



ADVICE TO COUNCIL: NO. 02-09

Re: The Commission for Environmental Cooperation (CEC) of North America and the North American Free Trade Agreement (NAFTA) Chapter 11

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 for Environmental Cooperation (NAAEC), which states that JPAC “may provide advice to the Council 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 that JPAC, in its Advice to Council 02-04, dated 8 March 2002, among other matters, expressed serious concern about potential negative effects of NAFTA Chapter 11 provisions on government’s ability to act in the public interest and offered several recommendations, further developed in this present advice, for action;

REMINDS Council that no reply to Advice to Council 02-04 has been received, despite the importance JPAC and the public attach to this matter, as evidenced by the substantive views and information exchanged in JPAC’s public session on this matter, which was organized for the 2002 Council Session in Ottawa and held on 18 June 2002;

WORKING on the premise that NAFTA Chapter 11 was constructed to attract transnational investment by minimizing the risk for investors, but given the information gathered during the JPAC session, the impact of Chapter 11 may be to put at risk the governments’ ability to legislate to protect the environment, human health and the public good, in general; and

BASED on exchanges with the public and on further discussion by JPAC during its regular session, the following are recommended as concrete steps Council might take in fulfilling its clear obligations under NAAEC Article 10(6) to “cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA”:

1. Understanding the sensitivity and complexity of managing the reduction of risk to investors and minimizing risk to the environment and the public good, Council should encourage its trade counterparts to make every effort to resolve conflicts through an interpretative approach (to Chapter 11 language) that builds on the principles of transparency, due process, openness and accountability.

2. As a follow-up to the Council statement, made at the June 2001 Regular Session in Guadalajara, and to be consistent with NAAEC Article 10(6), Council should move forward to “explore with our trade counterparts the possibility of convening a joint meeting between the CEC and the North American Free Trade Commission, aiming for 2003.”
3. As a follow-up to the Council statement, made at the June 2002 Regular Session in Ottawa, to take immediate “steps to facilitate public input on the work on Chapter 11 of the North American Free Trade Agreement (NAFTA) underway by the Chapter 11 Experts’ Group of the NAFTA Free Trade Commission”¹ and to “work with [its] trade counterparts to arrange a forum where interested parties can express their views on the operation and implementation of the Chapter,” Council should make the appropriate arrangements with its trade counterparts in order that the Chapter 11 Experts’ Group of the NAFTA Free Trade Commission involve JPAC and the public and that a JPAC representative be invited as an observer to their meetings and that their reports be made public.
4. Council is asked to confirm to JPAC that the CEC trade and environment officials of the NAAEC Article 10(6) Experts’ Group and the Chapter 11 Experts’ Group of the NAFTA Free Trade Commission will each be invited to make a report to the second JPAC public workshop on Chapter 11, to be held in conjunction with the CEC Symposium on the Environmental Effects of Trade scheduled for March 2003 This JPAC public workshop should focus mainly on transparency, due process, openness and accountability, as discussed above, and the potential parameters of the environmental, health and safety exception (the “carve out”) for stewardship by the Parties. To this end, it will be necessary to allocate additional financial resources to JPAC for 2003.

APPROVED ON 16 JULY 2002

¹ NAFTA Free Trade Commission Joint Statement: “A Foundation for Future Growth”: “We reviewed the operation of Chapter 11 of the NAFTA and directed experts to continue their work examining the implementation and operation of Chapter 11, including developing recommendation as appropriate. (...)The experts are to report to Ministers on a regular basis and, at a minimum, prior to the next meeting of the NAFTA Deputies in the fall of 2002. We view this work as a necessary and highly beneficial to the effective and proper implementation of the Chapter as well as to increase public understanding of the operation of the Chapter.” (28 May 2002)