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Trade, the Environment, and Environmental Health¹

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Many advocates of environmental health, in fact, many public policymakers, pay little attention to trade laws. These laws, which govern international trade and allow for globalization, have little enforcement powers and speak even less on health, safety, and the regulation of the environment. Yet by their design and implementation have altered, amended and outright banned laws and policies designed to protect the public's safety.

This paper discusses two areas of international trade: the North American Free Trade Agreement Side Agreement on the Environment and Chapter 11 of the North American Free Trade Agreement (NAFTA), and how these agreements prohibit states and other subnational governments from enacting laws to protect the public from environmental hazards.

NAFTA and the Environment

True to its promise as the most environmentally sensitive agreement, governments and environmentalists have used the North American Free Trade Agreement (NAFTA) to bolster environmental protection and challenge policies considered adverse to the environment. NAFTA's Environmental Side Agreement established the Commission for Environmental Protection (CEC), which brings together the heads of each countries' environmental departments to discuss concerns that face all three countries, and allows the public input into their decisions. The agreement offers procedures to challenge governments for not effectively enforcing their environmental laws. It created the Border Environment Cooperation

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Commission, which provides millions of dollars for water and sewage treatment along the U.S. - Mexico border. Chapters 7(b) and 9 that cover trade in goods and services can be applied equitably without interfering with state environmental policies.

But NAFTA also offers opportunities for investors to challenge NAFTA states when their laws are considered in violation with the agreement. This direct challenge is novel to NAFTA; no other trade agreement allows private citizens to challenge a signatory state. Concerns by Canadian and US investors about investing in Mexico spurred this language to give them a tangible guarantee that disputes over investments could be heard not only by a country's legal/political system, but also by an independent international tribunal unaligned with the disputant country.

NAFTA's Chapter 7, Section B Sanitary and Phytosanitary Measures

Chapter 7 applies to a national government's health and safety requirements, meaning any law that covers risks to health or life caused by animal or plant pests or diseases, food additives or contaminants; the laws related to sanitary and phytosanitary measures.² It is designed to protect the federal and state government's decisions regarding health, safety and environmental laws, while offering the other signatories and foreign nationals some assurances regarding their development and application.

NAFTA confirms the basic rights of each country, including their states and local governments, to determine the levels considered appropriate to protect the health and safety of humans, animals and plants. But it also requires that these levels are:

- Based on scientific principals and risk assessment;
- Applied only to the extent necessary to provide that level of protection; and
- Do not result in unfair discrimination or disguised restrictions on trade.³

The United States Trade Representative (USTR) reviewed the provisions of Chapter 7 that relate to states, concluding that Articles 712 to 717 have greatest applicability to the states. The chapter recognizes international codification of health, safety and environmental standards, and mandates that signatory governments use international standards when appropriate.⁴ States, local governments and federal agencies may establish levels of protection different than international norms, as long as these standards are set at higher. And the chapter encourages governments to participate in these international standard-setting organizations.

Another important aspect identified in Chapter 7(b) is equivalency and transparency. Since NAFTA's essential purpose is to reduce barriers to trade, the negotiators wanted assurances that sanitary and phytosanitary laws are not applied as an indirect trade barrier. Governments are to seek "equivalency" in their sanitary and phytosanitary laws, making their health, safety and environmental laws similar to each other while maintaining their chosen level of protection.⁵

² The North American Free Trade Agreement Article 709. [hereinafter *NAFTA*].

³ NAFTA Article 712 "Basic Rights and Obligations."

⁴ NAFTA Article 713 "International Standards and Standardizing Organizations."

⁵ NAFTA Article 714 "Equivalence."

Transparency refers to a government being open about their sanitary and phytosanitary regulations, and the procedures for implementing those regulations. Governments cannot act in secrecy about the development or administration of these rules, otherwise the rules could be applied as a barrier. Non-governmental entities who test or inspect or otherwise act in the role of administering these requirements also must act in an open and transparent manner.⁶

Finally, 7(b) requires both state and federal governments to adopt a formal notification process whenever they modify or develop sanitary and phytosanitary measures. The notification process will be determined by the NAFTA negotiators.⁷

Article 718 obligates the states most, requiring that states whenever they seek to develop or amend sanitary and phytosanitary laws to:

1. Publish a notice of the proposed policy and grant time for interested parties to review the proposal;
2. Identify in the notice the rationale behind the measure, describing the objective and the reason for the measure;
3. Provide a copy of the proposed measure to any interested party; and
4. Without discrimination, allow interested parties to comment and, upon request, discuss those comments.⁸

NAFTA Chapter 9, Standards-Related Measures

Chapter 9 discusses any standards imposed by a government that affect goods and services in trade. This includes technical regulations, standards, and procedures to assure conformity.

Article 902 expressly mandates that national governments must ensure that state and non-governmental standardizing bodies follow the provisions of this chapter, including modifying standards to follow international norms and maintaining compatibility with other standards.

Again, this chapter seeks to ensure that standards developed by either a government or non-governmental entity do not unnecessarily restrict trade. This means that standards should be:

- based on or use international standards; and
- used in the least trade-restrictive manner.⁹

States may adopt higher standards than international standards, but never lower standards nor should the standards be seen as discriminatory or trade restrictive.

