

Agreement on Internal Trade

**Report of the Article 1704 Panel
Concerning the Dispute Between
Alberta and Canada Regarding the
*Manganese-Based Fuel Additives Act***

June 12, 1998

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1. NATURE OF THE COMPLAINT

On April 25, 1997, Royal Assent was granted to the *Manganese-based Fuel Additives Act (the Act)*, an Act of the Parliament of Canada. The purpose of the *Act* is to prohibit the importation into Canada of, and interprovincial trade in, certain manganese-based automotive fuel additives as listed by schedule. The only substance listed in the schedule is Methylcyclopentadienyl Manganese Tricarbonyl (MMT). The *Act* came into force on June 24, 1997.

The Government of Alberta (the Complainant) contends that the *Act* fails to comply with Canada's (the Respondent) obligations under the *Agreement on Internal Trade (the Agreement)*, and that the inconsistencies cannot be justified by reference to the *Agreement's* provisions for measures associated with legitimate objectives. The Complainant contends that the *Act* has impaired internal trade, caused injury to Alberta refiners, and is inconsistent with general and specific provisions of the *Agreement*. The Governments of Québec, Nova Scotia and Saskatchewan (also Complainants) intervened in support of Alberta. The Government of Nova Scotia did not file a written submission or present oral arguments.

Specifically, the Complainants allege that the *Act* is inconsistent with the following provisions of the *Agreement*:

- Article 100 (Objective)
- Article 401 (Reciprocal Non-Discrimination)
- Article 402 (Right of Entry and Exit)
- Article 403 (No Obstacles)
- Article 404 (Legitimate Objectives)
- Article 405.1 (Reconciliation)
- Annex 405.1 (Standards and Standards-Related Measures)
- Article 1505.8 (Precautionary Principle)
- Article 1508.1 (Harmonization)

The Respondent maintains that the *Act* is consistent with the provisions of the *Agreement* governing permissible exceptions for legitimate objectives, such as health, environmental protection or consumer protection.

2. PANEL AUTHORITY

This Panel was convened pursuant to the terms of the *Agreement*. Parties agreed that the panel was properly constituted and had jurisdiction to hear the dispute.

Article 1705 of the *Agreement* states that the Panel shall “examine whether the actual or proposed measure or other matter at issue is or would be inconsistent with the *Agreement*.”

Article 1707.2 provides that the Panel report “shall contain:

- (a) findings of fact;
- (b) a determination, with reasons, as to whether the measure in question is or would be inconsistent with this *Agreement*;
- (c) a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury; and
- (d) recommendations, if requested by a disputing Party, to assist in resolving the dispute.”

3. BACKGROUND

MMT is used primarily to increase the octane levels in unleaded gasoline. It is produced in the United States by a single company, and imported, blended and distributed for sale to refiners in Canada by a wholly-owned subsidiary.

MMT has been used in unleaded gasoline in Canada since 1977. Motor vehicle manufacturers contend that the use of MMT negatively impacts on the emissions control devices incorporated into vehicles, particularly on the effectiveness of the next generation of on-board diagnostic equipment (OBD-II).

Motor vehicle manufacturers express concern that stricter emissions standards and narrower compliance margins cannot be attained without sophisticated emissions control systems, which are sensitive to MMT damage.

The manufacturer of MMT and Canadian refiners dispute any link between MMT and OBD-II system damage and refer to the 1993 determination of the United States Environmental Protection Agency to allow MMT use in unleaded gasoline in certain areas of the United States, which is based on the absence of any evidence that MMT use would cause or contribute to the failure of any emissions control device.

4. COMPLAINT PROCESS FOLLOWED

On April 28, 1997, at the request of Alberta refiners acting through the Canadian Petroleum Products Institute (CPPI), Alberta requested consultations with the Respondent in accordance with Annex 1510.1 (Consultations and Assistance of Council) of the *Agreement*.

Chapter 15 (Environmental Protection) consultations were initiated on May 12, 1997. The 40-day period for consultations under Chapter 15 ended on June 11, 1997, and on June 12 Alberta notified the Respondent that consultations had been unsuccessful.

The Complainants and the Respondent agreed to proceed directly to Chapter 17, following the expiration of the 90-day Chapter 15 time limit. On August 5, 1997, Alberta requested consultations under Chapter 17.

On September 8, 1997, the Complainants and the Respondent agreed that further consultations or the assistance of the Committee on Internal Trade would not resolve the dispute. The Complainants and the Respondent agreed to proceed directly to a Panel, pursuant to the provisions of Article 1704 (Request for Panel).

On October 16, 1997, Alberta requested the establishment of a Panel under Article 1704 of the *Agreement*.

Hearings were held in Ottawa on April 15 and 16, 1998.

5. PROVISIONS OF THE *AGREEMENT* PERTINENT TO THIS DISPUTE

The *Act* which is the subject of this dispute is a new measure adopted after the coming into force of the *Agreement*.

This report deals with the following provisions of the *Agreement*:

Chapter One (Operating Principles)

Chapter Three (Reaffirmation of Constitutional Powers and Responsibilities)

Chapter Four (General Rules), as modified by Article 1500 (Application of General Rules), and more specifically

Article 401

Article 402

Article 403

Article 404, as modified by Articles 1505.7 and 1505.8

Article 405, as modified by Articles 1505.2, 1505.3 and 1508.3

Article 1508

Article 1509.

6. OPERATING PRINCIPLES

“Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

Article 101: Mutually Agreed Principles

1. This Agreement applies to trade within Canada in accordance with the chapters of this Agreement.
2. This Agreement represents a reciprocally and mutually agreed balance of rights and obligations of the Parties.
3. In the application of this Agreement, the Parties shall be guided by the following principles:
 - (a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada;
 - (b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;
 - (c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments within Canada; and
 - (d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.
4. In applying the principles set out in paragraph 3, the Parties recognize:
 - (a) the need for full disclosure of information, legislation, regulations, policies and practices that have the potential to impede an open, efficient and stable domestic market;
 - (b) the need for exceptions and transition periods;
 - (c) the need for exceptions required to meet regional development objectives in Canada;
 - (d) the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective; and
 - (e) the need to take into account the importance of environmental objectives, consumer protection and labour standards.”

It is important to note that, while the *Agreement* provides transition periods for existing trade barriers, there is a prohibition against establishing new trade barriers inconsistent with the *Agreement*.

In developing this *Agreement*, the federal, provincial and territorial governments were determined to enhance and expand the domestic market and thereby strengthen the economic union. This process required both the reduction and eventual elimination of existing barriers and an undertaking not to introduce new barriers to internal trade.

Article 100 reflects this undertaking. Article 101.2 emphasizes that the mutually agreed balance of rights and obligations of the Parties to the *Agreement* are reciprocal, while Article 101.3 contains a commitment that new barriers will not be established. Article 101.4 recognizes factors that the Parties should consider in pursuing the objectives. Article 100 provides a broad statement of principles, modified by several factors. While the principles are a guide to policy-makers and dispute resolution panels, the rules governing this dispute are set out in Chapters Four through Fifteen.

7. CHAPTER 3 CONSTITUTIONAL POWERS AND RESPONSIBILITIES

“Article 300 (Reaffirmation of Constitutional Powers and Responsibilities)

Nothing in this Agreement alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.”

While the *Agreement* confirmed constitutional powers, Parties to the *Agreement* agreed to constrain the exercise of these powers in support of cooperative federalism. By entering into the *Agreement*, Parties agreed that past legislative or policy action may no longer be appropriate.

As a result, trade legislation is now required to meet two tests: 1) is the legislation within the constitutional authority of the government; and 2) does the legislation conform to the *Agreement*?

8. SUBSTANCE AND PROCESS

The Respondent submits that the issue in dispute is one of substance, and beyond specific provisions of the Agreement, the Panel should not consider whether the process was “good” or “bad” from a federal-provincial relations perspective.

