Berkeley Journal of International Law

Volume 24 | Issue 2 Article 11

2006

Toward a History of NAFTA's Chapter Eleven

Jennifer A. Heindl

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By
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I.
INTRODUCTION

Most commentators agree that Chapter Eleven on investment is one of the most important sections of the North American Free Trade Agreement (NAFTA).[1] Over ten years after the passage of NAFTA, Chapter Eleven continues to be controversial, not least because preliminary drafts of the Free Trade Agreement of the Americas contain an investment chapter that is virtually identical to NAFTA's.[2] Supporters see Chapter Eleven as necessary to allow companies to rationalize regional production and improve global competitiveness.[3] Skeptics see a threat to sovereign immunity and interference with the sovereign's regulatory powers.[4]

Perhaps the most innovative aspect of the investment chapter is the adjudicatory regime it implements, giving investors the right to require the arbitration of disputes with state parties. The Chapter Eleven dispute settlement procedures thus allow an investor to do something that was not possible under any previous multilateral trade agreement, all of which required that the investor's state pursue its citizen's claim.[5] This provision of NAFTA has raised the hackles of those who view it as a means for corporations to interfere with the sovereign rights of party nations to establish policies that may hurt investors'

1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* http://www.nafta-sec-alena.org [hereinafter NAFTA] (last visited Mar. 17, 2006).

2. Laura Altieri, *NAFTA and the FTAA: Regional Alternatives to Multilateralism*, 21 BERKELEY J. INT'L L. 847, 870 (2003).

3. *See* Daniel Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

4. *See* Public Citizen, NAFTA Chapter 11 Cases: Bankrupting Democracy (2001), *available at* http://www.citizen.org/documents/ACF186.PDF. (last visited Mar. 17, 2006).

5. *See* NAFTA, *supra* note 1, art. 1110, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1110 (last visited Mar. 5, 2006).

bottom line. [6]

Traditionally, industrialized states and transnational corporations have favored arbitration for the resolution of investment disputes, while developing countries were often coerced into accepting such dispute resolution procedures.[7] The dispute resolution mechanism of NAFTA, pushed especially by the United States, was intended particularly to restrain Mexico, with its autarchic government and history of nationalizing the petroleum industry.[8] Ironically, since NAFTA's implementation far more investor-state disputes have been initiated against Canada and the United States than against Mexico.[9] Criticism of investment arbitration has come from a new corner, and reached a new pitch, as politicians and domestic interest groups in the US and Canada voice concerns about sovereignty and adjudicatory transparency. Further anxiety surrounds questions of the exact scope of Chapter Eleven, which purposefully defines both investment and expropriation in terms that can be interpreted quite broadly.[10]

But how did we get to Chapter Eleven? Only recently the negotiating drafts of Chapter Eleven were released by the state parties, though without any commentary.[11] The negotiators of NAFTA and of Chapter Eleven in particular have offered little detailed information about the course of negotiations. The post-facto reports of negotiators that do exist tend naturally to present a smooth narrative of goodwill and mutual compromise, free from rancor.[12] We are thus left to interpret the various drafts as best we can to present some account of the negotiation: the players, their goals, their wins, and their losses.

Chapter Eleven, as ultimately formulated, established a substantive standard, an ad hoc tribunal that was available to investors in place of national courts. The strategic space of the resulting dispute-resolution body is tightly delimited, offering little room for institutional expansion.[13] As such, it represents an almost total victory for investor parties whose interests coincided largely with those of the United States negotiators. Canada, the most wary participant, could be seen as the least successful party, though it managed to preserve national review of some foreign investment.[14] With Mexico willing to follow the United States' lead, Canada was unable to get the more independent

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6. *See* Public Citizen, *supra,* note 4.

7. Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration*, 28 YALE J. INT'L LAW 365, 367 (2003).

