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Submission.

My submission is made in the form of evidence that proves beyond doubt that there are hidden problems with so-called Free Trade Agreements. The hidden problems are exasperated by the growing inability of decisions makers and their advisers to admit that they do not understand the potential complication of cleverly worded documents.

I further submit that the US Australia Free Trade Agreement is one of those cleverly worded documents, that has the ability to over-ride the courts and future parliaments, and as a result destroys our sovereignty.

New York Times | By ADAM LIPTAK | April 18, 2004

After the highest court in Massachusetts ruled against a Canadian real estate company and after the United State Supreme Court declined to hear its appeal, the company's day in court was over.

Or so thought Chief Justice Margaret H. Marshall of the Massachusetts court, until she learned of yet another layer of judicial review, by an international tribunal.

"I was at a dinner party," Chief Justice Marshall said in a recent telephone interview. "To say I was surprised to hear that a judgment of this court was being subjected to further review would be an understatement."

Tribunals like the one that ruled on the Massachusetts case were created by the North American Free Trade Agreement, and they have heard two challenges to American court judgments. In the other, the tribunal declared a Mississippi court's judgment at odds with international law, leaving the United States government potentially liable for hundreds of millions of dollars.

Any Canadian or Mexican business that contends it has been treated unjustly by the American judicial system can file a similar claim. American businesses with similar complaints about Canadian or Mexican court judgments can do the same. Under the Nafta agreement the government whose court system is challenged is responsible for awards by the tribunals.

"This is the biggest threat to United States judicial independence that no one has heard of and even fewer people understand," said John D. Echeverria, a law professor at Georgetown University.

In the Massachusetts case, brought by Mondev International, the Nafta tribunal decided in 2002 that the Massachusetts courts had not violated international law.

But in a separate pending case, brought by a Canadian company challenging the largest jury verdict in Mississippi history, a different Nafta tribunal offered a harsh assessment of Mississippi justice.

"The whole trial and its resultant verdict," the three-judge tribunal ruled last summer, "were clearly improper and discreditable and cannot be squared with minimum standards of international law and equitable treatment."

The Mississippi case arose from an exchange of companies between a Canadian concern, the Loewen Group, and companies owned by a Mississippi family, the O'Keefes. The O'Keefe family, contending that the Loewen Group did not live up to its obligations, sued for breach of contract and fraud. Although the tribunal found that the businesses were worth no more than $8 million, a jury in Jackson, Miss., awarded the family $500 million in 1995.

Loewen settled the case the next year, for $175 million. But, arguing that the trial had been unfair and that it had been coerced into settling by a requirement that the company post an appeal bond of $625 million, Loewen and one of its owners filed their claim in the Nafta tribunal in 1998. They asked for $725 million from the United States.

The availability of this additional layer of review, above even the United States Supreme Court, is a significant development, legal scholars said.

"It's basically been under the radar screen," Peter Spiro, a law professor at Hofstra University, said. "But it points to a fundamental reorientation of our constitutional system. You have an international tribunal essentially reviewing American court judgments."

The part of Nafta that created the tribunals, known as Chapter 11, received no consideration when it was passed in 1993.

"When we debated Nafta," Senator John Kerry of Massachusetts, the presumptive Democratic presidential nominee, said in 2002, "not a single word was uttered in discussing Chapter 11. Why? Because we didn't know how this provision would play out. No one really knew just how high the stakes would get."

Senator Kerry spoke before the tribunal rulings concerning the Massachusetts and Mississippi judgments. He offered his comments in connection with legislation he had offered to limit the jurisdiction of the tribunals. His amendment was rejected by the Senate.

Abner Mikva, a former chief judge of the federal appeals court in Washington and a former congressman, is one of the three Nafta judges considering the Mississippi case. He declined to discuss it but did offer his perspective on Chapter 11.

"If Congress had known that there was anything like this in Nafta," he said, "they would never have voted for it."

The other judges considering the case are Anthony Mason, a former chief justice of the Australian High Court, and Michael Mustill, a former British law lord. They were selected by the parties, and their judgment cannot be appealed.

Though the tribunal called the Mississippi trial "a disgrace" and "the antithesis of due process," it denied the claim of the company itself last summer. The tribunal said the Loewen Group was ineligible to bring the claim because it had become an American company in the meantime. The trade agreement allows claims only by foreign investors.

But a separate claim by Raymond L. Loewen, a former owner of the company who was and is Canadian, remains pending. He did not specify the damages he is seeking. A decision is expected soon.

Even Mr. Loewen's American lawyer, John H. Lewis Jr., expressed some discomfort with the power of the Nafta tribunals.

"I agree with the principle that that people should not short-circuit or second-guess the American legal system," he said. "But this case was so extreme that hopefully it will never happen again."

About a score of cases have been filed against the three countries that are parties to the trade agreement, mostly in connection with environmental and other regulations. The United States has yet to lose one, but Canada and Mexico have had to pay damages to American investors.

In the Mississippi case, the tribunal had faulted Judge James E. Graves Jr.of Circuit Court in Jackson for allowing lawyers for a Mississippi businessman to make "prejudicial and extravagant" statements to the jury about the Canadian defendants' wealth and nationality.

"Judge Graves failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice," the panel wrote. "The conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice."

Justice Graves, now a justice of the Mississippi Supreme Court, declined to comment.

Similar tribunals existed in other trade agreements even before Nafta.

"Bilateral investment treaties went both ways," said Todd Weiler, a Nafta expert at the University of Windsor Law School in Canada, "but in practice there weren't that many Barbadians or Nicaraguans investing in the U.S."

But there is substantial Canadian and Mexican investment here. That means, judges and legal scholars said, that the tribunals have the potential to upset the settled American constitutional order.

"There are grave implications here," Chief Justice Ronald M. George of the California Supreme Court said in an interview. "It's rather shocking that the highest courts of the state and federal governments could have their judgments circumvented by these tribunals."

Joe Bryant,