It is the Panel’s view that process is an integral part of the *Agreement*. In addition to the process obligations contained in specific Part IV chapters, especially Articles 1508 and 1509 (Canadian Council of Ministers of the Environment), and Article 1702 (Consultations), there are a number of general process commitments provided in the Preamble, the Operating Principles and the General Rules of the *Agreement*.

The general emphasis of the *Agreement* is on cooperative resolution of outstanding issues, including an obligation to consult and seek joint action where appropriate. The

Agreement has in fact changed the policy context facing governments by requiring a greater level of consultation or “process” when introducing measures affecting internal trade.

Articles 1705 and 1707 state that the mandate of a Panel is to determine if the measure under review is consistent with the *Agreement*. Therefore, the question is not whether the *Act* is consistent with a specific chapter, or even with Parts III (General Rules) and IV (Specific Rules), but whether the *Act* conforms to the *Agreement*, including the principles and process contained therein.

On the matter of process, reference was made to the inherent authority of Parliament and the deference due the Parliamentary process. In our view there is no issue relative to Parliamentary authority or Panel deference. The Parliament of Canada and the legislatures of the provinces and territories are not subservient to each other or to the Panel in the exercise of their Constitutional powers. However, they are Parties to this *Agreement*, and it is the *Agreement* which must prevail.

9. ARTICLE 401 (RECIPROCAL NON-DISCRIMINATION)

“1. Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:

- (a) its own like, directly competitive or substitutable goods; and
- (b) like, directly competitive or substitutable goods of any other Party or non-Party.

2. Subject to Article 404, each Party shall accord to persons, services and investments of any other Party treatment no less favourable than the best treatment it accords, in like circumstances, to:

- (a) its own persons, services and investments; and
- (b) persons, services and investments of any other Party or non-Party.

3. With respect to the Federal Government, paragraphs 1 and 2 mean that, subject to Article 404, it shall accord to:

- (a) the goods of a Province treatment no less favourable than the best treatment it accords to like, directly competitive or substitutable goods of any other Province or non-Party; and
- (b) the persons, services and investments of a Province treatment no less favourable than the best treatment it accords, in like circumstances, to persons, services and investments of any other Province or non-Party.

4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2 or 3.”

The basic issue as to whether the *Act* is inconsistent with Article 401 should be addressed in two stages:

1. Does the *Act* discriminate against the goods of one Party to the benefit of the goods of another Party?
2. Are the goods discriminated against “like, directly competitive or substitutable” with the goods of another Party?

In dealing with measures introduced by the Respondent, there must be a geographical component to the discrimination for a measure to be inconsistent with Article 401.3. This geographical component can be direct, where goods from one Party are favoured over identical goods from another Party, or indirect, where goods produced predominately in the territory of one Party are favoured over directly competitive or substitutable goods produced predominately in the territory of another Party.

The *Act* treats MMT less favourably than other octane enhancers, and MMT-enhanced gasoline less favourably than MMT-free gasoline. The intent of Article 401.3 is to prevent the Respondent from favouring goods from one province over the goods of another province. The Panel finds that there is no geographical discrimination in the *Act*. MMT-enhanced gasoline was produced in all provinces with refineries when the *Act* came into force, and all refineries in Canada could produce MMT-free gasoline with the proper equipment and process adjustments. Accordingly, market discrimination is more appropriately addressed under Article 403.

The *Act* is consistent with Article 401. The Panel is not required to weigh the scientific evidence presented to determine whether MMT-free gasoline and MMT-enhanced gasoline are like goods, or whether MMT and other octane enhancers are like, directly competitive or substitutable goods.

10. ARTICLES 402 (RIGHT OF ENTRY AND EXIT) AND 403 (NO OBSTACLES)

“Article 402 (Right of Entry and Exit)

Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries.”

“Articles 403 (No Obstacles)

Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.”

The Panel agrees with the Respondent and finds that the *Act* is inconsistent with Articles 402 and 403.

11. ARTICLE 405 (RECONCILIATION)

“1. In order to provide for the free movement of persons, goods, services and investments within Canada, the Parties shall, in accordance with Annex 405.1, reconcile their standards and standards-related measures by harmonization, mutual recognition or other means.

2. Where a difference, duplication or overlap in regulatory measures or regulatory regimes operates to create an obstacle to internal trade, the Parties shall, in accordance with Annex 405.2, cooperate with a view to addressing the difference, duplication or overlap.”

Article 1508 qualifies Article 405:

“1. The Parties shall endeavour to harmonize environmental measures that may directly affect interprovincial mobility and trade, following principles such as those set out in the *Statement of Interjurisdictional Cooperation on Environmental Matters* (Winnipeg: CCME, 1991) and *Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles* (Winnipeg: CCME, 1994) any other applicable principles established by the Council, and this Agreement.

2. In harmonizing environmental measures, the Parties shall maintain and endeavour to strengthen existing levels of environmental protection. The Parties shall not, through such harmonization, lower the levels of environmental protection.

3. In the event of an inconsistency between Article 405 (Reconciliation) and this Article, this Article prevails to the extent of the inconsistency.”

The *Act* does not restrict or make the manufacture or use of MMT illegal. In fact, it in no way restricts the use of MMT. MMT is a legal commodity. The *Act* prohibits the importation and internal trade in MMT.

The *Act* does not restrict the intraprovincial use of, or trade in, MMT-enhanced gasoline on environmental grounds, yet interprovincial trade is prohibited on environmental grounds. The Respondent argues that the intraprovincial use was beyond the legislative authority of Parliament. That factor underscores the need for consultation or joint action as reflected in the *Agreement*. Although there is no requirement for consensus, if the environment and the consumer are to be protected, and internal trade is to be enhanced, unilateral action at the federal level can be counterproductive and ineffective.

It is clear from the submissions that it was the automobile manufacturers who were the driving force behind the elimination of MMT. They claimed that the on-board monitoring equipment in new vehicles would be impaired by the use of MMT-enhanced gasoline. The evidence as to the impact of MMT on the environment is, at best, inconclusive.

Article 1508.3 provides that in the event of an inconsistency between Article 405 and Article 1508, Article 1508 prevails to the extent of the inconsistency. Therefore, if the Respondent complied with the provisions of Article 1508.1 and 1508.2, it is irrelevant whether there was compliance with the provisions of Article 405 and the related annexes. If the Respondent has not complied with Articles 1508.1 and 1508.2, then Article 405 applies.

When read together, Article 1508 and Article 1509.1 identify the Canadian Council of Ministers of the Environment (CCME) as the proper forum for harmonization of environmental measures that affect interprovincial trade. In the present case the Respondent failed to exhaust the established process for consultation, reconciliation and harmonization.

The Complainants tabled numerous letters from provincial cabinet ministers and officials, requesting the Respondent to reconsider its course of action and offering alternative process proposals. The Respondent's cabinet ministers and officials failed to provide an adequate, or at times any, response. The evidence before the Panel established that the Respondent did not follow the process provisions of the *Agreement*, and this disregard for process resulted in this dispute. Greater regard for the provisions of the *Agreement*, and more effective use of CCME, could have provided a solution consistent with the *Agreement*.

However, a breach of the Chapter 15 process does not of itself lead to a fatal inconsistency with the *Agreement*. It must be demonstrated that the breach materially affected the obligations under Article 405 and related annexes.

It is clear that the purpose of the legislation is to eliminate the use of MMT from gasoline in Canada. We make no determination as to whether the measure falls within the scope of Article 405.1 or Article 405.2, because the Panel's findings relative to Article 404 make such a determination immaterial to the outcome of this proceeding.

12. ARTICLE 404 (LEGITIMATE OBJECTIVES)

The Respondent has conceded that the *Act* is inconsistent with Article 402 and Article 403, but maintains that the *Act* is permissible under Article 404. The Respondent acknowledges that it bears the onus to demonstrate that the *Act* meets each of the four tests under Article 404.

