NAFTA AT SEVEN YEARS*

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The North American Free Trade Agreement (NAFTA), which entered into force January 1, 1994, will soon celebrate its seventh birthday. The purpose of this essay is to provide a brief, general assessment of how the NAFTA has performed during its infancy. Has it lived up to the hopes and expectations of its parents, the three NAFTA governments? Does it favor one parent over another? What problems do we foresee for NAFTA as it matures?

I. Initial assessment. Economic and trade effects of NAFTA

There are many unanswered questions surrounding the effects —as well as the effectiveness— of NAFTA. Has NAFTA benefited all three countries equally? How has it affected different sectors within the NAFTA countries? Has NAFTA been beneficial or harmful to the environment? Has NAFTA created jobs in Canada or the United States, or have jobs migrated to Mexico? Has NAFTA created jobs in Mexico, or has it merely forced workers into the maquiladora industry? Has the strength of organized labor been increased or diminished because of NAFTA?

Given the large number of variables involved, it may be years before we have any clear answers to such questions. The executive

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branches of government in Canada, Mexico and the United States have enthusiastically applauded the effects of NAFTA, asserting that the Agreement has contributed to dramatic increases in employment and economic growth under NAFTA.[1] This is natural, since it is the executive leadership in each country that has engineered the adoption of the Agreement, and is therefore most likely to defend its effects. On the other hand, legislative bodies and non-governmental organizations have been much more cautious, and critical, in their judgement of NAFTA's effects.[2]

One conclusion is irrefutable, however, from data compiled by the NAFTA governments, trilateral trade and investment have increased dramatically since NAFTA went into effect. Exports and imports between NAFTA members now total $567 billion per year, a 96 percent increase since NAFTA came into force.[3] U.S. exports to its NAFTA partners increased 66 percent during the first five years of the Agreement, and exports to Mexico alone increased by 90 percent.

The change in Mexico's international trading profile has been particularly profound. In the early 1980's, crude oil and natural gas accounted for over 70 percent of all exports, and manufactured goods made up only 19 percent.[4] By 1998, manufactured goods represented

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[1] *See, e.g.*, Office of the United States Trade Representative, Study on the Operation and Effect of the NAFTA (July 1997) (*hereinafter* "USTR Study on NAFTA"), at p. 2 "Several outside studies conclude that NAFTA contributed to America's economic expansion. The NAFTA in isolation had a modest positive effect on U.S. exports, income, investment and jobs supported by exports..." *See also* USTR Press Release 00-28, April 11, 2000, "NAFTA Meeting: Joint Statement, Dallas, Texas, April 7, 2000", releasing Joint Statement by deputy trade ministers of Canada, Mexico and the U.S.: "...North America is the growth center of the global economy, and our booming trade with one another has mitigated the economic impact of financial crises and slowdowns in other parts of the world. Most importantly, job creation has surged in all three NAFTA countries, with employment levels now at record highs. Since the NAFTA was implemented, employment in Canada has grown by 10.1 percent (1.3 million jobs), by 22 percent (2.2 million jobs) in Mexico and by over 7 percent (12.8 million jobs) in the United States".

[2] For a critical evaluation of NAFTA's effects on various economic sectors in Mexico, as well as environmental and labor effects, *see* Senado de la República, LVII Legislatura, Análisis de los efectos del Tratado de Libre Comercio en América del Norte en la economía mexicana: una visión sectorial a cinco años de distancia, Two volumes (2000) (*hereinafter* "Análisis del Senado").

[3] USTR Press Release, *supra* note 1.

[4] Análisis del Senado, *supra* note 2, at vol. I, p. 545.

90 percent of exports, and oil accounted for only 6 percent of exports.[5] The Mexican economy has also become much more dedicated to, and dependent upon, international trade: in 1983, international trade (exports plus imports) represented 19.73 percent of GDP (gross domestic product); by 1997, trade was 58.49 percent of the economy.[6] In short, Mexico has been transformed from an oil-exporting economy in which trade played a peripheral role, into an economy that is highly integrated into the world trading system, with Mexican industries becoming more integrated with industries in North America.

