

METHANEX CORPORATION VS. THE UNITED STATES OF AMERICA

Background Information

- Methanex Corporation is a Canadian-based company that is the world's largest producer of methanol, a substance that is commonly used in recyclable plastics, synthetic sealants, and gasoline
- Methanol is the main component of MTBE
 - MTBE is an organic compound that has been added to gasoline as an octane booster since the phase out of lead in the late 1970's
 - most gasoline is comprised of 3% to 9% MTBE
- in California in the 1990's, MTBE began showing up in drinking water in 30 public water systems, Lake Tahoe and Shasta Lakes, and 3,500 groundwater sites
 - because of its solubility in water and resistance to decomposition, MTBE moves rapidly in groundwater
 - MTBE is also more difficult to remove from water than other gasoline components.
- MTBE has been shown capable of causing cancer, kidney, reproductive, developmental, and nervous system toxicity in laboratory animals exposed to large amounts

Development of the Case

- 1999: Due to the increasing health effects, Governor Gray Davis issued a state-wide phase out of MTBE in gasoline
 - other states began phasing out MTBE because it was present in _ of US gasoline supply
- 4 months later Methanex Corporation filed a \$970 million suit against the United States for the damage that California was inflicting upon its future profits
 - claim that California's decision to ban the substance violates Chapter 11 of NAFTA
 - Chapter 11 said that foreign investors from US, Canada, and Mexico could sue a national government if it's company's assets, including expected profits, were damaged by laws or regulations of almost any kind
- Case was to be decided in front of a private, off-shore, 3 judge tribunal specified by NAFTA

Legal Concerns

- NAFTA grants foreign investors broader legal rights, which circumvent domestic court and legal systems.
 - "Regulatory takings" are not accepted in U.S. courts, but are considered valid in NAFTA tribunal hearings. Thus a taking can consist of any devaluation of an investment due to government laws or regulations be they federal, state, municipal (similarly there is no distinction between legislative, executive or judicial branches).
 - Nations party to NAFTA must grant foreign invests treatment "in accordance with international law". (i.e. claims can be made under the rules of other international trade agreements as well)
 - Out of state investors can sue national governments directly.

Methanex's Case

- Methanex claimed the presence of MTBE in the California water supply was due to the negligence of the California state government in implementing its own environmental water regulation (they had previously filed a complaint against the US government)
- Methanex contended that the regulations banning MTBE expropriated parts of its investments in the United States and denied it fair and equitable treatment in accordance with international law
- Claimed that the “least trade restrictive” solution had to be found as is stipulated by the WTO, and that California’s ban on MTBE was more restrictive than various alternate solutions.
- Argued that the ban gave preferential treatment to U.S. ethanol producers (a substitute product to methanol based fuel additives) in violation of NAFTA’s national treatment clauses, and essentially constituted an expropriation by diminishing its market share.

Counter-Arguments

- Health risks posed by MTBE justified the ban by the US government
 - An inherent health risk that other products do not have means that MTBE does not fall under national treatment laws
- Methanex’s claim to compensation was based on the decline of its share prices; the U.S. claimed that the decline began as early as 1995 and was due to market forces.
- Methanex’s claim does not clearly fall under NAFTA’s jurisdiction.
- NAFTA’s national treatment clauses only apply to foreign investors and investments in “like circumstances” with their domestic competitors; MTBE’s health hazards legally differentiate it from its competitor/substitute products and so Methanex’s investment does not qualify under national treatment clauses.

Significance

- First case to allow the use of amicus curiae
 - This allows outside organizations (like NGO’s) to provide expertise to the court
- In addition, they decided that the case must be decided on publicly, which had never been required of the Tribunal before
 - Pivotal in changing international investment cases from private, secretive affairs to public and transparent
- The privilege that NAFTA grants foreign investors to directly sue national governments may either act as a deterrent for future environmental legislation or may cause the rollback of current environmental legislation
 - The same concern is applicable to CAFTA, the recently approved free trade agreement between the U.S. and Central American countries that grants investors nearly identical investor to state dispute settlement rights

Sources

- <http://www.maine.gov/dep/rwm/homeowner/mtbe/ques.htm>
- <http://www.ratical.org/co-globalize/WG111701.html>
- <http://www.state.gov/s/l/c5818.htm>
- http://www.ciel.org/Tae/Methanex_Application_29June04.html

- <http://www.cardiff.ac.uk/cplan/teaching/cp0321/articles/sanchez2002.pdf>
- Neumeyer, Eric. Greening Trade and Investment. Chapter 5 (pages 81-83)
- <http://www.methanex.com/ourcompany/index.html>
- <http://www.nafta-sec-alena.org>
- http://are.berkeley.edu/courses/EEP131/Nafta_Chapter11.pdf
- http://are.berkeley.edu/courses/EEP131/trade_citizensguide.pdf
- http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (CAFTA text)
- <http://www.cardiff.ac.uk/cplan/teaching/cp0321/articles/sanchez2002.pdf>
- <http://www.state.gov/documents/organization/51052.pdf> (Full text of final decision)