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CAFTA's Investor Protection Provisions

A Threat to State and Local Sovereignty and Democracy

CAFTA – NAFTA Expansion

The Central American Free Trade Agreement (CAFTA) is an expansion of the NAFTA model to Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and the Dominican Republic. The Bush administration signed CAFTA on May 28, 2004, but has not yet officially submitted the agreement to Congress for a vote due to opposition to the pact.

Under NAFTA's investor protection provisions, corporations can use closed trade tribunals to privately enforce an extreme set of investor rights by directly suing the United States over the actions of governments which restrict the profitability of their investments. NAFTA has already generated "regulatory takings" cases against land use decisions, environmental and public health policies, and adverse court rulings that would not have been possible in U.S. courts. CAFTA's investment chapter replicates many of the problems seen in NAFTA, and introduces some alarming new ones.

CAFTA Empowers Foreign Corporations to Challenge State and Local Laws, Regulations, and Court Decisions and Demand Compensation

State and local governments are not safe from the reach of investor-state tribunals. Not only have federal policies been challenged by investors in NAFTA tribunals, but an increasing number of actions taken by state, provincial and municipal governments have been challenged as well. While the federal government is liable for any compensation awarded in investor-state tribunals, federal governments have a variety of avenues under domestic law to pressure state and local governments to alter their policies to reduce or avoid such liability.

CAFTA Gives Greater Rights to Foreign Corporations than Those Provided to U.S. Investors under the U.S. Constitution

Congress established in the Trade Promotion Act of 2002 that future trade agreements should not provide greater rights to foreign investors or businesses than provided to U.S. citizens and businesses by the U.S. Constitution as interpreted by the U.S. Supreme Court. However, CAFTA fails to meet that standard.

NAFTA's Eleven-Year Track Record

A few of the cases brought under NAFTA's investor protection provisions include:

***Metalclad v. Municipality of Guadalacazar, Mexico*:** A Mexican municipality demanded that a U.S. company obtain the same construction permit that had been required of the Mexican company that previously owned the toxic waste facility. When the municipality insisted that the company obtain the permit before it could begin expanding the facility, Metalclad filed a NAFTA Chapter 11 complaint. The NAFTA panel ruled that limiting the company's use of its property was a NAFTA-illegal action tantamount to an "indirect" taking. The Mexican government was ordered to pay $15.6 million in damages.

SD Myers v. Canada: In this case, a U.S. company sought compensation because its "right" to treat Canadian PCB waste in its Ohio facility was halted by Canada, acting in compliance with the Basel Convention, a multilateral environmental agreement that encourages nations to treat toxic waste domestically. Canada stopped the toxic trade before the U.S. did although both signed the treaty. SD Myers filed a NAFTA suit claiming discrimination. SD Myers was awarded $5 million in damages by a NAFTA tribunal.

Methanex v. U.S.: California's law banning MTBE in gasoline was challenged by a Canadian company that produces a component of the gasoline additive which has polluted water supplies in dozens of U.S. States. The company is demanding $970 million in compensation charging that the ban is tantamount to an expropriation of its assets.

Glamis Gold v. U.S: In 2003, a Canadian mining company, Glamis Gold, filed a notice that it intends to pursue a $50 million dollar NAFTA claim against mining regulations promulgated by the State of California intended to safeguard the environment and indigenous communities from the impacts of open-pit mining.

NAFTA by the Numbers

Total claims filed against all 3 NAFTA parties: **42**
Total cases currently in arbitration: **11**
Dismissed cases (won by NAFTA governments): **6**
Cases won by investors: **5**
Total damages awarded: **$35.4 million**
Total claims: **$28 billion***

*This amount excludes cases where there has been a final award, and includes the Baird and Sun Belt claims, which are disproportionately high. Without Baird and Sun Belt, total claims against all three NAFTA parties is $5 billion.

Opposition to the NAFTA Investor Policy Model

"Our objection to the investor state provision stems from our concern that investors from nations with well developed legal systems have abused such FTA provisions to challenge the authority of U.S. state and local governments. The *Methanex* and *Loewen* cases in particular have reinforced our concern that the provision will be abused by investors who simply hope to circumvent established legislative and judicial procedures."

National Conference of State Legislatures
Feb. 12, 2004 letter to USTR

"In particular, we are troubled that a claim by a foreign company that a local government's regulation or zoning law constitutes a taking against the company will make it impossible for the locality to enforce that specific regulation or law against the company. Equally troubling, such an action would appear to favor foreign companies over domestic companies, which would in all likelihood have to comply with the local regulation or law."

National Association of Towns and Townships
Apr. 4, 2002 letter to Congress

"Our recent experience under NAFTA demonstrates how drastically such provisions in international trade agreements can depart from American constitutional standards."

California Attorney General Bill Lockyer

Public Disputes, Private Tribunals

When investors demand taxpayer funds as compensation in investor-state tribunals, the cases are heard in arbitration bodies, which were designed to arbitrate private cases between contractual parties in narrow commercial disputes. Now, however, these private arbitral bodies are dealing with significant issues of public policy. While the CAFTA text provides for such tribunal proceedings to be open to public observation (if interested parties can afford to fly to distant venues to observe), citizens still cannot be party to a suit. And, state and local officials – such as the attorney general whose state law is being challenged – are excluded from the process unless invited by the federal government to participate.

Potential Cost to the Taxpayers Could Reach the Billions

In the first 11 years of NAFTA, with only 11 cases decided or settled, investors have succeeded five times with at least some of their claims. To date $35 million in public funds have been paid in compensation to foreign investors by governments. As an increasing number of cases are filed, billions in taxpayer dollars are being sought by NAFTA firms. Additionally the costs of defending cases are mounting. With 10 cases completed or pending against the United States, and just one case costing $3 million to defend, U.S. taxpayers may be billed an approximate $30 million for lawyers fees alone. If CAFTA were to be approved by Congress and go into effect, the liability and costs of the investor-state system would increase further.

Fast Track Rules Mean CAFTA Can't Be Fixed

CAFTA will be brought to vote under the Fast Track delegation mechanism. This means that no amendments can be made to the current text prior to a vote. Once CAFTA's implementing legislation is introduced, debate is limited to 20 hours in each chamber, and a vote must be taken within 60 days in the House, and 90 days in the Senate.

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