Despite the promotion of NAFTA as the key element in North American economic integration, it is questionable whether NAFTA itself was a principal determinant in this transformation of the Mexican economy. According to a detailed study commissioned by the Mexican Senate, NAFTA was not the central cause of major economic changes in the Mexican economy. Rather, changes in Mexican law were primarily responsible for the increased economic integration.[7] These domestic law changes, referred to as the la apertura ("the opening"), began with Mexico's accession to the GATT in 1986, which required a gradual dismantling of high taliff and non-tariff barriers on imported goods. The legal reforms continued throughout the presidency of Carlos Salinas de Gortari, and included the adoption in 1993 of a new Foreign Investment Law that removed many restrictions on foreign investment; a new industrial property laws in 1991 (and revised in 1994), that promised greater protection for intellectual property rights; and the privatization of hundreds of state-owned enterprises, which operated as a stimulus to both domestic and foreign investment. In the space of eight years (1986 to l994), Mexico converted itself from a state-centered and closed economy, to an open economy dominated by private

[5] Análisis del Senado, *supra* note 2, at vol. I, p. 545.

[6] *Id*. at p.60.

[7] *Id*. at pp. 60, 100, 545. *See* also Eric Gouvin, "Cross-Border Bank Branching Under the NAFTA: Public Choice and the Law of Corporate Groups," 13 Conn. J. Int'l L. 257, 269 ("the empirical data since the passage of [NAFTA] suggests that the Nortn American financial services market is not radically different [since the adoption of the Agreement]"). In the financial services area, important changes in Mexican banking laws, opening the Mexican banking market to foreign investment, were dictated by economic conditions (looming bank failures in the mid-1990's) and not required by NAFTA.

investment, in which the energy sector (oil and gas, electricity) remains as the only significant industrial sector in public hands.

Mexico's recent history demonstrates not that a free trade agreement is the key to economic development. Taiwan and Korea became impressive export platforms without the help of free trade agreements. Rather, Mexico's experience shows that the unilateral removal of artificial barriers to trade and investment can bring dramatic results, in Mexico's case leading to increased integration of its economy with its trading partners to the north. Other factors also contributed to integration: Mexico's proximity to the United States; its relative wealth of natural resources; and the size of its economy (small in comparison to its NAFTA partners, but large by Latin American standards). The negotiation of NAFTA, after Mexico had already embarked on a course of economic change, complemented the apertura and helped assure the dramatic economic results already noted. NAFTA is a success story not because it was the prime cause of regional economic integration, but because it complemented or furthered that integration.

II. NAFTA'S geopolitical importance

NAFTA's economic effects have been considerable, but NAFTA by itself would not have brought about such an increase in regional trade and investment. NAFTA's true importance lies in its geopolitical significance. NAFTA serves as a watershed in North American relations, and the Agreement will one day be viewed as the beginning of a long-term process of closer integration.

Evidence of the geopolitical significance of NAFTA came even before the Agreement was barely a year old. In December, 1994, a combination of conditions in Mexico —an overvalued peso, a change in presidential administrations (with allegations of electoral fraud against the PRI), and the stirrings of an armed rebellion by zapatistas in Chiapas— led to a flight of capital from Mexico and the beginnings of a dramatic devaluation of the peso. The Clinton administration was suddenly faced with a serious destabilization of a neighbor that had now become a major trading partner. The U.S. Congress appeared to oppose lending funds to Mexico to support the balance of payments, and the public at large was also opposed to this. De-

spite this opposition, President Clinton quickly used the executive branch's ability to arrange swap facilities with foreign governments to make a major loan to Mexico, which helped turn the tide against the peso.[8]

The speed with which President Clinton reacted was dictated by our new partnership with Mexico in NAFTA. Having used considerable political capital to assure U. S. adoption of NAFTA (against pressure from his own party, and from the public), Clinton could hardly stand by idly and watch the economy of its NAFTA partner fall into prolonged crisis. Numerous commentators have pointed to the existence of NAFTA as having had a major effect in helping Mexico to avoid long-term damage from the 1994 peso devaluation. President Clinton's quick financial assistance, as well as Mexico's trading partnership with Canada and the United States, were responsible for stemming the damage of the devaluation, and bringing about a rebound of the peso, and the economy, much more quickly than had occurred in 1982, during the last major peso devaluation crisis.[9]

1. NAFTA AS AN INSTITUTION

NAFTA's long-term importance is much greater than its medium-term trade effects. NAFTA is much more than a trade agreement[10] —it is an agreement that establishes, for the first time in North America, a permanent structure for the negotiation of economic issues of a bilateral and trilateral nature. In addition, NAFTA has been at the center of a

[8] President's decision to support the loan to Mexico is discussed in Joe Klein, "Eight Years", *The New Yorker*, October 16 and 23, 2000, p. 188 at p. 209.

