

TRANSPARENCY ISSUES IN NAFTA: CONCERNS AND DIRECTIONS FOR FREE TRADE IN AN OPEN ENVIRONMENT

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ABSTRACT

For any bilateral or multilateral trade agreement to be effective, it is imperative that transparency and good governance form the mainstay for achieving parity and trust amongst the partners. This article highlights pressing issues facing the partners of the North American Free Trade Agreement (NAFTA), analyzes some of the current areas of conflict and suggests action to reduce tensions and promote harmony, goodwill and cooperation.

The legal framework for transparency and governance needs to be seen as fair in addition to providing a mechanism for the airing of grievances and resolving conflicts. The requirements include: disclosure of relevant information, reasons for appropriate policy enactment and application and provision of investor protection safeguards. Of special import is the dire need to deal with issues of corruption at all levels. It is recommended that a conference be held to discuss issues of transparency and accountability as an initial endeavour in understanding the dynamics involved.

INTRODUCTION

International trade is more than just the sale or the transfer of goods and services. Trade is conducted across borders by a working framework that reconciles various laws, cultures and business practices. Though the adoption of the adage “honesty is the best policy” would necessarily be the best way of ensuring the most fair and best practices, the definition of “honesty” becomes the core issue. This involves defining honesty in the context of international trade, and identifying how best to assess, ensure, evaluate and implement it across borders.

A formalized approach, vis-à-vis international trade negotiations, would necessarily require a set of laws and regulations that stipulate the adoption of rules of transparency in all transactions. Therein lies the reason that transparency has become a “hot” issue in international trade. The issue of honesty, fairness and accountability in corporate governance and public sector undertakings makes transparency in international trade more critical today than ever before. This paper is aimed at discussing the issues of transparency that NAFTA partners and participants presently face. This paper also suggests possible approaches for the enhancement of transparency and the reduction and, if possible, removal of tensions and conflicts. Primarily four factors affect transparency in international trade. They are:

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1. the laws regarding trade;
2. the economics of trade;
3. the politics of trade; and
4. the culture regarding trade.

TRANSPARENCY IN INTERNATIONAL TRADE

Much of the analysis on the impact of NAFTA, from the time the trade agreement was passed in 1994 by Canada, Mexico and the United States has focused on the macro-economic impacts on the parties involved. The conclusions have either been largely positive or negative.¹ Transparency is often the casualty of such one-sided views. Transparency requires the ability to see the “grey” as well as the white and black.

What is often ignored is the issue of organizational transparency. Organizational transparency is needed for trade agreements to be effective and beneficial for the various trading populations. There are substantial transparency issues that often determine the success or failure of trade agreements. Some such issues are:

1. How open are the systems in terms of data?
2. How accessible is the system for the consumers and businesses that belong to the trading partnership?
3. Which issues are debated openly and which solutions sought both within the context of the nation and outside the context of the nation involving all trading partners?
4. How much effort is placed on attempting to ensure that the rights of all parties to the agreement, be they in the public or private sectors, are protected; and what avenues are available to the building of a consensus and the resolution of conflict?

This paper is posited on the following hypothesis: The greater the transparency exhibited by the various participants, the greater the benefits to all trading partners.

Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs (1998) forcefully argues that:

Having the necessary legal framework in place... is vital to the development of the global marketplace. The establishment and implementation of a fair, predictable and flexible set of legal rules is vital to the process...and a climate hospitable to the foreign investment necessary to generate economic growth. An independent judiciary also is important as a check against arbitrary government actions that affect business - a common problem in emerging markets - as a means of resolving private commercial disputes.²

¹ For the positive picture of NAFTA, the best web pages from our perspective are: Office of NAFTA and Inter-American Affairs (www.mac.doc.gov/nafta). For the negative perspective, see articles on NAFTA at: www.epinet.org

² For Stuart Eizenstat's article "Promoting the rule of law and anti-corruption in a globalized economy" see: <http://usinfo.state.gov/journals/ites/1198/ijec/eizen.htm>

Transparency and accountability will naturally go hand in hand. As such, for the purpose of this paper, transparency can be defined as honest discourse of matters of trade within the framework of a treaty for which all agreed upon parties are expressly accountable. This can also be understood as a process of enhancing openness that will promote international trade thus resolving issues between trading partners openly and genuinely benefiting all partners involved. For transparency to be effective, four conditions are essential:

1. a fair and predictable legal framework;
2. fair and predictable economic benefits;
3. fair and transparent government and administrative framework and practices; and
4. a clear framework of working through nuances that inevitably arise in international trade.

