

DRAFT Assessment—for Citizen Trade Policy Commission review

WATER POLICY AND INTERNATIONAL INVESTMENT AGREEMENTS: REPORT TO THE MAINE CITIZENS TRADE POLICY COMMISSION

The Maine Citizen's Trade Policy Commission has asked the Forum on Democracy and Trade to analyze the effect of international investment agreements on Maine's capacity to manage its water resources and water services and to suggest options for the Commission's future activity in this issue area.

What is the scope of Maine's interest in water policy?

Water is essential to life and necessary for economic well-being. Maine and other states regulate and manage water resources in order to protect the public health and the health of the environment, as well as to ensure adequate and sustainable supplies of water at a reasonable and fair price for individual consumption and for industrial, commercial, and agricultural use. Maine is blessed with an abundance of water, but if its water resources are not managed carefully, the ecological system may be irreparably harmed and the private interests of commercial users and distributors may trump the public interest of all the people of Maine.

The debate in Maine about how to appropriately regulate (if at all) the drinking water bottling industry illustrates the difficulties inherent in seeking the right balance between private and public interests and between commercial and environmental interests in water policy.

For example, the producer of Poland Springs bottled water, Nestle Waters North America, Inc.— a subsidiary of an Italian company¹ -- was recognized by Governor John Baldacci at the Maine International Trade Day in 2006, and given the "Foreign Direct Investor of the Year" Award.

Nonetheless, Nestle Waters' practices have been challenged as not always in the public interest, and perhaps not environmentally sustainable. U.S. bottled water companies have sued Nestle Waters alleging false labeling, i.e. that Poland Springs bottled water is not always spring water and it is not always pure. Nestle Waters also has been sued by landowners of lots adjacent to its properties or its suppliers' properties. Most significant of all, in response to concerns about the sustainability of water pumping and belief that Mainers are not being fairly compensated for depletion of a valuable natural resource, a group called *H₂O for Maine* is proposing a 20 cent per gallon tax on water pumped by drinking water bottlers like Nestle Waters. This tax would fund a trust for investing in Maine's economic development.²

¹ While Nestle's parent company is Swiss, research conducted by the Forum suggests that it was Nestle's Italian affiliate that was the locus of investment into Nestle Waters North America. See "Poland Springs Issues," by Craig Waugh, unpublished document on file with the Forum on Democracy and Trade.

² For more information, see <http://mitc.com/PDF;www.waterdividendtrust.com>; <http://nestle-watersna.com/PressCenter.html>;

Why should the Maine Citizens Trade Policy Commission closely monitor WTO negotiations on water services?

The General Agreement on Trade in Services (GATS) covers a wide range of economic activities. The GATS uses a “positive list” approach for *sector-specific commitments*; that is, when countries make offers on specific sectors that they agree to include within the scope of GATS rules. The United States has not made a commitment under “drinking water services” to GATS disciplines, and the United States Trade Representative (USTR) has assured states that the United States has no current plans to make such a commitment. But to suggest therefore that the United States does not have commitments under water services would be misleading. The United States does have sectoral commitments on various non-drinking-water services, including sewage treatment “contracted by private industry,” and also to water-related sectors such as other environmental services plus engineering and construction services (which include waterworks).³

European water companies have targeted the United States as an important market for expansion. European multinationals account for more than 50% of the private water market globally. The three major multinationals are Veolia (formerly Vivendi), RWE, and Suez. Each has grown through aggressive acquisition campaigns in the United States, in Europe, as well as in Central and South America.⁴

The private water industry based in Europe in the past has been keen to see the United States commit water services under the GATS. The European water industry has specifically urged the European Community to make this request of U.S. negotiators. But to the surprise of many observers, the EU has declined for now to make such a request of the United States. Thus for the near term, drinking water services (“water for human use”) appear to be off the table at GATS negotiations in Geneva. Nonetheless, the United States has made sectoral commitments for “distribution services,” “wastewater services,” and “environmental services” that might allow a challenge to the United States in the WTO based on Maine water policy. Bottled water operations in particular might be regarded as a “distribution service.” The Maine Citizens Commission, therefore, may still want to closely monitor GATS negotiations in Geneva related to sectoral commitments, and to seek clarification with respect to “distribution services” at both wholesale and retail levels.⁵

³ A good discussion of the number of GATS sectors where water usage might be implicated is found in “The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry,” Andrew Lang, *Journal of International Economic Law*, Vol. 7 No. 4; 2004; at pages 812-816.