The governments are to work towards conformity, to treat foreign goods no different than domestic goods, and seek agreements establishing conformity standards.¹⁰ And again, like in Chapter 7, states (along with the federal government) must:

⁶ NAFTA Article 714 “Equivalence” and 717 “Control, Inspection and Approval Procedures.”

⁷ NAFTA 718 “Notification, Publication and Provision of Information.”

⁸ *Ibid*, notes by the United State Trade Representative in the NAFTA/WTO State Implementation Symposium Briefing Book.

⁹ NAFTA Article 905 “Use of International Standards” and 904 “Basic Rights and Obligations.”

¹⁰ NAFTA Article 908 “Conformity Assessment.”

1. Publish a notice of the proposed policy and grant time for interested parties to review the proposal;
2. Identify in the notice the rationale behind the measure, describing the objective and the reason for the measure;
3. Provide a copy of the proposed measure to any interested party;
4. Allow interested parties to comment on the proposed standard, and
5. Allow foreign non-governmental persons to participate in developing the standards if domestic persons are involved.¹¹

NAFTA's Chapter 11

Chapter 11 of NAFTA provides private companies investing in foreign NAFTA countries protection from arbitrary and unreasonable government action against these companies.¹² It establishes a dispute settlement mechanism for investors to assure them treatment equal to domestic investors in accordance with the principles of international reciprocity and due process before an impartial NAFTA tribunal.

The first part of the chapter lays out the protections each of the NAFTA countries agreed to for foreign investors. Protections such as equal treatment under international law, which provides foreign investors the same protection and security as domestic investors receive, and other assurances that require NAFTA countries to treat foreign investors like they would domestic investors.¹³

Investors receive assurances that the countries will not, directly or indirectly, expropriate or nationalize the businesses or industries they invest in, unless certain conditions are met:

1. That the expropriation is for a public purpose;
2. That it is done on a non-discriminatory basis;
3. That it is in accordance with due process of law and general principles of international law and fairness; and
4. It is accompanied with payment of compensation.¹⁴

Investors receive compensation for direct expropriations, indirect expropriations, and for measure tantamount to expropriations.

But the differences between foreign vs. domestic investors comes in terms of redress. The domestic investor can seek redress against government actions through their courts of law. The foreign investor can use either the domestic courts or through one of three international dispute resolution mechanisms:

- the World Bank's International Center for the Settlement of Investment Disputes (ICSID);

¹¹ NAFTA Article 909 "Notification, Publication, and Provision of Information."

¹² NAFTA Article 1114: Environmental Measures.

¹³ NAFTA Article 1114 states that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." NAFTA, Article 1114.

¹⁴ NAFTA, Article 1110. Taken from the National Environmental Enforcement Journal, April 2002.

- ICSID's Additional Facility Rules;
- the rules of the United Nations Commission for International Trade Law (UNCITRAL rules).¹⁵

Instead of a judge or jury hearing the case (as in domestic disputes), a three person tribunal listens to the case, one chosen by host country, one chosen by the investor, and the last chosen by the NAFTA. Their decision should be based on the NAFTA or the WTO, rather than on precedence like the U.S. legal system, and cannot be appealed.¹⁶

These proceedings occur in private; the tribunal has no duty to disclose the nature of the proceedings nor how the panel came to its determination. Even the fact that a dispute has been settled and damages awarded often remains a secret.¹⁷

Most importantly, these decisions by the arbitration tribunals are enforceable in domestic courts, meaning the investor can sue to receive damages.¹⁸

Impact on SubNational Governments

For states and other subnational governments, the fact that a private investor can challenge a government causes no concern; private citizens have been able to sue governments for years. Nor does the free trade agreement cause concern; open markets benefit commerce. Rather, it is the broad, undefined scope that Chapter 11 offers investors that gives state governments cause for alarm.

And environmental laws have been the focus of twelve of the 40 known Chapter 11 cases. If you include laws related to animal health, agriculture or natural resources, then that number increases to 29, meaning over 70 percent of Chapter 11 challenges address protecting health or preserving the environment.¹⁹

When Congress approved NAFTA, it bound both the federal governments and the states to its terms. NAFTA subjects state laws and regulations to the basic trade principals of national treatment and non-discrimination. Section 105 of NAFTA provides that:

¹⁵ NAFTA, Article 1120.

¹⁶ In negotiating the agreement, the Parties (Canada, Mexico and the United States) recognized that it would be inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, the parties promised not to waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures to encourage the establishment, acquisition, expansion or retention an investment of an investor. The agreement allows for one party, if it considers that another party has offered such an encouragement, may request consultations with the other party. The two parties must consult as to avoid any such encouragement. NAFTA, Article 1120.

¹⁷ The U.S. Trade Representative continues to lobby for more transparency and disclosure within trade agreements, with both NAFTA and the WTO, but most countries do not disclosure court proceedings to the extent the U.S. does. Office of the United States Trade Representative, Press Release, Oct. 10, 2000.

¹⁸ NAFTA adopted the New York Convention of the United Nations, which permits an investor to seek damages in domestic courts.

¹⁹ As of July 1, 2010, based on claims identified by the U.S. Department of State. <http://www.state.gov/s/l/c3741.htm>.

Parties [United States, Mexico and Canada] shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.²⁰

Congress made it clear in the legislation implementing NAFTA that federal law trumps any provision in the agreement.²¹ As for state law, it is not so clear.