404(a) Purpose is to achieve a legitimate objective

“Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;”

The Party introducing an inconsistent measure must demonstrate that the purpose of the measure is to achieve a legitimate objective. The Panel does not agree that the requirement of Article 404(a) is a simple requirement to show that legislators or policy makers had declared the purpose to be a legitimate objective. Such an interpretation would open the door to Parties using the legitimate objectives justification to adopt trade restricting measures, by a simple declaration that the measure was in pursuit of a legitimate objective.

The Panel has considered the Respondent's willingness to tolerate the continued use of MMT, both through its suggestion of a two-pump system and the *Act's* tolerance of intraprovincial use. Despite the Respondent's assurance that economics would not support a MMT manufacturing facility in a single province, the fact is that under the *Act* MMT can be produced and used within each province with obvious impact on the environment and vehicle emission monitoring systems.

While the evidence on the effects of MMT is not conclusive, there was sufficient evidence to determine that the Respondent had a reasonable basis for believing that the *Act* would achieve a legitimate objective, and therefore meets the requirements of Article 404(a).

404(b) No undue impairment of access of goods that meet the legitimate objective

"Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

- (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;"

The evidence provided has focussed on: whether MMT affects the performance of the latest generation of emissions control devices in the newest vehicles; debate over the environmental and health effects, particularly in urban areas where smog is a problem; and the major concern of automobile manufacturers regarding the impact of MMT-enhanced gasoline on monitoring equipment in new vehicles.

In the recent past, a similar situation existed in the case of leaded gasoline. At that time, automobile manufacturers designed vehicles to operate on unleaded gasoline, while older vehicles could still use leaded gasoline. Even though it was established that lead was directly toxic, the phased elimination of this substance from gasoline took place over a number of years.

The Respondent has not demonstrated that there existed a matter of such urgency or a risk so widespread as to warrant such comprehensive restrictions as the *Act* provides on internal trade. If the legitimate objective of the *Act* is as stated, to prevent MMT from being used in newer model vehicles in major urban areas, then total elimination of MMT was unduly restrictive.

In light of these factors, the Panel has determined that the *Act* is inconsistent with Article 404(b).

404(c) Not more trade restrictive than necessary to achieve the legitimate objective

"Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

- (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective;"

Article 1505.7 qualifies Article 404(c):

“7. Further to Article 404(c) (Legitimate Objectives) and Annexes 405.1(5) and 405.2(5), an environmental measure shall not be considered to be more trade restrictive than necessary to achieve a legitimate objective if the Party adopting or maintaining the measure takes into account the need to minimize negative trade effects when choosing among equally effective and reasonably available means of achieving that legitimate objective.”

Article 404(c) and Article 1505.7 have three requirements: “take into account the need to minimize negative trade effects”, “equally effective” means, and “reasonably available” means. The onus is on the Respondent to demonstrate, on balance of probabilities, that it has met these requirements, and to demonstrate that no other available option would have met the legitimate objective.

Several options were identified as equally effective and reasonably available. From the evidence and the submissions of the Complainants, three of those options, namely tradable permits, taxation, and direct regulation under section 46 of CEPA, did not require further study on the effects of MMT.

Not all measures that eliminate MMT are equally trade restrictive. The intention of the *Agreement* is to limit the use of trade restrictions to achieve other objectives, rather than the objectives themselves.

Therefore the Panel determines that the Respondent has not discharged the requirements of 404(c), as modified by 1505.7.

404(d) No disguised restriction on trade

“Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

(d) the measure does not create a disguised restriction on trade.”

The Panel finds that the *Act* is transparent, and does not create a disguised restriction on trade.

13. DETERMINATION OF INJURY

While the issue of injury was conceded, no Party spoke substantively to the level of injury, and the Panel has insufficient evidence to assess the level of injury.

14. INTERNATIONAL VS. INTERNAL TRADE

The Complainants submit that the *Act* is a single “measure” and should be repealed. It is conceivable that the provisions of the *Agreement* might apply where the real object of

the *Act* relative to international trade was, in fact, a disguised mechanism to control internal trade, but that is not the situation in the present case. The Panel finds that the *Act* is divisible for the purposes of this review. In other words, the international impact can and should be separated from the internal trade implications. The Panel has determined that its authority to make recommendations is limited to matters affecting interprovincial trade.

The Respondent contends that the Panel's jurisdiction is limited to a review of the interprovincial trade aspects of a measure, and cannot make a recommendation respecting international trade. Therefore, the Panel cannot recommend that the *Act* be repealed, nor can it recommend that MMT be removed from the Schedule to the *Act*, because either of those recommendations would impact on the international trade component of the *Act*.

This raises a number of questions. Various international agreements have reduced or eliminated tariff barriers between countries and provided for equality of treatment among trading partners. The thrust of such agreements is positive and opens the Canadian market for the benefit of consumers and provides access to foreign markets that benefit domestic producers.

But these agreements cannot be used as a mechanism to create new barriers to internal trade. If international trade agreements provide an absolute defence to disputes under the *Agreement* there would be no need for Canada to meet any of the Article 404 tests. A simple declaration that Canada has restricted international trade in a particular product would be sufficient justification to restrict internal trade.

Alternatively, in any dispute, the Panel having determined that the measure constrains international trade, could only conclude that the new barrier on internal trade was in fact "justified".

The provisions relative to requiring consideration of alternatives and the requirement that the legislation be no more trade restrictive than necessary must be made effective.

Subsequent events may establish that permitting interprovincial trade in MMT while prohibiting the importation does breach an international agreement but this will be determined in a different forum. Our task is limited to determining whether the *Act* in question is inconsistent with the *Agreement* and recommending appropriate steps to remove the barrier to internal trade.

15. PANEL DETERMINATION

The Panel finds that the *Act* is inconsistent with the Articles 402 and 403 of the *Agreement*, and the inconsistency is not justified by the legitimate objectives test contained in Article 404.

Since the restriction on importation into Canada of MMT is not subject to the *Agreement*, and since the Panel does not believe that the object of the *Act* was a disguised restriction on internal trade, the Panel does not recommend repeal of the *Act*.

It may well be that the current structure of MMT supply is such that the *Act*'s international trade restriction is an effective barrier to internal trade in what is otherwise a legal product. However, this impediment must be dealt with in another forum.

The Panel recommends that the Respondent remove the inconsistency of the *Act* with the *Agreement*. Pending such action, the Panel recommends that the Respondent suspend the operation of the *Act* with respect to interprovincial trade.

The Respondent made reference to the need for harmonization with the regulatory environment in the United States. It is open to the Respondent and other Parties to the *Agreement* to consider establishing standards in Canada at levels not to exceed those permitted in the United States.

The Panel also recommends that the Respondent and the Complainants seek resolution of the outstanding harmonization and regulatory standards issues in conformance with the provisions of the *Agreement*, in particular by using CCME as a forum for discussion and resolution of the MMT issue.

Costs

Rule 53 of Annex 1706.1 (Panel Rules of Procedure) states that, in the event there are one or more intervening Parties in a dispute, the Panel shall distribute costs equitably. While disputing Parties may be required to bear all operational costs, alternatively the Panel may assign up to one-third of operational costs to the intervening Parties. However, there are no provisions in the *Agreement* providing guidance to the Panel on how to allocate costs.

With respect to costs, the Panel has determined that the Parties should bear the following share of Panel operational costs:

Canada - 60%

Alberta - 30%

Saskatchewan - 5%

Québec - 5%.

16. DISSENTING OPINION

I disagree with my colleagues.

The Respondent has been faced with a genuine dilemma. It has received the clearest of indications from the car manufacturers that further use of MMT is incompatible with

the most up to date pollution control equipment. At the same time, the Respondent has entered into a series of agreements, both nationally and internationally, to control fuel emissions.