[9] *See* USTR Study on NAFTA, *supra* note 1 at pp. 4, 25-27 (in 1982, it took Mexico 7 years to return to international financial markets, while in 1995, it took only 7 months); Análisis del Senado, *supra* note 2, vol. I at 544 (NAFTA served as a shock absorber during the peso crisis of December 1994, in guaranteeing Mexican access to markets in Canada and the U.S. and avoiding a more severe recession, and Clinton's financial package played a major role in restoring international financial confidence); Jorge Gonzales, "The North American Free Trade Agreement", in 30 Int'l Law. 345, at text accompanying notes 15-22.

[10] Of course, the Agreement and side agreements cover much more than traditional trade matters, and include provisions on trade in services (including financial services), foreign investment, business travel, intellectual property protection, competition policy, transparency in government, and environmental and labor matters.

trend in creating complimentary structures for governing non-economic relations.[11] The remarkable thing is that it has taken this long for such a structure to be established. Despite the periodic outbreak of economic tensions and disputes, economic relations between the United States and its neighbors have been governed in a piecemeal, sporadic fashion, with the formation of ad hoc approaches to each matter. This is especially true in regards to U.S.-Mexican relations. Mutual distrust and cultural differences, as well as the sheer difference in economic and military power between the two nations, have militated against long-term cooperation. In the past, Mexico has tried to protect itself from the potentially smothering of U.S. hegemony by resisting close relations with the United States. Mexico's adherence to NAFTA is a dramatic turn to a new course.

NAFTA negotiators were careful to limit the institutional structure of NAFTA, to avoid representing NAFTA as a supranational body, which would have threatened support for adoption of the Agreement in each of the NAFTA countries. The NAFTA's highest institution is the Free Trade Commission, an *ad hoc* assembly of the trade ministers of the three countries, who meet annually to discuss general issues of concern. To avoid the creation of a supranational bureaucracy, the NAFTA was careful to establish a tripartite Secretariat, split among the three NAFTA nations, each of which has a Section of the NAFTA Secretariat located within its trade ministry. The location of the NAFTA Secretariat within the trade ministry of each country limits the threat that a NAFTA Secretariat will begin to adopt ideas of its own, with insufficient input from the governments of the Parties. To date, the NAFTA Secretariat's principal function has been to administer the dispute resolution systems set forth in NAFTA, as discussed below.

Despite the concerted attempt to avoid "institutionalization" of NAFTA, I believe that the creation of permanent institutional structures is one of the most significant, lasting consequences of the Agreement. The U.S. Trade Representative has noted that "[m]ore than 25

[11] I have referred elsewhere to this phenomenon as the "NAFTA exercise". *See* Stephen Zamora, "NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade", in 12 Arizona Journal of International and Comparative Law 401 (1995).

different NAFTA Committees, Working Groups and their subsidiary bodies complement our active bilateral agendas with Canada and Mexico".[12] Many NAFTA articles establish Working Groups on technical matters,[13] committees to promote consultation,[14] and advisory committees.[15] The supplemental agreements on Environmental Cooperation and on Labor Cooperation establish secretariats that are charged with administering each of these agreements,[16] as well as national advisory committees and governmental committees.

The creation of a network of working groups and committees, related to NAFTA, is a new phenomenon in North American relations. It is particularly striking because of the lack of such interactions in the pre-NAFTA period. Professor Isidro Morales finds the creation of such a network dramatic, especially when one adds to this network of technical committees the work of NAFTA dispute resolution panels (discussed below):

> If we understand governance to mean the exercise of political, economic, and administrative authority within different spheres of human activity ..., it is clear that NAFTA is relocating the loci of authority within trade and investment matters from the nationalbased level to the transtate, yet substate levels.[17]

Professor Morales also takes note of the inclusion of non-governmental groups and individuals in the panoply of NAFTA panels and committees, and finds therein a movement "from the nation-state as

[12] Office of the United States Trade Representative, 2000 Trade Policy Agenda and 1999 Annual Report of the President of the United States on the Trade Agreements Program, March 2000, p. 171.

[13] See, for instance, NAFTA Article 513.1 (Working Group on Rules of Origin), Article 1504 (Working Group on Trade and Competition).

[14] See, for instance, NAFTA Article 706 (Committee on Agricultural Trade), Article 722 (Committee on Sanitary and Phytosanitary Measures), Article 913 (Committee on Standards-Related Measures, which includes subcommittees in specific areas), Article 1021.1 (Committee on Small Business), Article 1412 (Financial Services Committee).

[15] *See*, for instance, NAFTA Article 707 (Advisory Committee on Private Commercial Disputes regarding Agricultural Goods) Article 2022.4 (Advisory Committee on Private Commercial Disputes).

[16] North American Agreement on Environmental Cooperation, Article 11; North American Agreement on Labor Cooperation, Article 12.

[17] Isidro Morales, "NAFTA: The Governance of Economic Openness", *Annals of the American Academy of Political and Social Science*, vol. 565, pp. 35, 42 (1999).

the most important actor of [the system of economic governance] to a multi-actor international system in which firms, civil society organizations, and multilateral institutions are playing a salient role...".[18] Professor Morales' assessment appears visionary, if somewhat overstated. At the present time, it is important to note the creation of a general practice of structured links and contacts, giving rise to relatively permanent for consultation and negotiation. For purposes of future integration, this "institutionalization" of NAFTA (despite the attempt to downplay institutionalization) is extremely important. Over time, ongoing contacts among professionals in Canada, Mexico and the United States will tend to promote harmonization and will help to remove barriers to integration caused by the ignorance and distrust that still exists among many groups within the NAFTA trading partners.[19]

NAFTA is an inevitable step in the creation of a more integrated North America. Given the increased mobility of persons, money, goods and ideas, it is natural to assume that integration in North America will increase, and that legal and non-legal barriers will subside in the process. Europe offers an important, if inexact model. The European Union began with the adoption of a limited economic agreement, the European Coal and Steel Community; over the course of fifty years and numerous agreements and protocols later, free movement of labor, goods, capital and services exists throughout much of Europe, although the final steps of complete integration (monetary and political union) remain elusive. In the same way, the NAFTA exercise is not likely to remain static. Incoming President Vicente Fox was correct to raise the issue of increased integration and more open borders during his visit with President Clinton in Washington. By raising the issue even before he takes office, Vicente Fox has placed on the table for discussion something that is likely to become a reality by the middle of the Twenty-first Century, virtually free migration of labor across NAFTA's borders.

[18] *Id.*, p. 51.

[19] *See* generally Stephen Zamora, "Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration", 19 *Houston Journal of International Law* 615 (1997).

III. A NAFTA success story. Dispute resolution

The dispute settlement structures incorporated into the NAFTA are key to the observance of NAFTA's rules and the viable operation of the Agreement. NAFTA Chapter Twenty adopts detailed dispute settlement procedures for government-to-government disputes arising under the Agreement, and these procedures have been supplemented by model rules for Chapter Twenty dispute panels.

In addition to the Chapter 20 apparatus, there are special dispute settlement procedures written into other NAFTA chapters:

- Chapter Eleven. Investment (Articles 1115-1138) (Settlement of Disputes between a Party and an Investor of Another Party).
- Chapter Fourteen. Financial Services (Articles 1414 and 1415).
- Chapter Sixteen. Temporary Entry for Business Persons (Article 1606).
- Chapter Nineteen. Review and Dispute Settlement in Antidumping and Countervailing Duty Matters (Articles 1901-1911).

Chapters Eleven and Nineteen provide procedures for the resolution of disputes between private parties and government agencies, while the remaining dispute resolution procedures are available only to governments.

In general, the dispute mechanisms written into NAFTA have proved workable, and the decisions rendered thereunder have not been.

1. Chapter twenty disputes

Chapter Twenty involves a multi-step process of consultation, conciliation, and mediation under the guidance of the Free Trade Commission; if these methods fail to resolve the dispute, NAFTA authorizes the formation of a five-member NAFTA arbitral panel from a roster of experts.[20]

[20] The Parties have still not agreed upon a roster of Chapter 20 experts as envisaged by NAFTA Article 2009.

In many instances, NAFTA panels have "concurrent jurisdiction" with GATT/WTO panels: under NAFTA Article 2005, a Party may submit a dispute to either NAFTA procedures or to GATT/WTO procedures, insofar as a dispute may arise under both Agreements. Since many of NAFTA's provisions incorporate the general GATT/WTO commitments, many government-to-government disputes could be settled in either forum. Once a forum is selected, however, it is to become the exclusive forum for settling the dispute.[21]

As of February 1999, thirteen conflicts had been referred to the NAFTA for dispute resolution under Chapter 20, of which four have resulted in the formation of panels. The United States has been a party in each of the disputes presented: no cases have been brought by Mexico against Canada, or by Canada against Mexico.[22] As of August 31, 2000, two panel decisions had been rendered,[23] and two decisions are still pending.[24]

While this sampling is not large, the early results are positive. The consultation and conciliation procedures have helped dispose of a good number of cases, and according to one commentator, the fact that a majority of the disputes have been settled without convening a panel may appear to indicate that Chapter 20 is working as intended.[25]

The decisions rendered by NAFTA Chapter panels to date have been carefully reasoned, and while such decisions to not create binding interpretations, the process is designed to provide a strengthening of a rule-oriented, rule-enforcing system, rather than a flexible system of compromise. The former is in line with the strengthened dis-

[21] NAFTA Article 2005.6. For a discussion of the relative jurisdiction of NAFTA and GATT/WTO, *see* David Gantz, "Dispute Settlement Underthe NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties", 14 Am. U. Int'l L. Rev. 1025 (1999).

[22] *See* David Gantz, *supra* note 22 at pp. 1058-1059.

[23] CDA-95-2008-01, Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (unanimous decision in favor of Canada, Dec. 2 1996); USA-97-2008-01, U.S. Safeguard Action Taken on Broomcorn Brooms from Mexico (unanimous decision in favor of Mexico, January 30, 1998).

[24] USA-98-2008-01, Cross-Border Trucking Services and Investment, and USA-98-2008-02, Cross-Border Bus Services.

[25] Isidro Morales, *supra* note 18 at 45 (noting however, that "furhter research ... should be undertaken to clarify that hypothesis").

pute settlement mechanism of the WTO —with which NAFTA overlaps— rather than the flexible, and much-criticized, GATT panels of the pre-WTO era.[26] The WTO process does include a feature lacking in the NAFTA, an Appellate Body to which appeals from panel decisions may be made, whereas NAFTA provides for no appeal from a Chapter Twenty panel decision. This would appear to reinforce the rule-making aspects of the WTO dispute resolution procedures.

The early history indicates that NAFTA Chapter Twenty will be an infrequent but important forum for settlement of disputes among NAFTA Parties. The United States has been an unsuccessful litigant to date under Chapter Twenty, and one senses that support in the U.S. government for the procedure may be endangered, especially since an alternative forum —the WTO— will often be available. Nevertheless, the experience to date has shown that Chapter Twenty procedures work about as well as one might have expected.[27]

2. Chapter nineteen disputes

Chapter Nineteen was inserted into NAFTA on the initiative of the Canadian and Mexican governments, which had been dissatisfied with the aggressive application of U.S. antidumping and countervailing duty laws.[28] The chapter establishes procedures that allow a private party affected by an adverse antidumping or countervailing duty determination by a Party's trade regulatory agency to substitute binational panel review under NAFTA for a an appeal to a domestic court of law. It also allows private parties in NAFTA countries to appeal directly to a NAFTA panel, rather than having to request that a government pursue a remedy before the WTO.[29]

As of August 31, 2000, 66 panel reviews had been filed under Chapter Nineteen, by far the largest number of disputes resolved un-

[26] *Cf*. David Gantz, *supra* note 22 at p. 1103.

[27] *Cf*. David Lopez, "Dispute Resolution under NAFTA: Lessons from the Early Experience," 32 Tex. Int'l L.J. 163 (1997).

[28] Eric Pan, "Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication," 40 Harv. Int'l L.J., pp. 379, 382-384 (1999).

[29] *See* David Gantz, *supra* note 22 at p. 1045.

der NAFTA.[30] Of these, 36 reviews —over half the total number— involved U.S. agencies' determinations, from which 12 decisions have been issued.[31] 13 panel reviews involved Mexican agencies' determinations, from which 5 t decisions have been issued; and 18 panel reviews involved Canadian agencies' determinations, and these have resulted in 10 decisions.

Given the number of decisions that have been rendered to date, what is the early report card on the quality of the dispute settlement process, and on the efficiency of the process? According to one highly regarded expert (who has participated as a panelist in several Chapter Nineteen cases), trade officials in the United States have been distrustful of the Chapter Nineteen panel process, due to the partial reliance on foreign nationals who are not versed in U.S. law, and who are not as accountable for the results of their decisions.[32] Despite such fears, the record of dispute settlement under Chapter Nineteen appears to be a positive one. According to one of the most thorough studies of Chapter Nineteen decisions made to date,[33] NAFTA panels have performed admirably when compared with the U.S. courts that normally review decisions on unfair trade practices.[34] The same study concludes that panelists have judged cases in an apolitical fashion, and only in one case —Softwood Lumber— did panelists split along national lines.[35] Early prognosis that the use of *ad hoc* panels to decide Chapter Nineteen disputes would be temporary, and would lead to the formation of a permanent tribunal, has not been proven. Rather, "the Chapter 19 Binational Panel System should definitely be considered a success as a trade dispute mechanism".[36]

As with Chapter 20 Panels, Chapter Nineteen panel decisions are not subject to appellate review. However, under NAFTA Article

[30] These figures, and those following, are from NAFTA Secretariat Status Report of Active and Completed NAFTA Panels, August 31, 2000.

[31] Eight panel reviews of U.S. actions were withdrawn by request of participants.

[32] David Gantz, *supra* note 22 at pp. 1047-1048. Under NAFTA Annex 1901.2, NAFTA panelists are chosen from a roster of at least 75 experts, who must be citizens of a NAFTA country. Each Party appoints 25 experts to the roster.

[33] Eric Pan, *supra* note 29.

[34] *See id*. at p. 407.

[35] *Id*. at p. 441.

[36] *Id*. at p. 442.

1904.13 and Annex 1904.13, a Party can request the formation of an Extraordinary Challenge Committee to review any panel decision under Chapter Nineteen that involves gross misconduct or conflict of interest by a panel member, or where the panel manifestly exceeded its powers or jurisdiction, an extremely high standard of review. To date, only one extraordinary challenge procedure has been filed, involving Cement and Clinker from Mexico.[37] This may have as much to do with the high standard of review required to trigger action as it does with the satisfaction of trade officials with the performance of NAFTA panels.

3. NAFTA Chapter 11. Investment disputes

NAFTA Chapter 11 is evidence that NAFTA is much more than a free trade agreement, for it sets forth rule governing the sensitive issues of national treatment for foreign investors. For instance, in Article 1110, NAFTA sets forth rules regarding expropriation and compensation, subject that have been hotly contested in international law circles for more than a century. In addition, NAFTA Chapter 11 establishes procedures by which private investors may cause the formation of an arbitral panel to settle a dispute between the investor and a NAFTA Party arising out of an alleged breach of an obligation under Chapters 11 or 15 (involving state enterprises).

To date, approximately 10 disputes have been referred to panels under NAFTA Chapter 11. This number is uncertain, due to the secrecy surrounding the Chapter 11 process. NAFTA investment disputes may be submitted either to the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), including ICSID's Additional Facility, or to UNCITRAL. While ICSID maintains lists of cases pending and cases decided,[38] it is not required to maintain a list of all cases submitted to it, and several such cases referred to ICSID have been settled. At the present time, ICSID lists three cases in which panels have rendered decisions, all involving allegations of expropriation without compensation, due to changes

[37] ECC-00-1904-01USA.

[38] See www.worldbank.org/icsid/cases/cases.htm.

in environmental regulations covering waste treatment facilities.[39] UNCITRAL maintains no list of cases pending or decided, so it is unclear if any Chapter 11 cases have arisen under the UNCITRAL arbitration procedures.

In the first three decisions reported by ICSID, the results have been mixed. In the first case decided, Metalclad, the panel upheld the investor's charge of expropriation without compensation, and ordered the payment of damages. The investor was denied a recovery in the other two cases: in Robert Azinian for failure to prove a breach of NAFTA Chapter 11 provisions (annulment of a concession does not necessary involve expropriation); and in Waste Management for failure to effectively waive the investor's right to recourse in Mexican courts. The three decisions were unanimous, with the exception of Waste Management, in which one arbitrator, a citizen of the United States, wrote a long dissenting opinion.

Scholars are still trying to assess the early history of dispute settlement under Chapter 11. One scholar, an environmental advocate, is concerned about the large number of Chapter 11 cases alleging expropriation (NAFTA Article 1110) or unfair treatment (see NAFTA Article 1105) based on environmental regulation; he asserts that under principles of international law, environmental regulations should rarely, if ever, be held to constitute expropriation of property.[40] Even thought the decision has not yet been made public, the arbitral panel in the Metalclad case, which was decided August 30, 2000, appears to have found the actions by the state authority in Mexican to constitute indirect expropriation, awarding over 16 million dollars in damages to the investor.

The most important aspect of Chapter 11 dispute resolution, however, is that it exists at all, and appears to be functioning with reasonable justice and efficiency. The use of international arbitral tribunals to decide cases involving foreign investors can be seen as a radical

[39] Metalclad Corp. v. United Mexican States [Case No. ARB(AF)/97/1]; Robert Azinian and others v. United Mexican States [Case No. ARB(AF)/97/2]; and Waste Management, Inc. v. United Mexican States [Case No. ARB(AF)/98/2].

[40] J. Martin Wagner, "Nature Beyond the Nation State Symposium: International Investment, Expropriation and Environmental Protection", 29 Golden Gate U. L. Rev. 465 (1999).

departure from Mexico's adherence to the principles of the Calvo Clause, which is interpreted generally to signify that national tribunals are the courts of last resort in such cases. According to one scholar:

> Though Latin American countries, including Mexico, have moved progressively from the national-centered paradigm to that of the "minimum international standard" approach, chapter 11 of NAFTA is a turning point in this regard. Under NAFTA, Mexico is accepting ... that foreign arbitration could substitute for national tribunals in conflicts arising with foreign firms, including the case of expropriation...[41]

4. Conclusion: NAFTA dispute settlement

The early history of dispute settlement under NAFTA is positive. The process has worked with relative efficiency, and while there have been some delays in panel decisions, for the most part those delays have not been excessive, and in some instances the parties were complicit in the delays. The quality of the decisions made by panelists compares favorably with decisions of domestic tribunals and with the decisions of WTO panels.

In a formal sense, NAFTA panels do not create law, and they do not create binding interpretations. There is no "stare decisis" from NAFTA panel decisions. Indeed, Article 1136.1 states that "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case". There is no Appellate Body procedure to resolve conflicting rulings by NAFTA panels, as exist in the WTO; by and large, the NAFTA panel decisions are final. Does this mean that panels don't make law? I don't think so. It is apparent from reading the decisions that have been made public that NAFTA panelists consult both NAFTA and WTO panel reports, and panelists are probably influenced by such reports, especially to the extent they are well reasoned.

There are some problem areas in the dispute resolution system, however. Because of overlapping jurisdiction between NAFTA and WTO, a Party can use multiple filings in different forums for matters

[41] Isidro Morales, *supra* note 18 at p. 50.

that arise out of the same general area of dispute. Such a strategic use of multiple filings hardly seems in the best interests of the WTO and NAFTA trading systems.[42]

The Supplemental Agreements on Labor Cooperation and Environmental Cooperation include some elements of dispute resolution, involving allegations by one Party that another Party has shown a persistent pattern of failure to enforce either its labor laws or its environmental laws. Nevertheless, these Supplemental Agreements are largely "watchdog" agreements, and are not likely to generate a large number of disputes.[43] There have been no reported decisions to date under Chapters Fourteen and Sixteen, but one hopes that the procedures to be used for financial services and business travel will operate accordingly.

IV. Conclusion. A short list of NAFTA problem areas

Proponents of NAFTA can be justifiably pleased with the experience of the first seven years, and all but the most confirmed skeptics should be reassured that NAFTA has helped improve, rather than weaken, the economies of Canada, Mexico and the United States. It would be disingenuous to regard NAFTA as an unqualified success, however, and I would like to end this essay with some cautionary conclusions.

1. NAFTA'S LIMITED EFFECT ON FOREIGN DIRECT INVESTMENT

First, while trade has grown dramatically in the NAFTA region, NAFTA has not had as significant an impact in increasing foreign direct investment in the region. For instance, while the United States is by far the largest source of FDI to Mexico, the dollar amount of U.S. investment remains very small; in 1996 (admittedly, a difficult year to measure, due to the peso devaluations of 1994-1995), U.S. investment in Mexico amounted to only 0.2 percent of total new U.S. foreign investment that year. In 1997, the USTR concluded that

[42] *Cf.* Gantz, *supra* note 22 at pp. 1103-1104.

[43] To date, 22 submissions have been made by private citizens under the Labor side agreement, resulting in review by the NAALC and NAO of each country, and consultations.

NAFTA had only a minimal impact on aggregate U.S. investment to Mexico. U.S. FDI to Canada grew at significantly higher rates than those to Mexico.[44]

The total stock of total U.S. foreign direct investment (USFDI) in Mexico has not changed as appreciably as proponents of NAFTA on both sides of the border would have hoped. In 1995, at the outset of NAFTA, Mexico accounted for only 2 percent of the stock of U.S. FDI abroad.[45] In a recent study published by the U.S. Department of Commerce, the total stock of USFDI in Mexico was 34.3 billion dollars. This placed Mexico ninth on the list of countries with USFDI, slightly above Panama and Australia and just below Brazil. Considering that the total stock of USFDI is 1.13 billion dollars, this means that seven years after the entry into force of NAFTA, Mexico holds only 3 percent of total USFDI.[46]

The relatively small amount of U.S. investment may seem surprising at first, since a visitor to Mexico will usually take note of high-profile U.S. products, from automobiles to appliances to computers. Nevertheless, this investment appears to be localized in a relatively small number of industries, and among a small number of companies. Recent increases in USFDI in Mexico are due mostly to reinvested earnings of companies already doing business there, rather than in investment by new companies in new areas.[47] Mexico is still a relatively small economy, compared to the Canadian and U.S. economies, so the amount of U.S. and Canadian investment can be appreciable in Mexico without seeming large in comparison with other trading partners of the United States. It thus appears that the "giant sucking sound" that former Presidential candidate Ross Perot predicted —the migration of factories to Mexico— has not occurred.

These preliminary conclusions about NAFTA's limited effect to date on foreign investment must be qualified, however. I have not

[44] *See* USTR Study on NAFTA, *supra* note 1 at p. 23.

[45] *See* USTR Study on NAFTA, *supra* note 1 at pp. 23-24.

[46] Sylvia E. Bargas, "Direct Investment Positions for 1999: Country and Industry Detail", U.S. Department of Commerce, July 2000 Survey of Current Business, at Table 3.2 (www.bea.doc.gov/bea/ai/0700dip/table3-2.htm).

[47] *See* Bargas, *supra* note 45 at p. 6: "In Mexico, the increase mostly reflected the reinvested earnings of affiliates in several industries".

attempted to analyze the quality of new foreign investment, to try to determine if the new investments that are occurring add more productivity to the economy than before. This seems doubtful, however, given the large role that maquiladoras play in USFDI. Furthermore, I have not attempted to determine whether foreign direct investment from non-NAFTA countries has increased as a result of NAFTA. After all, to benefit from NAFTA's reduced tariffs, a manufacturer does not have to be beneficially owned by Mexicans, Canadians or U.S. interests. So long as the rules of origin are met, a "Mexican" company does not have to be owned by U.S., Mexican or Canadian citizens. At least some increase in Mexican investments must surely have come from European, Japanese, Korean investors who wish to capitalize on the large North American market, and can use Mexican labor, foreign technology, and NAFTA materials to produce goods and services in Mexico. The question remains how significant this has been.

I should also note that Mexican investment in the United States is miniscule, less than six-tenths of one percent of total FDI in the United States, and the stock of Mexican foreign investment in the United States actually appears to have declined since NAFTA came into effect.[48]

If Mexico is to compete in a global economy, it will probably have to do more to attract foreign investment, and the technology that comes with it, to take real advantage of NAFTA. It would be beneficial if that investment and technology could be spread to new industries, to make labor more productive in many sectors of society. Increasing U.S. and Canadian FDI and spreading that investment to new areas would bring considerable benefits to Mexico, assuming the investors operate with due respect for Mexican law and with a sense of long-term commitment to the investments.

2. NAFTA DOES NOT BENEFIT MEXICANS EQUALLY, THERE ARE WINNERS AND LOSERS

One of the main conclusions of the recent study by the Mexican Senate on the effects of NAFTA is that growth in trade under NAFTA

[48] USTR Study on NAFTA, *supra* note 1 at p. 25.

has only benefitted certain companies and certain industries. Small and medium-sized companies have largely been left out of NAFTA's benefits, as have certain regions and sectors. Most of the dramatic growth in international trade has been in the area of intra-firm transactions;[49] from 1994 to 1997, only 300 Mexican companies accounted for 55 percent of all exports, and 40 percent of exports were due to maquiladora operations, which continue to thrive in Mexico.[50] Industrial growth has been been drawn to the northern border and to the maquiladora industry, while causing "disindustrialization" and bankruptcies in other industries and areas.[51]

Mexico can reasonably question whether maquiladora growth —which involves only limited integration with the Mexican economy— is in the best interests of the country. Instead, Mexico will have to try to look for other ways to promote foreign investment, as it now appears to be doing in sectors such as electrical energy.

3. NAFTA AND THE LACK OF TRANSPARENCY

The final cautionary note regarding NAFTA has to do with a lack of transparency in the administration of NAFTA. For example, dispute proceedings under NAFTA Chapters Eleven and Twenty are conducted not only in private, but under a cloud of secrecy; not even the final decisions must be made public, although they often are released. Chapter Nineteen hearings are public, but are similarly cloaked in secrecy.[52] This reflects the traditional approach in international trade disputes, thus, even though the WTO's Dispute Settlement Understanding does not require secret proceedings, this has been the practice to date.[53]

In the post-Seattle era —that is, following the dramatic protests in Seattle, Washington, during the 2000 WTO Summit held in that city— the Free Trade Commission should consider taking steps to increase

[49] *See* Análisis del Senado, *supra* note 2, vol. I, pp. 29-31.
[50] *Id*. at vol. I, p. 60.
[51] *Id*. at vol. I, p. 549.
[52] *See* David Gantz, *supra* note 22 at pp. 1042-1043.
[53] *Id*. at p. 1052.

information surrounding all aspects of NAFTA. The web site of the NAFTA Secretariat should be developed much more fully, as a source of information for the public. There is no repository of final panel decisions in NAFTA disputes, and little public information on final outcomes of matters that do not reach a final decision. More light could be shed, and more public confidence gained, by opening NAFTA's processes —including the dispute settlement processes— to public scrutiny.

⊙ Índice General
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