

NAFTA's Chapter 11 Provision

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About Chapter 11

- NAFTA's chapter 11 currently allows private companies to sue national governments claiming that environmental policies are "expropriations" of their corporate profits

How the Disputes Are Decided

- These suits take place under NAFTA's "investor-state" dispute mechanism, modeled after private commercial arbitration
- Public policies are adjudicated behind closed doors and before arbitrators chosen by the parties to the dispute

The Provision

- **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.

The Provision (cont'd)

- 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.

Cases

- Several cases in the past X years have arisen under this NAFTA provision

Methanex

- Methanex is a Canadian corporation which produces methanol
- About 40% of Methanex sales in the U.S. were to third parties that used methanol for the production of MTBE
 - 132,000 tons were shipped to CA refineries for MTBE production

What's MTBE?

- Methyl tertiary butyl ether, or MTBE, is added to gasoline:
 - as a source of octane
 - as an oxygenate, to make the gas burn cleaner to reduce air pollution
 - to dilute undesirable gasoline components

MTBE & California

- In March 1999, Gray Davis ordered a ban on MTBE, because the additive was contaminating drinking water supplies

Methanex's Arguments

- MTBE is safe
 - not a carcinogen, nor a developmental or reproductive toxin
 - has been used as a medicine for humans
- The ineffective regulation and non-enforcement of environmental laws is responsible for the presence of MTBE in the water supplies

Methanex's Complaint

- The ban of MTBE in California is tantamount to an expropriation of the company's investment
- Methanex is seeking \$970 million in compensation from the United States