8. RALPH H. FOLSOM, MICHAEL WALLACE GORDON & DAVID LOPEZ, NAFTA: A PROBLEM-ORIENTED COURSEBOOK 25-28 (2000).

9. For a "score card" of NAFTA investment disputes, see Alvarez & Park, *supra* note 7, at 401-07.

10. HEMISPHERIC SOCIAL ALLIANCE, BRIEFING PAPER SERIES: TRADE AND INVESTMENT, VOL. 2, NO. 5, NAFTA INVESTOR RIGHTS PLUS 5 (2001), *available at* http://www.policyalternatives.ca/documents/National_Office_Pubs/brief2_5.pdf; *see also* Price, *supra* note 3.

11. NAFTA, *supra* note 1. Drafts of Chapter Eleven are available at http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp (last visited Mar. 17, 2006).

12. *See, e.g.*, Keith Bradsher, *Economic Accord Reached by U.S., Mexico, and Canada to Lower Trade Barriers*, N.Y. TIMES, Aug. 13, 1992, at A1.

13. *See, e.g., id.*

14. NAFTA, *supra* note 1, Annex 1138.2.

and institutionalized dispute-resolution body it favored; one that it had gotten in the Canada United States Free Trade Agreement (CUFTA), where the treaty-established Commission was empowered to settle disputes.[15] Mexico, economically the weakest party and anxious to entice American investment, had to play a careful game. While willing to concede to American wishes on most issues, the Mexican government was constrained by domestic politics to avoid *appearing* overly subservient to American demands.

In Part II, I briefly describe Chapter Eleven's major provisions and the dispute resolution procedure it established. In Part III, I discuss the background and lead-up to negotiation. What sort of domestic and international concerns were at work going into the negotiations? What did the players want? In Part IV, I discuss the negotiations on investment as revealed in the drafts and other sources describing major points of conflict and how they were ultimately resolved. In the last section, I briefly discuss the implications of the negotiating history both for those who have praised Chapter Eleven as a much-needed innovation and those who have critiqued it as a threat to national sovereignty.

II.
CHAPTER ELEVEN OF NAFTA

Chapter Eleven of NAFTA provides broad protection to US, Mexican, and Canadian investors, including incorporated and unincorporated entities, state entities, and natural persons, who own or control investments in the territory of any of the state parties not their own. Section A of Chapter Eleven defines the standards for treatment of investors by the state parties. NAFTA parties must treat NAFTA investors and investments as favorably as they treat non-NAFTA investors (most-favored nation treatment) and domestic investors in like circumstances[16] NAFTA parties must ensure that investors enjoy minimum standards of treatment prescribed by international law, including due process.[17] NAFTA parties may not impose or enforce specified performance requirements for the establishment, operation, management, conduct and operation of investments.[18] Most controversially, that NAFTA parties may not expropriate investments (neither directly nor indirectly, nor through any measures tantamount to expropriation, unless such expropriation is non-discriminatory) is established in pursuit of a public purpose, meets international minimum standards of treatment, and is accompanied by compensation at fair market value.[19]

A major innovation of NAFTA is its establishment of a procedure by which a private investor may initiate a claim against a NAFTA party when any of the

15. *See* Canada-U.S. Free Trade Agreement, art. 1608, H.R. Doc. No. 216, 100th Cong., 2d Sess. 2977 (1988), *reprinted in* 27 I.L.M. 281 [hereinafter CUFTA].
16. NAFTA, *supra* note 1, arts. 1102-03.
17. *Id.* art. 1105.
18. *Id.* art. 1106.
19. *Id.* art. 1110.

above-described commitments are not met.[20] The NAFTA investment dispute-settlement procedure thus most closely resembles those that exist in the many bilateral investment treaties (BITs) which have proliferated over the last twenty years.[21]