It is in this context that NAFTA is examined.

WHAT IS ORGANIZATIONAL TRANSPARENCY?

Several years ago economist George Akerloff wrote a paper on the used car market called, "*The Market for Lemons: Quality Uncertainty and the Market Mechanism*".³ The article captured the imagination of many macro-economists because it dealt with the quality of information and the importance of such information in business-consumer dynamics. The article, for all practical purposes, argued that dishonest businesses drive honest businesses away from the market. Professor Akerloff demonstrated that in a market for goods in which quality varies and the seller has more information about the quality than the buyer, good products and bad products must sell at the same price. The eventual consequence, Akerloff argued, is bad business driving away good business. This is even truer in trade relations between nations. Even in the midst of a multitude of good news, bad news gets a lot more attention and becomes more exaggerated. Enhanced transparency allows the good news to receive as much prominence as the bad news. Therefore, trade agreements between nations must be transparent - e.g. if trade agreements are not open, debated and analyzed frequently, they can create negative consequences to trading partners in the long run. At the outset then, attention needs to be focused on two issues of transparency:

1. the quality of trust between the NAFTA partners; and
2. the quality of debate between the NAFTA partners

The quality of trust

In the last few years, the trust between pro-NAFTA advocates and anti-NAFTA advocates has transformed from a purely nationalistic focus to an international focus. In other words, those who view NAFTA as good for international trade argue that it is good for the U.S.,

³ Details of George Akerloff's presentation are in the *Quarterly Journal of Economics* (1970), 84, pp 488-500

Mexico and Canada. Initial debates were largely focused on nationalistic grounds. Strangely enough, the trade union leaders, political leaders and academic critics of NAFTA have explicit or implicit alliances across the borders of these nations. The issue of trust and mistrust of NAFTA across borders has created trust among allies and foes of the treaty.⁴

As for governmental trust among the U.S., Canada and Mexico, four areas reflect greater trust and co-operation:

1. greater reduction in tariffs with the goal of eventually eliminating tariffs between the countries;
2. greater effectiveness in dispute resolution mechanisms;
3. greater awareness and sensitivity to issues of poverty and the environment; and
4. a greater need to have liberalized flow of capital, labour and finance focused on economic development.⁵

Opposition has also crystallized across borders on critical issues that need to be addressed at present or in the immediate future. Among these issues are:

1. issues of wage fairness across the borders (the issue of pay check economics has brought together many activists across borders);
2. the issue of commitment of corporations to the economies of Mexico, the U.S. and Canada has united opponents; and
3. issues related to environmental negative externalities have also united critics across borders.⁶

The fact that in a seven-year period, NAFTA has crystallized proponents and those in opposition to these issues in such a clear and transparent manner is indeed remarkable.

The quality of debate between NAFTA partners

The quality of debate, unlike the issue of trust, has largely blurred the issue of transparency. The debate on NAFTA in the last seven years has taken an “all good” or “all bad” format.

A typical example of the “all good” approach is that of John Sweeney, political analyst for the Heritage Foundation. Mr. Sweeney offers a grade “A” or “B” to NAFTA on:⁷

1. growth in trade;
2. growth in U.S. exports;
3. growth in U.S. employment;

⁴All one has to do to observe this is to attend the WTO talks and conferences inside and outside the halls. The coalition of proponents and opponents cuts across national boundaries.

⁵For an excellent presentation of this aspect www.ustr.gov/regions/whemisphere/nafta.shtml

⁶For an excellent and scholarly criticism of NAFTA: www.epinet.org/content.cfm/briefingpapers_nafta01_us

⁷For John Sweeney’s presentation: <http://www.heritage.org/research/TradeandForeignAid/BG1117.cfm>

4. output gains for U.S. manufacturing;
5. improved standards of living for American workers;
6. U.S. compliance with NAFTA;
7. U.S.- Mexico trade relations; and
8. the reform process in Mexico.

