context by the European Court of Human Rights, which has vested the process with its practical judicial experience and immense political wisdom, is especially welcome.

MARIA GAVOUNELI
University of Athens

NAFTA—investments (Chapter 11)—investor-state arbitration—environmental regulation—"relating to" an investment— national treatment—"fair and equitable treatment"—expropriation—amicus briefs—open hearings

METHANEX CORP. V. UNITED STATES. Partial Award on Jurisdiction and Admissibility. *At* <http://www.state.gov/documents/organization/12613.pdf>.

METHANEX CORP. V. UNITED STATES. Final Award on Jurisdiction and Merits. *At* <http://www.state.gov/documents/organization/51052.pdf>.

NAFTA Chapter 11 Arbitral Tribunal, August 7, 2002, and August 3, 2005.

During the 1990s, methyl tertiary butyl ether (MTBE) was the preferred oxygenate additive for California gasoline refiners striving to meet U.S. and California fuel standards intended to reduce air pollution.[1] Beginning in 1996, however, MTBE contamination from leaking gasoline tanks forced dozens of cities in California to close wells that supplied municipal drinking water.[2] In 1999, the governor of California directed state agencies to phase out the use of MTBE in California by the end of 2002.[3] Methanol, an alcohol derived from natural gas, is a key ingredient in the manufacture of MTBE. On December 3, 1999, Methanex Corporation, a Canadian corporation that was the dominant supplier of methanol to California producers of MTBE,[4] filed a claim for compensation of $970 million against the United States[5] contesting the governor's action under the investor-state arbitration provisions of Chapter 11 ("Investment") of the North American Free Trade Agreement (NAFTA).[6] In dismissing all elements of Methanex's claim, the arbitral tribunal found in both its partial[7] (Partial) and final[8] (Final) awards that it lacked jurisdiction under Chapter 11 because the California measures regulating MTBE were not ones "relating to" Methanex or its investments in methanol as required by NAFTA Article1101. The tribunal also made decisions to enhance public participation in its proceedings.

[1] Pub.L. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §7545(k) ("Reformulated gasoline for conventional vehicles")); California Phase 3 Reformulated Gasoline Regulations, CAL. CODE REGS. tit.13 §§2250–2273 (2003).

[2] Releases of conventional gasoline typically do not threaten drinking-water supplies because the components are not highly soluble and biodegrade relatively quickly. By comparison, MTBE is highly soluble in water and biodegrades slowly, so it can reach deep and also relatively distant aquifers quickly. It has a foul turpentine-like taste and a smell detectable at extremely low levels. Its cleanup is costly and time-consuming.

[3] Governor of California, Exec. Order D-5-99, March 25, 1999.

[4] Methanex Corp. v. United States, Final Award, pt. IID, para. 3 (NAFTA Ch. 11 Arb. Trib. August 3, 2005) [hereinafter Final]. Except as noted, the NAFTA documents cited in this case report are available at <http://www.naftalaw.org>.

[5] Statement of Claim, paras. 2–8 (Dec. 3, 1999), Final, *supra* note 4.

[6] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Stat. 2006, 32 ILM 289 & 605 (1993).

[7] Methanex Corp. v. United States, Partial Award on Jurisdiction and Admissibility (NAFTA Chap. 11 Arb. Trib. Aug. 7, 2002). At the time of the partial award, the arbitral tribunal comprised J. William F. Rowley, Warren Christopher, and V. V. Veeder (president).

[8] *See supra* note 4. At this stage W. Michael Reisman had replaced Warren Christopher on the arbitral tribunal.