⁴ Keeping track of mergers and acquisitions in this sector is practically a full-time job itself. Bloomberg.com notes that in the last three years, its index of U.S. water stocks has surged by 150%—three times faster than companies on the S&P 500 overall.

⁵ For more information see the discussion of “Water Services” on the Forum on Democracy & Trade website at http://www.forumdemocracy.net/trade_topics/water_services; for more on the EU’s recent

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Of even greater concern to the Maine Commission should be the recent resumption of WTO negotiations on, non-sectoral GATS obligations related to “domestic regulation.”

If WTO negotiations on GATS and domestic regulation are successful, the disciplines thus adopted under the GATS could become substantially more intrusive for Maine and other jurisdictions, not only in the area of water policy but across the board. The negotiations on domestic regulation are intended to ensure that domestic regulation does not amount to a trade barrier particularly with respect to measures “relating to qualification requirements and procedures, technical standards, and licensing requirements.”⁶

The potential intrusiveness of the general obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that these standards, requirements and procedures should be “not more burdensome than necessary to ensure the quality of a service.” Such a “necessity test” could put a range of water policy measures and a range of other regulatory measures in the State of Maine and in other jurisdictions at considerable risk of conflict with GATS obligations.

Parties to the domestic regulation negotiations in Geneva are now looking for a compromise on some less intrusive formulation than the necessity test for identifying a domestic regulation violation. However, one WTO member-state was quoted recently as saying that “any deal on services must include strong linkages between market access commitments and a domestic regulation component.”⁷ The outcome of these negotiations will be vital for Maine and all other U.S. states and localities.

Should a necessity test or something equivalent to it be agreed upon in Geneva, the Center for International Environmental Law has identified several areas where water policy could be threatened, including among others:

- qualifications of water service providers;
- the use of licenses, permits, and technical regulations and standards related to pollution discharges, operating permits, and other water policy measures;
- the use of environmental criteria related to water services in awarding concession contracts or assessing licensing fees; and
- requirements for water sustainability impact assessments before issuing licenses.⁸

As noted above, a number of other GATS sectors may implicate Maine’s water services and management of water resources, particular with respect to, for example, water treatment plants and sewer systems (construction, architecture, engineering, project management services, technical testing services, etc.).

actions also see Christina Deckwirth, “Water almost out of GATS,” A Corporate Europe Observatory Briefing, March 2006, available at <http://www.corporateeurope.org/water/gatswater2006.pdf>.

⁶ Center on International Environmental Law (CIEL), “GATS, Water, and the Environment,” October 2003, p.17, available at http://www.ciel.org/Publications/GATS_WaterEnv_Nov03.pdf.

⁷ “A ‘Green Light’ to Restart DDA [Doha Development Agenda]”, Washington Trade Daily, 17 November 2006, Vol. 15 No. 229.

⁸ CIEL, *supra*, p.2.

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What are Maine’s options for raising concerns about GATS and water services? ⁹

- The Maine CTPC has already communicated to USTR and the Maine congressional delegation its concerns about the domestic regulation negotiations in Geneva—negotiations that were suspended in July 2006 but apparently have recently restarted. Continued dialogue with USTR about the status of negotiations, and US proposals to the Working Party on Domestic Regulation, should be a priority for the Maine CPTC. Maine has sought to ensure that no ‘necessity tests,’ including operational necessity tests, are included in domestic regulation disciplines.
- The resumption of WTO negotiations on GATS and domestic regulation and the already-existing U.S. commitments on distribution services and on sewage services and environmental services bear very close watching and in the long run may threaten Maine’s authority over water policy more generally. Maine regulates a number of professions that pertain to water and environmental health. The qualification requirements used for service suppliers could be challenged as “more burdensome than necessary”; also possibly at risk are fees charged in order to obtain a license to practice a professional services in the state.
- Governor Baldacci’s April 2006 letter regarding GATS negotiations mentioned a number of sectors of concern to Maine, but did not mention water, as this was not seen as being part of a new GATS offer. The Maine CTPC may wish to again seek assurances that USTR does not intend to make further sectoral commitments on water services.
- Maine may wish to argue that a number of its water and sanitation projects are excepted from GATS disciplines because they “supplied in the exercise of government authority.”¹⁰ To date, there is no WTO jurisprudence, or any clear international consensus, regarding the scope and extent of the “government authority exception.” How this term is interpreted is crucial to the degree of regulatory flexibility that governments will be accorded in the water sector.
- Finally, Maine may wish to raise the issue of taxation as a limitation to specific articles of the GATS. In 1995, the United States Trade Representative assured states that he would seek a “carve-out” in the GATS to protect state taxing authority. Other WTO members rejected that carve-out, arguing that the use of different tax treatment in different states amounted to a violation of GATS ‘non-discrimination’ principles. While no cases have been brought forward in the GATS to challenge US tax measures, the possibility that Maine will adopt a tax on bottled water exports suggests that the Maine CTPC may want to ask USTR about the status of state taxation measures vis-à-vis the GATS.