Under Chapter Eleven, disputes between investors and state parties are settled through negotiation and arbitration. At least six months after an alleged violation and written notice of the claim, but not more than three years from when the investor knew or should have known of the alleged violation, a NAFTA investor may submit a claim to either the International Centre for the Settlement of Investment Disputes ("ICSID") under either the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention"). In the event that either the investor's home government or the host state is not a signatory to the Convention, the claim may be submitted under the ICSID Additional Facility Rule.[22] Alternatively, a dispute may be submitted to the United Nations Commission on International Trade Law ("UNCITRAL").[23]

The investor and the state-party must engage in a ninety-day consultation prior to initiating arbitration, to attempt to resolve their dispute. If the dispute is not resolved during this period, the investor can request binding arbitration.[24] The challenged state must agree to arbitration, and state parties must implement the ruling of the arbitration panel if it finds expropriation or an act "tantamount to expropriation" has taken place.[25]

The arbitration tribunal consists of three arbitrators, one chosen by the challenged state-party, one by the investor, and the third chosen jointly by the other two arbiters.[26] If the panel finds a violation of Chapter Eleven it can order the state to pay compensation to the investor for lost profits and related losses during the existence of the policy or act that has violated NAFTA, as well as future lost profits resulting from a continuing act or policy.[27] The panel cannot force the state-party to reverse a policy that it finds violates NAFTA; it can only require the state-party to make "fair and equitable" compensation to the investor for losses resulting from the policy.[28]

Chapter Eleven arbitration is available only for investors with complaints against state parties other than their own.[29] A Canadian, for example, cannot

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20. Azinian v. Mexico, Final Award, ICSID Case No. ARB(AF)/97/2 para. 82 (NAFTA Ch. 11 Arb. Trib., Nov. 1, 1999).

21. MAXWELL A. CAMERON AND BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 100 (2000).

22. NAFTA, *supra* note 1, art. 1120.

23. *Id.*

24. *Id.* art. 1119.

25. *Id.* arts. 1122, 1136.

26. *Id.* art. 1123; *see also* art. 1126 (allowing consolidation of claims before a tribunal consisting of arbitrators chosen by the Secretary-General).

27. *Id.* at art. 1135.

28. *Id.*

29. *Id.* art. 1117.

pursue Chapter Eleven arbitration for a Canadian policy that costs him profits; the dispute must be international in character. Investors can challenge the policies or actions of sub-national governments (regional, state, local) but only by way of the national government of the state-party.[30]

III.
THE POLITICAL AND ECONOMIC CONTEXT

A. The United States

While NAFTA's investment arbitration procedures have attracted a great deal of anxiety in the United States in the ten plus years since the agreement was signed, investment arbitration has long played a role in US trade policy. In the wake of the American Revolution, the Jay Treaty of 1794 granted British creditors the right to arbitrate claims for losses in the struggle for independence.[31] In the wake of the Civil War, in the Alabama Claims case, an international tribunal of arbitrators awarded the United States millions in damages against Great Britain, which had allowed its ports to be used for the construction of Confederate ships.[32] More recently the United States, like other developed nations has favored investment arbitration in its bilateral investment treaties, a preference that it brought to the NAFTA negotiating table.[33]

From the onset of negotiations the US insisted that all issues be on the table, including issues that were extremely sensitive to Mexico, like petroleum, and to Canada, like culture.[34] Trade groups in the US pressed for a comprehensive removal of not only trade, but also investment restrictions.[35] The US wanted the widest, most pro-investment measures it could get, which, considering the power differentials between the Parties, was not an unreasonable thing to expect.

B. Canada

Canada and the United States have had an extensive and relatively open trade relationship since the nineteenth century. Yet negotiations toward a free trade agreement repeatedly failed, largely because of fears within Canada, first of outright annexation and then of economic domination. Not until 1986 did the negotiations that led to the Canada-United States Free Trade Area Agreement begin.[36] CUFTA entered into effect in 1989.[37]

