



ADVICE TO COUNCIL NO: 03-01

Re: Seeking Balance between the Interests of the Public and Investors in the Application of Chapter 11 of the North American Free Trade Agreement (NAFTA)

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America:

IN ACCORDANCE with Article 16(4) of the North American Agreement on Environmental Cooperation (NAAEC), which states that JPAC "may provide advice to Council (composed of the environment ministers of the three NAFTA countries) on any matter within the scope of this agreement [...] and on the implementation and further elaboration of this agreement, and may perform such other functions as the Council may direct";

RECALLING Council's undertaking during the June 2002 Regular Session in Ottawa, Canada, to engage civil society in understanding the complex links between trade and environment;

FURTHER RECALLING Council's undertaking to work with its trade counterparts to arrange a forum where interested parties can express their views on the operation and implementation of Chapter 11 and to facilitate public input on the work underway by the Chapter 11 Experts' Group of the NAFTA Free Trade Commission;

MINDFUL of JPAC's Advice to Council 02-04 and 02-09, providing Council with a series of recommendations as concrete steps Council might take in fulfilling its obligations under NAAEC Article 10(6) to "cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA";

ACKNOWLEDGING that transparency has been improved by Council's decision to make summaries of the Article 10(6) Environment and Trade Officials Group meetings public and to organize a joint meeting with JPAC each time that the 10(6) Group convenes;

CONSIDERING the need for greater openness in the investor dispute regime of Chapter 11 of NAFTA;

NOTING that NAFTA countries are involved in negotiating trade agreements such as US-Chile Free Trade Agreement and the Free Trade Area of the Americas (FTAA);

FURTHER NOTING that the CEC is currently engaged in a ten-year review and assessment of the NAAEC;

HAVING organized and participated in a second public workshop on Chapter 11 of NAFTA in Mexico City, on 24 March 2003;

UNDERSTANDING the challenges inherent in balancing public policy objectives with the pursuit of sustainable development in the trade context;

OBLIGED to register disappointment that representatives from the three governments were not in attendance to share their government's perspectives on Chapter 11 matters;

BASED on the high-level of exchange with the public during this workshop;

JPAC RECOMMENDS THAT COUNCIL:

1. Consistent with the CEC's mandate to increase awareness and understanding of the environment, trade, social and cultural nexus and contribute clarity to this complex topic by informing public dialogue, instruct the Secretariat to commission a series of balanced and objective research reports on Chapter 11 and its ramifications, including consideration of such topics as:
 - The potential existence of a 'chilling effect' on national laws and policies, particularly those related to human health and the environment;
 - The impacts of concentrating investment in specific geographic areas (i.e., border regions and pollution havens);
 - Lessons learned over the past ten years and how the NAFTA Chapter 11 experience might contribute to existing and future trade agreements (bilateral trade agreements, the FTAA and others);
 - The need for environmental impact and risk assessment prior to the negotiation of new trade agreements;
 - Analysis of institutional and other capacity building needs to permit all three countries to properly and equitably implement the Chapter 11 provisions;
 - How broader cultural and social issues, including understanding and respect for cultural diversity, can be integrated into the Chapter 11 process;
 - Evaluating the pros and cons of pursuing the development of interpretative statements; 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.

2. Public policy concerns remain in the implementation of the Chapter 11 investor-dispute regime and Council is urged to address these concerns by pursuing improvements to NAFTA and Chapter 11 to ensure transparency, accountability and legitimacy by:
 - Engaging in and providing resources for public outreach;
 - Supporting the establishment of a structured public process, including such elements as the ability to attend tribunal hearings, enshrining the principle of *amicus* briefs, and access to information, as appropriate to and necessary for informed participation in the process;

- Encouraging that environmental, social and cultural expertise be brought into the arbitration panels; and
 - Ensuring that information concerning Chapter 11 issues be a feature in the CEC's Communication Plan.
3. Continue to work through NAAEC Article 10(6), under which there is a specific mandate to cooperate with the NAFTA Free Trade Commission (FTC) to achieve the environmental goals and objectives of NAFTA, and demonstrate governments' commitment to the sustainable development objectives of NAFTA by:
- Continuing to pursue a joint meeting between the CEC and the FTC and ensure that Chapter 11 is part of the agenda;
 - Continuing to consult with trade counterparts about facilitating public input into the NAFTA Chapter 11 Experts Group; and
 - Continuing to pursue a meeting of trade and environment ministers where space for public involvement is created and ensure that Chapter 11 is part of the agenda.

APPROVED BY JPAC
27 March 2003