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Public Workshop on Chapter 11 of the North American Free Trade Agreement (NAFTA) organized by the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America

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Mexico City

Summary Record

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) held a public workshop on Chapter 11 of the North American Free Trade Agreement (NAFTA) on 23 March 2003, in Mexico City, in conjunction with the second CEC North American Symposium on Assessing the Environmental Effects of Trade.

Documents and advice from JPAC to Council related to this issue may be obtained from the JPAC Liaison Officer's office or through CEC's web site, at <http://www.cec.org>.

DISCLAIMER: Although this summary was prepared with care, readers should be advised that it has not been reviewed nor approved by the intervenors and therefore may not accurately reflect their statements.

Introduction

The JPAC chair welcomed all the participants and opened the session by asking the JPAC members to introduce themselves. He also provided a brief resume about JPAC's past activities on this topic—including a first advice to Council on NAFTA's Chapter 11 in March 2002 and a second one after a JPAC public session on this issue, held in conjunction with the regular session of the CEC Council in June 2002. Finally, he explained that the present workshop had been organized so as to maximize interaction between the public and JPAC. See Annex A for the JPAC Advice to Council 03-01, "Seeking Balance between the Interests of the Public and Investors in the Application of Chapter 11 of the North American Free Trade Agreement (NAFTA)."

He then asked **Aaron Cosbey**, senior advisor, International Institute for Sustainable Development, to provide an overview of the background paper he had prepared for this session.

First, Mr. Cosbey congratulated JPAC on its tenacity in addressing this issue. He then explained that his organization had begun work on this subject in 1999 and had issued the first authoritative guide to environmental concerns in the book, *Private Rights, Public Problems.* It had also petitioned for 'friend of the court' standing in the *Methanex* case. The organization is developing a wider interest in the Free Trade of the Americas Agreement and is focusing on the possibilities that investment agreements may provide for promoting sustainable development.

He then proceeded to review the paper, "NAFTA's Chapter 11 and the Environment: Discussion Paper for a Public Workshop of the Joint Public Advisory Committee of the Commission for the Environmental Cooperation of North America," that had been made available to all participants prior to the session. See Annex B for this paper.

The **JPAC chair** thanked Mr. Cosbey and noted that the purpose of this paper was to provide an overview of the issues and identify possible solutions. He asked JPAC members for their comments.

A **JPAC member** asked if the governments had been invited to attend. The JPAC chair replied that they were invited. The Mexican government had planned to send a representative and then the US government requested that their participation be organized through teleconferencing. This was not possible logistically. Canada informed the organizers only several days before the session that they, too, could participate only through teleconferencing.

Another **JPAC member** asked for more information on other research that had been done on this subject in order to assist JPAC in better understanding what the CEC could contribute to this complex and controversial topic.

Mr. Cosbey explained that much has been done from the perspective of implications for public law, but not so much exists on the environmental implications, and this is where further work is needed. In the interests of fairness, he also pointed out that not everyone would agree with his point of view. Others would argue that not enough case law exists to support a firm position on the effects of Chapter 11 on domestic environmental regulation and public policy.

Session One: Issues related to expropriation, non-discrimination, performance requirements, and minimum international standards of treatment

The **JPAC chair** opened the session by posing the following questions to stimulate the discussion:

- When should *bona fide* regulations constitute expropriation?
- Are there problems with appropriating the non-discrimination principle from the trade context?
- Under what circumstances should import bans be considered performance requirements?
- How broadly should we define minimum international standards of treatment?

Comments from JPAC and the public included:

- Could a requirement to buy locally be imposed as a performance requirement—as a condition of entry for foreign investors? This is a condition, for example, that is imposed on domestic companies. Further, in Canada, there are circumstances in the indigenous treaty context where local purchase of goods and services is a treaty-protected requirement.
- Import bans may constitute performance requirements; however, the issue really centers on protecting biodiversity and human health (lindane-treated canola, as an example).
- Tribunal hearings are closed. If 'friend of the court standing' becomes a common feature of these hearings, this will assist bringing public policy perspectives into the dialogue, but it

does not adequately address the matter of transparency and accountability. It is only a partial solution.