Instead of stating that state law overrides NAFTA where the two conflict, or vice versa, Congress provided a consultation process for the states to work with the federal government, through the United States Trade Representative (USTR).²² These procedures are designed to negotiate out any conflict with state law, seeking conformity between state laws and the practices of the agreement. USTR is to continually inform the states of matters under the agreement “that directly relate to, or will potentially have a direct impact, the States.”²³

Recognizing that a potential conflict may occur, Congress added language to NAFTA’s implementing legislation discussing the relationship of the trade agreement against state and federal laws.

Against federal laws, the agreement subsides. Any conflict weighs in favor of federal law. In addition, Congress asserts:

Nothing in this Act shall be construed to (A) amend or modify any law of the United States, including any law regarding (i) the protection of human, animal or plant life or health; (ii) the protection of the environment, or ... (B) to limit any authority conferred under any law of the United States, ...unless specifically provided for in this Act.²⁴

As for state law, the act becomes more complicated. The President and the United States Trade Representative (USTR) are required to consult with the states to achieve conformity with state laws and the agreement. States were given the right to grandfather laws in conflict with the agreement, and every states’ Attorney General submitted a list of laws to USTR. In addition, USTR must inform states of matters that “directly relate to, or will potentially have a direct impact on” the states.²⁵

States, in turn, are given the opportunity to inform and advise USTR as to their positions which USTR is to “take into account” in formulating its positions for negotiations. Through a series of efforts, states are to be “involved ... to the greatest extent practicable at each stage of the development of United States positions regarding matters” addressed under the agreement.

²⁰ North American Free Trade Agreement Implementation Act, H.R. 3450, 103rd Cong., 1st Sess., Section 105.

²¹ 19 USC 3312(a)(1).

²² 19 USC 3312(b)(1).

²³ 19 USD 3312(b)(1)(B)(ii).

²⁴ 19 USC 3312(a).

²⁵ 19 USC 3312(b)(1)(B).

Furthermore, states are immune from legal challenge:

No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.²⁶

Therefore Congress made specific the fact that the federal government and only the federal government can bring a challenge invalidating a state law. This includes any challenges that may emerge under Chapter 11.

Congressional Protections for States

Congress and the President sought to avoid challenges against state laws by Mexico and Canada by providing certain protections for states to maintain their laws and standards. The U.S. committed itself under the implementing legislation of NAFTA to ensure that states have an opportunity to protect their rights by including them in international negotiations that affect their interests and allowing them to participate in dispute resolutions when their laws are challenged. The implementing legislation, being part of U.S. law, is binding on the U.S. and therefore enforceable in a U.S. court of law.

In addition, Congress included language in the implementing legislation of NAFTA guaranteeing states the ability to protect their laws by:

- providing states the right to be notified if a state law is challenged;
- providing states the right to participate in the defense of their laws; and
- providing states the right to be notified of proceedings other than challenges that might have a potential impact on states.²⁷

States must be informed about the procedures the federal government must follow in order to preempt a state law that violates NAFTA. Being enforceable in a U.S. court of law provides states the ability to redress grievances against the federal government.

Correspondence and testimony from the Clinton Administration and the U.S. Trade Representative reaffirmed NAFTA's commitment to states' authority by noting that states are unrestricted by NAFTA in setting environmental standards.²⁸ NAFTA imposes no obligations on states to adopt or conform with standards adopted by the federal government or international organizations or to refrain from setting higher levels of protection for human, animal, or plant health or the environment than those imposed under federal law or to refrain from modifying their health or labor standards.²⁹ State standards may differ from federal regulations and

²⁶ 19 USC 3312(b)(2).

²⁷ NAFTA Implementing Act, H.R. 3450, 103rd Cong., 1st Sess. Preamble.

²⁸ Letter from the U.S. Trade Representative Mickey Kantor to Rep. Henry Waxman, dated Oct. 26, 1993.

²⁹ Statement of Administrative Action, Ch. 1,B(1)(e) at 9-13, contained in the *Communication from the President of the United States Transmitting the Final Legal Text of the North American Free Trade Agreement, the Proposed North American Free Trade Agreement Implementation Act of 1993, and a Statement of Administrative Action*, U.S. Government Printing Office, Washington, DC 1993.

remain consistent with NAFTA. However, the same documents also says that each country is obligated to ensure that states within their jurisdiction observe the provisions of NAFTA, though each country is free to determine how to ensure conformity.

NAFTA's Chapter 11 and Environmental Laws

Chapter 11 of NAFTA, discussed previously, offers investors redress from government regulation when investing in NAFTA countries. Although the negotiators did not design this chapter to challenge state environmental laws, that is precisely what has occurred.

Of the 40 cases brought forth under Chapter 11, twelve have been against environmental regulations, including bans on MMT additives, location of hazardous waste sites, ban on PCB waste exports and the amount of timber that can be harvested. Seven of these cases challenged state or provincial environmental law.³⁰ The first came against the Mexican state of San Luis Potosi for their law prohibiting hazardous waste facilities, the second against California for its ban on MTBE.³¹

Ethyl Corporation v. Canada

The first dispute over an environmental law that a private investor used Chapter 11 resulted from Canada's attempt to ban the gasoline additive Methylcyclopentadienyl Manganese Tricarbonyl (MMT), and the Ethyl Corporation's challenge of that ban.