Alternatively, trade unionists, environmentalists and other critics give NAFTA's implementation on all factors presented by John Sweeney an "F". Generally, these critics argue that NAFTA has made Mexico poorer without making the United States and Canada any richer. In their opinion, while it is worse for Mexico, it is also bad for Canada and the U.S..⁸

There has not been much of a middle ground in this debate. In a democracy, when debates remain at the level of mere debates, one can choose to ignore them. However, highly crystallized debates get translated into policy prescriptions. They have significant economic and social impact on the citizens of the nations that trade together. For instance, much of the debate whether to grant the President "Fast Track" authority is viewed as "all good" or "all bad" and thus organizationally impairs a meaningful compromise on an extremely vital national and international issue.⁹

The opposition to Mr. Sweeney's view is expressed by Robert G. Scott, who views NAFTA's impact as largely negative, particularly in the U.S. He views NAFTA as a net job destroyer rather than a net job creator.¹⁰

It is interesting that critics of NAFTA, in the process of making some valid criticism, have exaggerated NAFTA's impact on:¹¹

1. Mexico's peso crisis of 1995;
2. the negative environmental impact of NAFTA;
3. the issue of exploitation of workers (both with and without the Maquiladoras); and
4. the overall job destruction both in the United States and Mexico.

While pro-NAFTA arguments have viewed the impact of NAFTA from an exaggeratedly optimistic view, the critics of NAFTA have also undertaken egregious distortions.

The exaggerated distortions on both sides destroy honest discussions that could accommodate reasonable compromises and possibly benefit Mexico, the U.S. and Canada. If genuine transparency is to exist in the relationship among these three nations, some honesty seems necessary, especially after roughly nine years of NAFTA implementation. Questions that have arisen include:

⁸ The best examples of this are the series of articles presented by the Economic Policy Institute available at <http://www.epinet.org/>

⁹ Robert E. Scott, "Fast Track to Lost Jobs: Trade Deficits and Manufacturing decline are the legacies of NAFTA and the WTO" in EPI October, 2001 available at: www.epinet.org/content.cfm/briefingpapers_bp118

¹⁰ Robert E. Scott "NAFTA's Pain Deepens: Job Destruction Accelerates in 1999 With Losses in Every State" at http://www.epinet.org/content.cfm/briefingpapers_nafta99_nafta99

¹¹ See series of articles presented by the Economic Policy Institute on NAFTA at <http://www.epinet.org/subjectpages/trade.cfm?CFID=646576&CFTOKEN=1342549>

1. are the economies of Mexico, the U.S. and Canada better off or worse off after NAFTA? How significant was NAFTA in making these nations better or worse?
2. is job creation in the U.S., Canada and Mexico better or worse after NAFTA? How significant was NAFTA in the dynamics of job creation?
3. is the environment better or worse off after NAFTA? How significant is NAFTA in such matters?
4. are the expectations exaggerated vis-à-vis NAFTA?

Unless the above questions are answered realistically, one would continue to have an exaggerated view of the pros and cons of NAFTA, thus preventing the necessary compromises that will benefit the U.S., Canada and Mexico on the following issues:

1. Since zero pollution, 100% clean air or perfectly clean environment is impossible but reasonable environmental standards are more than possible, NAFTA nations can easily hammer out a “reasonable” environmental agenda and accomplish set goals on clearly set timetables.
2. Since no trade agreement perfectly benefits all trading partners in terms of job creation and economic development, reasonable goals of wage standards, worker living quality standards and goals of democratizing the workplace can be accomplished, again based on reasonable agenda and reasonable timetables.

Transparency requires the acknowledgement of grey areas accompanied by reasonable (albeit imperfect) solutions that will benefit Mexico, the U.S. and Canada. The basic operational premise should be that a trade agreement is not a perfect document, but is a document of compromise that can eventually lead to a beneficial result for the trading partners. To date, the various debates have failed to achieve a genuine middle ground.

An honest assessment of NAFTA would lead one to the following conclusions: NAFTA is important for the participating economies, but equally important are other dynamics that occur in all three nations. These dynamics include:

1. NAFTA cannot dramatically change the wide gap between the economy of the United States and Mexico. However Mexico, with increasing exports, increasingly better flow of capital and investment, and by increasing the relative standards of living can gradually narrow this gap in a way which is good for both Mexico and the U.S. An honest assessment of this cannot be undertaken in the short term. Enormously painstaking effort and genuine compromises plus fundamental reforms are needed to narrow the gap. However, without question, NAFTA can expedite the task by providing the sources of investment and capital flow needed to accomplish such a task.

