims that go to international arbitration are often expedited; lawyers for Ethyl claim that the case will be settled by the end of the year. Since the tribunal's decision will be final and binding, the Canadian government has no recourse to appeal (outside of the tribunal's own limited appellate process). In allowing corporations to bypass national courts, international economic agreements like NAFTA and the proposed MAI replace the provisions of constitutional law with the authority of international panels established primarily to defend investors' "rights."
- **The Ethyl case points to the possibility that corporations could drain state treasuries.** There is no limit to the amount of compensation that could be sought by corporations under investor-to-state dispute resolution in the NAFTA and the proposed MAI. The \$251 million that Ethyl seeks may be the tip of the iceberg since corporations can request compensation for actual and future earnings losses as well as to repair their "tarnished images." If such cases are successful and proliferate, the day could come when a government's mandate to protect citizens extends only as far as its limited fiscal coffers. In addition, any number of corporations can consolidate their suits, thereby multiplying a government's potential payout.
- **The Ethyl case suggests that critics of NAFTA and GATT were correct in claiming that these agreements could pose a real threat to national sovereignty.** The likelihood that NAFTA, and other agreements like it, could restrict the ability of democratically elected governments to legislate on such important matters as public health and safety and environmental protection was dismissed by many NAFTA supporters. Yet the Ethyl case shows that the predictions of critics were in fact quite trenchant, as illustrated by Ethyl's attorneys: "[T]he potential for lawsuits under this [investor-to state dispute resolution] process is far-reaching since it could be used by more than 350 million individuals and corporations throughout the NAFTA countries."⁶ Under the proposed MAI, which will cover investors from 29 of the world's richest countries, the numbers can only grow.

ENDNOTES

¹ While automobile manufacturers may be legitimately concerned with clean air standards, their primary opposition to MMT is that they must bear the costs of repairing the cars' damaged pollution control systems.

² Ivanovich, David. "Collision Course → Slow Start for Gas Additive → MMT's Effect on Air, Cars Debated," Houston Chronicle, April 16, 1996; EDF, personal communication, 4/22/97.

³ Because adequate data on the health risks of long-term exposure to lower-level manganese emissions was not available, Health Canada could not consider MMT a health risk under CEPA provisions. In addition, the fuel standards established in CEPA are not sufficiently broad to cover a ban on substances that may damage pollution control systems in cars, even if such damage leads to increased emissions. The Canadian Minister of the Environment reports that certain key provisions of CEPA are being rewritten, and may cover a future ban on the use of MMT (personal communication 4/19/97).

⁴ ICSID staff, personal communication 4/22/97.

⁵ U.S. Department of Treasury Staff, Briefing to the Senate Committee on Banking, Housing and Urban Affairs on the MAI and Financial Services Agreement, 4/21/97.

⁶ Appleton & Associates, "First-Ever Lawsuit Against Canadian Government Using NAFTA Investor-State Process Brought," press release dated October 9, 1996.