BYRON L. DORGAN
NORTH DAKOTA
713 HART BUILDING
WASHINGTON, DC 20510-3405
202-224-2551
202-224-9378 TDD

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312 FEDERAL BUILDING
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March 22, 2002

Ambassador Robert B. Zoellick
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Ambassador Zoellick:

As you know, there has been widespread concern about the lack of transparency in the deliberations of NAFTA tribunals. And despite your efforts to address the problem, NAFTA tribunals seem to be as secretive as ever.

NAFTA tribunals are considering claims like those of Methanex, a Canadian chemical company. Methanex produces a fuel additive, which California recently banned for public health reasons. When Methanex found out that it stood to lose a lot of money due to California's regulation, the company invoked a provision in Chapter 11 of NAFTA, which is supposed to compensate foreign investors when governments take their property. Methanex argued that California's public health regulation was in effect a confiscation of the company's revenues, and asked that the United States compensate it in the amount of $970 million.

The Methanex case and others like it – which imperil the ability of the federal and state governments to enact regulations in the public interest – are being conducted in near total secrecy. NAFTA tribunals hold hearings behind closed doors, and it is often impossible to know what evidence has been presented. Though NAFTA itself does not require such secretiveness, the tribunals follow international arbitration rules that allow them to keep the public in the dark.

Last July, you met with your Canadian and Mexican counterparts to discuss the problem, and announced that you had agreed to make the proceedings of NAFTA tribunals more public. On July 31, following your announcement, the NAFTA Free Trade Commission issued an interpretation of Chapter 11 stating that tribunals should operate as transparently as possible. In testimony before the House Ways and Means Committee on February 13 of this year, you reiterated your view that it was important to have open proceedings.

I was therefore disappointed to learn that a NAFTA tribunal last week refused to open up the record of its proceedings. Notwithstanding your efforts, and the guidelines set forth by the NAFTA Free Trade Commission, the NAFTA tribunal responsible for the case of Pope & Talbot insisted on keeping information sealed, including transcripts of hearings. Indeed, the tribunal stated that the new guidelines merely buttressed the authority of the tribunal to "**conduct the arbitration in such manner as it considers appropriate**." In other words, a NAFTA tribunal can still do whatever it wants.

Given that NAFTA tribunals are disregarding your efforts to open up their proceedings, I would like to know whether you are prepared to negotiate with Canada and Mexico to ensure that your stated objectives relative to transparency are incorporated into the NAFTA agreement itself, such that tribunals have no choice but to operate in the public eye.

This should not be a daunting proposition. Together with your Canadian and Mexican counterparts, you have already endorsed the concept of transparency for tribunals. And there is also support for this concept in the U.S. Senate. The language in the Trade Promotion Authority bill reported by the Senate Finance Committee endorses the concept of transparency for tribunals in future trade agreements.

I look forward to your prompt response.

Sincerely,

Byron L. Dorgan

Byron L. Dorgan
United States Senator
North Dakota