



**THE ALTERNATIVE DISPUTE RESOLUTION INTRODUCED BY
DOMINICAN REPUBLIC AND CENTRAL AMERICA FREE TRADE
AGREEMENT: A subtle Justice Privatization?**

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The neoliberal economic changes sweeping the world have not missed Central America. The region stands to gain considerably from deeper integration into the US economy and the world economy, but integration may not be a smooth and easy process. DR-CAFTA, (Dominican Republic-Central America Free Trade Agreement) promises to stabilize access for Central American markets to the US market; it will also allow more duty-free exchange of products between the participating states. The world waits to see if all the changes brought about by DR-CAFTA will be positive: Will growth, development, and equality improve rapidly, ameliorating the lives of millions in the region?

Since the launch of North America Free Trade Agreement (NAFTA) in 1994, observations in Mexico, show that a strong government must play a key role in smoothing the transition from one style of economy to another. A series of complementary policies, largely focused on improving education and strengthening of administrative and justice sectors, has been extensively studied by the international development community, and several have shown promising signs. The recently released *World Bank study, Poverty Reduction and Growth: Virtuous and Vicious Cycle*, claims that countries have different problems, and therefore, need different kinds of supporting policies to improve the lives of the citizens. This study should shape the policies implemented in Central America to help states take full advantage of the promises of DR-CAFTA. Judicial Reform is one of these complementing efforts and since the beginning of the agreement; Guatemala's has done a slight in the course and purpose of the reform.

The Judicial Reform in Guatemala is an old process with a new tendency. Somehow the last trend initiated with the sign of the Peace Agreements between government and the Unidad Revolucionaria Nacional Guatemalteca -URNG-, in 1996 (UMOJ 2000:21, Domingo 2001: 22). Together, central administration,

judicial branch, social organizations pro Human Rights, international donors and commercial groups had their own goals and vision on how judicial system should work. Legal transplants and reforms come to every field and to different institutions. Sometimes legal reforms are subtle and buried into a broader social and economical change (Beibersheimer 2001: 12, ASIES 2004: 33).

Besides the Judicial Reform process focused in the judicial system as a primary changing subject, there are other actions addressed in different fields such as Free Trade Agreements -FTA- (Messick 1999: 08, Hendrix 2000). Many governments of the world over have and are increasingly signing, negotiating, or contemplating new bilateral or multilateral free trade and investment agreements. The primary motive is to improve the conditions under which global capital relocates, prospers, and repatriates. They are also meant to raise the stakes for governments of less developed countries economies by committing them to respect property and contractual rights of foreign investors and to agree on arbitration effectively clipping their sovereignty in the event of disagreements over subsequent investment contracts (Hendrix 2002/2003, De Sousa 2003).

The politics of FTA's is that they are designed to consent national treatment by providing an easy return to investments and prohibiting the expropriation of investors' assets without due and adequate compensation. The attendant consequence of this is that it has radically changed the concept of the sovereign nation state. That is, national economic identity and legal systems have been re defined with the recognition of ADR mechanisms (WB 2006, Runyon 2006).

The DRCAFTA has an extensive area of application not only in commercial and economical areas but in judicial and legal field. Indeed every each industry has to develop their own legal adjustments and regulations in order to reach improve their economical goals and perspectives (Teubner 1997, Felstiner and Gessner 2001). The controversies surrounding DR-CAFTA and many others multilateral agreements, disputes mechanism provokes a series of worrying concerns, some of which includes the following: why seek a different dispute mechanism when every country in the world has a legal system in place to protect foreign investments and purports to adhere to norms of international law? With so much likely adverse impacts of agreement's disputes on the economic and political lives of on developing countries so prevalent, are the promises of these treaties to these countries anything to go by?

Besides the arguments based on the benefits as a State for Guatemala, there are others that supports the profits for specific groups. One of those is the fact that traders could seek more specialize justice to solve specific problems in the daily negotiations. Therefore, Alternative Dispute Resolutions -ADR- becomes the preferred choice because according DR-CAFTA norms they will be more efficient (MINECO: 23). Will be access to justice granted for every one? ADR will bring equity and equality rather than exclusiveness?

This paper begins with a general view about the Law globalization and how international organizations and powerful states address impose their rules, using either force. Then is the framework of Judicial Reform in Guatemala and some numbers of the Judicial System. The framework of the DR-CAFTA is analyzed and how the judicial branch has to work to guarantee the transactions within the rule of law. Finally, the role of ADR for both commercial and access to justice views is shown in order to set up the analysis on how mandatory arbitration responds to Guatemala society configuration where instead to invest in legal education is easier to keep away from the judiciary and go with the private justice administration as ADR.

I. A GLOBAL TREND: THE TRANSNATIONALIZATION OF LAW

Legal globalization involves the *transnationalization* of some legal models, frameworks and ideas (Dezalay and Garth 2002a, 2002b; De Sousa Santos 1998; Fix-Fierro & Lopez Ayllon 1997:3). It is not a new process, during the second half of the twentieth century, and particularly during its last three decades, and in the particular case of Guatemala since the last years of 1960's. This occurred principally in the economic sphere, as globalize models of capitalist production and consumption generated new forms of legal regulation and favored the spread of transnationalized forms of law making, such as the *lex mercatoria* and *corporate law*, which appeared to operate almost independently of nation states (Teubner 1997; Appelbaum, Felstiner and Gessner 2001). However, other forms of legal globalization also had a profound impact on states and on relations between states and their citizens.