The history of the case is summarized in the tribunal's final award (Final, pt. II.D, paras. 8–11). California Senate Bill 521 (SB 521) called for the University of California to provide a "thorough and objective evaluation of the human health and environmental risks and benefits" of MTBE as compared with other methyl and ethanol oxygenates. Since the final UC report found significant risks of contamination from MTBE, along with high costs for treating water to remove it,[9] Governor Gray Davis certified the environmental risks of MTBE and called for the removal of MTBE from gasoline not later than December 31, 2002.[10]

Methanex's 1999 statement of claim identified SB 521 and the governor's executive order as a "measure" that violated the NAFTA's Article 1105 minimum standard of fair and equitable treatment.[11] Without asserting a loss of physical property, Methanex also claimed the California measure was "both directly and indirectly tantamount to an expropriation" under Article 1110 because it substantially diminished the value of Methanex's investments in the United States for the sale and production of methanol.[12] Relevant to Methanex's claim, MTBE competes in the gasoline market against another oxygenate, ethanol, which is an alcohol fermented from corn or sugar. Archer Daniels Midland Company (ADM), a U.S. company, is the major producer of ethanol for the U.S. market.

After the United States responded by challenging the tribunal's jurisdiction and the "admissibility" of Methanex's claims,[13] Methanex filed a draft amended statement of claim in February 2001. This amended claim dropped the challenge to SB 521 and asserted a denial of national treatment under NAFTA Article 1102 on the basis of a new allegation that Governor Davis specifically intended to advance the interests of the U.S. ethanol producer ADM.[14]

In 2002, without having heard any evidence, the tribunal issued a partial award on jurisdiction on Methanex's original, 1999 claim. The sole issue for the tribunal was whether California's measures were ones "relating to" the investments of Methanex as required by Article 1101(1).[15] This award was the first NAFTA Chapter 11 decision to undertake a detailed analysis of this limit on the chapter's scope and hence on the jurisdiction of Chapter 11 tribunals. The tribunal found against Methanex, determining that the California measures on MTBE did not relate in a legally significant way to the company's investments in methanol production and sales. But in light of Methanex's draft amended statement of claim, the partial award left open the possibility that the company's claim might satisfy the elements required under Chapter 11 if Methanex could establish that California officials intended to favor U.S. ethanol producers and to penalize foreign producers of MTBE *and* foreign producers of methanol (Partial, paras.

[9] *The Report to the Governor and Legislature of the State of California as Sponsored by SB 521* and associated materials are available at <http://tsrtp.ucdavis.edu/mtberpt/>.

[10] *See supra* note 3.

[11] Methanex alleged that the executive order was arbitrary and lacked substantive fairness because the University of California report on which it was based had reached "unfounded conclusions" and offered "unjustifiable recommendations." Methanex Statement of Claim, paras. 31, 34.

[12] *Id.*, para. 35.

[13] Statement of Defense of Respondent United States (Aug. 10, 2000), Final, *supra* note 4.

[14] As evidence, Methanex documented that Gray Davis, during his campaign for governor, had dinner with top executives at ADM headquarters and thereafter received substantial campaign contributions from ADM. After the executive order, ADM announced plans to build an ethanol facility in California, characterizing ethanol as a "domestic American product" and methanol and MTBE as "foreign products." Claimant Methanex Corporation's Draft Amended Claim (Feb. 12, 2001), Final, *supra* note 4.

[15] NAFTA Article 1101 provides, in pertinent part: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of a Party . . . ."

154, 157–58). It therefore gave Methanex the opportunity to submit a fresh pleading along those lines (*Id.*, para. 161).

Methanex filed such a pleading late in 2002, and the tribunal held evidentiary hearings in June 2004. The tribunal's final award of August 3, 2005, found that Methanex failed to adduce credible evidence to support its claim of impermissible intent on the part of Governor Davis; Methanex's claims under NAFTA Articles 1102, 1105, and 1110 therefore failed (Final, pt. IV.B, para. 38; pt. IV.C, para. 27; pt. IV.D, para. 18). Because there was "no illicit pretext" or "inten[t] to harm foreign methanol producers . . . or benefit domestic ethanol producers" on the part of the United States, the tribunal confirmed its earlier, interim award that it lacked jurisdiction under NAFTA Chapter 11 (*id.*, pt. IV.E, para. 22), and awarded all costs to the United States (*id.*, pt. V, paras. 5–12).