⁹ The Forum on Democracy & Trade has not undertaken an in-depth study of Maine’s water laws and regulations as part of this assessment. For more detail on water services in relation to the GATS, the reader is referred to www.forumdemocracy.net, under “Trade Topics: Water.” For more detail on how GATS may impact another sector of Maine’s economy, the reader is referred to the Report prepared for the Maine CTPC Subcommittee on Health Care.

¹⁰ See GATS Article I 3:(b) and (c).

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Why should Maine be concerned about the effect of international investment agreements on its capacity to manage water resources?

While GATS water issues should be monitored closely, recent developments such as the European Union’s decision not to seek inclusion of “water for human use” as a sector of economic activity that should come under the scope of GATS regulation suggest that a conflict between GATS rules and Maine’s authority to regulate drinking water services may be unlikely in the near term.¹¹ The possibility of a challenge under an international investment agreement to Maine’s authority to regulate its water resources, however, cannot be discounted even in the short term.

Two major NAFTA chapter 11 cases challenging the capacity of state and local government regulation to protect the safety of drinking water have already been adjudicated. The NAFTA tribunal in *Methanex v. United States* soundly rejected Vancouver-based Methanex Corporation’s claim for nearly a billion dollars in compensatory damages for California’s phase-out of the gasoline additive MTBE because it was polluting lakes and groundwater and was endangering the public health. But, in an equally important case, *Metalclad v. Mexico*, an international tribunal found a violation of NAFTA’s Chapter 11 on investment when state and local governments took regulatory action to stop operation by U.S.-based Metalclad corporation of a hazardous waste disposal facility believed to be a threat to drinking water safety and the environment. Neither the *Methanex* or *Metalclad* cases are formally precedential in NAFTA or other international investment litigation; future panels may cite the reasoning used in either case, or not refer to them at all.¹² But the existence of such litigation suggests that there is some risk that new international investment claims may be brought seeking compensation for regulation of water resources by Maine or other U.S. states or localities.¹³

¹¹ However, the European Union (for example) could challenge the regulation and taxation of bottled drinking water enterprises based on the current U.S. commitment under “distribution services,” and not as part of the service category “water for human use.”

¹² One encouraging trend in international investment litigation can be seen in the “Counter-Memorial” recently filed by the U.S. State Department in another NAFTA case, this one brought by the Glamis Gold Corporation of Canada. The Counter-Memorial sought to remind the tribunal that “United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law,” and directed the United States to negotiate agreements that: “[do] not accord greater substantive rights [to foreign investors] with respect to investment protections than United States investors in the United States [are accorded under U.S. law]. . . . United States law does not compensate plaintiffs solely upon a showing that regulations interfered with their expectations, as such a showing is insufficient to support a regulatory takings claim. Tellingly, despite Glamis’s heavy reliance on domestic jurisprudence throughout its Memorial, Glamis nowhere cites U.S. legal authority to support its proposition that an interference with one’s expectations alone is compensable. **It is inconceivable that the minimum standard of treatment required by international law would proscribe action commonly undertaken by States pursuant to national law.**” (emphasis added; internal footnotes omitted) Glamis is seeking compensation for expropriation of investment and a violation of minimum treatment through a NAFTA tribunal because of a California law whose purpose is environmental protection and the protection of sites of cultural significance. The *Glamis* case is still working its way through the dispute resolution process.

¹³ The risk of international investment litigation is not limited to challenges to state and local anti-pollution or drinking water safety measures; hypothetically it might extend to other water policy measures such as production limits, siting regulation, or taxation of bottled water pumping operations, for example.