A variety of international organizations and powerful states in the international system now promote the spread of liberal legal norms and western legal institutions in the name of strengthening democracy and peace and nation-building. Within a variety of different national contexts, the notion of rule of law construction is used as a kind of script to refer to a multiplicity of efforts to secure reformed and improved legal systems. Law has once again come to be seen as central to efforts to secure development. The strengthening of the rule of law within individual nation states is prescribed as a way to ensure effective and democratic governance and, to support peace and security within the international system.

Reform of judicial systems is a currently a major concern of both governments and donors in Latin America and some \$1 billion has been spent on judicial reform in the region since the 1980s. A variety of donors including the World Bank, the Inter-American Development Bank (IDB), the United Nations Development Program (UNDP), individual country donor programs such as USAID and NGOs support reform of the justice sector under the broad remits of promoting of democracy and advancing market reform. As Dezaley and Garth observe, there is now a burgeoning global industry dedicated to the import and export of the rule of law (Dezaley and Garth 2002a; Domingo and Sieder 2001, Carothers 1999).

Across Latin America, legal orders have historically been characterized by a continuing legal pluralism, seen as the overlapping coexistence of different legal and regulatory orders (Santos 1995). Since the foundation of the nation states in the XIX century law was a marker of modern statehood; there was one law and all citizens were to be subject to it without exception. However, in practice entire areas were characterized by a weak state presence and subjected to the private law of powerful social actors. As consequence, those *brown areas* territories and institutions where neither reasonably effective state bureaucracies nor properly sanctioned legality operate (O'Donnell 1993, 1999).

In the second half of the twentieth century much Latin America countries effectively came to operate outside properly sanctioned legality. In one hand the ghettos subject to the regulatory orders instituted by gangs and drug cartel rather than to national law. In the 1980s and 1990s the spread of transnational, organized crime combined with the historical lack of legal protections and rights guarantees extended by the state to increase the vulnerability of most Latin Americans, particularly the poor, marginalized and underprivileged. In the other hand corporative rules emerged as auto regulatory system due to the absence of effective state norms to guarantee transactions. In the present most of Latin America is characterized by the weak legal presence of the state and a high degree of legal pluralism. However, a diversity of legal conditions exists across the region linked, in turn, to different legacies of national and regional state formation.

Legal transnationalization has another strategy the Free Trade Agreements. In order to reach economical harmonization is vital to improve and match some legal institutions (De Sousa 2003, Salas 2001). The history of failures in Legal and Judicial Reform since 1960's show that is necessary to look for some assistance outside legal system (Dezalay & Garth 2002). So, the agreement brought all the structure to facilitate those in equal conditions seek for equal justice. In other words, according to the DR-CAFTA text the different economic fields are encourage to create their own regulations based on the agreement and to avoid state judicial system looking for a private, and specialized dispute resolution method (Runyon 2006, WB 2006)

II. THE LOCAL FRAMEWORK OF THE GLOBAL STRATEGIES: GUATEMALAN JUDICIAL REFORM PROCESS.

There are about 500 judges in the Guatemalan court system (one per 22,000 inhabitants), of whom about 17% are female. The courts of first instance dealing with civil, labor and administrative matters are concentrated in Guatemala City (UMOJ 2000:12). There are no justices of the peace in seventy three of the municipalities in the interior (UMOJ 2004:32) According to information compiled for 1996, there are an estimated 130,000 cases per year, the majority of which are

filed in Guatemala City and in the departmental capitals¹. Out of a total of approximately 4,100 persons employed by the Judicial Branch, 2,500 work as judicial and support staff, and a further 600 administrative employees are concentrated in the Guatemala City (World Bank 2002b). In 1997, with World Bank support, the Supreme Court of Justice carried out several consultations in which 32% of judges participated, as well as 100% of managerial personnel working in the administrative area. In addition, interviews were conducted with several sectors such as government, law schools and the legal community, the economic sector and the media (World Bank 2002b).

Since 1996, Guatemala was immersed in a political change that led to a polarization of the country and jeopardized institutional reforms initiated under the peace accords². Several factors contributed to this political dynamic, among them the process of compliance with the peace accords, general elections and international pressure in economical, social and political areas. The beginning of the Central America Free Trade Agreement - DRCAFTA- negotiations in 2000 played a key role in the process of confrontation. During the 1999 referendum for a constitutional reforms the NO won. Therefore it extinguished once and for all the meager momentum for the institutional reforms promised by the peace accords. It also had an adverse effect on other commitments, which remain unfulfilled to date. This translated into a lack of support for the legal reforms, and peace accords commitments had lost their momentum. This was a direct result of the countless obstacles and rejections that had accompanied the signing of the accords from the outset. A remarkable fact is that at every step of the way the powerful forces opposed to the accords permanently blocked any meaningful progress. (Sieder 2001, ASIES 2001, UMOJ 2000)

