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Groups Defend California's Right to Protect Public Health Canadian Corporation's NAFTA Suit Threatens State Sovereignty

San Francisco, CA – A coalition of environmental groups presented arguments today to the NAFTA dispute resolution panel hearing a foreign corporation's challenge to a California environmental regulation. In 1999, California decided to phase out MTBE, a gasoline additive suspected by the World Health Organization of being carcinogenic. MTBE has made its way into the groundwater supplies of hundreds of communities across the state, making the water undrinkable. The MTBE ban went into effect January 1, 2004.

Methanex Corporation, the Canadian parent company of a US manufacturer of methanol, one component of MTBE, has brought a \$970 million suit under the NAFTA against the United States, demanding compensation for profits and business opportunities it claims to have lost because of California's phase-out. Such "investment protection" lawsuits are allowed under NAFTA's Chapter 11 rules.

Today's submission by Earthjustice on behalf of Bluewater Network, Communities for a Better Environment, and the Center for International Environmental Law, is the first time public concerns have been expressed directly in a NAFTA investment proceeding. The groups argued that international law requires the tribunal to respect the right of governments to take action to protect important public values like the right to clean water. The amicus submission was delivered to the International Centre for Settlement of Investment Disputes, administered by the World Bank in Washington, DC.

"The state of California has both a right and an obligation to protect public health," said Martin Wagner, an attorney for Earthjustice who represented the groups. "Methanex's claim is tantamount to extortion, undermining health protections by demanding that the government pay nearly a billion dollars to protect citizens from harm. Our submission defends the right of California and all governments to protect public health and the environment without paying a fee to a corporation."

The threat presented by the Methanex case is further aggravated by the ongoing negotiations leading to the Free Trade of the Americas, an expansion of NAFTA's rules throughout the hemisphere. The agreement contains many of the same investor provisions that undermine regional decision-making and democracy.

"This would set the stage for a complete reversal of US environmental law," said Adrienne Bloch of Communities for a Better Environment. "The United States is being sued for protecting people and the environment from a chemical that is destroying our drinking water supply. This one's a no-brainer."

"The Methanex arbitral tribunal has set an important precedent by recognizing its powers to accept submissions from civil society," said Marcos Orellana, an attorney with the Center for International Environmental Law (CIEL). "The millions of dollars likely spent by the United States in defending itself from Methanex's unwarranted claims further amplify the threats posed by the NAFTA Chapter 11 model to legitimate environmental and health measures, especially in the developing world."

"Even the process for challenges under NAFTA's Chapter 11 is undemocratic. It allows foreign corporations to challenge public health laws in tribunals designed to prioritize trade over the public health," said Elisa Lynch of Bluewater.

Read the submission here: www.earthjustice.org/news/documents/4-04/MethanexAmicusSubmission.pdf

BACKGROUND

NAFTA Tribunal Methanex v. United States of America

Citizens Demand a Voice in Defense of Public Health

In October 2000, Earthjustice represented Bluewater Network and Communities for a Better Environment – environmental organizations that had worked to establish the California MTBE phase-out – as well as the Center for International Environmental Law in a petition to present their views to the tribunal hearing Methanex’s NAFTA claim. Although international arbitration tribunals had never before permitted citizens to participate in these confidential processes – a point Methanex’s lawyers highlighted to the tribunal – the groups convinced the tribunal that it had the authority to allow them to make written submissions in the case. The coalition filed that submission today.

Chapter 11: NAFTA’s Little Secret

Methanex has argued that the California phase-out of MTBE violates special protections NAFTA’s Chapter 11 provides to foreign investors. The Canadian firm Methanex, which operates a facility in the US, asserts that California’s action was intended to favor Midwestern producers of ethanol – a potential substitute for MTBE – at the expense of foreign methanol manufacturers. If successful, Methanex could receive an award of nearly one billion dollars, paid by US taxpayers.