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30. *Id.*
31. Barton Legum, *Federalism, NAFTA Chapter 11 and the Jay Treaty of 1794*, ICSID NEWS, Spring 2001, *available at* http://www.worldbank.org/icsid/news/news.htm. (last visited Mar. 17, 2006).
32. *See* THOMAS WILLING BALACH, THE ALABAMA ARBITRATION (1900).
33. CAMERON &TOMLIN, *supra* note 21, at 100.
34. *Id.* at 77.
35. *Id.*
36. MARYSE ROBERT, NEGOTIATING NAFTA: EXPLAINING THE OUTCOME IN CULTURE,

Investment was a central interest of the US in pursuing CUFTA. The Trudeau administration had alienated the US in the 1970's with its nationalist economic policies which limited the level of foreign investment in Canada, including the creation of the Foreign Investment Review Agency in 1973.[38] During the CUFTA negotiations, Canada resisted the strong investment discipline that the US tried to impose, and the final agreement is less demanding than the US wished. It is less favorable than the BITs that the US has signed with other countries.[39]

Canada's involvement in what would become the NAFTA discussions only began after the United States and Mexico formally announced their intention to pursue a bilateral trade agreement; and only after President Bush began the fast track process with Congress.[40] The appeal of entering NAFTA for Canada, despite the existence of CUFTA, included participation in the setting of rules which might lead to the movement of American industries in Canada to Mexico.[41]

Mexico's decision to negotiate a free trade agreement with the US put the Canadians in a difficult situation. Historically, Canadian trade and investment relations with Mexico specifically, and Latin America more generally, was minimal.[42] There was little indication that Mexico would pose an immediate threat to Canada's place in US markets, but over the long term this could easily change.[43] Canada had little incentive to seek an agreement with Mexico. At the same time, Canada had just finished negotiating a trade agreement with the United States that had been controversial at home.[44] However, in order to protect its interests in the North American market, Canada was compelled to participate.[45]

Canada was also concerned that a US-Mexico agreement would result in a hub and spoke trade model in North America with Mexico potentially getting preferential treatment and better market access than Canada had in CUFTA.[46] At the same time, if the US had trade agreements with both Canada and Mexico, this might make it more attractive than Canada for investors seeking access to a continental market.[47] Perhaps a multilateral agreement further offered a greater sense of equity over the hub and spoke quality of two separate bilateral agreements between two smaller economies and one economic powerhouse.

In negotiations, Canada would seek to preserve its position and potentially

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TEXTILES, AUTOS, AND PHARMACEUTICALS 23 (2000).

37. *Id.*
38. CAMERON & TOMLIN, *supra* note 21, at 100-01.
39. *Id.*
40. ROBERT, *supra* note 36, at 29-30.
41. CAMERON &TOMLIN, *supra* note 21, at 65.
42. *Id.* at 63.
43. *Id.* at 64.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

to improve the resultant free trade agreement. At the same time, it was intent on keeping the US from getting through the back door of NAFTA what it had failed to get in the front door CUFTA.[48]

C. Mexico

Mexico has been perceived, especially by NAFTA's critics, as the odd man out in the NAFTA negotiations.[49] Its political and economic situation as well as its status as a developing nation meant that while it had a good deal to gain from the establishment of a free trade zone, it also had much of great significance to lose. Mexico's identity as a nation was deeply implicated in its economic organization, which, as negotiations began, was far more closed than that of either Canada or the United States.[50]

The Mexican Constitution, established in 1917, was the product of revolution, and its progressive, even radical character reflects this fact.[51] Both revolution and constitution aimed to remedy the fact that, by the early 20th century, the vast majority of Mexico's land and natural resources were owned by a few families, by the Roman Catholic Church, and by foreigners.[52] Landholding and agriculture were essentially feudal in nature. Article 27 of the Constitution addressed the desire of victorious revolutionaries for land reform by authorizing expropriation to achieve a more equitable distribution of land. Article 27, includes the so-called "Calvo Clause." The Calvo clause establishes that no foreigner can have more rights than a Mexican, including rights of protection against expropriation.[53]