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It also suggests that the Maine Citizen’s Trade Policy Commission may want to work with the U.S. Trade Representative’s office and with the Maine congressional delegation to seek an official interpretation of NAFTA Chapter 11 and clear language in future agreements regarding investment agreements. This could include the codification of parts of the *Methanex* decision to protect bona fide government regulations, including water regulations, from any *Metalclad*-type claim that might be based on the actions of the State of Maine or one of its subdivisions (i.e., a county, town, or water service territory). As noted above, it would appear that the U.S. State Department has taken a line of argument suggesting that non-discriminatory environmental regulations cannot be judged as a violation of the “minimum standard of treatment”—at least with respect to the facts in the *Glamis Gold* case. Thus far, however, the NAFTA countries have not agreed to any interpretive statement clarifying the rights of states and provinces to take actions to protect natural resources, or to codify parts of the *Methanex* decision.

What are the options for reform of international investment agreements?

The Maine Citizens Trade Policy Commission may want to consider the options for reforming U.S. policy related to international trade and investment litigation to preclude a challenge to state or local water policy. The primary options are:

- Renewed consultations with USTR to seek interpretive notes for current agreements and to carve out of future agreements coverage of water policy and similar bona fide economic regulations, and
- Congressional action to carve out water policy from existing and future agreements, or at least prevent the enforcement of adverse tribunal decisions against states and localities under U.S. implementing legislation.

Renewed consultations with USTR. Such consultations might focus on three possible reform measures:

- (1) an interpretive note applying to current agreements;
- (2) a general exception for water policy measures in future agreements; and
- (3) a diplomatic review provision in future agreements.

- (1) *An interpretive note:* NAFTA article 1131(2) provides that an interpretation of a provision of Chapter 11 on investment by the Free Trade Commission (consisting of the three parties to the agreement, the United States, Canada, and Mexico) “shall be binding on a Tribunal established

Although the United States does not have bilateral or regional investment agreements or treaties with Italy, France, Germany, or Britain (the home base for most multinational water corporations), Nestle, Viola, RWE, and Suez do have in some cases foreign subsidiaries or could quickly create them in countries that do have such agreements with the United States. This phenomenon was observed in the case of a U.S. company, Bechtel, reorganizing its investment in Cochabamba, Bolivia, through its subsidiary in the Netherlands, in order to take advantage of an existing Bilateral Investment Agreement between Bolivia and the Netherlands.

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under this section.” CAFTA and some other agreements incorporate similar language allowing the parties to officially interpret the text of investment agreements. Therefore, the Maine Commission may want to consider the pros and cons of supporting an official interpretation of international investment agreements in order to incorporate and expand upon the central holdings of the *Methanex* case, i.e.:

- a non-discriminatory regulation for a public purpose, which is enacted with due process, cannot constitute an expropriation or a violation of minimum treatment under international law; and
- the “in like circumstances” test for discovering a national treatment violation must be read narrowly. The test does not encompass a comparison between two different products that are only generally in economic competition.

(2) *A general exception.* Another potential starting point for consultations with USTR might be to discuss including in future international investment agreements and treaties a general exception for water policy and land use measures.

There is considerable precedent for including such an exception in future investment agreements and treaties. NAFTA article 2102, for example, provides a general exception for national security measures. In addition, the WTO agreements including the GATS provide a long list of general exceptions, including measures protecting human and animal health and life, protection of consumers and workers, protection of national treasures of artistic, historic, or archeological value, and maintenance of capacity to collect income and property taxes, among others.¹⁴

(3) *Diplomatic review.* Diplomatic review of investor claims would allow either country connected to an investment dispute to stop a claim from proceeding. There is precedent for a diplomatic review provision. Claims involving tax measures are currently subject to diplomatic review under NAFTA article 2103.6.

A diplomatic review article in a future international investment agreement could simply state that no investor could bring a claim, until such time as the competent authorities in both the affected countries (the U.S. Attorney General, for example) agree to allow the claim to proceed.

¹⁴ One prominent Canadian trade lawyer, Steve Shrybman, has noted that “while the GATS does allow government measures to protect human, animal, or plant life, . . . it does not allow the other critical WTO environmental exception for measures relating to the ‘conservation of exhaustible natural resources.’” Shrybman argues therefore that “no government can use conservation to justify interfering with the rights of foreign service providers.” Crafting a general exception for conservation in the GATS might be one approach to addressing this. See “The Impact of International Services and Investment Agreements on Public Policy and Law Concerning Water,” Steven Shrybman, January 2002, originally published by the Council of Canadians. www.canadians.org.