³⁰ As of July 2010, five Chapter 11 claims have been brought against the United States for state actions: *Loewen v. United States*, regarding a Canadian funeral home chain and a Mississippi law to deter fraud (\$725 million claim); *Mondev v. United States*, where a Canadian firm won a suit against Massachusetts, but was denied damages due to sovereign immunity (\$50 million claim); and *ADF Group, Inc. v. United States*, in which a Canadian fabricator of structural steel challenged a "Buy America" clause in a contract they have with the Virginia Department of Transportation (\$90 million claim). The other two, *Methanex v. United States* and *Glamis Gold v. United States* are discussed in this paper.

³¹ Under NAFTA Chapter 11, the most serious challenge to state law came following a lawsuit in the state of Mississippi, *The Loewen Group, Inc. and Raymond L. Loewen v. the United States of America*. Loewen, a Canadian investor, was sued by a local funeral home operator in Mississippi claiming tortuous interference. The jury found for the plaintiff, and rather than appealing, Loewen filed a Notice of Claim against the United States under Chapter 11, seeking \$760 million in damages.

The claim alleges that the civil proceedings in Mississippi were deliberately biased because of Loewen's foreign investor status, and that the company did not receive due process by effectively being denied the right, or in reality the ability, to appeal. The state, through its court system, inflamed the jury against a foreign company and denied equal protection under the law, in violation of the national treatment obligations promised to investors in NAFTA Chapter 11.

Since that time Loewen has settled, however the results of the Chapter 11 claim are unknown; NAFTA has no public disclosure requirements. Loewen's did file for bankruptcy, making it unlikely that it received any of the \$760 million claim it sought from the U.S. But this and the other cases bring to the forefront the fact that state laws and policies can be challenged through trade agreement obligations made by the federal government.

As with all trade disputes, the NAFTA tribunal revealed little of their proceedings. These hearings are private, and unlike with the U.S. legal system, the accounts of the case and pleadings remain secret. But certain facts are known.

MMT enhances octane in gasoline, and was used in the U.S. until the government proposed a voluntary ban in 1977.³² It releases manganese, which is toxic to the nervous system, into the environment through tailpipe emissions.³³ It also causes auto emissions control systems to malfunction, making several auto manufacturers proponents of the U.S. ban. Finally, it increases emissions overall, through the engine's inability to fully burn the additive.

The Canadian Parliament sought a similar ban, and introduced Bill C-29. But unlike the U.S. ban, which is federally-imposed, C-29 reflected Canada's unique political system where the Provinces hold greater authority than states do in the U.S. The government sought only to ban cross-border transfer (both interstate and international) of the additive, rather than a full ban of the product. Parliament enacted this law, prohibiting the trade of MMT.

The Ethyl Corporation, a U.S. company that sold the fuel additive MMT, requested the U.S. government to initiate a case against Canada, which each country has the right to do, over Canada's decision to ban MMT.³⁴ Perhaps due to the fact that the U.S. Environmental Protection Agency had sought to ban MMT, the government refused to pursue any action.

Ethyl sought redress through Chapter 11, claiming loss of revenue equaling \$260 million.³⁵ Rather than defending this action (perhaps because they realized they had no case under NAFTA), the Canadian government repealed the ban, and settled with the Ethyl Corporation for \$13 million, representing the corporation's costs for litigation and profit loss.

Had Ethyl been a Canadian corporation, they would not have been permitted to seek a tribunal under NAFTA Chapter 11.

Metalclad vs. San Luis Potosi

The first case against a state government came in October of 1996 against the Mexican state of San Luis Potosi. Metalclad, a US corporation based in California, sought to build a hazardous waste incinerator in San Luis Potosi, with the blessing of the Mexican Federal Government.³⁶

³² Ethyl Corporation sought for a waiver from the US EPA to allow Methylcyclopentadienyl Manganese Tricarbonyl (MMT) be used as a gasoline additive, but EPA found in four separate instances that Ethyl's application failed to meet section 211(f)(4) of the Clean Air Act. 42 USC 7521, 7545. Ethyl then sued EPA in the 5th Circuit Federal Court, which ruled in favor of Ethyl.

³³ Testing is being done to evaluate whether levels in the air from fuel combustion would cause toxic effects.

³⁴ Methylcyclopentadienyl Manganese Tricarbonyl (MMT).

³⁵ Not only did Ethyl Corporation oppose this law, but the province of Alberta claimed the law violated Canadian internal trade law, and brought suit challenging the law in Canadian courts.

³⁶ Metalclad bought out other interests who originally sought to build the hazardous waste facility. The Mexican Federal Government initiated this effort, due to the fact they wanted a hazardous waste facility within Mexico to handle wastes from Maquilladoras (American-owned factories operating in Mexico). The state of San Luis Potosi, which has little authority in the Mexican Federal system, never was consulted in the manner, allowing Metalclad to receive all the required permits with little controversy.

But the state and local community fought this siting, with the Governor declaring the site part of a 600,000 acre ecological zone, essentially preventing the site from being built. In addition, demonstrators from the area blocked the entrance of the site, further preventing any construction.