The evidence before us clearly showed that the Respondent spent a great deal of time and effort attempting to get a consensus between the fuel industry and the car manufacturers. This effort was not rewarded with success, and the Respondent felt that in these circumstances it had no serious alternative but to introduce legislation.

The path of a simple ban on the substance MMT was not possible, because on the evidence MMT, while noxious in large amounts, did not appear to be dangerous in small quantities. The environmental effects of MMT are cumulative and indirect, in that it appears to affect the operations of fuel control equipment in the latest model vehicles.

For these reasons, I disagree with my colleagues that the *Act* does not meet the tests outlined in 404(b) and 404(c) of the *Agreement on Internal Trade*. There is no doubt that the legislation is by itself an impairment of internal trade. However, it is equally clear to me that the legislation satisfies the test set out in article 404. The purpose and effect of the legislation will be to get rid of MMT as a substance in gasoline. No other substances are so named or restricted, and therefore I would find that there has been “no undue impairment of access of goods”, and I would also find that the measure is “not more trade restrictive than necessary to achieve the legitimate objective”.

I would also disagree with my colleagues that insofar as the process followed has been less than perfect, the entire blame for this should be placed at the door of the Respondent. This legislation was before the Parliament of Canada for over a year, and there was ample opportunity for other governments to put forward alternative measures. I note that the so-called “two pump solution” was rejected by the petroleum industry itself. We have no basis upon which to find that the differences between the parties would have been resolved if this issue had been discussed further.

In short, the Respondent took action that it concluded was necessary for air quality and the improvement of the environment. The purpose of the *Agreement on Internal Trade* was not to dilute the ability of responsible governments to improve the environment of Canadians, provided these measures meet the tests set out in the *Agreement*. I would therefore have dismissed the application.

APPENDIX A

Participants in the Panel Hearings

The Panel

Clay Gilson, C.M. - chair
Claude Castonguay, C.C., O.Q.
Kathleen Kelly
Arthur Mauro, O.C., Q.C.
Bob Rae, P.C., Q.C.

Mark Newman - *Counsel to the Panel,*
Fillmore Riley

For Alberta

Internal Trade Representative
James Ogilvy - *Intergovernmental &*
Aboriginal Affairs

Counsel

Lorne Ternes - *Justice*

Other Officials

Doug Younie - *Environmental Protection*

For Québec

Acting Internal Trade Representative
Barry Le Blanc - *Canadian*
Intergovernmental Affairs

Counsel

Jean-François Jobin - *Justice*

Other Officials

Claude Sauvé - *Environment & Wildlife*
Françoise St.-Martin - *Natural Resources*
Raynald Archambault - *Natural Resources*

For Canada

Internal Trade Representative
Tom Wallace - *Industry*

Counsel

Brian Evernden - *Justice*
John Tyhurst - *Justice*

Other Officials

Frank Vena - *Environment*
Fulvio Fracassi - *Environment*
Irving Miller - *Justice*

For Saskatchewan

Internal Trade Representative
Robert Perrin - *Intergovernmental &*
Aboriginal Affairs

Counsel

Linda Zarzeczny - *Justice*

Other Officials

Scott Robinson - *Environment &*
Resource Management

APPENDIX B

Summary of Submissions

Complaining Party (Alberta)

Alberta contends that the *Act* fails to comply with Canada's obligations under the *Agreement on Internal Trade* (the *Agreement*), and that the inconsistencies with the *Agreement* cannot be justified by reference to the *Agreement's* provisions for measures associated with legitimate objectives. Specifically, Alberta argues that the *Act* does not serve as a legitimate objective and that Canada has not satisfied the four-part legitimate objectives test set out in Article 404 (Legitimate Objectives). Alberta contends that the *Act* has impaired internal trade, caused injury to Alberta refiners, and is inconsistent with general and specific provisions of the *Agreement*. The general and specific provisions in question are detailed below. Alberta also provides an estimate of the cost of the injury to refiners.

Alberta submits that it is arguing principally for fair treatment, due process and respect for jurisdiction. While fuel formulation is a matter of provincial concern, the federal, provincial and territorial governments have an established intergovernmental forum (CCME), and an established process for collaborative decision-making on environmental issues. Alberta alleges that Canada failed to utilize these established tools, and acted on its own, contrary to both the spirit and the word of the *Agreement*.

Alberta points out that, while the interprovincial marketing of MMT or fuels containing MMT is banned by the *Act*, the use and production of MMT within a province remains legal. Alberta stresses that, despite the broad application to certain manganese-based substances implied in the title of the *Act*, MMT is the only substance listed on the schedule of substances affected by the *Act*. Alberta alleges that the criminal sanctions outlined in the *Act* are a highly disproportionate punitive response to actions that have to do with a legal substance whose dangers have not been demonstrated. Alberta cites the disproportionate penalties as one reason why it considers the *Act* to be unreasonable.

Alberta notes that when First Ministers signed the *Agreement* in 1994 they agreed to a set of principles that would guide domestic trade to a new era of openness and ease of movement. In particular, Alberta cites Article 101.3 (Application of Mutually Agreed Principles), which states that

- (a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada;
- (b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;

- (c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments within Canada; and
- (d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.

Alberta argues that, while the constitutional authority of Parties is not impaired or altered by the *Agreement*, the language of the *Agreement* emphasizes that Parties have voluntarily agreed to restrain the use of their constitutional authority, in order to act cooperatively in the interests of a stronger, more competitive economy. In other words, Alberta argues that Parties have made a commitment to exercise their authority in a manner consistent with the obligations in the *Agreement*.

Specifically, Alberta alleges that:

1. the *Act* is inconsistent with the *Agreement*, and
2. the inconsistency is not permissible under Article 404.

The submission discusses each allegation in turn.

The *Act* is inconsistent with the *Agreement*

Alberta alleges that the *Act* is inconsistent with the following provisions of the *Agreement*:

- Article 100 (Objective)
- Article 401 (Reciprocal Non-Discrimination)
- Article 402 (Right of Entry and Exit)
- Article 403 (No Obstacles).
- Article 405.1 (Reconciliation)
- Annex 405.1 (Standards and Standards-Related Measures)
- Article 1505.8 (Precautionary Principle)
- Article 1508.1 (Harmonization).

Alberta notes that the objective of the *Agreement* is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. Alberta alleges that the *Act* is contrary to this objective because it eliminates the free movement of a legal good and disrupts an existing open, efficient and stable domestic market.

Alberta contends that the *Act* is inconsistent with Article 401 because MMT is treated differently than other substances that have the same end purpose, and are therefore

directly competitive or substitutable with MMT. Alberta alleges that the *Act* treats Alberta's MMT-enhanced unleaded gasoline less favourably than it treats unleaded gasoline that contain directly competitive or substitutable octane enhancers.

Alberta notes that all MMT used in Canada is purchased from a single source and transported interprovincially. The *Act* prohibits Alberta refiners from importing MMT from the Canadian source or from the United States, and Alberta refiners cannot sell any gasoline containing MMT across provincial boundaries. The *Act* prevents the free movement of a good across provincial boundaries. Alberta alleges that the *Act* is inconsistent with Article 402.

Furthermore, Alberta alleges that the *Act* is an excessively punitive measure designed to cripple trade in a product that remains legal to manufacture and use. Alberta contends that not only does the *Act* operate to create an obstacle to internal trade, it was designed specifically for that purpose. To support this contention, Alberta cites a letter from an Environment Canada official that states "(t)he intent of the . . . *Act* is to eliminate the use of MMT in . . . gasoline". As a result, Alberta alleges that the *Act* is inconsistent with Article 403.

Alberta maintains that gasoline formulation is a standards-setting process in which standards are established for the acceptability of fuel components and the proportions in which those components may be used, as well as for those substances deemed unacceptable for use. Alberta notes that fuel formulation is an ongoing concern of the CCME, which uses collaborative decision-making, scientific evidence and stakeholder participation to set standards. The Alberta submission cites work on benzene, sulphur and aromatics as examples of collaborative decision-making on fuel formulation.

