

The NAFTA Constitutional Challenge (General)

What is at stake?

The North American Free Trade Agreement (NAFTA), Chapter 11, deals explicitly with investment (rather than trade) and most importantly includes a mechanism for dealing with "investor-state" disputes. These are disputes between corporations and governments, and they allow foreign corporations to sue governments directly whenever they think their "rights" have been violated by a particular government measure, regulation or public interest legislation. Corporations have used chapter 11 to challenge environmental laws, municipal land-use controls, water protection measures, activities of public service providers like Canada Post and even the decisions of juries and appellate courts.

Why are we challenging Chapter 11?

We are NOT talking about dispute between a government a company over a breach of contract or about a traditional "expropriation" of private assets. NAFTA goes much further.

The key to the investor-state provision is NAFTA's extremely broad definition of "expropriation." By narrow legal definition, expropriation means the actual "taking" of private property, almost always land. But a well-organized effort by corporations in the US during the Reagan era led to a series of Supreme Court decisions that expanded this narrow legal definition to include what is now called "regulatory taking." This definition now includes any government regulatory action (law, regulation, rule or policy) that reduces the commercial value of an investment or the expected profit from an investment - including future profits. This new definition of expropriation has found its way into NAFTA's Chapter 11.

In effect, Chapter 11's dispute settlement provisions give foreign corporations the right to *directly enforce an international treaty signed by sovereign governments*, under which the corporations have absolutely no obligations. This underlines the fact that these trade agreements are primarily aimed at restricting governments from regulating or controlling corporations.

They say:

"NAFTA Chapter 11 is an integral part of the NAFTA, an agreement that has served Canada well."

Trade minister James Peterson, March 2, 2004

We say:

The willingness of our government to submit to these rules reflects an overwhelming concern for the commercial interest of foreign investors at the expense of the Canadian public.

NUMBERS AT A GLANCE

CASES FILED AGAINST:

Canada: 11
 United States 13
 Mexico: 15

TOTAL DAMAGES CLAIMED AGAINST:

Canada: 1.006 billion (excluding Sun Belt)
 United States : 2.618 billion
 Mexico: 501.1 million

TOTAL DAMAGES AWARDED AGAINST:

Canada: 27 million
 United States: 0
 Mexico: 18.2 million

SOME CASES AGAINST CANADA

Ethyl Corporation vs. Canada

Amount claimed: US\$ 250 million
 Out-of-court settlement: US\$13 million

S.D. Myers vs. Canada

Amount claimed : US\$20 million
 Award: US\$ 9 million

UPS vs. Canada

Amount claimed: US\$ 160 million
 Award: Tribunal process underway

Pope & Talbot vs. Canada

Amount claimed: US\$ 508 million
 Award: \$915,000 Cdn

All figures are in US\$ unless otherwise indicated