Metalclad filed a claim under Chapter 11, claiming the state law prevented it from building the site and that the Governor tacitly sponsored the demonstrations, seeking \$65 million for breach of contract and \$90 in loss profits.³⁷

The claim, brought in 1996 was decided in 2000 by a three panel tribunal. The tribunal consisted of three panelists: one chosen by Metalclad, one chosen by the Mexican Federal government, and the last determined by NAFTA.³⁸ The tribunal determined that Metalclad's investment was expropriated by San Luis Potosi, awarding Metalclad \$16.5 million from the Mexican Federal Government.³⁹ Furthermore, they allowed for Metalclad to open the site.⁴⁰

Hearings on the merits were held from late August through early September 1999. On August 30, 2000, the *Metalclad* tribunal issued an award in favor of the investor in the amount of \$16.7 million. Mexico petitioned the Supreme Court of British Columbia to set aside the award on the grounds that the *Metalclad* tribunal exceeded its jurisdiction and that enforcing the award would violate public policy. The British Columbia court set aside the award in part.⁴¹

Methanex v. United States

The Methanex case has been the most decisive Chapter 11 challenge of a state law. It concerns the gasoline additive methyl tertiary butyl ether (MTBE), produced by (among others) a corporation based in Vancouver, BC – Methanex Corporation.

A study by the University of California showed the MTBE had leached in ground water, and due to health risks attributed to MTBE (and the lack of any benefits to air quality),⁴² led the Governor to issue an executive order that proposed the removal of MTBE from gasolines in the state by the end of 2002.⁴³ The state legislature followed suit by adopting additional measures that

³⁷ This requested amount is higher than the GNP of the state of San Luis Potosi.

³⁸ The NAFTA negotiators designed this tribunal system to ensure no single country could dominate the tribunal. But panelists do not have to have experience in trade law, nor must they "represent" any position. The state had no input on the selection of the Mexican candidate.

³⁹ The Mexican Federal Government recently emphasized that they intend to pay the damage, though to date have been slow in appropriating the funds.

⁴⁰ The Tribunal found that the Mexican State violated NAFTA Chapter 1105 (fair treatment of foreign investors) and 1110 (the expropriation clause).

⁴¹ *Metalclad Corp. v. United Mexican States*, U.S. Department of State Website <http://www.state.gov/s/l/c3752.htm> (accessed May 13, 2010).

⁴² The University of California at Davis concluded that the costs of MTBE out weighed the advantages, noting the use of MTBE in gasolines offered "no significant additional air quality benefit," especially in light of the costs in treating contaminated water supplies, higher fuel prices, and lower fuel efficiency. University of California at Davis, UC Report: MTBE Fact Sheet (1998).

⁴³ The Governor acted on authority given to him by the state legislature through SB 521, the MTBE Public Health and Environmental Protection Act of 1997; Cal. Health and Safety Code section 43013.1(b)(1).

supported and strengthened the Governor's original order, enacting laws during the 1999 legislative session.⁴⁴

Methanex challenged these laws under Chapter 11, seeking a tribunal to review whether these measures:

- are based on credible scientific evidence;
- seek to solely punish a foreign corporation;
- failed to find acceptable alternatives short of banning MTBE, including measures designed to prevent leaching into water; and
- failed to consider interests of the shareholders (investors) of Methanex.⁴⁵

Methanex later added claims stating the United States (being responsible for the actions of the California government)⁴⁶ violated the national treatment obligations by discriminating against a foreign firm. In listing its damages, Methanex claimed that its losses, limited to the state of California, come to approximately \$970 million, and the award by the tribunal should reflect this amount, plus interest.

The case was heard before the United Nations Center for International Trade Law (UNCITRAL). The United States Trade Representative, who defended this case for California, chose former Secretary of State Warren Christopher as their choice for one of the tribunal panel. Methanex chose a second member and the NAFTA chose the third.

The choice of Christopher demonstrated USTR's consternation over this challenge. Corporations have used Chapter 11 several times before to challenge environmental laws, but never have they taken such a bold challenge as to take on a law with the full support of the state of California. (C-29 in Canada had significant internal challenges; San Luis Potosi has little authority when challenged by the Mexican Federal Government.)⁴⁷

⁴⁴ Other states that have acted on MTBE includes Arizona, Colorado, Connecticut, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Pennsylvania, South Dakota, and Virginia.

⁴⁵ Notice of Intent to Submit a Claim to Arbitration Under Article 1119, Section B, Chapter 11 of the North American Free Trade Agreement, section 8, submitted by the Methanex Corporation.

⁴⁶ The signatories to the NAFTA agreement are the United States government, the Canadian government, and the Mexican government. By signing the agreement, the federal government obligated the states and all sub-governments as well as the federal government.

⁴⁷ The California legislature, in response to the Methanex case, introduced two bills during the 2001 legislative session. SB 1111 (International Trade: environment) seeks to assess the potential impacts to the state's environmental laws as a result of international trade agreements such as the WTO and NAFTA. This bill requires the California Environmental Protection Agency to consult with legislative bodies and the public to determine which of our environmental laws could be considered a potential conflict with trade rules; requires that they hold a public hearing to gather constituent opinion; and requires that they publish a report of those findings and make recommendations to the Legislature, the California Congressional delegation, the Secretary for Technology, Trade, and Commerce, the United States Trade Representative, and the Administrator of the United States Environmental Protection Agency. Its companion bill, SB 1044 (Labor: International Trade Agreements) is designed to assess the potential impacts to the state's labor laws as a result of international trade agreements such as the WTO and NAFTA. This bill requires the Director of Industrial Relations to consult with legislative bodies and

Because of the guarantees Congress gave the states in enacting NAFTA, California was consulted, at least according to law, in defense of their law by USTR. The California Attorney General and the Governor's office participated in the dispute, to ensure the state's interests were represented.