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- b. *Congressional action.* As an adjunct to renewed consultations with USTR, the Maine Commission may want to consider calling for congressional action to carve out water policy and land use measures from existing and future agreements, or at least to prevent the enforcement of adverse tribunal decisions against states and localities under U.S. implementing legislation. Three types of congressional action might be considered: (1) an anti-preemption/cost shifting bill; (2) an appropriations rider; and (3) a comprehensive bill.

Beyond water policy issues, why should Maine be concerned about international investment agreements?

International investment agreements, such as Chapter 11 of the North American Free Trade Agreement (NAFTA), establish systems of investor-to-state dispute resolution:

- Which allow foreign investors to circumvent domestic courts, and
- Which allow foreign investors to file claims against national governments seeking money damages in compensation for economic regulation by state and local governments, including water-policy regulation.¹⁵

In addition to the unusual rules with respect to who has standing to bring and defend international investment cases¹⁶, consider these characteristics of the arbitrators who sit on the tribunals:

- Arbitrators are appointed by executive branch officials to hear one case, and thus do not enjoy tenure and are not subject to confirmation by the legislative branch.

¹⁵ These tribunals operate on the model of international arbitration of commercial contracts. Each of the two parties to the dispute picks one arbitrator, and the third is either mutually agreed upon by both parties or appointed by a World Bank official. International investment agreements are unique in providing a private right of action for foreign corporations to initiate claims for economic damages against a national government. Multinational corporations and other investors are placed on an equal footing with nation-states in a process for resolving an issue of public policy. Investors no longer have to work through trade ministries to pursue a claim. As a result, the volume of cases increases, and the claims themselves may be brought without the restraint that nation-states exercise when dealing with issues of international relations.

¹⁶ In contrast to the standing afforded foreign transnational corporations, U.S. state and local governments, although consulted, have no direct right to represent themselves before these international investment tribunals when a state or local law is alleged to be in violation of the United States' international obligations, even in cases where the state/local policy conflicts with the interests of the federal government or the Administration's political position. The inability of states and localities to represent themselves is a particular concern because international investment tribunals can effectively enforce their decisions by ordering the federal government to pay money damages to the foreign investor. The federal government has refused, so far, to assure states and localities that it will not seek reimbursement of any monies paid from the U.S. treasury to satisfy international tribunal judgments. Moreover, the federal government is authorized to sue to preempt any state or local measure that is a violation of a tribunal decision or that is otherwise inconsistent with an executive-legislative investment agreement.

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- Arbitrators are typically international commercial lawyers who may alternately serve as arbitrators in one case and plaintiff's counsel in the next, thus raising questions of conflict of interest.
- Arbitrators may have little or no familiarity with the U.S. constitutional principles of federalism and separation of powers, and are in any case forbidden to apply U.S. constitutional principles in rendering an opinion.
- Arbitrators make their decisions based on the text of an international investment agreement and customary international law, both of which are to be interpreted in light of the purpose of the agreement to promote international investment.

Fortunately, the international rules for resolving international investment disputes about water policy and the whole range of state economic regulations are at an early stage of development. If state and local officials are passive, those rules are likely to expand at the expense of state autonomy. But if Maine continues its active engagement with USTR and Congress and if other states follow Maine's lead:

- new official interpretations of NAFTA, CAFTA, and other existing agreements can be adopted;
- new provisions could be negotiated as part of international investment agreements to protect the sovereignty of Maine and the 49 other states; and
- Congress can pass new legislation to protect the states' authority over water and other regulatory policies.

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Appendix A: What was the Metalclad case about?

The possibility exists that under a bilateral or regional investment agreement like NAFTA's Chapter 11, Maine's authority to regulate its water resources could be challenged. The decision in *Metalclad v. Mexico* suggests this is a real possibility.¹⁷

This dispute arose over the use of a plot of land originally owned by a Mexican company (COTERIN), located near the municipality of Guadalucazar, in the state of San Luis Potosi, Mexico. In 1990, the Mexican federal government granted COTERIN a permit to build and operate a hazardous waste landfill on the land. But, in 1991 and 1992, the municipality denied COTERIN such a building permit. In 1993 the U.S. corporation Metalclad bought COTERIN and its permits, after receiving assurances from Mexican federal government officials that the project could go ahead.

