

Fair Trade or Free Trade? Understanding CAFTA

CAFTA's Environmental Chapter

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CAFTA's Environmental Chapter was leaked to the public, and is the only piece of the text of the agreement to which anyone, besides the negotiators, currently has access. The text of the chapter can be found at: http://www.quixote.org/quest/advocacy/fair_trade_cafta_environmental_chapter.pdf. The chapter has many reasons for alarm.

Weak standards of enforcement

The basic model for the CAFTA environmental chapter is the recently signed free trade agreement between Chile and the United States. The CAFTA chapter provides no real expansion of environmental protection, or meaningful enforcement of environmental laws. The basic requirement (and the only part of the text that seems to be reviewable under any dispute mechanism) is Article 2. This is simply a requirement that countries enforce their existing environmental laws.

- Under Article 2, there are some differences in language between the U.S. and Central American positions, but both versions create what seems a very large loophole: countries are free to apply discretion in enforcement of laws, meaning they can prioritize which laws or areas of enforcement are most important. Accordingly, [U.S. text]: "parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources."
- Allowing for some degree of discretion is not itself a problem - and no doubt necessary to reach an agreement. However, the text is so broadly worded that it would be difficult to force a decision on non-compliance, should a conflict ever reach dispute settlement.
- The weakness of this language is magnified by the general lack of enforcement of environmental laws in Central America and the United States currently. With CAFTA, this is, perhaps, a more significant problem in Central America where the increase in U.S. investment that would likely result from the agreement will put added pressure on the environment.

John Audley, fellow at the Carnegie Endowment for International Peace, has written, "Although the Central Americans are making progress toward designing and implementing effective environmental laws, the United States is already aware these laws may not yet be adequate and certainly not well enforced. Asking a country with weak enforcement capability to enforce (perhaps) insufficient laws means little in terms of real environmental protection." (full text of Audley's article, <http://www.ceip.org/files/pdf/wp40.pdf>.)

Capacity Building Assistance

The U.S. should place more emphasis on providing resources through technical assistance and capacity building grants to begin to offset that lack of enforcement in Central America. However, a complicating factor to this approach is that Central American governments have not themselves placed emphasis on the environment in their requests for capacity building assistance during the course of negotiations (with the exception of Costa Rica).

- In the original text, there is a proposed framework to establish a parallel agreement establishing an Environmental Cooperation and Capacity Building Mechanism. The proposed mechanism

establishes a Working Group to oversee the implementation of a very broad set of goals. But again, a lack of specificity weakens this provision. This mechanism also provides little opportunities for participation by non-governmental sectors in the Working Group. The only provision for public participation in this side agreement is very weak: "The parties shall take into account public comments and recommendations regarding the cooperative activities."

Dispute Settlement:

Article 8 establishes a framework for "Environmental Consultations." There are some differences between the positions of the U.S. and Central American negotiators on mechanisms for dispute settlement. Like the Chile Agreement, the U.S. is proposing that consultations, if stalemated, may have access to dispute settlement - but only as they relate to Article 2 talked about above. The Central American provisions, on the other hand, establish a consultative process involving the construction of a review panel and lengthy period of reports, discussions and oversight.

- Neither provision lays the groundwork for strict penalties or meaningful enforcement, and as noted, Article 2 is already so vague, that it is hard to see this being a terribly effective mechanism. Thus, as with the Chile agreement, this provision fails the "parity" standard - a standard whereby environmental concerns are given the same weight as commercial provisions.
- Finally, as in the Chile FTA, there are no mechanisms for individual citizens to raise complaints. Meanwhile, corporations are granted extensive rights to raise complaints under investment provisions - similar provisions in NAFTA have been used to weaken environmental standards. (See Public Citizen Report: Bankrupting Democracy on Chapter 11 cases under NAFTA)

As David Waskow of Friends of the Earth testified before the House Subcommittee on Commerce, Trade and Consumer Protection concerning the Chile and Singapore FTAs, "We believe that it is fundamentally imbalanced and inappropriate to omit a citizen petition mechanism for environmental provisions when the investment rules in these agreements include a private right of action for foreign investors."