NAFTA, THE ENVIRONMENT, AND MEXICO: THE CHALLENGE AND THE OPPORTUNITY FOR CHANGE FROM NEW INTERNATIONAL INSTITUTIONS*

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We are here this evening to celebrate the 30th anniversary of the faculty of law at the Universidad Panamericana. The idea of "panamerica" is an old and enduring dream. Next April, the heads of state of all the nations in the Western hemisphere will assemble for another Summit of the Americas, this one in Quebec. They will continue to move forward on the ambitious project to create a panamerican trade zone—the Free Trade Area of the Americas.

Mexico, sharing as it does the Spanish heritage of most countries in the hemisphere, has long celebrated and advocated panamericanism. Yet as we gather here near the end of the 20th century, I think you will agree that the dominant reality of Mexico today is its place in the ascendant North America—three nations that, notwithstanding their distinct identities, share a vitality, a dynamism, unmatched in any other region of the world.

This trinational North America is bound by many ties that grow stronger with time. The meeting of the three foreign ministers in Santa Fe, New Mexico, this past August marked a recognition of mutual interdependence, shared policy concerns, and the opportunities for cooperation and collaboration within North America and in our region's relations with the rest of the world. Each country brings to this endeavor its own perspective and its unique national interests, but the common agenda grows.

In my remarks tonight, I will address just one aspect of the North American enterprise: the protection of our environment. During the time that the North American Free Trade Agreement (NAFTA) was negotiated, there were in each country important elements of society and political leadership that advocated the need to manage the envi-

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ronmental effects of the new trade relationship. Some of those issues were addressed directly in the TLC itself, but other aspects of environmental protection were beyond the scope of the trade negotiations, and had to be confronted directly as matters of environmental policy. I was fortunate to participate in the historic first meeting of the three environmental ministers of our countries in September, 1992. The most important consequence of that meeting was the commitment to create new institutions and procedures to address environmental concerns. Within a year, the three countries had agreed to create the North American Commission for Environmental Cooperation—the Comisión para Cooperación Ambiental, or CCA.

The thesis of my talk tonight is that the NAFTA and the CCA have presented Mexico with serious international challenges to its national environmental policies, but that those challenges in fact have created opportunities for constructive change. One natural reaction to international challenges, expressed occasionally even by SEMARNAP Secretary Julia Carabias herself, is to protest foreign interference and reassert Mexican sovereignity over its own affairs. I will present the opposite argument: that these challenges have been appropriate manifestations of the interest of other nations in Mexico's environmental quality and that they have benefited Mexico and strengthened its own control over environmental policy. I base my opinion on two propositions:

1. All citizens of North America have a legitimate interest in the environmental policies and practices of all three countries. We share common and connected ecosystems and are affected by environmental conditions throughout the continent. We have mutual and reciprocal obligations to protect the environment.
2. The call for Mexican environmental policy to respond to international challenges and to adhere to international norms and procedures improves the protection of the environment in Mexico, and reinforces important elements of Mexico's autonomous legal, political, social, and economic reform and development.

Three examples from the experience with the NAFTA and the CCA will demonstrate these points. Each example involves a different provision of the trade agreement or the environmental side agreement.

My first example is the matter of the death 20,000 to 40,000 ducks and other birds at the Silva Reservoir in Guanajuato in the winter of 1994-1995. Immediately there was a suspicion that the birds had died because of pollution, including untreated toxic chemicals in waste water from local tanneries. Wanting to be sure that the problem would be studied and corrective steps taken, and not trusting Mexican officials to conduct a through and reliable investigation, two Mexican civic organizations, the Grupo de los Cien and the Centro Mexicano de Derecho Ambiental, in cooperation with an American environmental group, wrote a letter to the CCA requesting the CCA to make a report on the bird mortality under the authority of Article 13 of the environmental side agreement.

The outcome of this initiative and the involvement of the CCA is truly remarkable and encouraging for environmental protection and sustainable development. The CCA assembled a tri-national team of experts who investigated the cause of the death of the birds and the environmental conditions of the reservoir. Their study concluded that the principal cause of the deaths was disease among the birds, but the experts also concluded that the pollution of the reservoir may have made the birds more susceptible to disease. What followed from this study is a range of cooperative activities involving everyone from local citizens to officials of the State of Guanajuato to Canadian experts in environmental management. All kinds of measures to improve the environment of the Silva Reservoir and the surrounding region have been taken, including reductions in pollution from tanneries, changes in the use of pesticides and fertilizers by farmers, removal and containment of contaminated materials from the reservoir, and the creation of ecological protection zones. I cannot do better than to quote from a recent CCA report on these activities:

> The actions described above represent a local chapter in protecting the shared natural resources of North America—in this case the migratory birds that require sustained support in order to guarantee their survival. The project also demonstrates what can be achieved by strengthening local management capacity and making use of local resources and organizations. The work undertaken in the wake of this waterfowl die-off shows that, through international cooperation, public participation, the commitment of business, and the vision of local government and the CCA joining forces, it is possible to

transform an environmental problem into an opportunity for local community development.

Let me emphasize three lessons for Mexico from this experience.

1. Citizen organizations, both in Mexico and in other countries, serve a vital function in bringing environmental problems to public attention and in promoting response from government and from the society at large. And the access of these citizens to an international organization allowed them to channel their influence in the most effective and constructive direction.
2. Outside intervention is not foreign meddling, but useful assistance. Independent analysis of environmental problems through an international organization helped Mexico identify and evaluate the sources of environmental harm and pointed the way toward solutions.
3. The solutions would not have worked without the active participation and support of local citizens, ejidos and other local institutions, and state government agencies. The involvement of the CCA and Canadian experts created a politically neutral context of expert assistance in which these local groups could organize, convene, and cooperate.

My second example is the case of the controversial cruise ship pier planned for the island of Cozumel. This project has a long history, going back to approximately 1989. At the end of 1990, SEDUE granted permission to build the pier if the company complied with 64 conditions. Thereafter various delays and obstacles to the overall project scheme caused the company to seek, and be granted, a number of extensions to its construction permit. In January, 1996, three Mexican citizen organizations made a submission to the CCA under the provisions of Article 14 of the environmental agreement. The citizen submitters claimed that the Mexican government had failed to enforce certain provisions of the General Law of Ecological Equilibrium and Environmental Protection, especially the requirement for an assessment of the environmental impacts of the entire project.

Article 14 allows any citizen or organization in North America to submit to the CCA a claim that a government is failing to enforce its own environmental laws. Under Article 14, if the CCA determines that the submission meets certain basic requirements, the CCA will request a response from the government to the submitters' claims. Based on the submission and the response, the CCA then determines if the matter merits further investigation. If so, the CCA secretariat recommends to the Council of Ministers that the secretariat prepare a "factual record" of the situation. The Council then decides if such a factual record should be prepared.

The Mexican government made two kinds of responses to the citizen submission. First, it tried to avoid any inquiry by the CCA. It argued that the government actions took place before the effective date of the environmental side agreement, that the citizen submitters did not properly identify their organizations, and that they had failed to pursue remedies available to them under Mexican law. Second, the government responded to the merits of the claim that the issues were within the discretion of the government, and that the government had properly applied Mexican law.

The CCA secretariat nevertheless recommended a factual investigation. Although Secretary Carabias was very much opposed to this outside examination of the decisions made by her agency, this was the first case under Article 14 in which a factual investigation was being recommended and there was international controversy about the pier project. In light of the whole situation, she ultimately joined the other two environmental ministers in a unanimous Council decision to approve the preparation of the factual record. The factual record was completed at the end of 1997, and the Council agreed to release the report to the public.

Although the factual record reaches no legal conclusions, the facts that it reports tend to substantiate the claims by the environmental groups that SEDUE and SEMARNAP had not properly applied the environmental impact assessment requirements to the pier project. In interviews with Mexican newspapers, Secretary Carabias criticized the whole process as an improper interference by an international organization in sovereign decisions of the Mexican government. It appears, indeed, that the investigation by the CCA did serve

to heighten the degree of scrutiny about this pier project, within Mexico as well as in the international community, and caused further delays and modifications in the project.

Here again, I think that even though the CCA intervention was unwelcome by many people in Mexico, it served several beneficial purposes.

1. The Article 14 procedure allows citizens access to a remedy where effective remedies may not be available under national law for legal and political reasons. An international committee that reviewed the work of the CCA a couple of years ago observed that Article 14 "provides some 350 million pairs of eyes to alert the Council [of ministers] of any 'race to the bottom' through lax environmental enforcement. ... This process 'belongs' not to the Secretariat but to the citizens at large, for whose ultimate benefit it is intended".
2. An international body like the CCA, simply by reporting the facts based on its own investigation, helps to assure that government officials are held accountable to the public—not only the public in their own country, but the citizens of North America as a whole—for their actions in managing resources and protecting the environment.
3. The availability of international review of national decisions helps strengthen adherence to regular procedures, open decision making, public participation, and the rule of law by government officials at all levels of government.

My third example is a decision of international arbitrators under a provision of the TLC itself. Chapter 11 of the TLC sets rules among the three countries about the treatment of foreign investments. Basically, Chapter 11 require each government to assure that foreign investors are treated the same as investors of its own nations that they receive "fair and equitable" treatment in terms of regulations and legal procedures, and that foreign investments are not expropriated or severely restricted in ways that are equivalent to expropriation without compensation. Foreign investors who think that they have been unfairly treated contrary to these guarantees can bring a claim

against the government that will then be decided by an international arbitration panel.

In August, 2000, the panel of arbitrators in the case of Metalclad v. Mexico announced their final "award". Metalclad, a U.S. company, had purchased a Mexican waste management company that owned a waste transfer facility near the municipality of Guadalcalzar in San Luis Potosi. With the encouragement of Mexican environmental officials at the federal level, and after receiving all the appropriate environmental permits for construction and, ultimately, operation of a much-needed hazardous waste disposal facility, Metalclad developed the site into a modern hazardous waste management site. But for motives that can't be stated with certainty, local officials in Guadalcalzar and the governor of San Luis Potosi decided to oppose this project. After the facility was built, and without any notice to Metalclad, the municipal authorities in Guadalcalzar voted to deny Metalclad a local construction permit. The governor of San Luis Potosi then officially decreed that the area around and including the facility was a nature reserve for the protection of certain rare varieties of cactus.

The arbitrators decided that Metalclad had not received "fair and equitable" treatment. Mexican officials at the federal and local levels never made clear what legal rules applied to the facility, and indeed expressed contradictory views about that. The local government acted without proper notice to Metalclad or giving it an opportunity to be heard. The result was that Metalclad was not going to be allowed to operate its disposal site, which amounted to an expropriation. The governor's ecological decree made it all the more certain that the effect on Metalclad was equivalent to an expropriation of its investment. The arbitrators ordered Mexico to compensate Metalclad in the amount of $16.7 million for its investment in buying the business and constructing the waste disposal facility.

Some, including Mexican government officials, would insist that Metalclad or any other company is obligated to follow all local, state, and federal environmental requirements, and that Mexico should not be required to compensate a company that failed to secure all the necessary permits. But the facts in this case suggest to me that this is not a case of environmental regulation. After all, Metalclad had obtained and complied with all federal environmental permits and con-

ditions, even cleaning up waste left on the site by the previous owner. And Metalclad was helping Mexico meet a real need for locally-available modern hazardous waste disposal capacity. It appears that this was a case of opposition by local citizens to an officially-approved project, and perhaps a political and jurisdictional battle between the state governor and federal officials. From this perspective, the award of compensation seems fair.

The important lesson from the Metalclad decision is that Mexico faces the challenge of improving its public administration of environmental regulation in several respects. First, it needs to have clearer and more transparent rules and regulations, so that regulated businesses know which governments have jurisdiction and what the standards of performance are. Second, public authorities need to do a better job of assuring procedural fairness. Environmental protection decisions should be made in the open, with rights of public participation and regular procedures. If these steps are taken, then businesses in Mexico, whether Mexican-owned or foreign-owned, can take the necessary steps to protect the environment, free from politically-motivated decisions or corrupt influences. For the sake of Mexico's environment, such assurances for investors will help promote both foreign and domestic investment in vital environmental services like waste disposal, sewage treatment, and public water supply.

Winds of change are blowing strongly in Mexico these days. President-elect Fox was the governor of Guanajuato when the state government and local communities and businesses began the process of cleaning up the many sources of environmental contamination of the Silva Reservoir region. I am hopeful, therefore, that the new administration taking office in Mexico recognizes the legitimacy of international processes, typically initiated by Mexican citizens, using the mechanisms of the environmental side agreement to the NAFTA. Surely the president-elect recognizes the value of the expertise and other resources available from all three countries through the work of the CCA in catalyzing the local community and business responses that are absolutely vital in Mexico-and throughout the world—if we are to achieve sustainable development. Living up to international standards and expectations is a challenge for Mexico, but it is a tremendous opportunity as well.