MTBE: A Growing Public Health Issue

MTBE (methyl tertiary-butyl ether), a gasoline additive intended to lower air pollution, has been recognized as a threat to water quality and human health. Once MTBE enters the ground or surface water, it renders water unfit for human consumption. Even low concentrations can cause water to smell and taste like turpentine. The EPA acknowledges MTBE is a potential carcinogen <http://www.epa.gov/mtbe/water.htm#concerns>. A University of California report estimated that at least 10,000 sites in California have been impacted by MTBE contamination. By 1996, the city of Santa Monica had to shut down half of its municipal wells – which served the city’s 93,000 residents – because they had been contaminated with MTBE.

Trade Agreements Undermine Local Control

With the establishment of international investment rules like NAFTA’s, national and state environmental laws are threatened by undemocratic procedures. NAFTA gives foreign investors unprecedented power to challenge national and state laws and to demand compensation when environmental or health measures affect the value of their investments. One of the most problematic aspects of these provisions has been that they are exercised largely in secret. Investors’ challenges to national regulations are decided in confidential arbitration proceedings, meaning the public can have no role in deciding the fate of democratically enacted health and environmental measures. The efforts of this coalition of environmentalists is helping to open these processes to the light of public scrutiny.

Because of the threat posed by MTBE, the California Senate and Assembly passed the MTBE Public Health and Environmental Protection Act in September 1997. The law called for the University of California to evaluate the human health and environmental risks of the use of MTBE in gasoline, and for the governor to take appropriate action in response to the findings. The study concluding that the use of MTBE in gasoline posed a “significant risk” to California’s environment. As a result, in 1999 the governor ordered MTBE to be removed from gasoline by the end of 2002.

This is where the international investment rules come into play. Three months after the governor announced the MTBE ban, a Canadian corporation called Methanex, which manufactures one component of MTBE (methanol), filed a claim against the United States demanding \$970 million if California insisted on following through with its MTBE ban.

Methanex's Claims

First, Methanex argued that California's action had taken away future profits it was entitled to, violating NAFTA's prohibition against what is called "expropriation." The concept of expropriation is international law's version of what US law calls protection against "takings." The principle is straightforward: the government can take private property for the benefit of society at large – as when it decides it needs to build a highway in a certain area of private property – but it must pay fair compensation. However, under international law no compensation is due where a government regulates in the public interest for the protection of health and the environment.

US courts have recognized limitations to that rule, however, because governments could not carry out their responsibility to promote the common good if they had to pay every time government action impacts private property. As the Supreme Court has said, the impacts of regulations protecting important public interests "are the burdens we must all bear in exchange for the advantage of living and doing business in a civilized community." Methanex argued that NAFTA does not contain the same limitation as US law, and that it was therefore entitled to compensation it could not obtain in US courts.

Methanex's second concern was its belief that California's ban was intended not to protect health or the environment, but to remove foreign competition for US (mostly Midwestern) producers of ethanol, one likely candidate to replace MTBE in gasoline. NAFTA requires that foreign investors receive treatment "no less favorable" than domestic ones. Methanex was not deterred by California's claim that it did not intend to add ethanol to its gasoline (in fact, the state sought permission from the federal government not to replace MTBE with any additive).

In August 2002, the NAFTA tribunal dismissed most of Methanex's claims on the ground that its investment in methanol production was not tied closely enough to California's ban on MTBE. The tribunal was concerned, however, about Methanex's allegations of discrimination and allowed the case to go forward on that basis.

Trade Tribunals Undermine Democracy and Open Government

The Methanex NAFTA case raises important public policy issues. Instead of resolving those issues in processes open to full public participation, as do most US courts, international investment tribunals decide them in relative secret with little if any opportunity for a full airing of the issues. The tribunal's decision in the Methanex case will have precedential effect that will help determine the rights and obligations of governments in implementing future health and environmental measures.

A decision requiring the United States to compensate Methanex would not only pressure California to rescind important environmental and health measures, but would also compromise the legitimate powers of governments to protect the health, safety, and environment of their citizens. Commercial trade agreements would be empowered to trump local, regional, state, and, eventually, federal health and environmental standards.