CORPORATE *Sovereignty*

Free Trade Agreements in the Americas

by Brent Foster

If President Bush, Canadian Prime Minister Jean Chretien, and Mexican President Vincente Fox or the leader of any other country asked the world's largest corporations to draw up their ideal free trade agreement, it would probably look a lot like the North American Free Trade Agreement (NAFTA). It is difficult to convey to the average person just what this means, because most people still think trade agreements deal primarily with tariffs and quotas.

Most people are surprised when you tell them that under NAFTA Congress gave Canadian-owned corporations the right to challenge California's law that protects its drinking water from a carcinogenic gasoline additive called MTBE. The disbelief in their eyes grows when you explain to them that under NAFTA our congressional representatives also agreed to discourage federal and state governments from purchasing U.S.-made products.

By the time you try to convince someone that under NAFTA Congress gave foreign corporations the right to force the United States into court for alleged violations of its free trade provisions, you better have some good evidence close by. There is a strong and understandable impulse to deny that the United States, Mexico, and Canada were the first countries ever to give foreign corporations the right to sue them for violations of a trade agreement.

A rash of legal challenges to environmental laws in the United States, Mexico and Canada by foreign companies makes it tough, however, for even the most ardent free traders to deny that NAFTA gave corporations a new and very powerful tool to fight virtually any law that cuts into their potential profits. Corporations have already successfully used NAFTA to overturn a ban on the sale of a neurologically toxic chemical in Canada and to win more than $20 million in damages after a Mexican state refused to site a toxic waste treatment facility on top of its drinking water supply. There is good reason, however, to think that these cases are just the first signs of what corporations plan to do with their newly-found powers under NAFTA.

Trade agreements have existed in one form or another for thousands of years. However, until now, the countries involved dealt with violations of these agreements directly. NAFTA changed all this. Its investor protection provisions have become the blueprint for future trade agreements, such as the Free Trade Area of the Americas (FTAA), which would essentially expand NAFTA to 34 countries in the Western Hemisphere.

In agreeing to NAFTA, Congress gave foreign investors the extraordinary power of taking enforcement of a trade agreement into their own hands. NAFTA gave corporate investors the power to take the United States before a NAFTA tribunal of judges and win billions of dollars in economic damages by claiming that U.S. laws, regulations, or other actions violated NAFTA. Contrary to most people's assumptions, NAFTA gave foreign corporate investors the right to challenge laws regardless of whether they were even intended as trade barriers.

Historically, if a corporation or investor had a complaint about the trade practices of another country, they would ask their government to initiate talks with that country or, at times, to bring a challenge before a given trade body's tribunal. Even under the

provisions of the World Trade Organization (WTO), for example, only countries have the power to bring trade-based challenges and seek monetary sanctions, while private corporations do not.

By only allowing countries to bring trade challenges, there is some assurance that a country, before a trade-based complaint, will consider its public policy ramifications. For example, when considering a challenge to a Canadian law intended to protect its people from a toxic chemical, the United States would have to consider the fact that this would open the door for a later Canadian challenge to similarly-intended U.S. legislation. Under NAFTA's every-corporation-for-itself system, however, there is no reason for such restraint and the most alarmist predictions that critics of the agreement made prior to its passage have been realized.

The significance of giving corporations, and any other "investor", the right to sue a foreign government becomes especially clear when you consider the new restrictions that NAFTA actually places on government actions, regardless of whether they have any direct bearing on trade.

NAFTA's Chapter 11 places two primary restrictions on governmental actions at the federal, state and local levels. First, it forbids governments from treating foreign investors any less favorably than U.S. investors. Second, it prohibits the direct or indirect "expropriation" or "taking" of an investment without compensation. Many Oregonians became familiar with the concept of "takings" in the land use context during the fight over Ballot Measure 7 several years ago and the subsequent court battles that ensued. *(See Measure 7 Forum at www.oregonsfuture.org—ed.)* Whereas the basic premise of Measure 7 was that state and local governments would have to pay compensation for the effect of any restriction they imposed on land use, NAFTA's Chapter 11 provisions are dramatically broader.

