

Citizens Panel Sees Faults And Suggests Reforms

Does the North American Free Trade Agreement's Chapter 11 protect the rights of foreign investors over the environment? That was one of the questions posed at a public workshop I hosted last March in Mexico City as Chair of the Joint Public Advisory Committee of the Commission for Environmental Cooperation—a trinational organization created under a side accord of NAFTA. The meeting galvanized the 150 participants and led JPAC to make several recommendations to the environment ministers of Canada, Mexico, and the United States.

The environment ministers, who compose the governing Council of the CEC, had agreed in June 2002 to facilitate public input into the work of the Chapter 11 Experts' Group of the NAFTA Free Trade Commission. JPAC sought to move the debate forward.

The controversy over Chapter 11 is primarily about its dispute resolution process, which first emerged as an issue in the 1990s, when foreign direct investment (FDI) became one of the main drivers of economic globalization, fueling international trade and development around the world. Global FDI increased from \$230 billion in 1990 to \$1.37 trillion in 2000.

This growth was supported by innovative provisions contained in Chapter 11 and by nearly 2000 bilateral investment treaties worldwide. While the economic benefits generated by the liberalization of investment flows are generally considered positive, the environmental and social impacts associated with the provisions of international investment treaties are the subject of an important debate among governments, academics, the private sector, and civil society.

Indeed, the perceived potential negative effects of Chapter 11, including the chilling effect on regulators and the use of its provisions as a weapon by some multinational corporations against environmental pro-

tection, are fueling distrust. This is one of the factors that ultimately led to the failure of the Multilateral Agreement on Investment, negotiated under the aegis of the OECD, and why an open and transparent debate is needed now more than ever.

For these reasons, the JPAC workshop focused debate on several issues surrounding Chapter 11. For instance, should the adoption of bona fide regulations, including environmental regulations, open the door to claims of expropriation and compensation by foreign corporations? And should an environmental, health, and safety exception be incorporated into Chapter 11 to allow governments the freedom to regulate without fear of having to compensate foreign corporations?

The resulting discussions were, needless to say, dynamic, and extremely productive. Through *Advice to the CEC Council on Seeking Balance between the Interests of the Public and Investors in the Application of Chapter 11*, JPAC recommended that the environment ministers instruct the CEC Secretariat to commission a series of research reports on Chapter 11 and its ramifications. JPAC has advised consideration of such topics as:

- The potential of a chilling effect on national laws and policies, particularly those related to human health and the environment;
- The impact of concentrated investment in specific areas (i.e., border regions and "pollution havens");
- Lessons learned over the past 10 years and how the Chapter 11 experience might contribute to existing and future trade agreements;
- Evaluating the pros and cons of pursuing the development of "interpretative statements" of NAFTA;
- Analysis of institutional and other capacity-building needs to permit all three countries to properly and equitably implement the Chapter 11 provisions;
- The need for environmental impact and risk assessment prior to the

negotiation of new trade agreements;

- How broader cultural and social issues, including understanding and cultural diversity, can be integrated into the Chapter 11 process; and,

- Assessing the opportunities that past and upcoming bilateral trade agreements might offer to advance improved versions of Chapter 11 and how they might in turn affect the way NAFTA operates.

In addition, public policy concerns remain in the implementation of the Chapter 11 investor-dispute regime. JPAC therefore urged the CEC Council to address these concerns by pursuing improvements to NAFTA and Chapter 11 to ensure transparency, accountability, and legitimacy. Our suggestions include:

- Engaging in and providing resources for public outreach;

- Supporting the establishment of a structured public process (including the ability to attend tribunal hearings, submit amicus briefs, and have access to the information necessary for informed participation); and,

- Including environmental, social, and cultural expertise in the arbitration panels.

Finally, JPAC advised the Council to pursue cooperation with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA. Specifically, JPAC believes that active collaboration among trade and environment ministers and officials would demonstrate the governments' commitment to the sustainable development objectives of NAFTA.

At the 10th regular session of the CEC Council in June in Washington, D.C., JPAC will raise these issues directly with the environment ministers in the spirit that informed our meeting in Mexico.

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