Alberta contends that the intent of the *Act* is to eliminate the use of MMT in unleaded gasoline, and therefore it is a "standards-related measure" in the language of the *Agreement*. The effect of the *Act* is to set the allowable standard for MMT at zero. Alberta alleges that Canada, in the course of developing a standards-related measure, acted inconsistently with Article 405.1 by failing to seek reconciliation of its standards and standards-related measures by harmonization, mutual recognition or other means. Alberta also alleges that Canada acted inconsistently with Article 1508.1 by failing to endeavour to harmonize an environmental measure, and ignored or blocked provincial efforts to harmonize MMT standards.

Alberta notes that the right of Parties to establish standards and standards-related measures that do not conform to the obligations of the *Agreement* is limited by the requirement that such measures relate to achieving a legitimate objective. In addition to the four-part test for legitimate objectives contained in Article 404, Alberta maintains that Annex 405.1 imposes explicit limits on the use of such measures. Specifically, Alberta notes that Annex 405.1 directs Parties to:

- ensure the measure is not more trade restrictive than necessary [405.1(5)]
- take into account the risks that non-fulfilment of the objective would create [405.1(5)]

- ensure proportionality between those risks and the trade restrictiveness of the measure [405.1(5)]
- ensure consistent action when dealing with comparable situations [405.1(6)]
- ensure the measure has a scientific, factual or other reasonable basis [405.1(8)]
- ensure measures are based on an assessment of risk where appropriate [405.1(8)].

In environmental policy, the precautionary principle means that a Party may take measures to deal with an environmental issue even if full scientific certainty about the nature or impact of the issue is not available. Alberta notes that Article 1505.8 implicitly recognizes the precautionary principle, but it argues that Article 1505.8 does not eliminate the requirement for a scientific foundation for the measure, including the level of protection identified and some form of risk assessment. Alberta cites instances in international trade disputes where Canada has argued that the precautionary principle does not eliminate the need for some scientific information indicating a risk exists. Alberta suggested that Canada's approach to domestic regulation should be consistent with its stance before international trade tribunals.

In summary, Alberta alleges that the *Act* is inconsistent with several of the general and specific rules of the *Agreement*. Alberta notes that the *Agreement* permits inconsistent measures if those measures meet the justification or proportionality test contained in Article 404.

The inconsistency is not permissible under Article 404.

Alberta alleges that the *Act* does not meet the requirements of Article 404. Alberta notes that Article 404 imposes a four-part test, and that all four parts of the test must be satisfied before the inconsistent measure can be justified.

Alberta rejects Canada's use of the precautionary principle as a justification for taking action on MMT. Alberta alleges that Canada is using Article 1505.8 as an excuse for a lack of scientific rigour. Alberta contends that Canada's reliance on scientific evidence from interested industries, combined with a repeated refusal to conduct independent scientific study, undermines any defence based on the precautionary principle. Even if the *Act* served a legitimate objective, Alberta alleges that it fails the Article 404 justification test.

Under Article 404 (a), the purpose of the measure must be to achieve a legitimate objective. Article 200 (Definitions of General Application) defines legitimate objective to include protection of the environment, protection of human, animal or plant life or health, and consumer protection, considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.

Alberta cites statements by federal government members and officials that characterize their concerns about MMT as being (a) an increase in exhaust hydrocarbon emissions, (b) damage to catalytic converters, and (c) adverse health effects. Alberta notes that, if

these concerns could be substantiated, then it could be argued that Canada's intention was to address a legitimate objective relating to protection of human health, protection of the environment and consumer protection. Furthermore, it could be argued that Article 1505.8 clarifies that full scientific certainty is not required for Canada to rely on a scientific justification for the legitimate objective.

Alberta notes that the Environment Minister for Canada identified five points that Canada had considered that led to the introduction of the *Act*. The Alberta submission provides documentation, primarily from federal officials, that Alberta claims refutes the Minister's rationale for introducing the legislation. Alberta claims that the documentation demonstrates that the evidence against Canada's claim to have taken a "correct and prudent approach" is more convincing than the evidence in its favour.

Based on the documentation provided, Alberta claims that Canada knew that banning MMT would not achieve a legitimate objective, that Canada deliberately avoided independent scientific study for fear that study might undermine the basis for the *Act*, and that recent developments in the United States have eliminated harmonization with the U.S. as a rationale for the *Act*. Alberta alleges that the purpose of the *Act* is not to achieve a legitimate objective, because the *Act* is not structured in a way that could achieve protection of the environment, consumer protection or protection of human health. Therefore, Alberta contends that the Article 404(a) justification test has not been satisfied.

Under Article 404(b), the measure must not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective. Alberta submits that the *Act* severely impairs the movement of and ability to obtain MMT lawfully, yet MMT remains a substance that is legal to use. Alberta maintains that, if the stated objective of the *Act* is environmental protection, the *Act* is ineffective because MMT is still in use. Alberta alleges that Canada failed to seek less access-impairing approaches to achieving the stated legitimate objective, and therefore the Article 404(b) justification test has not been met.

Article 404(c) as modified by Article 1505.7 (Not More Trade Restrictive Than Necessary) provides that a measure must not be more trade restrictive than necessary to achieve a legitimate objective. Alberta contends that Canada must demonstrate that it took into account the need to minimize negative trade effects when choosing among equally effective and reasonably available means of achieving its legitimate objective.

Alberta alleges that the *Act* maximizes negative trade effects, that Canada suppressed equally effective means of achieving the legitimate objective, and that Canada has failed to demonstrate that it took into account the need to minimize negative trade effects. Alberta alleges that Canada refused to consider less trade-restricting proposals from CPPI and the company manufacturing MMT, suppressed independent scientific inquiry, and conducted separate negotiations with automobile manufacturers that made it difficult to consider other ways of addressing the issue. Alberta contends that the Article 404(c) justification test has not been met.

Article 404(d) provides that a measure must not create a disguised restriction on trade. Alberta acknowledges that the measure creates a direct and clearly obvious restriction on trade. However, Alberta alleges that the *Act* creates a disguised restriction because, while it purports to regulate a range of manganese-based substances, in effect it targets a single substance produced by a single supplier. Alberta contends that the Article 404(d) justification test has not been met.

Alberta requests the Panel to determine that:

- the *Act* is inconsistent with Articles 401, 402, and 403
- the *Act*'s prohibition of interprovincial trade in, or importation for a commercial purpose of, MMT does not serve a legitimate objective within the meaning of Article 404(a)
- the prohibition impairs unduly the access to MMT
- the measure is more trade restrictive than necessary to achieve the stated objective
- the measure is a disguised restriction on trade, and
- the *Act* fails to fulfill the requirements of Articles 405 and 1508.

Alberta seeks a determination that the findings of fact establish that the *Act* has impaired internal trade and has caused injury to Alberta refiners, and is therefore inconsistent with the general intent and specific provisions of the *Agreement*. Alberta requests that the Panel recommend:

- that the Parliament of Canada repeal the *Act*
- the federal, provincial and territorial governments work through the CCME and any other appropriate bodies, together with industry stakeholders, employing disinterested science, to investigate the effects of MMT as a gasoline additive, and
- in the interim Canada delist MMT from the schedule of the *Act*.

2. Defending Party (Canada)

Canada submits that the *Act* is consistent with its obligations under the *Agreement*. Canada maintains that the *Agreement* recognizes the need for environmental and consumer-oriented regulation, and that the *Agreement* recognizes and protects the legislative process where judgement is required for the protection of the public interest. Canada asserts that a reasonable and sufficient basis for legislative action existed, and that the *Agreement* requires no more.