At first blush, it is easy to agree with the notion that the United States should not treat foreign investors "any less favorably" than it treats U.S. investors. However, the issues become more complicated when you realize that this provision is being interpreted to mean that the federal and state governments are barred from considering the benefits of buying goods and services from domestic or local sources rather than foreign ones.

For example, are there any national security reasons why federal or state governments would want to encourage the purchase of domestically produced oil? Similarly, does the goal of preserving national food security justify a federal policy of buying U.S.-grown food whenever possible? In light of high unemployment and the resulting costs on government unemployment programs, does it make sense for federal and state governments to make purchasing decisions that attempt to support domestic or local jobs?

In a country in which "Buy USA" has been both a patriotic and an economic rallying cry on and off for decades, the notion of using taxpayer money in a way that supports taxpayers, as opposed to foreign corporations, seems as natural as motherhood and apple pie. However, when the U.S Congress voted for NAFTA in order to give U.S. corporations greater access to business in Mexico and Canada, they ignored warnings from labor unions and others that the "no

A Case for Scrutiny:
MMT and The Complexity Behind Controversy

The controversy over MMT in Canada began in 1991 and did not end until 1998. Eventually Canada passed federal legislation in 1997 banning inter-provincial trade of MMT, but the government reversed its own ban a year later and paid compensation to Ethyl Corporation for its lost business. This reversal followed a decision by a panel convened under Canada's own Agreement on Internal Trade (a federal-provincial accord). A NAFTA tribunal never ruled on the MMT case.

MMT is sold by Ethyl as an additive for gasoline that boosts octane levels. Canada's 1997 legislation reflected primarily the result of lobbying pressure from automakers, who claimed that MMT fouled their pollution control systems. We carefully reconstructed the meetings between the parties and concluded that, despite extensive review by government regulators, and negotiation between the automakers and the petroleum refiners, this claim was never independently validated. Well before Canada's legislative ban on the inter-provincial trade of MMT came into effect, the U.S. Environmental Protection Agency (EPA) had ruled that MMT did not impair the pollution control systems on cars, which was ostensibly the reason for Canada's action.

In both Canada and the United States, federal regulators were concerned about adverse health effects of exposure to manganese (a key component of MMT), which is, like other heavy metals, a neurotoxin at sufficiently high doses. In the United States the EPA required Ethyl to conduct numerous studies of the health risks of MMT, but it never imposed regulatory controls on MMT as a result of a health risk assessment. In Canada, Health Canada issued a study in 1994—consistent with the EPA's findings since 1978 when MMT first started to replace lead in gasoline—stating that MMT did not pose a health risk for Canadians. As such, the Canadian ban on MMT was never based on health concerns. Similarly, no environmental risks justifying regulatory action were found by the federal authorities in either country.

In June 1998, a Canadian internal trade panel found that the federal government had failed to demonstrate that the risk of MMT was of such urgency or so widespread

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less favorable” provision could hurt people in this country.

Concern about how the equal treatment requirement, as it has been called, would be used by corporations is not just hypothetical. Currently, a Canadian company, ADP Group, is suing the United States under NAFTA’s investment protection provisions and challenging the federal requirement that U.S. highway funds be used to buy U.S.-made concrete and steel unless domestic sources cost more than 25 percent of non-domestic sources. While the “Buy-American” policy hangs directly in the balance, so are hundreds or thousands of laws in states, such as Oregon, which mandate governments to favor local companies in certain types of purchasing decisions.

Another case that further highlights the potential effects of NAFTA is a suit United Parcel Service (UPS) has brought against Canada arguing that it violates NAFTA by subsidizing its postal service, in the same way that countries around the world do, including the United States. In giving federal funds to its postal service, UPS argues, Canada is treating it more favorably than it treats UPS and is therefore violating NAFTA. When it was pointed out to a UPS executive that the U.S. postal system could be challenged on similar grounds, he agreed and suggested that someone should bring a challenge under NAFTA against the United States.