The peace accords mandated an increase of budget allocations to the justice sector and a massive extension of its institutional coverage throughout the country. In 1997 Justice Strengthening Commission was set up according to the terms of the September 1996 Agreement for the Strengthening of Civilian Power and subsequently assumed a unique process of consultation on reform of the justice system with different civic and professional groups throughout the country. The Commission's comprehensive and broad-ranging recommendations, published in April 1998, included a series of measures to increase judicial independence and reduce corruption, professionalize the judiciary, guarantee basic rights, increase access to justice and make it more multicultural (Comisión de Fortalecimiento de la Justicia 1998). As a consequence some of these recommendations were incorporated into the Plan for Modernization, approved in 1997 and supported by the World Bank, the Inter-American Development Bank -IDB-, the United Nations Development Program -UNDP-, the United States Agency for International Development -USAID-, and the governments of Sweden, Japan,

¹ Guatemala has 22 administrative divisions called "*departamentos*" each one with a capital city and a total 331 municipalities.

² The peace accords needed a Constitution's reform throughout a national referendum in order to implement all the wanted changes. Nevertheless the reform was jeopardize by the introduction of other Constitution's articles in the referendum with any relation with the peace accord's will.

Switzerland and Canada, among others (Hendrix 2000, Carothers 2001).

In the justice sphere, it was only possible to move forward with reforms that were not contingent on constitutional reform. Judicial modernization and democratization advanced slowly, marked by setbacks and lengthy periods in which it appeared to grind to a halt. Moreover, a highly formalistic vision guided the modernization program, which served as the foundation for implementation of commitments relating to the justice system (ASIES 2004, Salas 2001).

The legal strategy included preparing an analysis of the existing system for the administration of justice and the reforms contemplated in the peace accords, a proposed profile with indicators for judicial candidates, and proposed procedures for their selection (Hendrix 2000). This work became the technical legal basis for participation and support by the citizen's organizations and contributed political, social, and legal elements to generate an unprecedented public debate. This marked the first time that citizens' groups participated actively in a selection process of this nature. As the process evolved, it was clearly necessary to move beyond generic proposals. The combination of political and technical issues, and particularly the development of serious proposals worthy of consideration, contributed significantly to the level of impact achieved. In other words, the value of participation increases to the extent that it goes beyond pure activism to operate at levels requiring technical and political skills critical to articulating proposals and demands (Assies 2003, Castillo 2000).

DR-CAFTA calls for the liberalization of markets in five Central American states and the Dominican Republic with the US. It is a step along the way to the Free Trade Agreement of the Americas (FTAA) proposed by the US to increase trade and market access throughout thirty-four states of the western hemisphere. The DR-CAFTA states' combined GDP equals approximately 0.5 percent of the US GDP, making this among the most asymmetrical agreements of its kind to date. DR-CAFTA will liberalize agriculture, manufacturing, public services, and government procurement in Central America; in exchange, the US will allow increased market access for certain sectors" like textiles and sugar (Castillo 2000, WOLA 2005). DR-CAFTA is hotly contested both in Central America and in some sectors in the US; unfortunately, vitriolic rhetoric from both sides complicates discussion of some of the most urgent issues. Most of the changes to trade proposed by DR-CAFTA will not be dramatic because the Caribbean Basin Initiative -CBI- already covers them (Runyon 2006). The CBI, signed in 1983, allows the region preferential access to US markets for a substantial number of products. The US expanded the terms of the CBI in 1986 and again in 2000, allowing trade concessions similar to those enjoyed by Mexico under NAFTA. The key difference under DR-CAFTA is that free trade will become bilateral: the US will begin to export products duty-free to Central America as well as importing products duty-free from the region. (WOLA 2005; World Bank 2002. Castillo 2000, OEA 2005)

As consensus from governmental and no governmental institutions and consultants the fundamental problems in Guatemala's judicial system are the following:

- Deficient performance of the courts
 - Limited access to justice
 - Corruption
 - Poor institutional management
 - Poor perception on the part of the public of the Judicial Branch
- (ASIES 2001, 2004, Castillo 2000, Domingo & Sieder 2001)

Thus, donors and national beneficiaries agree in the objectives to promote the participation of citizens so as to achieve a more efficient and accessible judicial system through are:

- a) The strengthening of the Judicial Branch's institutional and administrative capacity;
- b) The strengthening of the fight against corruption by encouraging various measures to make Judicial Branch services more transparent and reliable;
- c) The improvement of access to justice by diversifying justice administration services, experimenting with and introducing alternative mechanisms for conflict resolution, as well as the adaptation of services to the special characteristics of communities, and the construction of new courts and court complexes;
- d) The strengthening of communication with stakeholders and the public, as well as the capacity of the Modernization Commission of the Judicial Branch to advice on plans and policies for project implementation and the establishment of inter coordination mechanisms.

