NAFTA provision could blunt U.S. health protection

By Thomas D. Elias

Ventura County Star
November 26, 2004

Most complaints about the North American Free Trade Agreement come from workers and politicians on the campaign trail who focus on the unquestioned phenomenon of jobs moving from America to Mexico as companies exploit cheap labor there.

\This is dangerous enough, especially if it's your job that's migrating south to a land where wages are a fraction of what anyone could survive on in this country.

But there's also a threat that NAFTA might destroy something else that's at least as important: the right of states and cities to protect the health and well-being of their citizens. No function of government could be more important than that; yet, NAFTA may soon allow foreign companies to limit what governments can do for their people.

Those are the very high stakes in a $970 million claim brought against the United States and California by the Methanex Corp. of Vancouver, British Columbia, the Canadian parent company of the largest American maker of the gasoline additive MTBE, methyl tertiary butyl ether.

The additive is mostly gone from California gasoline, the result of a 2001 executive order by ex-Gov. Gray Davis, who acted when it became clear that MTBE, which probably helps cause cancer in those exposed to it, was fouling California's drinking water in many locations.

Most MTBE that's in water supplies from Lake Tahoe to the Southern California underground water table got there because of leaky gasoline station tanks. The additive has mostly been replaced in California gasoline by corn-based ethanol, another controversial chemical because it can have some ill effects on air quality and lead to gasoline price increases.

But the ethanol issues don't matter to Methanex. The company is simply concerned with its losses, which it estimates at almost $1 billion in vanished California business.

The firm claims NAFTA's investor rights provisions -- written into the treaty mostly to protect American firms investing in Mexico and Canada -- allow any corporation in a participating country to sue the federal government of a host country when there's the possibility that a government policy or state or local law threatens investors.

California's near-ban on MTBE does more than just threaten the profits of Methanex. It has cost the firm heavily.

Methanex has precedent on its side as it sues. In 1998, the U.S.-based Ethyl Corp. sued Canada over its health-based ban on another fuel additive called MMT. Ethyl charged the Canadian ban "expropriated" future profits and damaged the company reputation. Canada caved: Rather than risk a NAFTA court judgment that could have amounted to $250 million, Canada gave up on its MMT ban.

So much for health, when money is at stake.

At least no one is seriously talking about bringing back MTBE just to keep Methanex from collecting a billion or so bucks.

But it's also true that no one knows what the federal government might do to a state or local government if a NAFTA tribunal -- made up of two lawyers chosen by the disputing parties and one who's supposedly impartial -- assessed a big penalty against the national administration over actions by a single state, city or county.

There apparently is a conflict between established American law and the NAFTA treaty. While the U.S. Supreme Court has often held that the impact of regulations protecting the public are "the burdens we must all bear" as the price of "doing business in a civilized community," NAFTA has no such limitations.

Methanex "only sought to sue in a NAFTA tribunal" after it concluded it had no hope of winning anything in any American court, the firm says.

A preliminary decision favoring California's action on technical grounds came down in 2002, but it left Methanex the right to continue suing on grounds it was discriminated against. The fact that ethanol is by no means pure -- even though its harm is to air, not water -- might be grounds for a believable discrimination claim.

It's all still rather murky, but this much is clear: Before there's any expansion of NAFTA to other countries, as sought by President Bush, the provisions that prevent elected American officials from protecting their citizens have to be revised. If that means the other countries also get to place restrictions on U.S. firms, so be it. Maybe this would even discourage some companies from moving American jobs to low-wage foreign locales.

-- Thomas D. Elias, of Santa Monica, is a columnist and author. His e-mail address is tdelias@aol.com.