2. The “new” economy, manufacturing sector growth, and productivity factors in each of the three economies have significantly more impact on job creation or job destruction than NAFTA can accomplish. At this point, NAFTA’s impact on job creation and job destruction seems rather minor and some of these displacements would have occurred in the course of normal trade with or without NAFTA.
3. The resolution of environmental issues makes NAFTA a valuable instrument for reasonable compromises. It is much easier to discuss, debate and resolve issues of common concern, taking into account the efforts being made by all parties to ensure compliance at all levels.

FAIR AND PREDICTABLE ECONOMIC BENEFITS

Economists have long emphasized the importance of comparative advantage as a result of international trade. Hence it follows that, the greater the reality and perception of the benefits of international trade, the greater the support for NAFTA. Often, tariff and non-tariff trade barriers are a result of real or perceived damage to the local economy caused by international trade vis-à-vis the trading partner.

There are also perceptions that multi-national corporations (MNCs) are exploitative and injurious to the local economy, and dissipate the much needed capital from the nation. However, many MNCs which comply with labour standards, environmental legislation, and the creation of employment opportunities while also contributing to economic development, find that they are viewed as “enemies”.

One of the purposes of NAFTA is to ensure that the economic benefits and related costs can be shared by all trading partners resulting in an advantageous situation for all. The current controversy over restrictions on export of products, such as the avocado, and several tariff restrictions on a variety of products related to manufacturing parts in Mexico, are an indication that the U.S., Canada and Mexico have genuine apprehensions about open borders and open trade. This prevails even though tacitly all three know the pitfalls of such outdated modes of thought.¹²

Yet, even the critics of NAFTA agree about the explosion in border trade since NAFTA came into effect. The fear of losing jobs in each of the countries has failed to materialize, and in actuality a rise in job creations has occurred, as indicated by most economic reports.¹³ The key to success is fair and equitable transparency in economic matters practiced by all three partners. Indeed, such a task of spreading economic benefits among the three nations would allow the policy to expand and include other nations such as Chile.

¹² Lois Stanford, “Mexico’s Empresario in Export Agriculture: Examining the Avocado Industry of Michoacan”, 1998 working paper at New Mexico State University at: <http://136.142.158.105/LASA98/Stanford.pdf>

¹³ Klein, Schuh and Triest, “Job Creation, Job Destruction and International Competition: Job Flows and Trade - The Case of NAFTA” Working Paper 02-8, Federal Reserve Bank of Boston, at: <http://www.bos.frb.org/economic/wp/wp2002/wp028.htm>

THE CURRENT LEGAL FRAMEWORK FOR TRANSPARENCY GOVERNANCE

NAFTA's existing legal framework can be best described as subject to the "caravan effect" - the tendency to circle the wagons and become defensive when confronted. This is where legal issues get dragged into unsolvable conflicts that eventually become sensitive public issues which remain contentious. The net result is that any solutions leave a bad taste in the mouths of each nation involved. The current trucking dispute is an excellent example of how a dispute should not be handled where there is a strong international trade agreement like NAFTA. It is easy for governments to talk about NAFTA, but to ignore it when political pressures, particularly in the domestic arena, are felt. This results in intolerable scenarios where blame is put on all concerned. The trucking controversy between the U.S. and Mexico reflects both the promise and the peril of NAFTA.¹⁴ Trucks are indeed an inefficient means of moving goods across borders between the countries. But environmental issues, technical compliance and union/non-union truck workers (unionized in the U.S. and largely non-unionized in Mexico) have caused enormous difficulty in moving goods across borders.

NAFTA gave Mexican trucks unrestricted access to the U.S. beginning in 1995, but the timetable for opening the U.S. to Mexican trucks has been pushed back three times amid pressure from organized labour in the U.S. It is not difficult to conclude that clear-cut laws are needed to enforce transparency and understanding between NAFTA partners. There is also concern about the safety of Mexican trucks. A crucial problem is that many do not meet U.S. weight, driver and insurance standards. The relative disparity in wages between U.S. and Mexican truck drivers and the fear on the part of unionized truck drivers that an unrestricted labour market in the trucking industry will drive wages down are concerns often expressed by unions in both the U.S. and Canada. In spite of all this, all data indicates that the volume of truck traffic on both sides of the border has not dramatically increased. The seriousness of the issue is aptly reflected in a recent report on February 19, 2001 in the *U.S. News & World Report* entitled "Truckin' into a Treaty Flap"¹⁵:

A death watch is on across the United States. Die-hard opponents of the North American Free Trade Agreement are waiting for the first time a Mexican truck kills an American in a highway accident. When that happens - and surely it will - they promise to blame the tragedy on President George W. Bush and stir up renewed opposition to the controversial 1994 trade treaty.