While NAFTA’s equal treatment requirement has been the source of many challenges, the highest profile cases brought by corporations under NAFTA have been aimed at laws, regulations or other actions that a corporation claims is an “expropriation” or “taking” that entitles it to compensation.

One of the first challenges under NAFTA’s investment protection provisions was brought in April 1997 by the U.S.-based Ethyl Corporation against Canada for its ban on the sale of manganese-based substances. The ban came in the wake of a report by the Canadian Environmental Health Directorate finding that such substances caused adverse neurological effects similar to mild Parkinson’s disease. Manganese is a key ingredient in a gasoline additive designed to prevent engine knocking, called MMT. Five days after Canada implemented the ban, Ethyl Corporation, whose Canadian subsidiary was the sole processor, distributor and importer of MMT, filed a claim under NAFTA alleging that Canada’s regulation banning manganese constituted a “taking” of Ethyl’s business in Canada and claimed $250 million in damages. *(See sidebar “A Case for Scrutiny MMT…”—ed.)*

In addition to seeking compensation for the loss of future sales inside Canada and worldwide, Ethyl claimed that Canada should reimburse Ethyl for its lobbying expenses against the ban. Ethyl also asserted that even the legislative debate about banning MMT constituted a taking under NAFTA because discussion of adverse effects of MMT by elected officials damaged Ethyl’s reputation.

In July of 1998, Canada gave up its fight against Ethyl Corporation and agreed to two terms of settlement. First, Canada agreed to pay Ethyl $ 17.5 million, including $ 4.5 million in attorney fees. Second, Canada agreed to lift the ban on MMT. MMT continues to be sold today in Canada today and, as a result, Canadians continue to be affected by the neurological side effects attributable now not just to MMT, but to NAFTA’s investor protection provisions as well.

The Metalclad Corporation, based in Newport Beach, California, brought a similar suit against Mexico after the Mexican State of San Luis Potosi declared a toxic waste storage facility owned by Metalclad an environmental hazard and ordered the site shut down. The decision came after a geological audit prepared by the University of San Luis Potosi found that Metalclad’s plant, which had a record of pollution problems, was located on an underground alluvial stream and that pollution from the facility could contaminate the local water supply. In January of 1997, Metalclad filed a claim against the Mexican government under Chapter 11 of NAFTA alleging that it was entitled to $90 million in compensation from the poverty-stricken Mexican government as a result of Mexico’s “taking” of Metalclad’s right to operate its facility.

In August of 2000, the NAFTA tribunal in a broad and precedent-setting decision ruled in favor of Metalclad and ordered Mexico to pay $16.7 million in damages. For a country like Mexico where enforcement of

Continued from previous page.

that it warranted the restrictions on internal trade. Within a few weeks of this ruling, the federal government lifted the ban on MMT and negotiated compensation with Ethyl, which suspended further proceedings against the Canadian government, including a challenge under NAFTA.

In “MMT: A Risk Management Masquerade,” published as chapter 4 of In the Chamber of Risks: Understanding Risk Controversies (McGill-Queen’s University Press, 2001), we review the entire history of the long battle between Ethyl and the EPA over the regulation of MMT in the United States. (For information on how to obtain this and other titles, see www.leiss.ca.) As of the time of this writing, the EPA has required additional studies from Ethyl on emissions characteristics and health effects.

William Leiss and Stephen Hill for Oregon’s Future

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See Barbara Dudley’s response on next page.

environmental laws is already a rarity, the chilling effect that this ruling could have on future efforts to protect Mexicans from toxic chemicals may be the most serious casualty of a NAFTA ruling to date. *(See expropriation in glossary—ed.)*

Both the Metalclad and Ethyl Corporation cases highlight the incredible new powers corporations won under NAFTA to challenge laws and government actions. With this gain in corporate investors' control over the laws that affect our lives came a corresponding loss in the power of democratically elected governments to protect the health, safety, and welfare of its citizens. In voting for NAFTA, our elected representatives gave corporations a powerful new tool with which they can affect our lives, and they have not been shy about using it.