(OEA 2005, Runyon 2006, Carothers 2001, Hendrix 2000)

The creation and support of new judiciary systems are encourage. For those seeking the inclusion of "living law" into the state judicial scheme, ADR's based on consuetudinary law plays an important role, in order to make more efficient and accurate the judicial decisions. And for the ones who wants standard norms to resolve conflicts based in the economical features which can assure a future relation, alternative methods are the solution to avoid bureaucracy in tribunals. Therefore the ADR match with both perspectives and its introduction is spread in different areas.

III. THE INTENDED REFORM OF DOMINICAN REPUBLIC AND CENTRAL AMERICA FREE TRADE AGREEMENT -DR-CAFTA -.

According to the publication *DR-CAFTA: Challenges and Opportunities for Central America report*, economies that sign free trade agreements tend to see an increase in their overall growth rates of about 0.6 percent annually during the first five years after implementation. For the case of DR-CAFTA, this would translate into nearly half a million fewer Central Americans living in poverty by 2010. (World Bank 2005, OEA 2005)

In words of Paul Wolfowitz³: *"Greater trade opportunities are essential to improving living standards in developing countries..." "...This agreement will help secure and expand the access of Central American nations to their largest trading partner and help provide the potential for increased trade and investment in the region –critical factors in boosting economic growth and reducing poverty."* (World Bank 2005: 8).

Greater trade levels will arise from the removal of virtually all tariff and quota barriers, consolidating the preferential market access Central America already has in U.S. markets through the Caribbean Basin Initiative. DR-CAFTA should also deepen regional integration among the Central American nations themselves and promote greater levels of foreign investment. (Runyon 2006, OEA 2005)

The study says the agreement needs to be accompanied by a complementary development agenda in order for countries to reap maximum benefits. This agenda should highlight actions in areas such as:

- Investments in trade facilitation, such as ports, roads, and customs;
- Institutional and regulatory reforms (e.g. transparency, rule of law, red tape);
- Innovation and education;
- Assistance to the most vulnerable groups to adapt to the new competitive environment.

(World Bank 2005, OEA 2005)

A specific research carried out as part of the study, 90 percent of households in Nicaragua, 84 percent in Guatemala, and 68 percent in El Salvador are net consumers of sensitive agricultural commodities, and as such can be expected to benefit from the decrease in food prices. Only about 9 percent of households in Nicaragua, 16 percent in Guatemala, and 5 percent in El Salvador are net producers of sensitive commodities.

³ Paul Wolfowitz was unanimously approved as 10th President of the World Bank Group by the institution's Board of Executive Directors on March 31, 2005.

Nonetheless, the report says that appropriate attention needs to be paid to ensuring that poor households among net producers are protected. For this, the design of appropriate support programs will be needed, such as technical assistance, conditional cash transfers, and selective investments in education, rural infrastructure, and rural finance to ensure that the poor have the means to take full advantage of the new opportunities arising out of DR-CAFTA. (Runyon 2006, World Bank 2006)

As a result of DR-CAFTA, duties affecting trade with the U.S. will be eliminated for virtually all goods. Due to strong sensitivities, some agricultural products were exempted from the eventual zero-duty status: sugar for entry into the United States of America white maize for entry into four Central American nations (El Salvador, Guatemala, Honduras and Nicaragua) and potatoes and onions into Costa Rica. While the bulk of tariffs will be removed upon implementation, some tariffs will be phased out gradually. Central America's number of products with gradual phase outs is significantly higher than that at the U.S. number. Consequently, commerce will increase to the point that specialized judges will be needed (OEA 2005), in this case not only in commercial or trading area but deeper in specific industrial or economical fields. That could be seen as an efficiency because a narrow scope to cover a deeper knowledge and a faster resolution. But so far in Guatemala, that level of specialization is far away. Thus Alternative methods, such arbitration, where experts in the specific field of controversy solve it, arose as the better solution.

In opposition to World Bank and US government view, social organizations resist to the DR-CAFTA actively since the beginning of the negotiations in 2000. The peak of the protests took place during the first three months of 2005. In March 10th despite mobilizations of social and popular sectors linked to the MICSP (Indigenous, Farmers, Union and Popular Movement) in the rejection to the Agreement the congress approved DR-CAFTA as a matter of national urgency. Constantly pressure over the congress from the US embassy was noted on various occasions by members opposed to the agreement, but in the end this pressure prevailed over popular interests. In return, members of congress promised a package of palliative measures for the effects of the agreement. (Dosal 2005, Prensa Libre 2004/2005)

The overall situation for the people in Central America and the Dominican Republic is characterized by high levels of poverty, a growing gap between the rich and poor that is also widening in the U.S, weak enforcement of labor and environmental laws. Many people live in extreme poverty and lack access to basic services like water, sanitation, electricity. Trade could be a component in the economic and social development of these countries, but only if it is about more than business as usual and has at its core the protection and development of people's lives and livelihoods. However, the trade rules set forth in DR-CAFTA favor the interests of the wealthy, the powerful, and global corporations. Often these rules severely limit the ability of these countries to use the very tools that the U.S. used in the past (and still uses) to build and maintain our competitive

economy (OEA 2005, Messick 1991, Castillo 2000). For instance, one of these rules is the mandatory arbitration rule, which obligates that any controversy resulted of a commercial transaction hast to resolve in the arbitration procedure. That compulsory requirement could be unaffordable for many middle size and small companies due to the cost of the process and the cost-benefit situation after the deal.