On the positive side, one of the key features of NAFTA's legal framework is what is called a "national treatment", in which countries must treat firms of partner countries the same way they treat their own firms. In this, all three countries have worked diligently and meticulously for optimum results. Many manufacturing companies (particularly in the

¹⁴Guthrie, Amy, "Mexico asks United States to address cross border trucking dispute", *Dow Jones*, March 12, 2003. Available also at: <http://www.geocities.com/ericquire/articles/ftaa/dowjones030312.htm>

¹⁵Sheets, Kenneth (2001) "Truckin' into a treaty flap", *U.S. & World News Report*, February 9, 2001 v130 i7 p 48

automotive and electronic industries) do not consider Mexico as an “assembly-line” or “cheap-labour” stop. Instead, Mexico is viewed as a place of quality labour capable of sophisticated manufacturing capacity. The effect of this is the fact that Mexico has felt a tremendous boost in its confidence by feeling the effects of upgrading the quality of labour and working conditions.

DO ‘HARD’ LAW INSTRUMENTS WORK?

Many arguments have been put forth regarding the need for “hard” legislation in trade agreements to ensure workability in economic relations. “Hard” legislation is precise and obligatory, while “soft” legislation allows for a moderate degree of delegation of decision-making authority. Abbot¹⁶ argues that “hard legislation is preferable to soft legislation” for NAFTA, as the experience of the WTO and EU suggests. Hard law:

1. reduces intergovernmental transaction costs associated with trade and investment;
2. reduces private risk premiums associated with trade and investment;
3. promotes transparency and provides corollary participation benefits;
4. tends to restrain strategic political behaviour; and
5. may increase the range of integration effects by encouraging private actions to enforce intergovernmental obligations.

The experience of governments has been that “soft” agreements of early years, such as GATT in 1947, were not conducive to addressing “complex second and third generation trade barriers.”¹⁷ Hence, beginning with the Uruguay Round in 1986, governments sought to enhance the levels of specificity, delegation of dispute settlement authority and obligation in GATT culminating with the conclusion of the WTO agreement in 1994.

While hard legislation may be preferable to soft legislation for accomplishing international economic objectives, a high degree of flexibility in the implementation of the various provisions is essential because:

1. there will be a need to cater to changes in economic conditions;
2. cultural and social sensitivities may require changes to policy;
3. time frames may need to be adjusted to suit prevailing conditions;
4. business practices may be such as to require amendments or adaptations to previously negotiated provisions; and
5. changes in government officials, especially at the local level, may be required to reinforce the need to conform to agreed-to principles.

¹⁶ Abbot, Frederick M. (2000) “NAFTA and the Legalization of World Politics: A Case Study”. *International Organization* 54, Summer 2000, pp. 519-547

¹⁷ *Ibid.*

Still, hard legislation has to serve as the fundamental basis of the applicable terms and conditions. This will ensure that transparency is achieved through the stipulation of precise terms for both businesses and public sector officials responsible for implementing the operational aspects.

THE NEED FOR GOVERNMENTS TO BE TRANSPARENT

Transparency has to start at the highest level. There have been many complaints where governments have failed to disclose fully their intentions, such as:

1. subsidizing a certain sector, hence inhibiting competition;
2. giving preferential treatment to a country's own citizens or corporations at the expense of legitimate external investors;
3. establishing policies that deviate from the spirit of the free trade agreement;
4. failing to disclose fully information regarding changes in processes, procedures and structures in trade transactions; and
5. taking "off balance-sheet" protectionism measures in direct contradiction to trade liberalization.