* * * *

The *Methanex* arbitration unfolded during a period when claims and awards in other NAFTA Chapter 11 arbitrations had persuaded many in the North American environmental community that NAFTA's investment provisions posed a serious, unexpected threat to local environmental protection measures.[16] The Methanex filing and its high-value compensation claim created particular alarm in the North American environmental community.[17] In the six-year history of NAFTA to that point, it was the fourth substantial investor claim under Chapter 11 seeking compensation because of local or national environmental measures. Canada had already settled one case and paid compensation.[18]

The two other claims then pending against environmental measures resulted in partial or final awards of compensation that reinforced the anxiety in civil society.[19] Substantively, environmentalists and others were especially critical of the awards' broad interpretations of Article 1105's "fair and equitable treatment" requirements and Article 1110's "tantamount to expropriation" language.[20] Further fueling criticism of the NAFTA Chapter 11 arbitration process were the privacy of tribunal hearings, which were held behind closed doors, and the official inaccessibility of the pleadings and briefs during the early stages of the arbitration proceedings.[21]

The *Methanex* awards should go some way to ease those concerns and thus to reshape the debate on investor-protection agreements. Of the many issues covered in the *Methanex* tribunal's lengthy, comprehensive awards, four are especially relevant to broader concerns about the

[16] *See* John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AJIL 429 (2006).

[17] *See* Robert Collier & Glen Martin, *Canadian Firm Sues California over MTBE*, S.F. CHRON., June 18, 1999, at A1 (reporting reaction of U.S. Sierra Club to Methanex notice of intent to file claim); *NAFTA Suits Harm Environment, Critics Charge*, TORONTO STAR, June 17, 1999, Business (Edition 1) (reporting reaction of Sierra Club of Canada).

[18] Ethyl Corp. v. Canada, Award on Jurisdiction (NAFTA Chap. 11 Arb. Trib. June 24, 1998), 38 ILM 537 (1999). This case was settled. *See* National Round Table on the Environment and the Economy, *Managing Potentially Toxic Substances in Canada:A State of the Debate Report*, App. 1.C ("MMT Case Study") (2001).

[19] S.D. Myers, Inc. v. Canada, Partial Award on Liability (NAFTA Chap. 11 Arb. Trib. Nov. 13, 2000) (discussed in case report by Charles H. Brower II at 98 AJIL 339 (2004)); Metalclad Corp. v. United Mexican States, Award (NAFTA Chap. 11 Arb. Trib. Aug. 30, 2000) (discussed in case report by William S. Dodge at 95 AJIL 210 (2001)).

[20] *See, e.g.*, INT'L INST. SUSTAINABLE DEV., PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 15–36 (2001). Moreover, one tribunal had reasoned that, on certain facts at least, a violation of the national treatment obligation of Article 1102 was also a violation of Article 1105. *S.D. Myers*, para. 266.

[21] *E.g.*, NOW with Bill Moyers: Trading Democracy (Public Broadcasting System Feb. 1, 2002) (transcript available at <http://www.pbs.org/now/transcript/transcript_tdfull.html>); J. Anthony VanDuzer, *Investor-State Dispute Settlement Under NAFTA Chapter 11: The Shape of Things to Come?* 1998 CAN. Y.B. INT'L L. 263.

effects of NAFTA Chapter 11 on national regulatory autonomy. The following discussion will focus on the partial award on jurisdiction under Article 1101—the tribunal's most original contribution—but will also briefly touch on the final award's discussion of Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (expropriation).

Article 1101. Before hearing any evidence, the tribunal had to weigh the United States' argument that Methanex's claim, on its face, fell outside the scope of NAFTA Chapter 11, defined in Article 1101(1) as extending to claims by an investor against measures "relating to" the investor or its investment. The United States argued that environmental measures, by their nature, have the potential "to affect enormous numbers of investors and investments." To prevent "untold numbers of local, state and federal" environmental measures from being subject to claims by those incidentally affected, the phrase "relating to" must be understood to require a "legally significant connection" between the particular measure and the particular investor or its investment. In this case, Methanex was no more directly affected by California's measure than any other supplier of goods or services to MTBE producers. The California measure would affect Methanex only by reducing demand for its product and thus affecting its profitability.[22] In separate submissions under NAFTA Article 1128,[23] Canada and Mexico supported the U.S. position.[24] Citing certain statements by NAFTA party governments and also the discussions of Article 1101 in earlier Chapter 11 awards, Methanex argued in response that "relating to" means nothing more than "affecting" and that the California measures affected Methanex's opportunity to make sales of methanol to California refiners.[25]

