



21 August 2003 (Sent on 17 September)

Lic. Gustavo Alanís-Ortega
JPAC Chair for 2003
Commission for Environmental Cooperation
393, rue St-Jacques ouest, bureau 200
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Re: Response to JPAC Advice to Council 03-01 and letter dated March 27, 2003

Dear Lic. Alanís-Ortega:

On behalf of the Council, the Alternate Representatives thank the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) for its most recent advice to the Council, which covers a range of environment and trade topics, as outlined below. We are pleased that you have given so much detailed thought to the possible linkages between North American trade and its environmental effects and that you continue to be actively engaged on this topic. We would like to respond to each of the categories of suggestions you made.

On behalf of the Council, we offer the following in response to your most recent correspondence (letter dated March 27, 2003 and advice 03-01).

Investment Issues

You asked that the Secretariat commission a series of balanced and objective research reports on Chapter 11 and its ramifications, and that these reports cover a broad range of topics. These topics include: the potential chilling effect on national laws and policies, investment concentration in geographic areas, lessons learned over the past ten years that may contribute to future trade agreements, and the need for environmental impact and risk assessment. As you are aware the CEC Ministers have announced the intention to undertake a retrospective of the implementation of the NAAEC, as well as an assessment of the environmental effects of NAFTA. We intend to conduct this assessment where such analysis fits into the CEC work plan.

You also suggested that the CEC undertake an analysis of the institutional and other capacity building needs to properly implement Chapter 11. This proposal falls outside of the CEC's current work plan. Given the current work plan and budget commitment, we believe it is more productive for each government to consider its investment obligations individually or through other fora.

You also proposed having the CEC evaluate whether interpretative statements are a useful mechanism for addressing transparency issues in the Chapter 11 dispute resolution process. This issue is being considered by the NAFTA Investment Experts Group, which consists of investment experts from the three Parties and includes representatives of EPA and Environment Canada. The Investment Experts Group also seeks input from nongovernmental organizations on these issues, as was done in the trilateral, multi-stakeholder consultation in Montreal on May 28, 2003. There already exists a trilateral process for considering possible interpretations relating to transparency issues – a process in which the environmental ministries play a role and in which the views of JPAC are taken into account. The Council considers that there is significant value in this process.

Additionally, we agree that it is important to conduct environmental impact assessments in connection with negotiation of new trade agreements. However we do not believe it is necessary at this time for the CEC to launch a study on this topic. Trading partners in the Western Hemisphere increasingly find environmental reviews of trade agreements to be a useful tool to inform trade negotiators about potential environmental effects. These environmental reviews are designed to analyze a range of potential environmental impacts, including those relating to investment obligations. Canada has developed a comprehensive environmental assessment process to gauge probable impacts of new multilateral, regional and bilateral trade agreements. These assessments assist in the development of mitigation plans to limit negative environmental impacts.

As to your suggestion that the CEC assess the lessons that might be drawn from other dispute settlement procedures, we believe it is premature for the Secretariat to consider such a task. Many bilateral and plurilateral trade agreements involving North American countries have only recently been concluded, and we do not yet have historical data from those agreements that can provide a basis for comparison. Likewise, your suggestion that the CEC might find merit in studying the lessons learned on dispute resolution under NAFTA so that these lessons could be usefully applied to future trade negotiations does not seem well-suited to the CEC's mandate, which is to focus on North American issues.

As you know, however, U.S. experience with NAFTA investor-state arbitration influenced the development of some of the investment negotiating objectives included in the 2002 U.S. Trade Promotion Authority legislation, and several of those objectives were reflected in the recently concluded U.S. free trade agreements with Singapore and Chile.

Canada is updating its Foreign Investment Protection Agreement model and is engaged in bilateral free trade negotiations with Singapore and a group of Central American nations in addition to the ongoing negotiations in the FTAA. Canada has indicated that its experience with the NAFTA has informed all of these processes and that it will continue to incorporate lessons learned from experience with NAFTA Chapter 11 in all of its future agreements.

Advice on Investor-State Dispute Issues

In addition to the series of bilateral reports that you suggested on various trade and environment issues, you also urged the Council to try to strengthen the accountability and legitimacy of NAFTA Chapter 11 by providing additional resources for public outreach and supporting other steps designed to enhance the transparency of investor-state arbitral proceedings. The Council and the Secretariat are committed to transparency in government operations, and the Secretariat's work on public submissions filed under NAAEC Articles 14 and 15 reflects that commitment to transparency.

Further, and in keeping with its role under Article 10(6), the Council will continue to facilitate public input and foster dialogue between trade and environment officials of each of the Parties to follow progress under NAFTA Chapter 11 and to keep under review potential issues that affect the achievement of the environmental goals of NAFTA. The recent meetings convened by the Council and JPAC in Mexico City this March on this topic are one example of how we might continue to engage in this way.

The Free Trade Commission (FTC) has responded to public concerns about transparency by asking the Chapter 11 Investment Experts' Group to review and examine the operation and implementation of that chapter; to identify shared priorities; and to increase understanding of the chapter's operation. In addition, in July 2001, the FTC issued a formal interpretation of Chapter 11 that addressed public access to documents generated in Chapter 11 arbitrations.

Finally, the Investment Experts' Group has convened two recent meetings to address shared priorities for additional work. The first meeting, held in February, reviewed current activity and initiated planning for the May 28 consultations with nongovernmental organizations in Montreal. The Council and JPAC played an important role in building momentum for this meeting. The Council's 2002 communiqué called for just such a forum, during which the nongovernmental stakeholders could express their views on the operation of Chapter 11. We think it is important to analyze the results of the May 28 consultations to better understand public and nongovernmental organization positions on these issues before deciding on a course of activity on these matters within the CEC.

Enhancing the NAAEC Environmental Goals Under Article 10(6)

We appreciate your advice that we stay on course with the Article 10(6) process whereby environment and trade officials of all three countries work to enhance cooperation and to avoid trade disputes. We are committed to continuing the Article 10(6) process and to enhancing collaboration between the long-established 10(6) Working Group and the Investment Experts' Group.

We continue to examine how the CEC and the Free Trade Commission can enhance cooperation in North America. The three Parties have discussed the proposed trade and environment ministerial, but have not identified an agenda for such a meeting that would result in concrete advancement of the trade and environment agenda. As you know, during our Tenth Regular Session, considering that there are trade and environment matters that merit discussion, we

requested the NAAEC Article 10(6) working group, at a senior level, to report back on a proposed agenda and their work on crosscutting trade and environment issues of concern before the next Council Session.

In closing, the Council appreciates the suggestions forwarded by the JPAC on several CEC issues of importance and looks forward to future letters of advice.

Yours sincerely,

[Original signed]

Olga Ojeda Cárdenas
Alternate Representative for Mexico

cc: Norine Smith, Alternate Representative for Canada
Judith E. Ayres, Alternate Representative for the United States
Victor Shantora, CEC Acting Executive Director
JPAC Members