In October, 1994, the City of Guadalucazar ordered a halt to construction of the Metalclad landfill because Metalclad had not obtained proper municipal building permits. Metalclad applied again for a municipal permit and immediately resumed construction, completing the project in March 1995. That same month, Metalclad attempted to open its new facility for operations. But angry local protestors, allegedly with the aid of state troopers, blocked the opening of the new facility. The landfill remained closed until November 1995. In November 1995, Metalclad entered into an agreement with two federal agencies, and the facility began to operate. The Guadalucazar city council responded in December 1995 by denying Metalclad's last petition for a municipal building permit and shortly thereafter obtained an injunction barring Metalclad from operating the facility.¹⁸ Finally, in September 1997, the Governor of San Luis Potosi issued a state-level decree which established the landfill site as a protected natural area. Thus, without any reference to the lack of a municipal building permit, the state government entirely prevented the landfill from operating.

Earlier on January 2, 1997, Metalclad had already demanded arbitration under NAFTA's Chapter 11. In its claim against the Mexican federal government, Metalclad argued that the nation of Mexico was responsible under international law for the conduct of its governmental subdivisions, and that both the state of San Luis Potosi and the municipality of Guadalucazar had violated NAFTA section 1105's "minimum treatment" standard, and NAFTA section 1110's "expropriation" prohibition.

¹⁷ *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), available at <http://www.worldbank.org/icsid/cases/mm-award-e.pdf> (also available at www.naftalaw.com). For a full version of this analysis of the *Metalclad* case, see the Forum on Democracy & Trade website at: http://www.forumdemocracy.net/disputes/nafta_cases/metalclad_v_mexico.

¹⁸ Guadalucazar brought action against the federal government in Mexican court to challenge the agreement the federal agencies entered into with Metalclad. Pending resolution of this suit, Guadalucazar successfully obtained a preliminary injunction barring further operations at the landfill site. While the action was pending, the same federal agencies granted Metalclad a further permit which authorized a substantial expansion of the landfill site.

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In August 2000 the NAFTA tribunal issued a decision and found that Metalclad was entitled to monetary relief in the amount of \$16.9 million from the nation of Mexico. The Metalclad tribunal found that Mexican state and local authorities—in seeking to assure the safety of drinking water supplies—had violated two important investor rights protected by NAFTA: Article 1110 on expropriation and Article 1105 on minimum treatment under international law.

- ***Compensation for expropriation.*** NAFTA requires member nations to compensate investors if national or subnational governments “directly or indirectly nationalize or expropriate” an investment of the other countries' investors in its territory. Expropriation includes measures “tantamount to nationalization or expropriation.” The Metalclad tribunal had to decide not only the scope of expropriation, but also what the open-ended references to “tantamount to expropriation” and “indirect” expropriation meant.

The Metalclad tribunal broadly read the term “tantamount to expropriation” and “indirect expropriation” in NAFTA’s article on expropriation. This broad reading granted to investors a set of property rights protections that extend beyond the protections granted to property owners under the Fifth Amendment to the U.S. Constitution.

In interpreting the Fifth Amendment “takings” clause, the U.S. Supreme Court “usually has applied the regulatory takings analysis only to regulations of specific interests in property.” Expected or future economic benefits are not considered property under the Takings Clause. By way of contrast, the Metalclad tribunal read NAFTA’s expropriation article to include not merely the seizure of property or its regulation to the point that its economic value is extinguished, but also “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property...” In its Metalclad opinion, the “tribunal made it clear...that the relevant ‘investment’ for purposes of its expropriation analysis was Metalclad’s broader interest in operating a particular type of business, not merely its interest in its real property.”

- ***Minimum treatment under international law.*** NAFTA article 1105(1) requires member nations to provide other members' investors with treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. Article 1105 is intended to serve roughly the same purpose as “due process” norms in U.S. constitutional law, but because article 1105’s terms are largely undefined, especially when compared with the extensive U.S. case law on procedural and substantive due process, international investment tribunals exercise great discretion when they make inherently subjective judgments about when government action violates fundamental principles of procedural or substantive justice.

According to the Metalclad tribunal, Mexico breached article 1105(1) because it “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment.” The tribunal noted the lack of an “orderly process:”

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Appendix B: What was the Methanex case about?