The tribunal, applying a Vienna Convention Article 31 approach of discerning the "ordinary meaning" of the treaty language "in its context and in light of the object and purpose of NAFTA," reasoned that Methanex's interpretation could not accord with NAFTA's purpose; it would put no boundaries on investor claims against states, allowing any investor to challenge any measure that brought about some change in its economic circumstances. Asserting that "a strong dose of practical common-sense is required" in interpreting the treaty, and analogizing to proximate causation principles in tort, the tribunal concluded that there must be a practical limit to investor claims and that the United States' call for a "legally significant connection" provided such a practical limit (Partial, paras. 135–39). The tribunal discounted Methanex's reliance on awards of other NAFTA Chapter 11 tribunals, finding that *Pope & Talbot* was not germane to the particular issue[26] and that the separate views of one arbitrator in *S.D. Myers* (who suggested a low threshold of relation) were neither authoritative nor persuasive (*id.*, paras. 142–43).[27] For all these reasons, the tribunal affirmed that "relating to" in Article 1101(1) requires a legally significant connection between the measure complained of and the investments of the investor. In the instant case, neither Methanex nor its U.S. affiliates ever manufactured or sold MTBE (*id.*, para. 24). The tribunal found that the California measure to phase out the use of MTBE therefore lacked a legally significant connection to Methanex's business of producing and selling methanol, with the consequence that the tribunal had no

[22] U.S. Memorial on Jurisdiction and Admissibility 47–49 (Nov. 13, 2000), Final, *supra* note 4.

[23] Article 1128 authorizes any NAFTA party, after written notice to the disputing parties, to make a submission to a tribunal on "a question of interpretation of this Agreement."

[24] United Mexican States, [Article 1128 Submission on Jurisdiction] (n.d.), Final, *supra* note 4; Canada, Second Submission Pursuant to NAFTA Article 1128 (Apr. 30, 2001), Final, *supra* note 4.

[25] Methanex Counter-memorial on Jurisdiction 47-51 (Feb. 12, 2001), Final, *supra* note 4.

[26] Pope & Talbot v. Canada, Motion to Dismiss (Chap. 11 Arb. Trib. Jan. 26, 2000) (discussed in case report by David A. Gantz at 97 AJIL 937 (2003)).

[27] *S.D. Myers*, Sep. Op. Schwartz, Arb., paras. 47–64.

jurisdiction to hear Methanex's claim as originally stated (*id.*, para. 150). The tribunal argued further that an allegation of intent to harm foreign MTBE producers, without any intent to harm foreign methanol producers, would also be insufficient to establish the requisite legal connection to Methanex (*id.*, para. 154).

The partial award is the first Chapter 11 ruling to confront the fundamental question whether an investor whose activities are not being directly regulated, but whose market is being substantially affected by government regulation of some other activity or product, can maintain a claim under Chapter 11.[28] The *Methanex* tribunal correctly judged this to be a bridge too far, one that would open investor-state arbitration to virtually any investor financially affected by government action. For the reasons given by the United States and reiterated by the tribunal itself, a narrow reading of "legally significant connection" between investor and measure is especially comforting to governments that are considering environmental regulation, which almost invariably imposes economic costs, and sometimes even direct business losses, on a variety of private parties.

Even so, the tribunal and the United States recognized that in the context of NAFTA's national treatment obligation, a showing of specific intent in adopting a measure to discriminate against a foreign investor and in favor of a competing domestic investor would establish a connection that is "legally significant." That was precisely the thrust of Methanex's unsuccessful effort in the second round to show that Governor Davis intended not just to regulate MTBE, but, in particular, to disadvantage Methanex in favor of ADM. Similarly, failure to accord a foreign investor the minimum standard of treatment under international law (as required by Article 1105) would connect a measure and an investor in a "legally significant" way even when the underlying laws or regulations, if fairly applied, were beyond challenge.