According to purpose of the DRCAFTA is necessary that the judicial system assure the economic performance giving plenty security to trade goods and services (World Bank 2006: 34) . Thus, the need to strength the legal framework to support economic activity in the agenda of the Agreement is necessary. Rule of law is a primary goal for commercial requests and must be based on the perspective of facilitating interactions and transactions (Messick 1999: 21)

In addition to changing the economic scene in Central America, DR-CAFTA will likely have other effects on the region. Nicaragua, Honduras, El Salvador, and Guatemala all began the process of democratic reforms at more or less the same time that they launched their economic reforms, and the international community hopes that DR-CAFTA will help reinforce domestic democratic reforms as well as economic liberalization. One of the most real benefits of the free trade agreement is the credibility effect that comes with the locking in of policies and reforms in areas like contract enforcement, property rights, and regulatory systems (OEA 2005, World Bank 2005:86).

IV. MORE THAN COMMERCIAL AGREEMENT: THE IMPORTANCE OF THE JUDICIAL FOR AGREEMENT'S IMPLEMENTATION.

The judicial branch of a state plays an important role in both the consolidation of democracy and in the improvement of economic and investment conditions for domestic and foreign interests. Like the legislative branch, however, the judiciary is not easy to define in a positive manner. The definition, provided by Buscaglia, Dakolias, and Ratliff, states that the "*ideal judicial system is composed of institutions capable of applying and enforcing laws equitably and efficiently*" (Buscaglia, Dakolias and Ratliff 1995: 1,2)

The role of the courts in economic integration will also be key in Central America. Pressure for reforms is mounting as there is an increasingly widespread belief that the judicial sector in Latin America is ill prepared to foster private sector development in a market system. Both foreign and domestic investors and entrepreneurs expect their nominal rights, which are typically standard and strong, to be ignored or violated in the courts system; the corrupt and blatantly rent seeking behavior of judges drives people away from the court systems. In a typical but unfortunate pattern, large businesses that can afford to develop or identify alternate solutions no longer participate in the courts, leaving the small and medium enterprises that can ill afford financial losses to fund the judges' and other officials' salary supplements. Therefore the use of arbitration and other methods

for commercial relations guarantee a more predictable scenario for parties and the cost could be afford because the future benefits of the relation will increase (Deon 2004, Robles 2005).

As integration pressures increase and legislation gets passed to bring laws nominally in step with treaties and investors' needs, tensions about how rights are or are not protected are rising. Part of the tension in Latin American legal systems comes from the inherent clash between civil law and common law traditions, but a significant part of the problem is the lack of an effective judicial system that could enforce the new laws (Buscaglia, et. al 1995: 1,5,6,18).

In this reform it is believed that the judicial system and economic institutions and their performance interact with each other, and that the impact of the judicial system on the economy differs depending on the stage of development, (Messick 1999:12) presented the following two ways by which the judicial system affects economic development. Each of them supports one idea about how the judicial system could be more efficient and guarantee justice. The first is that when a good judicial system contributes to economic development by preventing the government's abuse of power and safeguarding the rule of law. This idea, which focuses on a judicial system's function of checking over the administrative authorities, can be taken as a view in which judicial independence is highly valued. This route is particularly important in developing countries where a judicial system has yet to be sufficiently established. The second route, on the other hand, is that where a judicial system supports economic development by facilitating and promoting various interactions and transactions in economic and social domains. This idea attaches great importance to judicial efficiency. Both ideas are promoted by the judicial reform; the first one supports the human rights movement that looks for an inclusive judicial system with transparency and sort of welfare conciseness and the second is the DR - CAFTA idea that seeks for commercial relations (Deon 2005, OEA 2005, Robles 2005)

The Agreement doesn't set the formal rules on how arbitration must be conducted. As it was mentioned before, it only contains a mandatory arbitration clause, but according the nature of ADR system is in how the relation that origins the conflict built the main point that will affect the resolution. So, if the contract establishes clauses preferences for the importers or exporters reflecting the Free Trade Agreement (DRCAFTA Annex III) the arbitration process will do it, as well.

Formerly, contracts and other enforcement mechanisms used to rely very much on informal means, such as reputation and trust, in a period when the judicial system was underdeveloped. Specifically, if one breaks the rules or promise made with one's counterpart in a transaction, that counterpart would never return for another deal or transaction, thereby creating an incentive for parties concerned to honor contracts and promises so they can accumulate reputation to that effect. As such, there emerges a mechanism that facilitates transactions even in the absence of formal courts (Fix Fierro & Lopez-Ayllon 1997: 8, Nagle 2000: 5).

It can be said that traders or any other parties concerned, due to the absence of a properly functioning judicial system, have no other choice but to rely upon their existing counterparts for the smooth fulfillment of contracts. Meanwhile, in situations where the economic environment is undergoing significant changes, it is important not to miss profit opportunities that can be derived from transactions with new transaction partners. To ensure the execution of a contract with a new transaction partner, that is, in a situation in which no mechanisms of reputation are at work, the judiciary as a formal enforcement mechanism must be implemented. Also, in situations where long-term, continuous transactions are highly valued, it is often difficult to stop dealing with long-term partners even when unprofitable. Here, the judiciary plays an important third party mechanism of settling disputes in accordance with certain rules.