Methanex v United States was one of the first cases brought against the United States under the investment chapter of NAFTA.¹⁹ NAFTA's investment chapter provided the Methanex corporation, a Vancouver-based multinational firm, a private right of action before an international tribunal to seek an award of economic damages against the U.S. federal government in compensation for California's phase-out of the gasoline additive MTBE that was poisoning the groundwater and lakes of California.

The Methanex case drew wide public attention because the Canadian plaintiff was seeking nearly \$1 billion in compensation for lost "future profits." Methanex claims that loss resulted from California's regulation of MTBE. California argued that it was responding to a clear, scientifically-documented threat to public health and the environment.

- *MTBE — a fuel additive.* MTBE belongs to a group of chemicals called oxygenates. According to the U.S. Environmental Protection Agency (EPA), when oxygenates like MTBE are added to gasoline, they produce a cleaner burning fuel, thereby reducing tailpipe emissions and air pollution. The 1990 Clean Air Act Amendments require oxygenates to be blended into reformulated gasoline that is used in high-smog areas and in areas with high carbon monoxide levels in winter months. The act does not stipulate the use of MTBE, but most refiners chose to use MTBE rather than other oxygenates because of its price. About 26 percent of the gasoline sold in the United States in 2000 was blended with MTBE. Ethanol is the other widely used oxygenate.
- *MTBE — a public health threat.* Although it helps improve air quality, MTBE unfortunately presents a serious risk to drinking water supplies. MTBE is hydrophilic, meaning it is chemically attracted to water molecules. As a result, it spreads quickly over great distances into groundwater and will persist there. Once it is in the water supply, MTBE is very difficult to clean up. It does not readily bind to particles of soil. It does not degrade easily. MTBE may persist in the groundwater for decades. No inexpensive technology now exists to remove MTBE from drinking water.

MTBE has a foul taste, and smells like turpentine. Even in low concentrations, it is easy to smell and taste MTBE in drinking water. MTBE has been shown to be carcinogenic in rats and mice. MTBE is also a potential cause of cancer in humans, and may be associated with memory loss, asthma, and skin irritation.

MTBE contamination of ground and surface water has been widely reported in California and across the nation. Leaking underground storage tanks are by far the most significant source of MTBE pollution. Pipeline leaks, spills at gas stations, and car accidents also contaminate the groundwater with MTBE.

¹⁹ For the unabridged and fully footnoted version of this analysis of the *Methanex* case, see the Forum's website at http://www.forumdemocracy.net/disputes/nafta_cases/methanex_v_united_states.

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One study estimates that MTBE has polluted 10,000 shallow groundwater wells in California. Another report, by a research team at the University of California at Davis (UC Davis), estimated that 3,486 groundwater sites in California are contaminated with MTBE. California reported detecting MTBE in 30 public water systems. In Santa Monica, the city shut seven of its wells because of MTBE contamination, thus losing half its water supply. In South Lake Tahoe, 12 of 34 wells were closed. MTBE was found in northern California lakes such as Tahoe, Donner, and Shasta. To the south, MTBE was detected in lakes and reservoirs including Castaic, Pyramid and Perris.

- *California phases out the use of MTBE.* Responding to complaints about MTBE contamination of groundwater, lakes and reservoirs across the state, the California legislature passed S.B. 521 (Mountjoy), the MTBE Public Health and Environmental Protection Act of 1997. The act authorized a comprehensive study of the health effects of MTBE. It also authorized the governor to act by regulation to phase out the use of MTBE as a gasoline additive, if the study proved were to prove the chemical as harmful. Governor Gray Davis acted in 1999 to phase out MTBE, based on the UC Davis report. The report showed that the cost of using MTBE as a gasoline additive outweighed its benefits.

Importantly, other states—and then the federal government—followed California’s lead in curbing MTBE use.

After lengthy proceedings and deliberations, however, a NAFTA tribunal ruled that all of Methanex corporation’s claims failed, and assessed the corporation for substantial litigation costs incurred by the United States.²⁰ It is a landmark decision because of two key holdings:

- with some caveats, a non-discriminatory regulation for a public purpose, which is enacted with due process, cannot constitute an expropriation; and
- the “in like circumstances” test for discovering a national treatment violation must be read narrowly. The test does not encompass a comparison between two different products that are only generally in economic competition.

²⁰ *Methanex v. United States*, Final Award, available at <http://www.state.gov/s/l/c5818.html>. (also available at www.naftalaw.com).