Article1102. Article 1102 requires each NAFTA party to accord to investors of another party "treatment no less favorable than it accords, in like circumstances," to its own investors. The tribunal focused its attention on "like circumstances"; it framed the legal issue to be the choice of the proper "comparator" (Final, pt. IV.B, paras. 16–17). Methanex urged that its treatment as a supplier to the gasoline additives market be compared to the treatment of the U.S. ethanol producer ADM, which also supplies an additive. The United States argued that, because Article 1102 is meant to guard against discrimination on the basis of nationality, the treatment of the foreign investor should be compared to the treatment of domestic investors with the same investments, or with the most similar investments if no domestic investor is in the same circumstances. On this view, the treatment of Methanex should be compared to the treatment of U.S. methanol producers (*id.*, pt. IV.B, paras. 13–15).

The tribunal found that the California measures do not discriminate between Methanex and U.S. methanol producers whose circumstances are presumably identical to Methanex's (Final, pt. IV.B, paras. 17–19). Thus, under the U.S. logic, Methanex did not receive less favorable treatment. Nevertheless, the tribunal went on to consider the Methanex-ADM comparison. Methanex argued that the interpretation of "like circumstances" should be informed by the GATT and WTO jurisprudence on "like products"—which emphasizes competitive relationships between products over narrow determinations of their "likeness." With an unusual nod

[28] Although the *Pope & Talbot* January 26, 2000, award (motion to dismiss) dealt with jurisdiction and the "relating to" language, the argument disposed of there was Canada's assertion that measures regulating goods do not relate to an "investment." In *Methanex*, the regulation of MTBE clearly addresses a good, but that is not the distinction on which the analysis turns.

to an amicus brief,[29] the tribunal rejected this approach, adopting the view that "like circumstances" in the investment context in general, and in NAFTA Chapter 11 in particular, is not analogous to "like products" in the context of trade in goods (*id.*, pt. IV.B, para. 27, 29–37). Looking at the "circumstances" of competition between methanol and ethanol in the market for fuel additives, the tribunal found the circumstances of Methanex and U.S. ethanol producers dissimilar. Unlike ethanol, methanol itself is not usable as a fuel or gasoline additive (indeed, it is banned for those uses because of its corrosivity). Methanol is useful in gasoline only as a feedstock in the production of MTBE, and thus does not compete with ethanol, which can be put directly into gasoline (*id.*, pt. IV.B, paras. 24, 28).

Though the final conclusion that Methanex and ADM are not "in like circumstances" seems sound, the tribunal's reasoning glosses over considerations that are potentially relevant to future national treatment claims. The selection of the business sector to compare can be determinative of the national treatment issue and should thus be carefully considered. Merely because there are U.S. and foreign producers of methanol and the California measures do not discriminate between them de jure does not mean that there might not be de facto discriminatory intent or effect in a measure affecting one submarket for methanol. As a raw material, methanol is a feedstock for many distinct products, including windshield washer fluid, plastics, and formaldehyde. Methanex had positioned itself as the dominant supplier of methanol to one such submarket: U.S. producers of MTBE. The California measure thus may have only slightly affected domestic methanol producers not so exposed to the California MTBE market, while substantially harming Methanex's U.S. business. If that were true, the tribunal's conclusion that the U.S producers and Methanex are in the identical "business" would miss the point of potential discriminatory treatment. Analysis of the "circumstances" of competition should look beyond mere producer characteristics to take such market differentiation into account. On the facts in *Methanex*, this distinction has no bearing on the outcome because the gravamen of Methanex's national treatment claim was discrimination between it and U.S. producers of a different product, ethanol. On that point, the tribunal was right to hold that a foreign investor producing a raw material sold to unaffiliated producers of one gasoline oxygenate is not in "like circumstances" with the domestic producer of a competing oxygenate.