Canada disputes Alberta's assertion that the *Act*'s regulatory regime is heavy-handed and targeted to prejudice a particular industry or region. Canada also disputes Alberta's characterization of various facts, and claims that the documents submitted by Alberta are incomplete and one-sided.

In response to Alberta's contentions, Canada:

- rejects the contention that the *Act* violates Article 401
- rejects the contention that the *Act* is a standard or standard-related measure, or in any way a violation of Article 405
- accepts that the *Act* violates Article 402, and does not contest that the *Act* can be construed as a contravention of Article 403
- contends that the *Act* meets the standard set by Article 404, when interpreted in the context of Chapter 15
- contends that the burden of proof required to demonstrate that the conditions under Article 404 have been satisfied is eased by several provisions of Chapter 15, particularly Article 1505 (Basic Rights and Obligations).

Canada submits that a Panel review process is not intended to be a new review of the facts surrounding the purpose of a measure, and that it is neither feasible nor appropriate for the Panel to weigh a decision taken by Parliament for correctness on the basis of scientific evidence. Canada asserts that courts of law show deference to the initial findings of policy makers and expert tribunals, and therefore apply a standard of reasonableness, not correctness, to the review of their decisions. Canada submits that the Panel should focus on determining if there was a reasonable basis for the legislative action taken.

Canada's submission provides an extensive review of the technical basis and history of the MMT issue. The key points made in the submission are:

- MMT is a highly toxic organo-metallic compound
- manganese, a key ingredient of MMT, causes disabling neurological impairments when inhaled at high doses
- the health and environmental impacts of long-term, low dose exposure to airborne respirable manganese and unburned MMT are undetermined
- the combustion of MMT produces residues inside engines, emissions control and monitoring systems and releases manganese and unburned MMT into the atmosphere
- although permitted in certain areas of the U.S., American refiners generally do not use MMT
- Canada is the only OECD country in which MMT has been widely used
- air pollution is a serious health issue in Canada, and the transportation sector is the single leading source of air pollution in Canada
- Canada is a signatory to a number of international agreements designed to decrease the release of pollutants into the atmosphere, including agreements that require stringent national emissions controls standards for automobiles

- Canada has taken a number of initiatives, on its own and in cooperation with provincial and territorial governments, to reduce air pollution
- Canada has been moving towards harmonization of its vehicle emissions control programs with more stringent U.S. requirements
- OBD technology is a key tool for long-term pollution reduction
- Canadian motor vehicle manufacturers increased pressure on Canada to eliminate MMT from unleaded gasoline because of the manufacturers' concerns about the effects of MMT on OBD systems
- Canada sponsored, encouraged and participated in a number of industry/government efforts to achieve consensus on the MMT issue - these efforts did not result in agreement between the automobile and refining industries
- one reason that consensus could not be achieved was because the scientific data presented by both sides of the dispute was inconclusive
- Canada decided to legislate once it became evident that the parties could not agree on a solution, that the automobile manufacturers were taking steps to remove or deactivate new emissions technologies and suspend warranty coverage for damage suspected to be caused by MMT, and after further independent research and analysis indicated that the automobile manufacturers' data were more relevant
- automobile manufacturers and other vehicle equipment manufacturers provided studies to Canada outlining their concerns about the effects of MMT
- a number of other independent organizations also supported Canada's legislative initiative on MMT
- Parliament weighed the supporting and opposing arguments and the available evidence, and determined that there was sufficient risk of prejudice to the public interest in the environment, human health and consumer interests to justify the legislation.

Canada responds to the Alberta submission in two ways. First, it argues that the *Act* is in conformity with the *Agreement*. Second, it takes issue with certain factual allegations made by Alberta.

Conformity with the *Agreement*

Canada notes that the *Act* is a law of general application regulating interprovincial trade in and importation for commercial purposes of any manganese-based substance mentioned in the schedule to the *Act*. Canada maintains the offences and penalties found in the *Act* are comparable with those of other federal environmental legislation. Parliament passed the *Act* for the purposes of protecting the environment, human health and consumers.

Canada states that the purpose of the *Act* is to achieve legitimate objectives, as defined in Article 200. Canada acknowledges that the *Act* restricts trade, but contends that the conditions outlined in Article 404 have been met.

Canada also asserts that, where the provisions of Chapter 15 conflict or modify the general rules contained in Chapter 4, Chapter 15 prevails. Canada accepts that the *Act* is an environmental measure and that Chapter 15 applies.

Canada rejects the allegation that the *Act* is a discriminatory measure, and therefore violates Article 401. Canada states that the *Act* treats all gasoline containing MMT equally, regardless of where it is produced. Canada asserts that the federal obligation in Article 401 is to treat goods produced in one province the same as it treats the same good produced in another province. Canada asserts that the *Act* treats MMT or MMT-enhanced gasoline the same regardless of province of origin. Canada rejects Alberta's claim that other gasoline additives are "like, directly competitive or substitutable goods", because MMT has different costs, differing octane-enhancing properties and differing effects on the environment and human health.

Canada accepts that the *Act* prevents the movement of MMT and MMT-enhanced gasoline across provincial boundaries, and is therefore inconsistent with Article 402. However, Canada submits that the measure is still permissible as it was established to achieve a legitimate objective as defined in Article 404.

Canada maintains that Article 403 was designed to prohibit indirect or disguised barriers to the free movement of persons, goods, services or investments within Canada. As such, Canada asserts that the *Act* is an open and transparent measure, and is not an indirect barrier to trade. Canada also rejects Alberta's contention that the severity of sanctions constitutes an obstacle to trade. Canada submits that the severity of any sanctions is irrelevant to Article 403, and in any event the sanctions are no more severe than those contained in other similar federal regulatory regimes. However, since Canada has conceded that the *Act* is inconsistent with Article 402, it does not contest that the *Act* operates to create an obstacle to internal trade and is therefore inconsistent with Article 403. However, Canada submits that the measure is still permissible as it was established to achieve a legitimate objective as defined in Article 404.

Canada asserts that the *Act* is not a standard or standard-related measure within the meaning of Article 200, and therefore Article 405.1 does not apply. Canada maintains that the *Act* is a regulatory measure as defined by Article 200 and Article 405.2 (Regulatory Measures and Regulatory Regimes). Canada asserts that the *Act* does not contain a specification, and there is no provision for adjusting the quantity of MMT used in gasoline. Therefore, adjustment and reconciliation of standards as provided for in Article 405.1 cannot occur.

Canada submits that the obstacle to trade created by the *Act* is not the result of any difference, duplication or overlap with the regulatory measure or regulatory regime of another Party, so Canada claims that the provisions of Annex 405.2 do not come into play. Furthermore, Canada notes that Chapter 17 does not apply to Annex 405.2 [Annex 405.2(10)], and submits that the Panel does not have standing to determine if the requirements of Article 405.2 come into play and have been met.

Canada maintains that the only obligation of Article 405 is a joint obligation for Parties to review their standards with the objective of reconciling those standards. Canada submits that one Party cannot be held to have violated a joint obligation.

Canada submits that, in any event, even if the Panel finds that the *Act* is a standard and that Annex 405.1 imposes additional obligations on Parties, Canada has met all the conditions elaborated in Paragraphs 4 through 8 of Annex 405.1.

Canada submits that the requirement to take into account the risks of non-fulfilment [Annex 405.1(5)] is no more than a requirement to follow a reasonable process, and claims that it has done this. Furthermore, Canada claims that the requirement to ensure proportionality [Annex 405.1(5)] is a requirement that the measure is no more trade restrictive than necessary to deal with the risk. Canada lists three alternatives it identified that could achieve the objective of eliminating MMT from gasoline (voluntary elimination, provincial regulation, and federal regulation). Canada maintains that these three alternatives are equally trade restrictive, and claims that it selected the only alternative available to it.

