

Congress of the United States

Washington, DC 20515

October 4, 2001

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

We are writing to express our very serious concerns regarding possible negotiating proposals concerning investment provisions for bilateral and Free Trade Area of the Americas negotiations that are currently the subject of an intensive interagency process within your Administration. Given the serious problems that we believe exist in NAFTA's Chapter 11 on investment, we believe that the U.S. position on investment must involve a substantial revision of the Chapter 11 model. We urge that you not present any proposals in negotiations until substantial consultations with Congress have taken place and until the policy revisions that we outline below are reflected in the U.S. position.

NAFTA's investment provisions have opened the door to a number of unexpected legal challenges brought before international tribunals by foreign companies seeking financial compensation from governments. Many of these challenges have been brought on the grounds that foreign investors must be compensated when regulation entirely within the scope of traditional governmental authority over the environment, health and safety or government purchasing negatively affects their business interests. Under the vague and overly broad language in the substantive provisions of Chapter 11, the actions against the United States could result in outcomes that would not be possible if the challenges were brought in domestic courts, thereby granting to foreign investors greater rights than those that are available to U.S. citizens.

Moreover, challenges under Chapter 11 are conducted before tribunals whose proceedings are not open to the public, whose rulings are not required to follow any judicial precedent, and whose decisions are not subject to any standard appeals process. Further, there is no diplomatic check or screen, such as approval from a national government, before private entities can bring these cases before international tribunals.

These cases represent a troubling shift of oversight over environmental and public interest regulation to international tribunals operating behind closed doors. We therefore believe that the provisions of Chapter 11 represent a fundamental threat to the ability of democratic governments to protect the public interest.

We appreciate that Ambassador Zoellick recently joined with his ministerial colleagues from Canada and Mexico to issue an interpretation of some Chapter 11 provisions, thereby acknowledging that changes in the Chapter 11 model are needed. However, we do not believe

that these interpretations address many of the most fundamental and critical problems with the Chapter 11 rules.

Nor do we believe that the interpretations successfully resolve the difficulties they attempt to repair. Most notably, the interpretation limiting the minimum standard of treatment to customary international law does not specify in any fashion what the terms of customary international law are, leaving in place what amounts to an extremely vague and open-ended standard that can be used to challenge efforts to protect the environment and the public interest. Further, the interpretation providing transparency for documents is undercut by the interpretation's acknowledgment that the arbitration rules applied by tribunals in specific cases, which have been used to limit disclosure of documents, would not be affected.

The lack of substantial change carried out by the NAFTA ministers' recent actions indicates that a new model for investment rules must be developed. We therefore urge that the U.S. government seek much broader and more fundamental changes to the Chapter 11 model in developing proposals for any future trade agreements. Specifically, we urge that the following revisions be made.

- Ensure that foreign investors will enjoy no greater protection than that afforded to domestic U.S. investors under the U.S. constitution;
- Require that all private investors gain approval from their home country government before bringing a case under the investment provisions;
- Limit expropriation to cases in which there is direct expropriation of all economically beneficial use of property;

Limit violations of minimum standard of treatment to a customary international law standard defined as denial of justice and failure to provide full protection and security;

Provide a clear exception for the governmental exercise of police powers, including legitimate health, safety, environmental, consumer and employment opportunity laws and regulations;

Establish a standing appellate mechanism to correct erroneous decisions by tribunals;
and

- Ensure that all proceedings, submissions, findings, and decisions are promptly made public and that all hearings are open to the public, and ensure that amicus briefs will be accepted and considered by the tribunals.

To ensure that such provisions are reflected in future trade agreements, Congress should specify these as mandatory negotiating objectives in any trade negotiation authority it offers to the President.

In addition, as the process of developing revised negotiating positions on these issues evolves, we firmly believe that the U.S. positions should be available to the American public at the same time that they are made available to foreign governments. The current policy of keeping U.S. proposals shrouded in secrecy undercuts U.S. calls for more openness and transparency in the operation of international trade institutions.

We believe that unless the important issues outlined above are addressed and the Chapter 11 model for investment provisions substantially revised, future trade and investment agreements will undermine our country's ability to raise our environmental and public interests without the risk of suits by foreign investors, a risk that our nation should not tolerate. We look forward to hearing from you soon concerning this important matter.

Sincerely,

John Lewis

David Wu

Betty McCollum

Anna Shoo