

-NAFTA Need Fixing? It Sure Does!- Prime Minister Martin market tests amending NAFTA before top U.S. media executives

By Howard Mann

Prime Minister Paul Martin ventured Wednesday into potentially hostile territory, proclaiming what many feel is an obvious statement: NAFTA needs fixing. He's right.

That NAFTA needs fixing should not be a surprise: it was the most complex trade agreement in its day, and is now over ten years old. We have learned some lessons since its birth.

Mr. Martin focused on the need for a truly effective dispute settlement process. The issue is narrow, but important for securing a better functioning market. It is a prerequisite for buffeting U.S. protectionism against Canada, and other countries in similar WTO mechanisms. So, calling to fix the current "dispute non-settlement" system is warranted. But is it sufficient?

The Canadian government is already seeking public input on changes to NAFTA's "rules of origin". These are the controversial rules that limit free trade under NAFTA to goods that meet specific minimum domestic content thresholds.

Another concern is the need to fix NAFTA's Chapter 11 obligations on the protection of foreign investments. These rules have spawned over thirty international arbitrations since 1997 between investors and one of the NAFTA states using the special "investor-state" arbitration process reserved for foreign investors. About one third of these arbitrations have had a direct or indirect

environmental aspect; others are tied to human health.

The reason for this is twofold. First, NAFTA provides a set of rules just for foreign investors. Ostensibly designed to protect foreign investors from discrimination, the rules have been interpreted in an increasingly broad way by the Tribunals the investors have created. Today, several of the provisions have no clearly identifiable scope.

Example one: In 2001, the NAFTA governments sought to limit the interpretation of the provision mandating "minimum international standards of treatment" to standards that exist in what is known as "customary international law." Since then, arbitrators have been tripping over themselves to expand the content of customary international law in response, in order to make it "robust" in the language of one decision.

Example two: The rules against expropriation continue to deliver diverging and irreconcilable decisions on whether regulations designed to protect the environment and public health can be defined as expropriations of investors' property or assets. The uncertainty is so clear that in its new agreements dealing with international investment, the U.S. includes specific limitations on the scope

The Canadian government is already seeking public input on changes to NAFTA's "rules of origin". These are the controversial rules that limit free trade under NAFTA to goods that meet specific minimum domestic content thresholds.

of the expropriation rules, limits they argue should be understood as included in the NAFTA rules.

But even here, the U.S. view is quirky. In a recent NAFTA hearing, they argued that regulations to protect public health were not expropriatory, but refused to argue the same for measures to protect the environment. This leaves a critical governmental function open to increasing challenge.

Canada too, in its new model agreement on international investment rules, seeks to constrain the scope of the expropriation rules. But NAFTA remains unchanged.

And it's not just the rules. NAFTA's once-secretive investor-state process has experienced a number of changes that have made it the most transparent such process in the world. In fact, Paul Martin helped make it so during the election campaign of 2000 when, as Finance Minister, he supported the intervention of amicus curiae, NGOs as "friends of the court." Unfortunately, though, four years later the rules to ensure transparent proceedings are still not enshrined.

It is also time to rethink the process for appointing arbitrators in these cases in the first place. For example, lawyers sit one day as a judging arbitrator and they or their partners can sit the next day arguing another case on similar points of law. Do we allow judges in domestic courts to be practising lawyers? Of course not. This obvious conflict of interest at the international level is justifiable only by reference to history, not by the current realities of the investor-state process.

Getting stewardship of the continental economy right is just half the battle. As Mr. Martin said in his speech, we also have to get stewardship of the environment right. We cannot do so if the special rules for foreign investors inhibit that process.

We also cannot get stewardship of the environment right until we understand that the borders do not constrain environmental impacts. Mr. Martin understands this: he cites pending cross-border water and air pollution problems that, primarily, the U.S. continues to neglect. One reason is the absence of rules that compel all governments to ensure that the cross-border impacts of activities within their jurisdiction are assessed and mitigated before a project begins. NAFTA's so-called environmental

side agreement called for just such an obligation to be created within three years of NAFTA coming into force. We still do not have it.

The Prime Minister, in fact, had much more to say than NAFTA needs fixing. Indeed, his speech is a tour de force on the need for much better continental and international stewardship of the economy and the environment. He identified a number of specific programs, institutional requirements and economic goals. The Prime Minister has a chance to show that the existing institutions in North America can lead the way to better stewardship of the economy and the environment here at home.

Howard Mann is an international lawyer in Ottawa and the Senior International Law Advisor to the International Institute for Sustainable Development, based in Winnipeg. The text of the Prime Minister Martin's speech can be accessed by clicking here.