V. THE ROLE OF ADR SYSTEMS IN THE JUDICIAL REFORM PROCESS.

The need for alternatives to the formal legal system has engaged the attention of the legal fraternity, comprising judges, lawyers and law researchers for several decades now. This has for long been seen as integral to the process of judicial reform and as signifying the access to justice approach. Mario Cappelletti and Bryant Garth point out that the emergence of the right of access to justice as the most basic human right was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless (Cappelletti and Garth, 1978: 8-9). It was not enough that the state proclaimed a formal right of equal access to justice. The state was required to guarantee, by affirmative action, effective access to justice.

There is an imperative need to acknowledge that those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. The economically disadvantaged litigant is, notwithstanding the present concerted moves to reach legal aid through a geographically wide network of legal aid institutions (De Sousa Santos 1998:34), unable to effectively access the system as they encounter barriers in the form of expenses, lawyers and delays. The formal system, as presently ordered, tends to operate to the greater disadvantage of this class of society which then looks to devising ways of avoiding it rather than engaging with it. Without fundamental systemic changes, any alternative system, however promising the results may seem, is bound to be viewed with suspicion. The participatory nature of an ADR mechanism, which offers a level playing field that encourages a just result and where the control of the result is in the hands of the parties, and not the lawyers or the judges, would act as a definite incentive to get parties to embrace it.

In line with the peace agreements, and the recommendations of the 1998 Justice Strengthening Commission from Guatemala, international donors supported the increased use of ADR mechanisms as complements to the formal justice system.

Forms of ADR include negotiation, conciliation, mediation and arbitration. Such measures are generally aimed to remove minor legal claims from the courts, freeing up the latter and increasing the efficiency of the judicial process. In Guatemala they are also intended to achieve more culturally appropriate and accessible forms of justice and conflict resolution for the majority. The promotion of ADR is a key feature of legal globalization and transnationalized forms of rule of law construction (Salas 2001). Not all ADR concerns the poor - indeed a major area of ADR expansion is that of arbitration in commercial law, promoted in particular by the World Bank. However, many donors support ADR under the broader remit of furthering greater access to justice for underprivileged groups. In theory, informal dispute resolution processes are more accessible in terms of the language they employ. Procedures are often lauded as simpler, cheaper, more flexible and faster than those deployed in the courts and as involving a greater degree of participation by the parties to a conflict, who are encouraged to reach consensual settlements.

There is no discussion about the fact that development of ADR mechanism is the key to improving judicial efficiency. ADR institutions play an important role in increasing competition among the existing courts and expanding options for settling disputes. An ADR mechanism provides an alternative to the conventional means of dispute settlement by way of a lawsuit.

In developing countries where a formal court system has yet to be sufficiently developed, an ADR mechanism can provide a workable substitute. Meanwhile, with the development of a formal court system, the number of cases brought to court would increase. In this process, the presence of ADR, and thus of an alternative, provides discipline to the conventional court system by making it difficult for judges to take bribes from litigants and thus reducing opportunities for corruption. This has been empirically proven by analyzing ADR systems in Chile and Ecuador (Buscaglia and Dakolias, 1999). Meanwhile, when a formal court system becomes efficient, court judgments become sufficiently predictable, thus leading to a relative increase in the number of cases handled in out-of-court settlements that offer simplified procedures (World Bank, 2002). As such, formal legal procedures at courts and ADR mechanisms are both alternative and complementary to each other. In other words, regardless of the degree of judicial system development, competition and increased options for settling disputes helps clarify the sharing of roles between formal courts and ADR systems, strengthens the complementary relations between them, and improves the efficiency of the respective mechanisms. In this regard, ADR mechanisms are intrinsically important for the improvement of judicial efficiency.

Basically, there are two types of ADR process, namely a coordination-type, which would resolve disputes through mediation and conciliation (with a neutral third party facilitating conciliation or negotiations between conflicting parties) rather than making a judgment, and a verdict-type which would settle disputes through arbitration (with an arbitrator giving a binding judgment).

Nevertheless other more intractable factors, exists and influence the judiciary as a system and judges in a particular way. Those include the singular lack of will among political and business elites and justice sector employees to support fundamental reforms and secure effective legal accountability and the increasingly effective colonization of the Guatemalan state and particularly the judicial apparatus by organized crime.

Judges, lawyers and public prosecutors continue to be highly vulnerable to internal and external intimidation, interference and corruption. Powers to promote discipline or dismiss judges and public prosecutors are concentrated in the Supreme Court. In a study carried out in 2001, some 25% of judges interviewed and 87% of public prosecutors acknowledged they had been the target of pressure either from their superiors or interested parties to alter the course of investigations and cases (OEA 2005). Low salaries and poor training also fomented corruption. Disciplinary procedures remain inadequate and officials charged with malfeasance rarely faced criminal prosecution. In addition to bribery, justice officials are also subject to intimidation. Constant harassment and threats mean that many are scared to testify, investigate or judge impartially. Private insurance companies in Guatemala consider judges and magistrates to be such a high risk that they cannot obtain life insurance and in 2001 the Supreme Court declared it lacked the funds to pay for an insurance scheme for its employees.

