CAFTA Facts

Office of the United States Trade Representative www.ustr.gov
CAFTA Policy Brief – May 2005

Investment Provisions in CAFTA

- There are misperceptions and misinformation regarding how the investment protections in the Central American – Dominican Republic FTA (CAFTA) actually operate and how these provisions are different from those in Chapter 11 of the North American Free Trade Agreement (NAFTA), which predated TPA.

- First, nothing in CAFTA or any other free trade agreement (FTA) or bilateral investment treaty (BIT) interferes with a state or local government's right to regulate. An investor cannot enjoin regulatory action through arbitration, nor can arbitral tribunals.

- Second, the CAFTA critics fail to note that the Administration substantially revised FTA investment chapters in direct response to the guidance that Congress provided in TPA. CAFTA is thus significantly different from NAFTA in the following ways:

    - The CAFTA expropriation provisions articulate standards drawn directly from U.S. Supreme Court decisions and take regulatory interests fully into account. Consistent with U.S. law, for example, the CAFTA text specifies that nondiscriminatory regulatory actions designed and applied to protect the public welfare do not constitute indirect expropriations "except in rare circumstances."

    - The arbitration process under CAFTA is more open and transparent than NAFTA. Under CAFTA, hearings and documents are now public, and *amicus curiae* submissions are now expressly authorized.

    - The CAFTA investment chapter includes checks to help ensure that investors cannot abuse the arbitration process. The agreement includes a special provision (based on U.S. court rules) that allows tribunals to dismiss frivolous claims at an early stage of the proceedings and expressly authorizes awards of attorneys' fees and costs if a claim is found to be frivolous.

    - Under CAFTA, governments may now review draft opinions before they are issued in final form (litigants may comment on them) and issue interpretations of the rules that are binding on tribunals.

- Furthermore, CAFTA critics completely mischaracterize the NAFTA arbitration record:

    - The U.S. has never lost a single case under NAFTA or any other FTA or BIT, nor has the United States ever paid a single penny to settle such a case.

    - The NAFTA Chapter 11 investor-state cases that critics cite as undermining domestic laws are still pending (e.g., the Methanex and Glamis cases), involve measures that domestic tribunals have found to be inconsistent with domestic law (e.g., the Ethyl case), or have been dismissed (e.g., the Loewen case).

- Finally, we must not forget the significant benefits that U.S. companies investing abroad will derive from CAFTA's investment chapter. These provisions level the playing field for U.S. investors by giving them legal protections in Central America comparable to the protections that foreign investors already receive in the United States.