For years governments have used executive and cabinet privilege to prevent claims of non-disclosure made against them by the corporate world. The recent case against Canada changed the scenario once and for all. On September 6, 2000, a NAFTA panel, hearing the *Pope & Talbot* dispute against Canada, ruled that Canada's attempt to suppress evidence could not prevail. The Canadian government had issued an S.39 certificate, which prevents a court from compelling the production of any document that the certificate deems to be confidential.¹⁸

In its brief reasoned decision, the tribunal found that S.39 certificates provided an unfair advantage for governments against private litigants. The NAFTA tribunal did not have the power to compel production of the missing documents. However, it did indicate that if Canada did not produce documents which it found to be relevant, it would run the risk of having an adverse inference taken against it or even having the burden of proof reversed on those specific factual issues covered by the suppressed material. NAFTA permits a foreign investor to bring a claim against a government for a breach of a substantive obligation contained in NAFTA's investment chapter. Since 1996, four NAFTA investor-state claims have been brought against Canada, four against Mexico and three against the U.S.¹⁹

The impact of the *Pope & Talbot* transparency decision is far ranging and fundamental. NAFTA has now created a process that requires government transparency. Only those

¹⁸ See complete list of Awards at Pope and Talbot at: <http://www.appletonlaw.com/4b3P&T.htm>

¹⁹ See list of NAFTA cases at: <http://government.cce.cornell.edu/doc/reports/freetrade/cases.htm>

government documents that objectively have a valid need to be secret (such as military defence secrets) can be properly withheld. Otherwise, this NAFTA decision ensures “that the light of day will fall upon thousands of pages of documents that would otherwise never have been produced to a trier of fact.”²⁰ NAFTA tribunals will now be able to see all the relevant material in a claim so that they can make objective and fair decisions.

Canada has now come out against NAFTA Chapter 11, which allows companies to sue member countries to protect their investment. In an interview with the prestigious *Toronto Globe and Mail* on December 12, 2000, Canadian Trade Minister Pierre Pettigrew said that he would not sign a deal on the proposed free-trade agreement of the Americas (FTAA) if it contained a Chapter 11 equivalent. Ottawa-based trade consultant Peter Clark said the government is realizing that Chapter 11 is “more investor friendly” than NAFTA authors had intended it to be.²¹

TRANSPARENCY IN INVESTOR PROTECTION - THE CONTROVERSY OVER CHAPTER ELEVEN

The main objective of international law on foreign investment is the development of international investment obligations, such as the obligation to provide fair and equitable treatment, full protection and security and national treatment to foreign investors and their investment. NAFTA contains the strongest international protections for investment in any multinational agreement. NAFTA Chapter 11 obligations provide extensive protections for all investors from NAFTA countries in the territory of another NAFTA member. NAFTA also contains an important development in the Investor-State Dispute Settlement System, which allows investors to obtain compensation for their losses from international arbitration tribunals if governments do not meet their NAFTA investment commitments.²²

One major case that has attracted considerable attention, because it potentially raises a number of important substantive questions of transparency, is the litigation involving *Metalclad*. The American company took action against Mexico claiming that “it had failed to accord the investor fair and equitable treatment as required by NAFTA Article 1105.”²³ Among other assertions, *Metalclad* alleged that its investment had been indirectly expropriated within the meaning of Article 1110 through a combination of acts and omissions attributed to Mexico.

Metalclad CEO Grant Kesler claimed that the state governor in Mexico encouraged local residents to protest against the American firm, and blocked *Metalclad*'s progress in an attempt to protect the Mexican monopoly on hazardous waste. The California-based company had asked the tribunal for at least \$113 million in damages, claiming that

²⁰ Abbot, Frederick M. (2000) “NAFTA and the Legalization of World Politics: A Case Study”. *International Organization* 54, Summer 2000, pp. 519-547

²¹ MacKinnon, Mark (2000), “Canada Seeks Review of NAFTA's Chapter Eleven”, *The Globe and Mail*, December 13, 2000, Toronto, Canada

²² The full NAFTA sections including Chapter 11 are available at: <http://www.ustr.gov/regions/whemisphere/nafta.shtml>

²³ Mealey's International Arbitration Report (2000) “Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico”, *Mealey's Publications Inc.* Vol. 16; No. 1

municipal authorities in Guadalcázar sabotaged the company's investment by refusing to issue building permits. The town had refused to allow the company to acquire, develop and operate a hazardous waste transfer station and landfill in the La Pedrera valley within the municipality.²⁴ On August 30, 2000, the tribunal in the *Metalclad* case issued an award in favour of the claimant. The three arbitrators joined in finding that Mexico had failed to provide the necessary protections and awarded \$16.7 million to the investor. The tribunal's decision was based on a finding that "the denial of its right to operate was improper and resulted from a process which breached Mexico's obligation to provide a minimum standard of treatment under Article 1105." The tribunal also found an indirect expropriation as a consequence.²⁵