In many countries it has become popular to promote ADR on the grounds that it permits more informal dispute resolution than traditional litigation and adjudication; that ADR allows the parties to settle their disputes in private and confidentially; and that ADR permits the parties to devise outcomes of disputes that might not be possible in a court of law but seem more appropriate to particular types of disputes. No doubt there are many circumstances in which parties benefit from informality, privacy and creative problem resolution. But these goals are not necessarily consistent with a rule of law.

Formal procedures designed to level the playing field between parties of unequal power and to minimize bias offer obstacles to preferment and privilege. Public processes such as trials ensure that information relevant to a conflict is accessible to the press and to other interested civil society organizations, that decision makers' behavior is open to public scrutiny, and that the outcomes of disputes can survive the light of day. Mediation surrounded by special confidentiality privileges intended to facilitate settlement may also facilitate threats.

The privatization of justice through imposition of ADR use is in the air. So far none commercial relation regarding DR- CAFTA has used it, so we can use a case study to illustrate. Nevertheless some examples and can be illustrative. Since NAFTA implementation to 2002 the cost for commercial transactions increased in 21% within Mexican national middle or small companies, and in a 35% amongst Mexican middle or small companies and international ones. Further the transactions between multinational companies which establish an judicial dispute resolution - no matter which country tribunals- is 23% more expensive that those

which has arbitration clause (Robles 2005, Deon 2005). Regarding the last, there are to ways of interpretation of the facts. Could be said that arbitration is cheaper than public judicial system, which here is unknown, because the studies doesn't reflect the procedure costs and it could be different for one case to another. In the other hand, it shows that small and middle entrepreneurs can not afford an arbitration process, so they have to use judicial system, cause an efficient and faster solution provide by private justice is unreasonable.

VI. CONCLUSION: ARE THE ADR A TOOL FOR JUSTICE ACCESS OR A SUBTLE JUSTICE PRIVATIZATION?

Reviewing the current judicial reform projects in Guatemala from the perspectives outlined above, it is hard to believe that the reforms have a chance in truly succeeding. Although the reforms outlined above try to simultaneously address efficiency, access, and independence as Prillaman calls for, they have had little effect on these three variables (Prillaman 2000). The outputs of this broad based reform have been very limited. Perhaps the only hope is that the reforms have in some way strengthened democracy as is called for in the USAID program. However, that goal is not defined nor is it able to be tested at present. Currently, it does not look like there has been a strengthening of democracy, but maybe the small achievements of certain justice centers could become models for new centers and methods of administration of government. Maybe Hendrix is correct in that little by little change can be implemented and the rule of law will eventually have a chance (Hendrix 2000:11). However, for this to happen, judicial reform will have to be one of many successful reforms.

Expanding the stakes in reform enactment is not an automatic solution. It may result in slower implementation and less ambitious objectives, and may generate additional conflicts. It does not resolve the problems of inadequate subjective models and other cultural constraints, inexperience, or more broadly inclusive, but still self-serving agendas. Such collective agencies have already been attempted, and observers have noted their tendency to adopt the fireman's syndrome, an implicit agreement that members will not criticize each others proposal for fear of cutting off funding. This is one area where the participation of external donors may be helpful. First, they can help create and support the directive alliance or external consortium of stakeholders. Second, they can raise the level of technical input, and as mentioned earlier, ensure that actions are fully informed by their own and others experience in comparable reforms. Donors may not fully appreciate local needs and circumstances, but they do have experience and potentially useful technical expertise which can help avoid repeating common mistakes. Third, they can help set and enforce the agreements on specific objectives, procedural rules, and substantive benchmarks and continued monitoring to ensure compliance. These agreements should extend not only to local parties, but also to the donors themselves to ensure a common coordinated effort. Unfortunately, donors' record here has not been very positive.

Today, there is an almost total lack of the rule of law in Guatemala. In addition, the economic situation of the country as a whole and especially for the majority of the population, has not improved even after ten years of peace, some minimal economic growth, and a lot of foreign aid and assistance. It would therefore seem obvious that Guatemala is in need of judicial and legal reform. However, what this paper has explored in part is whether or not the rule of law can be restored in Guatemala through this reform. I'm undecided on what all of this means for judicial reform in Guatemala. While I still believe that judicial reform is a necessary part of any development program and that a comprehensive development program is needed in Guatemala, I believe that there are some necessary precedents which are possibly missing - such as political will on the part of the government and the elites.