- We should not be too optimistic about opportunities for public input in the FTAA process and as an avenue for improving the NAFTA process.
- Where are the current cases heading? Is a trend developing towards decisions that may not have been intended by the original drafters of NAFTA? Is there sufficient case law to date to allow for an assessment?
- There are no environmental exceptions (carve outs) in Chapter 11 of NAFTA as a whole.
- Rather than looking at interpreting specific provisions, it may be more productive to consider providing mechanisms in the arbitration process for bringing forward issues of public policy.
- Does public policy get 'trumped'? Let's look creatively at how the CEC could contribute to resolving the impasse. Could, or should, the CEC pursue a role for itself in the arbitration process? More broadly, is there a place for the CEC to insinuate itself into the FTAA discussions? Mr. Cosbey replied that no role for the CEC was envisaged in the FTC or Chapter 11 tribunal. The avenue is through NAAEC Article 10(6). Regarding the FTAA, the points of entry are very limited. The CEC could commission research and make the results available to the negotiators.
- Explore the opportunities for BITs, e.g., the Chile/US Free Trade Agreement discussions to raise the bar.
- We need a 'smoking gun.' Perhaps the reasoning used by the tribunal in the *Metalclad* case is one. Yes, there was an expropriation, but the reasoning was terrible. Look at the implications for carbon emission caps under Kyoto.
- This the second public event organized by JPAC. Both have presented only one side of the debate. JPAC should bear in mind that there is absolutely no consensus on the impacts of Chapter 11 cases. These are huge cases and because of lack of access to documents, only partial analysis is possible. JPAC is doing a disservice to the public. We need more objective academic research. What is being presented is a 'point of view,' not fact.
- Domestic remedies may also be an option. A Supreme Court ruling in any country would have a profound effect.
- We need to be proactive. There is currently a regulatory chill "out there,"—one which existed even before Chapter 11. Research focussed on a risk assessment perspective would be a very valuable exercise.
- This is a hugely complex topic. There is no consensus on outcomes. However, lack of transparency is clearly a problem. The FTC does not have a sustainable development culture. This needs to be pursued by the CEC via NAAEC Article 10(6) as both a mandate and an obligation. Consider developing non-binding guidelines for the tribunals.
- Distinguish between bad law and bad cases. Tribunals cannot change law. They can only award compensation.
- Should not attempt definitions. Every case is different. Application of the law is the issue—not the purpose of the law. There is no regulatory chill in the United States. It has the most advance environmental protection system on the planet.
- Consider creating a permanent roster of environmental experts. The Preamble to NAFTA contains the justification for including sustainable development as a topic for consideration by the tribunals. Need to clarify the force they have in governing the provisions of NAFTA, including Chapter 11.
- We have many examples where GATT-specific law is being developed.

Session Two: Potential parameters of the environmental, health and safety exception for stewardship by the Parties

The JPAC chair opened the session by posing the following questions to stimulate the discussion:

- What are the pros and cons of seeking a GATT Article 20-like exception clause in Chapter 11?
- Are there relevant lessons from the WTO experience?
- Does the concept of exceptions reduce sovereign rights that already exist (i.e., rights to regulate in the public interest)?

Comments from JPAC and the public included:

- If a determination is made that there has been an expropriation, does an enforcement mechanism exist? Mr. Cosbey replied that there is none.
- In Canada there is no equivalent protection for property against takings. We need to remember that the legal context in each country is very different.
- It is normally outside the capacity of smaller companies to litigate, so the cases thus far involve larger companies.
- Can import bans be used as a protective measure, especially if there is no domestic ban? In the case of lindane, a curious dilemma is emerging where acting on the basis of an international agreement (POPs Convention) can result in a major financial burden for the country through a Chapter 11 tribunal compensation award.
- If environmental risk assessment was done in advance, some of these problems could be avoided. We need to create a climate where investors would combine due diligence with environmental risk assessment.
- It is not unusual that an import ban not be accompanied by a domestic ban. This is often the case with invasive species or diseases in animals. Imports are banned, but not local production.
- What are the tests for 'bone fide' regulations, or laws for that matter? And what about non-regulatory measures adopted domestically such as zoning measures.
- It is important to understand that no domestic regulation can appear *bone fide* when being scrutinized by a trade panel (inherent bias). The compromises that were made domestically to get that regulation or law are magnified. It is not just environmental regulations that are at risk, but also health regulations. The whole gamut of public policy is endangered by these claims.
- Would the answer be different if the debates leading up to the acceptance of a domestic regulation (compromises, etc.) were included a discussion on trade issues?
- No it would not. This is already done at the federal level in Canada. The bottom line is that you can regulate if you want, but you have to pay if you affect investment.
- When does regulatory chill take place? For example, in a dispute with Canada concerning packaging, the Philip Morris Tobacco Company did send a letter threatening a Chapter 11 challenge. We will never know what effect this had since everything takes place behind closed doors. Chapter 11 is being used as a pre-emptive weapon.
- These debates can also have positive consequences on domestic processes. For example, in Quebec, media attention over hazardous waste imports from the United States has resulted in stricter hazardous waste management regulations.

- The CEC should begin assessing the capacity of countries to implement Chapter 11-type provisions in the FTAA context. Liberalized trade is not an end in itself, but an element of sustainable development. What we are seeing, however, is that trade issues are being elevated over other societal interests.
- In countries where the rule of law does not exist (inept courts or corrupt systems), domestic standards will be compromised and foreign investors will benefit. Part of the discussion, therefore, should concern raising the capacity of legal systems to support environmental protection and human rights—[we should] help to foster improvements in domestic systems in other countries
- Rights should be accompanied by responsibilities. In many instances, this requires capacity building.
- At its June 2002 Session, the CEC Council made a commitment to have public involvement in the FTC process. What has happened since? Environmental and other societal interests are being left behind in the discussions.
- Trade should not 'trump' public policy objectives. WTO rules, for example, can incorporate exceptions.
- Current WTO discussions are questioning the accuracy of Article 20-type exceptions. Based on experience, questions of interpretation are seen as very important. When looking at exceptions, the unintended effects also need to be taken into account.
- GATT Article 20 is insufficient for protecting the range of public policy issues and domestic regulations. The WTO intrudes far too strongly into the capacity of governments. There is an emerging strategy for international law to explicitly constrain intrusion by the WTO and to protect countries against trade based challenges. Examples include CITES, the Convention on POPs, and developing an international agreement for the protection of cultural diversity. With strong international statements to support public policy, countries will be less inclined to go to the WTO.
- Reopening NAFTA is a dangerous option. You will always lose something.
- Where is the threat to sovereignty? There are no impediments for countries to regulate as long as it is done on solid grounds. Where is the issue?
- The CEC might consider work on better defining corporate responsibilities, liabilities, risk assessments and disclosure to assist in avoiding intrusion of trade-related bodies into domestic environmental affairs.
- Interpretative statements can be very useful in that they can bind tribunals.

Session Three: Issues related to transparency, legitimacy and accountability

The JPAC chair opened the session by posing the following questions to stimulate the discussion:

- Is there a need for a more open process of arbitration?
- If so, what should it look like?
- Is there a need for a standing roster of Chapter 11 panelists?
- Is there a need for an appeals mechanism?

Comments from JPAC and the public included:

- There is nothing to prevent Chapter 11 arbitrators from having environmental backgrounds. The panel can also call expert witnesses.