The Mexican government reacted angrily to losing its first major NAFTA investor arbitration, and tried to have the multimillion-dollar award reversed before a neutral court.²⁶ It petitioned the Supreme Court of British Columbia to set aside the award on the grounds that the *Metalclad* tribunal exceeded its jurisdiction and that enforcing the award would violate public policy.²⁷ The British Columbia court set aside the award relating to the breach of Article 1105 and the consequent finding of a breach of Article 1110. The Court did find that the tribunal had applied a different standard from that set out in Article 1105. However, the Court left in place the tribunal's finding of expropriation. On October 29, 2001 Metalclad Corporation announced that it had received \$16,002,433 from Mexico in full settlement of its NAFTA claim. All appeals and cross-appeals were dismissed, as the first NAFTA arbitration ever commenced came to a conclusion.²⁸

This has resulted in claims that the recourse to international arbitration provided for in NAFTA is adversarial, costly, and time-consuming. This ultimately produces a winner and a corresponding loser, even in close cases in which both sides may have had more to gain by constructing a *via media*. A properly constructed mediation process would be more beneficial for all parties involved.

The major contentions are that:

1. companies get too many rights at the expense of taxpayers;
2. the process bypasses national due process and openness;
3. panels have power to make unlimited awards; and
4. these provisions will be extended to the Free Trade of the Americas Agreement (FTAA) now being negotiated between 31 Latin American and Caribbean nations for implementation by 2005.

²⁴ A summary of the Metalclad case by Michelle Sforza is available at: <http://www.greenleft.org.au/back/1998/331/331p23b.htm>

²⁵ PR Newswire (2001) "United Mexican States Pays Metalclad \$16,002,433 in Full Settlement of Its NAFTA Claim", *PR Newswire* Oct 29, 2001, available at http://www.findarticles.com/cf_0/m4PRN/2001_Oct_29/79509236/html

²⁶ Mealey's International Arbitration Report (2000) "Mexican Government to Attempt to Set Aside NAFTA Award", *Mealey's Publications Inc.* Vol. 15; No.11

²⁷ VanDuzer, J.A. (2002) "NAFTA Chapter 11 to Date: The Progress of a Work in Progress". Paper presented to NAFTA Chapter 11 Conference hosted by Carlton University, Center for Trade Policy and Law on Friday Jan 18, 2002 and available at <http://www.carleton.ca/ctpl/chapter11/>

²⁸ "United Mexican States Pays Metalclad \$16,002,433 in Full Settlement of Its NAFTA Claim", *PR Newswire* Oct 29, 2001, available at http://www.findarticles.com/cf_0/m4PRN/2001_Oct_29/79509236/html

ACTION AGAINST CORRUPTION: CENTRALITY OF GOOD GOVERNANCE AND TRANSPARENCY

At the 9th International Anti-Corruption Conference held on 10-15 October 1999 in Durban, South Africa, the International Monetary Fund in declaring its role in promoting transparency stated:

Transparency, accountability, and governance are words that have come to the forefront in current discussions of macroeconomic and financial policy. Availability of information on government economic policies and actions, a clear sense of organizational responsibility, and an assurance that governments are efficiently administered and free of systemic corruption have always, of course, been seen as important. Until very recently, however, these concerns have been dealt with at a rather general political or administrative level. Now they are clearly seen as issues to be addressed as an integral part of economic policy discussion, be it by the IMF or by national governments and regional organizations.²⁹

Countries, corporations and consumers pay a high price for corruption, which is endemic in the developing world. Corruption damages economic development and prevents reform. In the light of NAFTA, it would be a truism to say that corruption is the single most impeding factor towards greater progress in regional co-operation between the two developed partners, Canada and the U.S., and the emerging partner, Mexico.