Some critics believe that because judicial reform is inherently political, there are certain prerequisites for it to be successful. Judicial reform is seen as a threat to many. There are many stakeholders including possibly any of the following: the judges, judicial personnel, attorneys, and the organized bar, those benefiting from current rulings, the executive, and the military, among other possibilities (Messick 1999: 9; Prillaman 2000:6). Any of these actors may act as an obstacle to reform, and often times does so in Guatemala. Therefore, many believe that a broad consensus for reform is needed prior to implementing any reform program (Messick 1999:10; Prillaman 2000:9). What is obviously lacking on the part of the political, military, and economic elites in Guatemala is political will to reform, political will to accept democracy, democratic institutions, the rule of law, a level playing field, or even the rules of the game. On the part of the populace the greatest obstacles, although completely understandable perhaps, are a lack of political will, political apathy, and possibly fear. The poor and the indigenous make up a majority of the population; they could be a strong force if they could unite and channel their voice. However, in a society where there is little example of protest succeeding or even being allowed to exist without repression or electoral politics helping anyone other than those who are elected, where the majority are illiterate and do not have enough to subsist, it is hard to imagine that their divisions will be easily overcome in the near future. In addition, when some reforms are intended to seek for more inclusion of disadvantaged groups the stakeholders use the institutional channeling mechanisms to change it in their benefit, such as ADR's. It is incredible how law has lost some space against economy and how it is more perceptible in countries like Guatemala, where the elites are not in principal positions within the judicial system. So, instead of searching a more effective legal education for judges, is easy and cheaper to use arbitrates or mediators with the expertise, acknowledge and social capital to resolve disputes. Even when this process seeks for a specialization for more efficient, effective and corruption-less judges it is clear that in the framework of the DR-CAFTA, a peasant, cannot afford an expensive process in a mandatory way⁴.

⁴ The Decreto 11-2006 *Ley de Implementación del Tratado de Libre Comercio con los Estados Unidos* contains the reforms in the jurisdiction area where Arbitration becomes the mandatory jurisdiction to solve conflicts between individuals. Art. 117.

Something international financial organizations, USAID, and others who are interested in development issues in Guatemala may want to consider is how to build political will in Guatemala on the part of the elites and how to foster it in the poor and working class through education or grass roots organizing. If the IMF and the World Bank cannot even get Guatemala to comply with basic fiscal management policies like taxes, I'm not sure what kind of influence they can have on issues which may cut even further into the pockets and the beliefs of the elites, such as the rule of law and that everyone in society, including the elites, must be a part of the rule of law and cannot be above it, cannot change it to suit their needs, and that it has to work equally for the poor as well as the rich, the indigenous as well as the ladino.

Some legal remedies are intended to replace remedies that were traditionally deemed more appropriate but that disadvantaged women and members of less powerful groups. Encouraging a return to such remedies may represent a setback for disadvantaged groups, rather than being a mark of progress. "Creative outcomes" that truly do satisfy all the parties at the mediation table are not always in the best interest of third parties who are *not* at the table or in the interest of the public at large. Private agreements do not offer the opportunity for the judiciary to articulate and reaffirm norms that are intended to guide the behavior of all actors in the society. Sometimes mediation and settlement is described as *bargaining within the shadow of the law*. The saying refers to parties' ability to resolve their cases privately, without recourse to public adjudication, when they have a shared understanding of what would be the outcome of their dispute if it were publicly adjudicated. Where there is sufficient law - and high confidence that the law would be applied fairly by the judiciary if its assistance were sought settlement and mediation may offer effective and fair means of dispute resolution. But where it is not clear what the law is or whether and how it would be applied, informal private dispute resolution threatens rather than supports the rule of law.

Despite the difficulties for the reform implementation as a whole, are some specially concern the ADR. From an economic national, local and regional involves dispute resolution institutions based on international models like UNCITRAL or WTO. These bodies are thus given the responsibility to adjudicate virtually all investment disputes without democratic structures or transparency, despite the fact that they are not serving an international judicial function governed by treaty and international law but private goals. These arbitration bodies have developed their own set of rules for both conciliation and arbitration that are based completely on legal systems of the North, especially the US, and ignore much of the world's wealth of experience in settling disputes, such as Asian, Caribbean or African rules of arbitration.

The record of these bodies thus far has been very investor friendly, in awarding substantial damages and compensation to multinational corporations for transgressions of developing country governments or individuals. Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the

ills of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

Under these conditions, there is clearly little incentive or need for international investors to settle disputes amicably, given the highly favorable outcomes for corporations that have initiated proceedings under such agreements. So, I can affirm that the use of alternative dispute resolution systems works as instruments of economic hegemony. Such in Guatemala case they have become potent weapons of multinational companies against not only counterparties or individuals but also governments or societies of countries that have signed the treaty.

The specialization of justice is indeed a requirement for an efficient and transparent judicial system. But when that specialization is taking part out of the public judiciary the access to justice is not guaranteed. As it was shown along this paper DR-CAFTA set a new group of norms and laws and imposes some mandatory action for those under their action's scope even when they don't even give consent to do so. Besides, that specialization brought a cost, in some cases too high that is not only measure in economical capital, but in social and cultural. In order to receive a more accurate, efficient and reliable service of justice citizens must seek private judges such as arbitrators, councilors or mediators that have abandoned the public system of justice for a more profitable job. Thus and finally ADR methods could increase access to justice and make justice more efficient but in countries like Guatemala, where judicial reform has too many problems to solve and many directions to the same goal, their implementation just reflex the inequity existing in its society and promotes a privatization of justice.

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