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NAFTA Renegotiations Present an Opportunity to Strengthen ISDS' Public Policy Perspective

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Chapter 11: Where Investors Go to Complain

NAFTA renegotiations began last year and, with attention once again on this 23-year old trade deal, critics are taking the opportunity to voice their concerns. U.S. President Trump has himself propounded, and indeed campaigned on, an abundance of criticism directed at NAFTA. While no part of NAFTA has been safe from the critics, none has been criticized as much as the Investor State Dispute Settlement ("ISDS") mechanism under Chapter 11.

Chapter 11 establishes a framework which provides investors from NAFTA countries with "a predictable, rules-based investment climate, as well as dispute settlement procedures which are designed to provide timely recourse to an impartial tribunal." Section B of Chapter 11 establishes the ISDS mechanism which is intended to ensure that investors and NAFTA Parties receive equal treatment in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Chapter 11 is More than a Tool for Investors

Critics of Chapter 11's ISDS mechanism argue that ISDS allows wealthy investors to undermine the capacity of NAFTA Parties to regulate or legislate in the public interest. This criticism is most commonly directed at the alleged impact of ISDS on each Party's ability to implement trade-restrictive measures in order to safeguard the environment. Some argue that Chapter 11's ISDS mechanism encourages NAFTA Parties to shy away from bold regulatory environmental and public policy protections so as to avoid costly arbitrations. While NAFTA's investment protections and ISDS provisions are certainly not perfect, these arguments are misguided and generally inaccurate. A closer look at the ISDS framework under Chapter 11 reveals a far more nuanced and neutral adjudicative process than what is alleged, which, with the right revisions, could even serve as a tool to advance environmental protection.

Public Policy Can and *Has* Influenced Chapter 11 Arbitral Tribunals

At the outset, it should be noted that under international law a Chapter 11 tribunal is

obliged to interpret NAFTA with regard to the entire treaty as well as the wider legal context within which NAFTA was enacted. In interpreting NAFTA, Chapter 11 tribunals have noted that NAFTA expresses a clear message of environmental protection and enhancement, such as under Article 1114(1), which ensures investment activity will be undertaken "in a manner sensitive to environmental concerns." Moreover, Chapter 11 tribunals have stated that the simultaneous creation of NAFTA and the North American Agreement on Environmental Cooperation ("NAAEC") suggests that the Parties viewed environmental protection to be compatible with open trade. While not explicitly referring to public policy considerations as was done in some free trade agreements (see, for example, the EU-Vietnam free trade agreement) NAFTA does recognize the right of States to regulate their internal public policy concerns.

Chapter 11 tribunals have also drawn from a variety of international sources to suggest that NAFTA could be interpreted to protect the environment. For instance, the tribunal in *S.D. Myers, Inc. v. Government of Canada* relied on Article XX of the General Agreement on Tariffs and Trade ("GATT") to indicate that restrictive trade measures may be permissible if they are "necessary to protect human, animal or plant life or health". This is not to suggest that all restrictive trade measures are permissible so long as they are intended to protect the environment: Tribunals have often been wary of restrictions on international trade disguised as environmental or social protections. The tribunal in S.D. Myers held that a trade-restrictive measure intended to protect the environment was not permissible if the same outcome could be "achieved by reasonably available means that are less injurious to trade." The tribunal rejected Canada's claim that it had enacted a regulation restricting the export of Polychlorinated biphenyl ("PCB"), an environmentally hazardous chemical compound, to protect the environment and accused Canada of wrapping up raw economic protectionism in the guise of an environmental measure without scientific merit. In reaching this conclusion, it relied on evidence which demonstrated that Canada's export ban had actually negatively affected its environment by impeding access to affordable waste facilities and interfering with the availability of clean dumping options.

Indeed, environmental protection can serve as an affirmative defense for States facing treaty claims. For example, in *Chemtura Corporation v. Government of Canada* the claimant alleged that Canada's Pest Management Regulatory Agency ("PMRA") had enacted a trade restrictive measure which was disguised as an environmental protection to limit certain pesticides. In its analysis of *Chemtura*'s 1103 Fair and Equitable Treatment claims and its 1110 Expropriation claims, the tribunal noted that the PMRA had acted "within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by [the prohibited pesticide]." According to the tribunal, a measure adopted under such circumstances is a valid exercise of the State's police powers. While it did not make any reference to the reasoning given in *S.D. Myers*, the *Chemtura* tribunal applied a similar analysis by considering whether the regulation was necessary to protect the environment and concluded that the outcome had been achieved through appropriate means.

Adjustments Can Be Made so that Public Policy Considerations Provide Clearer Guidance for Chapter 11 Tribunals

ISDS under Chapter 11 of NAFTA can reach beyond the protection of investors. As the cases referenced above suggest, ISDS principles of treaty interpretation can also be employed to protect the interests of the citizens of Canada, Mexico and the U.S. Thus, instead of aiming at dismantling of the ISDS procedure, NAFTA renegotiations should focus on affirming the importance of protecting the Parties regulatory powers. Therefore, the revisions should provide for tribunals to put greater emphasis on NAFTA's existing environmental protection principles. Furthermore, NAFTA Parties should use the renegotiation talks as an opportunity to draft into the treaty more explicit language as to each Party's commitment to environmental protection.

While NAFTA's ISDS mechanism leaves room for improvement, its critics have failed to take into account that Chapter 11 has been interpreted by tribunals to protect the environment, which suggests that it is capable to serve both as a means to further open trade and environmental protection.

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