Around the world collective and co-operative efforts are at hand to fight the menace. Multi-pronged action is being taken under the auspices of Transparency International, a non-profit, non-governmental organization dedicated to eradicating corruption. A Global Forum on Fighting Corruption Declaration (February 26, 1999) resulted when African leaders met their Western counterparts to address the issue as part of the Collaborative Frameworks to Address Corruption in Washington D. C. on February 23, 1999. The ministers and representatives of the government involved, under the auspices of the Global Coalition for Africa, drafted a list of Principles to Combat Corruption in African Countries.³⁰

The United States has taken steps on the demand side of the corruption equation to promote good governance, and as such, limit the opportunities for corruption. It is working with willing partner governments around the developing world as well as with international organizations such as the IMF and the World Bank to address these issues. The U.S. has identified eight key elements of the corruption problem and is developing programs to deal with each separately³¹:

²⁹ 9th International Anti Corruption Conference organized by the International Monetary Fund in Durban, South Africa on 10-15 October 1999. See list of papers presented by Transparency International at: http://www.transparency.org/iacc/9th_iacc/papers4.html

³⁰ Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials, Final Report, July 21, 1999 available at: <http://usinfo.state.gov/topical/econ/integrity/confirp.htm>

³¹ Eizenstat, Stuart E. (1998) "Promoting the Rule of Law and Anti-Corruption in a Globalized Economy", Economic Perspectives, United States Information Agency (USIA), Washington, D.C.

1. *Economic policy reform*, including deregulation. To pave way for more competition, onerous and unnecessary licensing requirements to be removed. Areas of discretionary authority to be clearly defined.
2. *Transparency reforms*, including steps to streamline and make more predictable administrative processes affecting trade and investment.
3. *Public sector/civil service reform* to shrink the size of bureaucracies and reduce their influence in markets.
4. *Public finance reform* to create effective surveillance agencies armed with accounting and auditing skills. Procurement reform with the establishment of fair and open procedures for public purchasing with WTO norms.
5. *Judicial reform* to create independent court systems with powers to enforce their rulings. This includes development of independent judiciaries that operate pursuant to ethical principles and codes of conduct.
6. *Commercial law reform* to create the necessary regulation to deal with securities, shareholders' rights, real estate, intellectual property, bankruptcy, anti-trust and the environment.
7. *Strengthening civil society* through public education and civic awareness programs to improve public oversight and participation in government, as well as support for an independent media.
8. *Law agency reforms* to root out internal corruption and raise respect for human dignity. Over and above this sits *ethical reform*, the establishment of codes of conduct for government officials and financial disclosure rules.

With the change of government in Mexico, it is expected that much progress will be made in the implementation of these reforms that are so vital to the establishment of an effective rule of law and transparent practices. This will undoubtedly enhance Mexico's participation in NAFTA as an equal partner and tilt in its favour, somewhat at least, the benefits of the free trade agreement it expects and truly deserves.

CONCLUSION: BROADENING THE GLOBALIZATION GOVERNANCE AGENDA

The recent protests, albeit violent, in Seattle and Davao are indicative of the global demand for democracy, transparency and a new consideration for environmental and developmental issues.³² Transparency is a process. It is a process of dialogue, debate and consensus leading to action. Once Mexico's economy starts to improve, then the U.S. and Canada will view Mexico as a long term partner. This perspective will enhance transparency further. For NAFTA to reach its true potential of a free market serving the participants in the most equitable fashion, all three parties need to commit wholly to implementing the accepted principles of transparency and good governance at all levels.

³² Johnson, P. and Mayrand, K. (2000) "Beyond Trade: Broadening the Globalization Governance Agenda" G8 Scholarly Publications and Papers, University of Toronto, Canada

In conclusion, the Director General of WTO, Mark Moore states, "The cost of failure would be a stop to the multilateral liberalization wheel and a return to trade-distorting and development-slowing regionalism." The same is the case for NAFTA: "its success or failure will depend on reconciliation of trade, environment, and development agendas under a broadened system of global governance."³³ In order to meet the expectations of the various parties, governments will have to live up to their obligations and enforce public sector governance. The laws may have to remain general in nature, in line with existing international practice, but interpretive errors in some cases make clear the need to promote quality and consistency of tribunal awards. Regulators need to work towards balancing the interests of investors, governments and the public through transparency, accountability and legitimacy. It is recommended that an international conference be organized that focuses on vital transparency issues. This could serve as a preliminary framework for further detailed research into the specific needs of member countries and commercial and governmental participants of NAFTA. The conference could be a valuable tool to stimulate discussion among the various participants. This will include home and host countries, secretariats, representatives of industries, trade unions, and academics. It should ideally be hosted by a research institute or even the NAFTA Secretariat. What is imperative is that the subject is recognized to be of significant importance to making the agreement function in a more efficient and pragmatic manner, which will result in the reduction of litigation and the resulting increase in frustration and costs.

³³ *Ibid.*