The Constitution of 1917 gave all underground resources to the state, and the Calvo clause required that foreign investors, who had dominated national industry and commerce, to promise not to seek the protection of their home governments.[54] In 1938 President Cardenas' nationalization of the oil and natural gas industry, creating PEMEX, a state monopoly, was seen by many Mexicans as an extension of the revolution; a declaration of economic independence from foreign powers.[55]

The Mexican political system is centered on a strong executive. At the time of NAFTA's negotiation, Mexico's government had been in the hands of the Partido Revolucionario Institucional ("PRI") or its forebears since the Revolution.[56] The PRI found a solid base among the subsistence farmers, union

48. *Id.* at 100-01.
49. *Id.* at 51.
50. *Id.*
51. FOLSOM ET. AL., *supra* note 8, at 26.
52. *Id.*
53. *Id.*;.*see also* CARLOS CALVO, LE DROIT INTERNATIONAL THEORETIQUE ET PRATIQUE (1896); Kurt Lipstein, *The Place of the Calvo Clause in International Law*, 22 BRIT Y.B. INT'L L 130 (1945).
54. FOLSOM ET. AL., supra note 8, at 26.
55. *Id.*
56. *Id.* at 27.

laborers, and state employees who had supported it for over fifty years.[57] During the seventies Mexico benefited greatly from high oil prices. At the same time, perhaps as a result, the government engaged in reckless spending. Corruption, always a problem in Mexico, became rampant. Even as the national debt grew, the country became more hostile to foreign investment. Mexico moved further towards a centralized command and control economy.[58] In 1982, President Portillo nationalized the banks and devalued the peso.[59]

President Portillo's successor, Miguel de la Madrid, inherited an economic crisis. One of the new generation "technocrat" PRI politicians, he began to address corruption, brought Mexico into GATT (1986), and pursued limited market reforms.[60] Presidents Salinas (1988-1994) and Zedillo (1994-2000), also PRI candidates, continued in the same vein, pursuing a policy of privatization and movement toward a free market economy.[61]

On trade, the technocrats were not only willing, but also anxious to attract foreign investment. In order to pay its external debts and expand its economy, Mexico needed to liberalize trade, and the technocrats were ready to accept hard discipline in an investment agreement.[62] At the same time, Mexican officials were aware that such a move would likely be controversial at home, and that some things, such as the state monopoly on petroleum, would not be negotiable.[63]

IV.
THE NEGOTIATIONS AND THE DRAFTS

Negotiations on NAFTA began in June 1991 in Toronto. They would close at the Watergate in Washington, D.C. in August of 1992. The negotiations included nineteen working groups organized under six major negotiating areas: market access, trade rules, services, investment, intellectual property, and dispute settlement.[64] One negotiator for each country headed each group. The Chief Negotiators, Julius Katz (US), Herminio Blanco Medoza (Mexico) and John Weeks (Canada) met regularly to discuss the most contentious issues.[65] During the negotiating period there were also seven ministerial meetings in which the progress of negotiations was reviewed and pressure applied to keep things moving forward. In addition to the government negotiators, there was a bevy of advisory committees from the private sector, including business, labor,

57. *Id.* at 28.
58. *Id.* at 27-28.
59. Jose Lopez Portillo, *President when Mexico's Default Set Off Debt Crisis, Dies at 83*, N.Y. TIMES, Feb. 18, 2004, *available at* http://www.latinamericanstudies.org/mexico/portillo-obituary.htm (last visited Mar. 17, 2006).
60. Robert, *supra* note 36, at 26.
61. *Id.*
62. CAMERON & TOMLIN, *supra* note 21, at 100-01.
63. *Id.*
64. ROBERT, *supra* note 36, at 36-37.
65. *Id.* at 37.

and academic representatives from each country.

Though negotiations officially started in June, the real bargaining began in October, when the first tariff offers were exchanged. At the end of October, after the third ministerial meeting at Zacatecas, Mexico, drafting began.[66] By December 1991 lawyers had put together a draft text with initial proposals.[67] On December 13th and 14th, