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This is a Research Paper written December 7, 2004 by Nathaniel Cooper while at the University of Baltimore, Baltimore, Maryland for a masters Degree in Legal and Ethical Studies. The Legislative Process (LEST 1352). Revised in 2009 to tell why I am running for the United State Senate for North Carolina. The Economy 101, World Class Education for our Children, Veterans, Our Senior Citizens and NAFTA (Chapter Eleven)

Title: Facts about the North Atlantic Free Trade Agreement (NAFTA) noted in 2004

“North American economic integration began in earnest when Canada and the United States concluded a broad free trade agreement in 1989. Without intending to do so, the Canada – United State Free Trade Agreement (CFTA) laid the foundation for the North Atlantic Free Trade Agreement (NAFTA). NAFTA did not repeal the CFTA. The CFTA agreement continues to govern selected areas of trade (as specified in NAFTA).” The CFTA have incorporated in it conditions subsequent, which is that if either nation withdrew from, or if NAFTA fails CFTA would continue to be binding on the two nations. Ralph H. Folsom, NAFTA in a Nutshell, University of San Diego, (1999): p.18

The first NAFTA case involves an option to purchase a track of land in the city of Boston, Massachusetts, resulting in the case of *Mondev Corporation of Canada v. NAFTA*. This law suit challenges the concept of sovereign immunity. While another case in Mississippi, O’keefe, et al, challenges the rules of civil procedure at the state and local court level.

For the sake of clarity and understanding of these facts the following three paragraphs are direct quotes: “ NAFTA’s groundbreaking investment chapter, which granted expansive new rights and privileges for foreign investors operating in the three NAFTA signatory nations: the United States, Canada and Mexico. It is often said that NAFTA was more of an investment agreement than a trade agreement. Now NAFTA’s investor privileges and protections are at the core of the proposed FTAA. NAFTA’s investor protections are unprecedented in a multilateral trading agreement. Since the agreement’s enactment,

corporate investors in all three NAFTA countries have used these new rights to challenge a variety of national, state and local environmental and public health policies, domestic judicial decisions, a federal procurement law and even a government provision of a parcel delivery service as NAFTA violations.

While most of these cases are still pending, some corporations have already succeeded with these challenges. NAFTA also provides foreign investors the ability to privately enforce their new investor rights. Called “investor-to-state” dispute resolution, this extraordinary mechanism empowers private investors and corporations to sue NAFTA-signatory governments in special tribunals to obtain cash compensation for government policies or actions that the investor believe violate their new rights under NAFTA. These “new rights trump all national rights of the signatory countries. If a corporation wins its case, it can be awarded unlimited amounts of taxpayer dollars directly from the treasury of the offending nation even though it has gone around in secrecy around the country’s domestic court system and domestic laws to obtain such an award.

Supporters of NAFTA claimed that these extensive investor’s protections and their private enforcement mechanism were necessary to protect investors from sale and seizure of private property (i.e. nationalization). “Mexico, which nationalized its foreign oil refineries in 1938, was the prime target of these concerns.”

[http://www. Citizen.org/publications/release.cfm?ID=7076](http://www.Citizen.org/publications/release.cfm?ID=7076) p. 1.

The majority of the investor-to-state cases filed to date have had little to do with the seizure of property as NAFTA supporter feared. Instead, the cases challenge environmental laws, regulations and government decisions at the national, state and local level. The impact of NAFTA on Canada during the first seven years of NAFTA was \$11 billion dollars made

against the Canadian taxpayers, \$1.8 billion against the American taxpayers and \$294 million against Mexican taxpayers for a total of \$ 13 billion in claims filed by corporations against the three member nations. There are plans in the pipe that will change the name of NAFTA to the “Trade Promotion Authority” and let 31 Latin American and Caribbean nations join by 2005.

DISCUSSION:

Mediation is defined as a voluntarily accepted form of dispute settlement without litigation, but, enforceable by the court on a national basis and by a tribunal on an international basis once parties have voluntarily and mutually agreed on a settlement of a dispute. This definition is key to understanding the power of NAFTA and its secret tribunal powers.

In presenting this paper I will present facts dealing with international tribunals, and the international environment. These facts will show the complexities of communication, interpreting agreements, statutes and regulations written by someone else and how ambiguity and other tactical strategies incorporated in the process are skillfully used by an international tribunal for the benefit of foreign corporations operating in the United States, but to the disadvantage of American corporations operating in their own country.

During mediation when parties mutually agree, and arrive at a voluntary settlement agreement of a dispute, the agreement is binding and enforceable under international law. In mediation there is no prevailing or adversarial party and it could be a win – win situation for both parties and its good diplomacy. The cost of mediation is usually paid by the tribunal or the court. The voluntary dialogue does eliminate misunderstanding and ensure that there are

meeting of the minds by both sides on issues. This concept is tantamount to good political, economic and diplomatic relations.

The art of written or verbal communication between parties from an international perspective is difficult because of many reasons. Some of these reasons are geographical, institutional, interpretational, and understanding of word meaning and use by parties. Decoding verbal and written communication is driven by respective societal norms, mores and value systems. A solution to minimize this problem is mandatory mediation by parties instead of arbitration or a court verdict.

The other side of this issue is that ambiguity is sometimes intentional. Disguised intentional ambiguity is a business practice that allows for penalizing errors in business judgment in order that one side profit at the expense of the other side.

The American jurisprudence system is an adversarial jurisprudence. This is the essence of a capitalist society from a dispute resolution norm in America. Therefore, errors in business judgment is what makes the capitalist system work. Mediation could be the tool that soften the pure capitalist concept, and make it more acceptable globally. However, business ethics must be an integral part of the process.

Article one, Section 9; of the United State Constitution clearly established that “No money shall be drawn from the Treasury, but in ‘Consequence of Appropriations made by Law’ Congress has, throughout American history, attempted to build a structure of power on this foundation. The net results often has been dissatisfaction and anxiety over control of

expenditures. Policies difficult to control by law may be equally difficult to control through appropriations.” William J. Keefe, Morris S. Qgul, The American Legislative Process; Congress and the States: p. 441.

These cases are decided by international tribunals under international law, trumping national law. The Canadian’s is now arguing a violation of national sovereignty and eminent domain authority. The fact is American jurisprudence support the Canadian’s argument. *In the recent case of Southern Illinois Development Authority v. National City Environmental, L.L.C.* Supreme Court of Illinois 2002,199 Ill.2nd 225, 263 Ill Dec. 241. 768 N.E.2nd 1. Declared “Before the right of eminent domain may be exercised, the law, beyond a doubt, requires that the use for which is taken shall be public as distinguished from a private use.” W. Bruce and James W. Wly, Jr., Case and Materials on Modern Property Law.5th edition, (2003): p. 702.

“While most cases are still pending, some corporations have already succeeded with these challenges. If a corporation wins its case, it will be awarded unlimited amounts of taxpayer dollars direct from the treasury of the offending nation even though it has gone around the country’s domestic court system and domestic laws to obtain such an award.”

While the majority of these cases so far had very little seizure of property. “Instead, these case challenges environmental laws, regulations and government decisions at the national, state and local level. “<http://www.citizen.org/publications/release.cfm?ID=7076> p. 1. “Foreign corporations have taken two lawsuits they lost in the U.S. domestic courts to be reheard in the NAFTA investor-to-state system. One challenges the concept of sovereign

immunity, regarding contract disputes in the city of Boston Massachusetts and the other challenges the rule of civil procedures, the jury system and a damage award in a Mississippi state court. IBID., 2.

Some Republican and Democratic members of Congress, alike, who voted for NAFTA, now say that these cases have been unexpected and unwelcome results of the agreement. This appears to be a case of intentionally writing bad law or not paying attention to what their staffers wrote into law. Or is this an example of intentional ambiguity with a future concealed agenda? A Congressional Quarterly Weekly Report quoted a staff writer speaking with a senator on line item veto. "I had a senator this afternoon tell me he's going to vote for this the item veto bill. He doesn't believe in it, he thinks it going to a tragedy if it ever occurred.... [I'm counting on the Supreme Court to save us from ourselves]." Quoted in the *Congressional Quarterly Weekly Report*, March 20, 1996, p.865.

How ridiculous and irresponsible is this? However, when one speak of legislative intent it is said that "The [Supreme] Court no doubt must listen to the voice of Congress. But often Congress can not be heard clearly because its speech is muffled. Even when it has spoken....what is said the listener hears... one listens with what is already in one's head. William J. Keefe, Morris S. Qgul, The American Legislative Process; p.468.

Many of these then government employees (congressional staffers) who drafted the NAFTA agreement are now on the other side of this equation. They are former government practicing attorneys, now with private law firms representing these corporations both foreign and domestic. They are now taking these cases to tribunals in secrecy, bypassing the U.S. court system because they know what results they can get. This is hypocrisy at it best, but is legal under NAFTA. It has the smell of unethical practices and covert scheme incorporated in

the drafting stage of NAFTA for the government, with devious hidden motives to ensure themselves of future personal monetary gains at taxpayer's expense.

The string of cases analyzed in this report show how these NAFTA rules are being used by foreign investors to demand payment for any government action that impacts the value of an investor's property. Yet such a notion of 'regulatory taking' does not exist for U.S. citizen or companies because it has been rejected by congress and the courts.

<http://www.citizen.org/publications/release.cfm?ID=7076> 3.

Another down side of this agreement is that U.S. corporations or companies in the U.S. are still obligated to comply with U.S. statutes and U.S. court decisions. While foreign national corporations or companies operating in the United States can bypass the U.S. court system completely. They opt for a settlement from an international tribunal consisting of three members and this tribunal may not include an American citizen. These tribunals applying strictly international law can make awards directly from the U.S. Treasury for payment to foreign corporations without the knowledge or consent of the American people based strictly on the way the NAFTA agreement is written.

The bottom line is that NAFTA cases give foreign national corporations greater rights and remedies operating in the United States than are given U. S. corporations here in America. There was no new United States dispute settlement machinery created when NAFTA was written to settle disputes. "NAFTA instead relied on two already existing dispute resolution systems, one operating under the auspices of the World Bank and the other operating under the auspices of the United Nations" Ibid.,p4. This is one of the primary reasons for job outsourcing from America.

While it is true that under NAFTA, a panel cannot directly resend a law, and it is the federal government that is technically liable for any damages, federal governments currently have a variety of avenues under domestic law to bend state and local governments to their will. For example federal governments can withhold funds from state and local governments hostage until the offending measure is rescinded, or until the locality agrees to contribute to the damage award.” I bid., p.6. This is key to understanding the impact of the NAFTA agreement.

A clarification relating to NAFTA Chapter 11 was issued by the Free Trade Commission, consisting of three NAFTA country trade ministers on the issue of interpretations of NAFTA rules if agreed to by consensus. There were two issues of clarification, one dealing with building criticism of the close door tribunal hearings and the other an attempt at clarification of misunderstandings pertaining to “minimum standards” of treatment under Article 1105 by certain NAFTA rights and protections to those afforded by customary international law. “Unfortunately, the language in the trade ministers agreement conflicts with the plain language of NATFA and does not define what is encompassed in the rubric of ‘customary’ law.” Ibid., p.9. This action resulted in key players not knowing what body of law is included yielding an extremely vague and open-end standard that may be used to challenge efforts to protect the environment and the public interest.

Experience with discourse, and especially globally, language bearer on many occasions is a real issue. While serving as the finance Class A Agent Officer for Joint Services Operations Reforger in Belgium, Germany, Luxemburg and the Netherlands, with only foreign nationals armed escorts while procuring and transporting funds to support the Operation, because of certain international status-of-forces agreement on weapons and ammunitions possession and

use. This kind of dependency and interaction between foreign nations to accomplish an international mission is based on mutual trust, precise understanding of language and respect. My point is that interdependency and trust is reciprocal among nations, and if you violate that trust and interdependency when it advantageous to one nation to the detriment of another knowingly, it could and most likely will come back to haunt the first violator of trust, resulting in unnecessary conflict.

Another example was my experience of attending an Instructor Training Class with all foreign national commissioned officers. The only other American in the class was the instructor. It was intriguing and very interesting to observe how these foreigners some struggled to decode what was being said, and the number of clarification questions, they repeatedly asked questions to ensure they were correctly decoding what was being communicated. It appears that this did not happen in the drafting of NAFTA.

A final example was my supervising and working with a totally foreign national Commercial Account Section with only one other low grade American in the section. Some contracts were written in English, German, French and Dutch. I was very successful in this job and developed a real appreciation for the necessity of accuracy and complete understanding of words and meanings from a diverse perspective. From an international perspective the art of ensuring that we were interpreting and meaning the same thing with each word used in contract agreement and compliance is sometimes extremely difficult, but, is an absolute must at times or all is lost. It is all about establishing trust, goodwill and diplomacy on a reciprocal basis.

The NAFTA results thus far appear to be a critical pain staking part of what misunderstanding is about in this case. Under the surface the real objective appears to be a

Contest to see who can out fox the other for profit motives, and personal gains on an international or global basis. It is all about the doctrine of the survival of the fittest.

The United States is immune from law suit under its sovereign immunity clause of the U.S. Constitution except to the extent it consents to be sued. This is the same argument Canada makes. But in the NAFTA agreement both nations have consented to the authority of the tribunals. Remember the Senator's quote, "I'm counting on the Supreme Court to save us from ourselves." Quoted in the *Congressional Quarterly Weekly Report*, March 20, 1996, p.865. the court can not imply a waiver of sovereign immunity; congress must unequivocally express it. The underlying premises is that if the United States Government under its national supremacy clause does not grant U.S. corporations certain rights and privileges while operating in the United States. Can a three person NAFTA tribunal grant foreign corporations operating in the United States these same rights and privileges denied United State corporations by the United States Government. NAFTA as currently written says yes.

The United States Constitution sovereign immunity clause, the supremacy clause, the commerce clause, the federal judiciary, the state constitution, state legislature, the state and local judiciaries of both the state of Massachusetts and Mississippi are challenged to make a determination of whether all of these authorities are preempted or subordinate to tribunal authority by NAFTA. The way the NAFTA agreement is written they are.

If chapter 11 of the NAFTA contractual agreement and its tribunal authority trumps all of the above, it would be a great infringement on a substratum principle of more than a century of American Common Law jurisprudence to be altered by an administrative arm of NAFTA. This means an administrative arm of NAFTA can ignore the laws of the United States and

give greater rights, remedies, and protection to foreign corporations operating in the U.S., than are given U.S. corporations and companies operating here in their own country. This also means that where a foreign corporation has lost a lawsuit in the United States domestic court it can take the same case to an international tribunal to be reheard in NAFTA investor-to-state tribunal.

While most of these cases, at the writing of this paper in December 2004, are still pending some have succeeded with their appeals to NAFTA tribunals.

The essence of a capitalistic system is that an entrepreneur (corporation, business or individual) be able to go out into the marketplace and catch some other entrepreneur out there making an error in business judgment and you devour he or she. Drive them one out of business for their error in business judgment, let the competitors buy up his assets and expand their businesses and the system continues to work with little or no turbulence for the consumers.

America transferred its manufacturing technologies out to a non-NAFTA country (China), (once you transfer out your technology you can not get that technology back). Outsource American manufacturing jobs to China, India and other developing countries. And at the same time import workers on a large scale from the 31 South American countries including the Caribbean countries to America is a formula for disaster as America has now confirmed.

Finally, with respect to some of the congressional staffer that wrote the NAFTA Agreement have left the federal sector and are now working for the foreign and U.S. corporations. Is this hypocrisy, a lack of-loyalty-to-country, insincerity, two-facedness,

and a violation of the oath they took when they were employed by the federal government or what?

How do you begin to correct this? Cancel chapter eleven of NAFTA, or possibly the whole NAFTA Agreement, and create a new manufacturing and high tech technologies in America.

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