



The Problem with NAFTA's Chapter 11 Investor Suit Rules Has Not Been Fixed in CAFTA

During debate over the Trade Act of 2002, Senator Baucus instructed USTR to place a “ceiling” on the investor suit rules at the level of U.S. law. But that has not happened.

CAFTA Chapter 10 includes investor suit rules that are similar to those in NAFTA Chapter 11, allowing foreign investors to challenge public interest and environmental protections before international tribunals, bypassing domestic courts. These rules have given foreign investors broad rights that do not exist under U.S. law.

The Trade Act of 2002 requires that trade agreements give foreign investors “no greater substantive rights” than U.S. citizens have under U.S. law. In introducing that amendment to the Trade Act, Senator Baucus said:

“[T]he rights of U.S. investors under U.S. law define the ceiling. Negotiators must not enter into agreements that grant foreign investors rights that breach that ceiling . . . Given the interests at stake, we must be crystal clear about the ground rules. U.S. negotiators must not conclude agreements that give foreign investors greater protection of their property rights than our own citizens already enjoy. Our well-developed law should define the ceiling. The amendment that we offer today makes that unmistakable.” (*148 Cong. Rec. S4267-02, 2002 WL 975801*)

Unfortunately, that ceiling has been breached in CAFTA. **CAFTA would still provide foreign investors with rights to challenge environmental protections that go far beyond the rights provided under U.S. law:**

- In CAFTA, USTR cherry picked a few legal standards from a single Supreme Court case, taking those standards completely **out of context** and **ignoring many key Constitutional principles**. (*Annex 10-C*)
- CAFTA actually expands the definition of an “investment” to cover a wide variety of economic interests that goes **far beyond what is considered property** in U.S. law regarding “regulatory takings.” (*Article 10.28*)
- CAFTA **does not ensure the Constitutional principle that the government can regulate a public nuisance** – such as pollution released from a property – without compensating the property owner.
- CAFTA **does not include** the key Constitutional principle that a “regulatory taking” of property **must be examined in terms of the permanent impact of government action on a piece of property in its entirety** – not just a part of the property, or for a temporary period.
- CAFTA **does not protect the government’s ability to take actions that affect personal property** – such as banning the sale of a hazardous chemical – without paying any compensation.
- CAFTA includes the **vague and open-ended standard of “fair and equitable treatment”** without limiting it to the U.S. Constitutional principle of procedural due process. (*Article 10.5*)
- The few U.S. standards that CAFTA claims to incorporate – such as “character of the government action” – are left **vague and are stripped entirely of their context and clarifications in U.S. law**. (*Annex 10-C*)