Canada also claims that it acted consistently in treating manganese-based additives equally and gasoline containing such additives equally [Annex 405.1(6)]. Canada maintains that the requirement to specify standards in terms of performance or competence [Annex 405.1(7)] is not applicable, since the *Act* does not establish a standard. Finally, Canada maintains that the *Act* has a scientific, factual or other reasonable basis [Annex 405.1(8)].

Canada maintains that the *Act* meets the requirements of Article 404 and is therefore permissible under the *Agreement*. Canada's submission cites the whole of Article 1505. Canada maintains that Article 1505 reflects a special concern for environmental protection in the *Agreement*, and that the *Agreement's* drafters accommodated this special concern by providing for a lower standard of proof in the case of environmental measures. Canada maintains that it met the standard of proof for Chapter 15 in acting prudently based on the facts and issue history it has already cited.

Canada maintains that the test in Article 404(a) only requires that the purpose of the measure be to achieve a legitimate objective. Canada asserts that, given the context the *Act* was developed in, the purpose of the *Act* clearly is to achieve the legitimate objectives of protection of the environment, protection of human health and consumer protection. Canada maintains that Parliament weighed the evidence and the claims of both sides of the debate, and concluded that the risks associated with the continued use of MMT in gasoline outweighed the benefits attributed to its use or the cost of eliminating its use. Canada submits that the Panel should defer to Parliament's conclusion that the purpose of the *Act* is to achieve a legitimate objective.

Canada submits that the *Act* does not unduly impair access within the meaning of Article 404(b) because the only goods that are affected are those goods which are the target of the legitimate objective of the legislation. Canada maintains that the *Act* does not go beyond the measure necessary to achieve the legitimate objective.

Canada claims that the *Act* is not more trade restrictive than necessary within the meaning of Article 404(c) because Canada utilized the only option reasonably available to it. Options presented by the automobile manufacturers were rejected by refiners, and options presented by the refiners were rejected by Canada. Canada maintains the rejection of the refiners' options was justified given the available evidence and the timing of more stringent emissions regulations. Canada also maintains that banning MMT was not an option, since it was unable to obtain the concurrence of the provinces.

Canada maintains that the *Act* is not a disguised restriction within the meaning of Article 404(d) because it is completely open and transparent, does not represent an attempt to protect a particular industry or region, and does not target a single substance.

Response to Certain Factual Allegations

Canada rejects suggestions by Alberta that it abandoned science or refused to employ or sponsor independent scientific study. Canada notes that two independent experts commissioned by Canada assigned more weight to data submitted by the automobile manufacturers than to data submitted by the refiners and the company manufacturing MMT, and suggested that further study would achieve little.

Canada also rejects suggestions by Alberta that the rationale for the *Act* shifted over time, and maintains that the fundamental environmental and human health rationale for the legislation was consistent.

Canada rejects Alberta's contention that recent developments in the United States have removed harmonization of gasoline standards with the United States as a rationale for the *Act*. Canada notes that it is not bound to follow American regulatory standards where it thinks those standards are deficient.

Canada maintains that the internal federal government memoranda submitted by Alberta which question the reliability of OBD systems and the agenda of the automobile manufacturers are irrelevant, because the working -level officials who wrote the letters did not purport to represent government policy and did not have all relevant information available to them.

Canada claims that the costs to Alberta refiners cited in the Alberta submission are unsupported, and in any event, are outweighed by the cost of replacing MMT-fouled spark plugs.

Canada submits that the Panel should find that the *Act* is not inconsistent with the *Agreement*, and dismiss Alberta's complaint.

3. Summary of Intervening Parties Arguments

Québec and Saskatchewan filed written submissions, while Nova Scotia did not file written material.

Québec

The Government of Québec filed a brief opposing the passage and implementation of the *Manganese-based Fuel Additives Act*. Québec maintains that the process used by Canada failed to respect commitments made in the *Agreement* to reduce obstacles to internal trade, and that the measures contained in the *Act* do not conform with the provisions of the *Agreement* that prohibit and limit barriers to trade. In summary, Québec supports Alberta's contention that the legislative measures enacted by Canada under the *Act* prejudicially affect interprovincial trade and that those measures cannot be permitted within the meaning of Article 404 of the *Agreement*.

Québec notes that the mutually-agreed principles of the *Agreement*, as outlined in Article 101, include a commitment not to establish new barriers to trade and to facilitate the cross-boundary movement of persons, goods, services and investments within Canada. The Parties to the *Agreement* are also required to reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments. Québec maintains that, as a signatory to the *Agreement*, Canada is responsible for ensuring compliance with the *Agreement* by all its departments.

Québec objections are based on both the process used by Canada to address the MMT issue, and the measures chosen by Canada at the conclusion of the process.

Process

Québec maintains that the process that led to the enactment of the *Act* was inconsistent with many of the provisions of the *Agreement*. Québec argues that Canada did not provide other Parties to the *Agreement* any real opportunity for joint review of the selected measures, and did not undertake serious and constructive consultations with other Parties to find better solutions to the MMT issue.

Québec maintains that the process used by Canada contravened the following *Agreement* obligations:

Article 405

Annex 405.1

- Paragraph 13 (establish mechanisms to consult and cooperate)
- Paragraph 14 (joint review to reconcile obstacles to internal trade)

Annex 405.2

- Paragraph 9 (joint review of regulatory measures that are obstacles to trade)

Article 1508

- Paragraph 1 (endeavour to harmonize environmental measures).

Québec notes that the environmental impacts of petroleum product use is an area of long-standing provincial regulation, and that provincial standards for fuel formulation already exist. Québec alleges that Canada did not engage in joint review, joint action,

reconciliation or harmonization for MMT despite the fact that meaningful collaboration between Canada and provincial Parties had already taken place on other fuel formulation issues.

Petroleum product use in Québec has been regulated by the provincial government for more than 25 years. Over the years, Québec has amended the legislation and regulations to accommodate new scientific information and to harmonize its standards with other jurisdictions.

The Québec submission identified several collaborative processes which have been used in the last several years to deal with the environmental effects of petroleum products, particularly in the areas of benzene, sulfur content, lead tetraethyl, and underground storage tanks. Québec states that, while some of the processes took long periods of time, joint effort led to successful outcomes. Québec notes the difference in the federal approach to resolving the matters listed above, compared to the federal approach on the MMT issue.

Québec lists a number of proposals made by other Parties to the *Agreement* and by third parties to Canada to find other avenues to resolve the MMT issue, including a two-pump system and tradable permits, and alleges that Canada ignored these proposals and pursued unilateral action. Québec asserts that Canada is obligated by the *Agreement* to give favourable consideration to these proposals, or to seek the assistance of the Canadian Council of Ministers of the Environment. Québec also asserts that Canada violated its obligations for transparency under Articles 406 (Transparency) and 1506 (Transparency) by not giving other Parties notice of its intended measures.

In summary, Québec alleges that the process of developing the *Act* was so flawed as to undermine Canada's justification for the *Act*.

Measures Chosen

Québec states that the *Act* clearly and directly affects interprovincial trade in a negative manner, and therefore creates prejudicial effects and obstacles to internal trade.

Québec notes that petroleum companies in each provincial jurisdiction may continue to produce and sell gasoline containing MMT within that jurisdiction, but the companies cannot sell or trade gasoline containing MMT across provincial boundaries. The requirement that fuel sold interprovincially be manganese-free creates a difference in standards between Québec's standard and Canada's standard, creates a jurisdictional overlap where none existed before, and will cause additional costs for refining companies.

Québec alleges that the *Act* contravenes Articles 402 and 403 by directly affecting a company's ability to sell beyond provincial boundaries a product which can be legally manufactured and sold within the province.

Québec also alleges that the *Act* is not permissible under Article 404 because the measure does not meet the condition that a measure should not be more trade restrictive than necessary to achieve a legitimate objective. Québec notes that all four of the conditions set out in Article 404 must be met for a non-conforming measure to be permissible.