Sunbelt Water Inc., of Santa Barbara, California, is currently challenging British Columbia's ban on the export of its water supplies, which B.C. adopted out of fear that it would loose water critical for fish and agriculture to thirsty Californians.

U.S.-based S.D. Myers Corporation, which transports and treats toxic waste, won a NAFTA lawsuit against Canada after the country temporarily banned the export of highly toxic PCB's because it was concern that they-were being incompletely burned in the United States and were drifting back into Canada. Even though the ban was actually required by an international treaty on toxic waste, the NAFTA tribunal found Canada had violated NAFTA.

While it may seem like U.S. corporations are the ones most frequently using NAFTA's investment protection provisions, the highest profile NAFTA challenge

Barbara Dudley's Comments on MMT and NAFTA

It is true that Health Canada (the Canadian equivalent of the EPA) failed to find conclusive evidence of health risks from exposure to low levels of manganese (a heavy metal found in MMT), despite studies by neurotoxicologists at the University of Quebec at Montreal, which indicated that low level exposure to manganese can cause memory impairment and tremors similar to those experienced by victims of Parkinson's Disease. Understanding how exposure to airborne heavy metals damages the human nervous systems is often very difficult. In the case of lead, the earlier gasoline additive, it took sixty years to collect enough data to justify a ban. This explains why many countries have relied on the "precautionary principle" to ban or restrict the use of MMT as a fuel additive. (Steven Shrybman, The World Trade Organization, 1999).

Two successive Canadian environment ministers, Sheila Copps and Sergio Marchi, implemented a trade ban on MMT relying not on the toxicological evidence but on evidence that it interfered with emission control devices in automobiles. Because neither this finding nor the evidence of the toxicologists was based on "scientific certainty", trade lawyers warned the Canadian government that the ban was vulnerable to a challenge by the Ethyl Corporation under NAFTA, which could cost taxpayers hundreds of millions of dollars. As a result, negotiators for the Canadian government and Ethyl Corporation reached an agreement in which Ottawa dropped its ban on MMT and paid the company $10 million for legal costs and lost profits, and issued a statement to the effect that the manganese-based additive is neither an environmental nor a health risk. In return, Ethyl dropped its NAFTA challenge and its claim for $250 million in damages. (Shawn McCarthy, Toronto Globe and Mail, July 20, 1998). So, yes, there was never a NAFTA ruling on the MMT ban, but the NAFTA challenge achieved its desired results for the US-based multinational Ethyl Corporation.

William Leiss Responds

It is true that neurotoxicologists at the University of Quebec at Montreal found that low-level exposure to manganese could cause memory impairment and tremors. The danger to Canadians depends on how low is low, and whether the actual exposures exceed the presumed threshold of harm. At the time of the study there were many other sources of manganese, including the by products of steel mills that were salting the Canadian environment with far more manganese than the use of MMT in fuel. Health Canada conducted two major studies to assess the risk. In the second one, it concluded that what the U.S. calls the reference level (threshold of presumed harm) was exceeded, in all of Canada, only in Sault Sainte Marie and Hamilton, Ontario (arguably because both have steel mills) and in the Toronto subway system due to grinding of steel rails. Health Canada never banned MMT for this reason.

(The Ethyl Corp was once the primary manufacturer of lead additive for gasoline and fought in the courts for years to keep it from being banned—ed.)

to date involves a suit filed by the Canadian-based Methanex Corporation against the United States challenging California's ban on the carcinogenic gasoline additive MTBE. California called for MTBE to be phased out by 2002 after MTBE had contaminated more than 10,000 drinking water wells. Methanex, which makes a primary component of MTBE, in turn filed a claim seeking $970 million in damages against the United States.

Were Methanex to win, the United States would either have to pay the nearly $1 billion in damages or, as is more likely to occur, the federal government would force California to withdraw its ban on MTBE by threatening to withhold federal highway funds, suspend federal grants to police agencies, or use a host of other tools the federal government has at its disposal to control state actions. As a result, even though NAFTA tribunals technically cannot overturn a given law, the ability to award unlimited economic damages effectively gives them the same power.