- Perhaps there could be a permanent roster of panelists. There should also be an appeal process.
- We need to elevate our ability to impact decisions in favor of the environment and public interests using the institutions we already have. Getting sustainable development expertise into the hearing process and calling for interpretive statements on key questions can assist this. We can use the preambular language of NAFTA as justification.
- There is a risk that making expansive interpretations will benefit companies. Trade lawyers have an inherent bias.
- There is a difference between making a process more accountable, legitimate and transparent by bringing in different expertise, and making it more open for people to come and discuss domestic public policy. I am not sure if I want trade tribunals debating public policy.
- There are several key elements in making the process more accountable and transparent: bring in expert witnesses, have arbitrators versed in the public policy issues at hand, release documents, allow for *amicus* briefs, have the ability to actually be present to plead a case, open the proceeding entirely to the public. These options are all different and can contribute in different ways.
- Who is making interpretations becomes very important. We must all use the 'same language.' Capacity building needs to involve environmental education. This was made very explicit at the WSSD.
- Progress is being made. Five years ago, we never even knew what cases had been filed or at what stage they were. We can credit NGOs for this progress. Documents are on web sites, minus confidential business information (also a domestic rule).
- Even if the process is more transparent, it is very difficult for non-lawyers to follow. We need to find other ways of educating the public about these cases and their implications. I would value hearing from people in Mexico about *Metalclad*. I take the view that this is a company that acted in bad faith. People in the region would have a different perspective than lawyers. We lack comment from the affected public on the impact of cases.
- Typically, small landowners or land users are not taken into account. In Mexico, land gets expropriated without information having been provided to the owners, and they are paid a very low price. The government then turns around and resells the land to companies at a much higher rate.
- Transparency is required throughout the process—from the time the issue is filed. There should be ways to inform the general public about the nature of a case and its possible implications. The CEC should look at ways this could be done.
- Investors also want transparency. This will help weed out the 'wrong doers.' Then once an agreement is achieved, investors should be provided legal certainty.
- The core issue on the lack of balance between investors and the public interest is lack of transparency. Other issues are important, but they could all be resolved if there were full transparency.
- We are living in societies that value trade over other issues, such as culture.
- It is important to separate industries in Mexico. Most large companies are complying and promoting environmental protection. SMEs, especially smaller enterprises, however, think that caring for the environment is just an additional expense—not a sound investment.
- Education can help. This would be a good place for governments to put additional effort. The CEC could recommend this.

Session Four: Issues of effectiveness/feasibility of amendments to the NAFTA versus interpretive statements

The JPAC chair opened the session by posing the following questions to stimulate the discussion:

- What are the arguments for and against amending NAFTA, versus interpretative statements?
- Do the answers differ for process issues versus substantive issues?
- How well has the June 2001 interpretive statement worked to date, and what lessons are there for similar future statements?

Comments from JPAC and the public included:

- We need to reopen NAFTA even if it is a Pandora's box. Farmers in Mexico cannot compete or protect themselves. Land cultivated by indigenous peoples is being taken over for non-food crops and then the US is selling genetically modified corn back to Mexico. This is wrong. Maize and beans should be exempted from NAFTA.
- Cultural aspects have not been dealt with in NAFTA or NAAEC. We need to start positioning cultural issues. NAFTA cannot stay static.
- The issue of exporting domestic laws (the US legal regime, for example) goes to the core of the Chapter 11 debate. If so, then the US companies should be abiding by other countries' laws. When we create a tool like Chapter 11, lawyers will do everything they can to use it aggressively on behalf of those who can afford to pay.
- How deeply do we want trade agreements to wade into domestic laws? We should be dealing only with those clear cases where a government is treating a foreign investor differently than a domestic investor. We need to step back and look at what was intended by Chapter 11.
- Everyone should be assuming a degree of risk. Why should the public assume the costs? Ideally NAFTA should be reopened to deal with this current imbalance, however, it is too dangerous. We should pursue the potential for interpretative statements to help gain a balance.
- There is no such thing as 'risk free' investment. Chapter 11 creates an imbalance in favor of trade. Takings and expropriations are probably the most pressing issues in need of clarity.
- There are also other ways of protecting investment, such as contractual agreements with national governments.
- Before we decide to press for NAFTA to be amended, we need better analysis of whether or not the North American environment has improved or deteriorated since NAFTA. This is precisely the mandate of the CEC to assist in this assessment.
- NAFTA's relationship with the FTAA will have to be reconciled. Perhaps the FTAA negotiations provide an opportunity to 'upgrade' NAFTA.
- The CEC should do more research, hold more public discussions such as this one, push for the trade and environment ministerial meeting, and continue to highlight areas requiring reforms.

The JPAC chair and individual JPAC members enthusiastically thanked all the participants and Mr. Cosbey for the very rich discussions. The chair noted that rather than a recital of problems participants contributed thoughtful and substantive recommendations for improvements.

Prepared by Lorraine Brooke