Québec notes that limits on the trade-restrictiveness of measures justified by the legitimate objective test are contained in Paragraph 5 of Annex 405.1, Paragraph 5 of Annex 405.2, and Article 1505.7.

Québec outlines the following basis for its contention that the measure does not meet the “not more trade restrictive than necessary” condition:

- Canada has not carried out consultations necessary to identify other solutions, nor has it proposed or examined other valid options.
- Canada did not consult with independent petroleum product retailers, owners of filling stations, consumer and driver associations, or other interested parties
- discussions with automobile manufacturers did not focus on identifying alternative solutions
- Canada did not draw upon the expertise of provincial governments in this area
- transitional measures, or combinations of various measures, including fiscal incentives such as tradable permits, were not considered
- technical solutions, such as altering manganese levels, were not considered
- the hasty nature of Canada’s approach precluded the thorough analysis required by Annex 405.1, Paragraph 8
- the *Act* permits the continued use of MMT, but restricts trade in it.

Québec requests the panel to recognize that the *Act* creates significant barriers to internal trade, that Canada contravened several provisions of the *Agreement* when adopting the *Act*, and that Canada failed to meet its obligations under the *Agreement*.

Québec requests the panel to conclude that:

- the *Act* is inconsistent with the *Agreement*
- the *Act* should be repealed, or at least that MMT should be withdrawn from the schedule of the *Act*
- Canada should convene the Parties to the *Agreement* to discuss the issues at stake and identify possible solutions, should Canada wish to proceed on the MMT issue.

Saskatchewan

Saskatchewan filed a brief opposing the passage and implementation of the *Manganese-based Fuel Additives Act*. Saskatchewan agrees with, and adopts, all of the arguments made by Alberta in its submission. Saskatchewan also adopts the

discussion and explanation of facts, and the evidence in support, filed by Alberta in its submission.

Saskatchewan states that the Preamble, Mutually-Agreed Principles, and Rules of the *Agreement* demonstrate that the intent of the Parties is to eliminate barriers to trade and to maintain and enhance meaningful consultations on matters involving internal trade.

Saskatchewan alleges that the *Act* creates a new barrier to trade, prevents movement of a good across provincial boundaries, and creates an obstacle to internal trade. Specifically, Saskatchewan alleges that the *Act* is inconsistent with Article 401, Article 402 and Article 403, and that Canada has failed to comply with Article 405 and Article 1508.

Saskatchewan maintains that Canada has not demonstrated that the four-part test of a legitimate objective contained in Article 404 has been met. Saskatchewan also draws the Panel's attention to the limits on the trade-restrictiveness of measures justified by the legitimate objective test as contained in Paragraph 5 of Annex 405.1, Paragraph 5 of Annex 405.2, and Article 1505.7. Saskatchewan asserts that, when read together, the clear intent of the *Agreement* is that legitimate objectives justifications are intended to be used as a last resort, after a fair and rigorous process.

Saskatchewan states that it is not aware of any evidence that suggests that Canada took into account the need to minimize negative trade effects or the requirement to ensure proportionality [Annex 405.1(5)]. In fact, Saskatchewan alleges that Canada rejected suggestions on how to meet these provisions. Saskatchewan cites several letters from Cabinet Ministers, senior officials and industry representatives to Canada requesting a delay in proceeding with the *Act* while alternatives are explored.

Saskatchewan suggests that Canada could have used the provisions of the *Canadian Environmental Protection Act (CEPA)* as a less trade-restrictive route. Saskatchewan submits that the CEPA process is based on reasoned investigation, science and consultation, and is "tailor-made" for the MMT issue.

Saskatchewan rejects any suggestion that Canada's process and legislative solution was based on an emergency or urgent situation requiring immediate action. Saskatchewan notes that the MMT issue dates back to 1992, and asserts that nothing has occurred since then to cause a government to believe immediate action was necessary.

Saskatchewan submits that on any reasonable standard of proof, the federal government is unable to satisfy the onus upon it to show a legitimate objective for the *Act*.

Saskatchewan notes that the primary justification that Canada has given for the *Act* is protection of the environment, yet MMT remains legal to use in Canada. The *Act* bans interprovincial trade in MMT, not the use of MMT. Saskatchewan disagrees that the act of importing or trading in MMT is inherently damaging.

Saskatchewan maintains that controlling the use and production of MMT is a provincial matter, and that the *Act* is an attempt to fill a gap in Canada's constitutional authority. Saskatchewan disputes that this constitutes a legitimate objective.

In summary, Saskatchewan maintains that Canada has failed to demonstrate that the *Act* meets the legitimate objectives test outlined in Article 404(a), 404(b) and 404(c), in particular the "not more trade restrictive than necessary" test.

Accordingly, Saskatchewan requests the panel to:

- find facts consistent with those set out in the submissions of Alberta and Saskatchewan
- determine that the *Act* is inconsistent with Articles 401, 402, 403, 405.1 and 1508
- determine that Canada has not complied with Article 405.2
- in the alternative, determine that while the purpose of the *Act* is to achieve a legitimate objective, Canada has not demonstrated the conditions and requirements set out in Articles 404(b), 404(c) and 1505(7)
- recommend that Canada should immediately withdraw MMT from the schedule of the *Act*
- recommend that the *Act* should be repealed,
- recommend that Canada should cooperate with interested Parties and persons to obtain third party information
- recommend that Canada and interested Parties and persons work collaboratively to resolve the issue.

4. Supplementary Submissions

The Panel provided the consulting Parties with an opportunity to file additional written material, subsequent to the initial written submissions. Alberta and Québec filed additional documentation, while Canada filed additional arguments. Saskatchewan filed a letter noting that it may request a further opportunity to respond to Canada's arguments at some point prior to or during the oral hearings.

Alberta filed the following documents:

- the interim report on Bill C-29 of the Standing Senate Committee on Energy, Environment and Natural Resources, detailing the committee's reflections and conclusions and the majority and minority reports
- a report from an engineering firm outlining the cost to refiners of removing MMT
- a memo from the U.S. EPA containing data purporting to demonstrate that MMT decreases emissions of carbon monoxide and nitrogen oxides
- a memo from CPPI outlining the costs of various octane enhancers

- a memo from CPPI indicating that alternative octane enhancers are substitutes for MMT
- a letter from CPPI providing cost estimates for refineries resulting from MMT removal.

Québec filed the documentation that supports the assertions made in its written submission, including correspondence, committee reports and studies. The Québec documentation included four consultant reports outlining alternative options for dealing with MMT.

Canada's supplementary submission responded to four issues raised in the initial written submissions of Saskatchewan and Québec. Those issues are:

- reference to the CCME as a forum for consultation
- the method chosen to regulate MMT
- urgency
- other "less trade restrictive" options.

With respect to referring the MMT matter to the CCME for consideration, Canada argues that provincial requests to use the CCME's Cleaner Vehicles and Fuels Task Force as a forum came too late in the Task Force's work for the Task Force to incorporate MMT into its report. Canada also notes that the CCME met five times between the time the *Act* was introduced and the time Royal Assent was granted, but did not add MMT to its work plan at any one of these meetings.

Canada disputes allegations that the CEPA process would provide an effective process for dealing with the question of MMT. Canada states that CEPA can only be used to regulate substances that are directly toxic as a result of such substances entering the environment. Canada asserts that MMT's negative effects are indirect, so Canada used its constitutional authority to regulate international and interprovincial trade, consistent with previous actions on other issues.

Canada maintains that urgent action was necessary, as automobile manufacturers had threatened, or taken, action to disconnect or disable the OBD-II systems or disconnect new emissions control technology and remove warranty coverage on vehicles already coming onto the market.

With respect to the less trade restrictive options identified by Québec, Canada maintains that those options had either been rejected by CPPI or had not been raised by stakeholders during the debate on the issue.