Article 1105. The tribunal found no unfair treatment of Methanex that was violative of international law norms under Article 1105. Earlier Chapter 11 tribunals had read Article 1105 broadly. In reaction to these awards, the NAFTA Free Trade Commission (FTC), during the long course of the *Methanex* arbitration, issued an interpretation of Article 1105,[30] which the tribunal properly treated as binding on it under NAFTA Article 1131(2).[31] That interpretation expressly confines Article 1105 to the "customary international law minimum standard of treatment of aliens"; the terms "'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond" such customary international law. This narrow interpretation of the minimum standard of treatment to be accorded to foreign investors is favorable to environmental protection interests; it affords governments substantial latitude in their regulatory treatment of foreign investors and helps maintain a degree of parity between

[29] The tribunal cites the amicus brief filed by the International Institute for Sustainable Development.

[30] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, pt. B (July 31, 2001) ("Minimum Standard of Treatment in Accordance with International Law"), *at* <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> [hereinafter Notes of Interpretation].

[31] Article 1131(2) provides: "An interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

foreign investors and domestic investors with respect to the grounds on which they can successfully argue for compensation because of disparate or abusive treatment by the governing authorities.[32]

Article 1110. The vexing interpretive question in Article 1110 is whether the phrase "tantamount to expropriation" merely clarifies the right to compensation for indirect expropriations, or whether it creates a broader right for compensation for measures with lesser effect on the investment. Distancing itself from some earlier tribunal awards that appeared to give "tantamount to expropriation" an unduly broad reading, the *Methanex* tribunal enunciated a restrictive approach in denying Methanex's claim of Article 1110 expropriation due to regulatory measures:

> But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation. (Final, pt. IV.D, para. 7)

In conclusion, the *Methanex* awards gave readings to each of the critical articles of NAFTA Chapter 11 that set a high bar for investor claimants to vault over to gain compensation from host states. They reduce the chance for a successful claim, and thus the incentive for investors to mount challenges to national regulatory actions. This outcome is beneficial from the environmental and civil society perspectives; the substantial threat to national autonomy for bona fide regulation of business activities that many saw in early Chapter 11 awards appears to have receded, without depriving investors of the opportunity to challenge clearly discriminatory or abusive government behavior. Moreover, with the endorsement of the NAFTA Free Trade Commission, the *Methanex* tribunal also established important rights of civil society participation and observation in investor-state arbitrations.[33] These outcomes give the *Methanex* Chapter 11 arbitration special significance for the continuing international dialogue about international protection of investor rights and the procedures for resolving foreign-investor claims against host country governments.

SANFORD E. GAINES
University of Houston Law Center

[32] It should be noted in passing that the United States, in negotiating other free trade agreements, has hewed closely, but not precisely, to the NAFTA Free Trade Commission language. For example, Article 10.5 of the Central American–Dominican Republic–United States Free Trade Agreement, Aug. 5, 2004, *at* <http://www.fas.usda.gov/itp/CAFTA/cafta.html>, repeats the Free Trade Commission text almost verbatim but then adds specific subparagraphs defining "fair and equitable treatment" by reference to "the principle of due process," and "full protection and security" by reference to a minimum international standard of police protection.

[33] Most notably, the *Methanex* tribunal accepted briefs amicus curiae and opened tribunal proceedings to public observation. On amicus briefs, the tribunal decided (January 15, 2001) that it had discretionary authority to allow amicus submissions under Article 15(1) of the UNCITRAL Arbitration Rules. Subsequently, a joint motion to the tribunal by Canadian and U.S. nongovernmental organizations petitioning for amicus curiae status (Jan. 31, 2003) prompted the NAFTA party governments to adopt a statement clarifying that nothing in Chapter 11 bars amicus participation and recommending procedures for tribunals to accept and rule on petitions for amicus status. NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-disputing Party Participation* (Oct. 7, 2003), *at* <http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf>. The parties to the arbitration agreed to allow public observation of tribunal hearings through closed-circuit television. *See also* Notes of Interpretation, *supra* note 30, pt. A (committing the NAFTA governments to make most documents publicly available unless subject to specific confidentiality protections, as in the case of confidential business information).