Many watching this case believe a victory for Methanex could actually be a real benefit in that it would expose the extent to which Congress traded away the public interest in passing NAFTA. The free trade advocates, including the judges who sit on the NAFTA tribunals, however, are highly aware that this case has the potential to throw a giant monkey wrench in the free-trade freight train. That train was moving so fast that only one member of Congress (a Republican) even read the full text of NAFTA—and when he did he voted against the agreement.

Not surprisingly, a NAFTA tribunal recently went so far as to ignore some of the plain language of NAFTA in order to make a preliminary ruling against Methanex. The tribunal did, however, leave the door open for Methanex to amend its complaint and keep its claim alive.

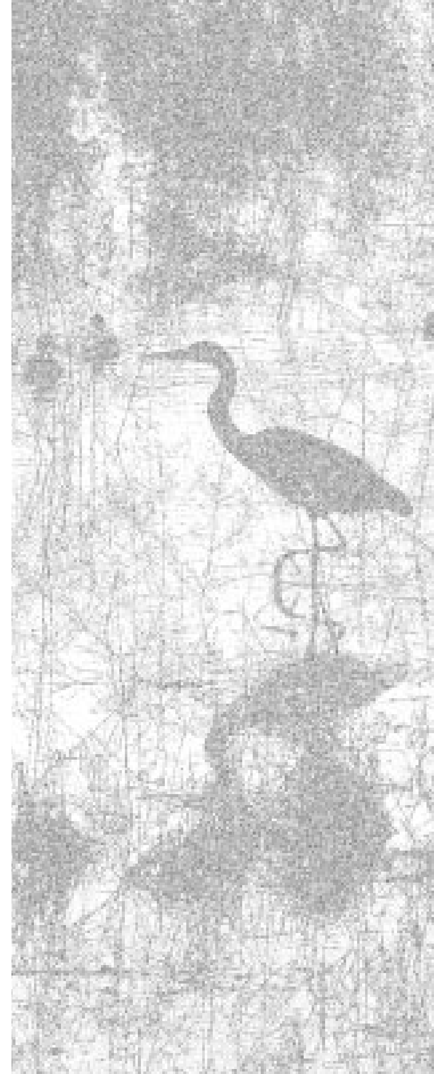
The Methanex case alarmed Democrats and Republicans alike in the California legislature and made it more difficult for Oregon's elected representatives, most of whom consider themselves strong free traders, to ignore NAFTA's serious threat to basic protections of the environment and of human health. Nonetheless, Senator Ron Wyden continues to discount the serious potential for trade agreements such as NAFTA to undermine environmental and labor protections at the local, state and federal level.

Despite strong opposition from a diverse group of environmental, labor, religious, and human rights groups, Wyden voted to give George W. Bush Fast Track trade authority to negotiate the Free Trade Area of the Americas (FTAA), which significantly expands NAFTA's investor protections provisions. *(See Jim Bailey's comments on Fast Track p.17.)*

After consistent criticism from a broad spectrum of constituents, there are some indications that U.S. trade negotiators may be slightly moderating their view on the types of actions which could constitute a "taking" or "expropriation," but word of this has alarmed U.S. business interests who clearly have the ear of the Bush administration.

As negotiations move forward on the FTAA, it is critical to closely evaluate the effects that NAFTA and its investor protection provisions have had not just on trade, but on the ability of local, state, and federal governments to perform their most basic functions. NAFTA's investor-protection measures may represent one of the most significant shifts in power from democratically-elected governments to corporations in history. Free trade boosters downplay the significance of this shift or deny it all together.

It is not surprising that NAFTA looks a lot like what the largest corporations in the Americas would like to see in a trade agreement, because they were the ones who wrote it. It seems that the FTAA will have the same corporate drafters and once again reflect their legal obligation to make the protection of profits priority number one. When Congress considers the FTAA, I hope it's not too much to ask that this time they bother to find out what they are agreeing to.



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