The decision was handed down by the tribunal in August 2005, and held in favor of California. This dispute, litigated by U.S. State Department lawyers along with advice from the California Attorney General's office, found that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects...a foreign investor or investment is not deemed expropriatory and compensable...." The U.S. government was compensated for its costs of defending the case, but the tribunal did not award any costs to the state of California.

Glamis Gold v. the United States

Glamis Gold, a mining company incorporated in Nevada, purchased rights to mine on Federal Lands in eastern Imperial Valley California. After several years of negotiating with the Department of Interior, Glamis received approval to operate an open pit mining operating and processing facility. The California Legislature, however, passed SB 1828, which protected historic and Native American sites from mining operations.⁴⁸ Though vetoed by Governor Davis, the Governor directed the California Mining Board to explore options to meet the provisions of the law.

The Mining Board adopted emergency regulations requiring operators to backfill all operations to "achieve the approximate original contours of the mined land prior to mining activities" which essentially adopted the provisions of SB 1828.⁴⁹ This regulation was followed by the enactment of Senate Bill 22⁵⁰ in April of 2003, which gave legislative authorization to the emergency regulation by requiring the backfill requirements any mining operations within one mile of any Native American sacred sites, a circumstance which applied to the Glamis site making it economically unfeasible. The Governor agreed to sign this law which required mining

the public to determine which California labor laws could be considered a potential conflict with trade rules; requires that they hold a public hearing to gather constituent opinion; and requires that they publish a report of those findings and make recommendations to the Legislature, the California Congressional delegation, the Secretary for Technology, Trade, and Commerce, the United States Trade Representative, and the United States Secretary of Labor.

⁴⁸ California Senate Bill 1828 (Sess. 2002). This bill would prohibit a lead agency from approving a reclamation plan and financial assurances for a surface mining operation for gold, silver, copper, or other metallic minerals that is located on, or within one mile of, any Native American sacred site, as defined, and in an area of special concern, as defined, unless the reclamation plan requires that all excavation be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining, and the financial assurances are sufficient in amount to provide for that backfilling and grading.

⁴⁹ *Glamis Gold, Ltd. v. United States*, U.S. Department of State Website <http://www.state.gov/s//c10986.htm> (accessed May 13, 2010).

⁵⁰ California Senate Bill 22 (Sess. 2003). This bill authorizes the enactment of SB 1828 (Sess. 2002), prohibiting any mines within one mile of a Native American sacred site unless the operator agrees to backfill the mine to its original contours.

companies to restore the earth they disturb in response to concerns that an open-pit gold mine would scar a part of the desert that the Quechan tribe considers holy.

In July of 2003, Glamis submitted a request for an arbitration panel to review whether Glamis had been denied their investment and sought compensation of \$50 million from the U.S. for the actions by the Department of Interior and California Mining Board and Legislature.⁵¹ The firm's claim contended that California's law amounts to an "indirect expropriation" of the company's property, something that is specifically forbidden in NAFTA and may also be barred in CAFTA.

On June 8, 2009, the Tribunal released the Award, dismissing Glamis's claim in its entirety and ordering Glamis to pay two-thirds of the arbitration costs in the case.⁵²

California A.B. 338 (2004) Scrap Tire Bill

Although not a case where Chapter 11 was used to negate a state law, this is an instance where the threat of a challenge led to the rejection of a law designed to protect the environment. During the 2004 legislative session in California Assemblyman Lloyd Levine introduced and the Legislature passed Assembly Bill 338, the Scrap Tire Bill, that required California Department of Transportation to use tires recycled in the U.S. as filler in road construction.⁵³ Assemblyman Levine introduced the law as a measure to reduce the amount of old tires in landfills and encourage recycling by the state government. But Governor Schwarzenegger vetoed the bill, stating it would violate international trade pacts and encourage retaliation against California goods.

The Governor was concerned because Canadian and Mexican producers provide much of the "crumb rubber" that this bill would require the California Department of Transportation to purchase from U.S. recyclers. Since the law never was enacted, it is unknown whether the one of the NAFTA partners would have challenged this law under NAFTA Chapter 11.

Grand River Enterprises Six Nations, Ltd. V. United States of America

Grand River Enterprises Six Nations, Ltd., a Canadian corporation involved in the manufacture and sale of tobacco products, along with Jerry Montour, Kenneth Hill and Arthur Montour filed a Notice of Arbitration in March 2004, under Chapter 11 of the NAFTA, against the United States. The claim alleges that a 1998 settlement agreement between various U.S. state attorney generals and the major tobacco companies and certain state legislation that partially implements the settlement breached the obligations of the United States under Chapter Eleven of the North American Free Trade Agreement. The company seeks not less than \$340 million for damages allegedly resulting from the settlement agreement.

⁵¹ An arbitration panel was agreed to in January 2004. *Glamis Gold, Ltd v. the United States*, Agreement on Certain Procedural Matters, January 20, 2004.

⁵² *Glamis Gold, Ltd v. the United States of America*, International Centre for the Settlement of Investors Suits, Washington, D.C., June 8, 2009. (<http://www.state.gov/documents/organization/125798.pdf>; accessed on June 10, 2010).

⁵³ California Assembly Bill 338 (Sess. 2004).

As of March 2010, the parties are still negotiating the terms of the dispute, and no decision is expected anytime soon.⁵⁴

Waste Management, Inc. v. United States of Mexico

In 1995 the Mexican state of Guerrero and the municipality of Acapulco granted a 15-year concession to Acaverde, a local waste disposal company, for public waste management services (street cleaning, landfilling, etc.) Although Acaverde fulfilled its obligations, the state and city neglected to pay for these services and failed to meet other obligations set forth in the concession agreement. Because it was a subsidiary of an U.S. – based company, Waste Services, Inc. (now Waste Management, Inc), Acaverde was able to bring a challenge against Mexico under NAFTA Chapter 11 for the actions of this state and municipality. In addition, Waste Management asserted that Banobras, a Mexican bank that had issued an unconditional guarantee for the payment, arbitrarily refused to honor the payment guarantee.

A NAFTA Tribunal initially dismissed the Waste Management's claim for lack of jurisdiction, stating that the investor Waste Management had failed to submit a valid waiver making the case improper before the Tribunal.

Waste Management resubmitted its case, addressing the jurisdictional questions, and in this case, the Tribunal accepted jurisdiction over objections made by Mexico. However, the Tribunal ultimately issued an unanimous award dismissing Waste Management's claims in their entirety.⁵⁵

V.G. Gallo v. the Government of Canada

An Ontario investment company, known as 1532382 Ontario Inc., purchased a former iron ore mine (the Adams Mine) in Northern Ontario with the intent of turning the site into a non-hazardous landfill. The previous owner, a Canadian company, wanted to open a landfill on the site and sought the environmental approvals from the governments of Canada and Ontario, receiving several (but not all) necessary permits to operate the facility. In 2002, the site was sold to 1532382 Ontario Inc, which is wholly owned by V.G. Gallo, a national of the United States. Gallo's intent was to operate the mine as a landfill, using the permits previously received by the Canadian and Ontario governments.

In 2004, the Ontario Legislature introduced "An Act to Prevent the Disposal of Waste at the Adams Mine Site and to Amend the Environmental Protection Act in Respect to the Disposal of Waste in Lakes, Bill 49" which prevents disposal of waste at the Adams Mine Site.⁵⁶ The act also nullified the environmental permits received by the Ontario government to operate the

⁵⁴ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, U.S. Department of State Website <http://www.state.gov/s/l/c11935.htm> (accessed June 29, 2010).

⁵⁵ *Waste Management, Inc. v. United Mexico States*, U.S. Department of State Website <http://www.state.gov/s/l/c3733.htm> (accessed June 29, 2010).

⁵⁶ Ontario General Assembly Bill 49 (June 2004). The law enacts 1) a blanket prohibition against the disposal of waste at the Adams Mine site; 2) the revocation of all the environmental and operational permits and approvals to operate the mine as a solid waste landfill granted by the government. In addition, the law limits the causes of action that may be submitted before a court.

facility. Gallo claimed this act (and other measures taken by the Government of Ontario) violate NAFTA Article 1105 (minimum standard of treatment) and Article 1110 (expropriation).⁵⁷

This case remains before a Tribunal, which is still collecting information and has not issued a decision.

Merrill & Ring Forestry L.P. v. the Government of Canada

A long running dispute regarding measures in softwood lumber imposed by both the United States and governments in Canada have led to several Chapter 11 challenges. Merrill & Ring Forestry L.P., a forestry and land management company incorporated in the state of Washington, challenged measures imposed by both the governments of Canada and British Columbia.⁵⁸ These measures require that lumber from both public lands and private lands purchased from the Crown be deemed “surplus” to provincial needs before being allowed to be exported. Logs harvested in Canada must undergo a procedure to determine if domestic needs have been met before the logs can be considered surplus and eligible for export. The surplus testing procedure involves the lumber being advertised for domestic sale first, and if the logs receive no adequate bids from domestic buyers, then they are considered surplus and available for export. The province of British Columbia enacted a similar measure, meaning logs harvested from that province must undergo a second testing before exportation.

Merrill & Ring claimed these measures caused the company financial loss. It had holdings in British Columbia, and considered the surplus lumber measures made harvesting trees on these lands cost prohibitive. The company sued for damages, alleging that Canada violated NAFTA Article 1102 (national treatment), Article 1103 (most favored nation treatment), Article 1105 (minimum standard of treatment), Article 1106 (prohibition on performance requirements), and Article 1110 (expropriation).⁵⁹ In a decision released in March 2010, the Tribunal found for Canada on almost every count, stating that the NAFTA is not “an insurance policy, guaranteeing that every investor exporter will get for its products the best available [price] in the international market.”⁶⁰ Regarding Article 1105, however, the Tribunal concluded that Canada did breach the minimum standard requirement, but that damages could not be adequately calculated, and refused to impose any financial award.

⁵⁷ Notice to Submit a Claim to Arbitration, V.G. Gallo v. Government of Canada.

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/gallo.pdf>

⁵⁸ In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Merrill & Ring Forestry, L.P. v. the Government of Canada, Submission of the United States of America, access at <http://www.state.gov/documents/organization/128851.pdf>, p. 15

⁵⁹ In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Merrill & Ring Forestry, L.P. v. the Government of Canada, Submission of the United States of America, access at <http://www.state.gov/documents/organization/128851.pdf>

⁶⁰ In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Merrill & Ring Forestry, L.P. v. the Government of Canada, Submission of the United States of America, access at <http://www.state.gov/documents/organization/128851.pdf> p. 56

Dow Agrosciences LLC v. the Government of Canada

The province of Quebec instituted the *Pesticides Management Code* in 2003 which, among other things, bans on the sale and application of certain class of pesticides that containing potentially harmful ingredients, one being the chemical 2,4-D, manufactured by the U.S.-based Dow Agrosciences. The provincial government originally sought the ban as a precautionary measure, until the pesticide had been assessed.⁶¹

Although the government of Canada had granted Dow the right to sell and use 2,4-D for commercial and domestic lawn use, and the assessments did not discover any conclusive threats from the use of 2,4-D, Quebec chose to kept the ban in place, imposing it in March 2006.

On August 25, 2008, Dow AgroSciences LLC, served a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 Sections 1105 (Minimum standard treatment) and 1110 (Expropriation) of the NAFTA, for losses allegedly caused by a Quebec ban on the sale and certain uses of lawn pesticides containing the active ingredient 2,4-D, and has since requested a Tribunal hearing on the merits of this case.⁶² As of July 2010, no Tribunal has been convened.

John R. Andre v. Government of Canada

The most recent Chapter 11 challenge came against a measure imposed by the Northwest Territory in Canada that sought to limit the number of caribou hunting tags professional hunting clubs could receive. Although this measure restricts both domestic and foreign investors, John R. Andre of Montana is seeking relief via the NAFTA Chapter 11 investor protections.⁶³

Since this case was recently submitted, no decision on the merits of the challenge have been issued.

Award of Damages; Retaliation against State Laws

⁶¹ On August 25, 2008, Dow AgroSciences LLC, a U.S. corporation, served a Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of the NAFTA, for losses allegedly caused by a Quebec ban on the sale and certain uses of lawn pesticides containing the active ingredient 2,4-D. In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Dow Agrosciences LLC v. the Government of Canada. Access July 11, 2010 at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC.pdf>.

⁶² On March 31, 2009, Dow AgroSciences served a Notice of Arbitration under Chapter Eleven of the NAFTA, for losses allegedly caused by a Quebec ban on the sale and certain uses of lawn pesticides containing the active ingredient 2,4-D. In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Dow Agrosciences LLC v. the Government of Canada. Accessed July 11, 2010 at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC-2.pdf>.

⁶³ Notice of Intent to Submit Claim of Arbitration Pursuan to Chapter Eleven of the North American Free Trade Agreement, John R. Andre v. the Government of Canada, March 19, 2010. Accessed July 14, 2010 at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/JohnR_Andre_FiledNOI.pdf.

Damages for these claims will not come from the states, nor can USTR or any Tribunal force a state or province to repeal any law, rule or regulation. Most of the decisions made by NAFTA Tribunals have favored the states or provincial measures. Recent decisions have rarely awarded damages for the investors, and in some cases Tribunals have awarded the governments attorney fees. But states have not always had their laws upheld, and investors continue to challenge state and provincial laws through Chapter 11.

The patience of Congress and its federal counterparts in Canada and Mexico to permit state laws that violate trade agreements and cost their taxpayers several to perhaps hundreds of millions of dollars could motivate Congress to enact legislation superceding any states' (or city, county, or any local government's) law. The fact that investors can claim compensation for any environmental measure (health and safety laws, natural resource protections, etc.) that may limit or reduce their profits places a chilling effect on such measures, and could hinder future innovative efforts to protect the health of the environment.

As stated above, U.S. states received protections from Congress when enacted the law accepting the NAFTA. In addition, Congress forbade investors a private right of action in U.S. courts to enforce panel rulings.⁶⁴ But Congress can enforce a NAFTA ruling, by directly suing a state seeking the preemption of a state law as a violation of NAFTA.⁶⁵ Or, more likely, the federal government may apply economic or political pressure on a state to force them to amend their policies. Otherwise, the federal government (through USTR) will be forced to pay damages of some sort (either monetary or higher tariffs) until the state policy is repealed.⁶⁶

Conclusion

States and state legislatures, though not directly involved with trade negotiations, are obligated by their provisions. USTR often made the argument that in the 50 years of the GATT, only one state law had ever been challenged.⁶⁷ But since the signing of the NAFTA agreement, state laws and policies have been under pressure to conform to the NAFTA provisions. Pressure that, in the coming world of globalization, cannot be ignored or diminished by a change of policy or administration. NAFTA forever has forced states to bring their environmental (and health and safety) laws in line with international norms, determined by institutions outside the reach of most public officials.

⁶⁴ 19 U.S.C. §. 3312 (c), 19 U.S.C. §. 102 (c)

⁶⁵ *Id.*

⁶⁶ In the case *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (CA1 1999), the First Circuit Court of Appeals offered language stating that federal trade policy is essentially foreign policy, meaning state law that violates trade law is actionable in federal court. The Supreme Court took up the case in *Crosby v. National Foreign Trade Council*, No. 99-474, 530 U.S. 363 (June 19, 2000), but did not comment on whether trade policy is equivalent to foreign policy.

⁶⁷ The decision, entitled "Beer II," regarded a challenge by Canada against a Minnesota state statute that gave a tax break to microbreweries. The dispute resolution panel concluded that the tax break discriminated against the major Canadian breweries, in violation of the Canadian Free Trade Agreement.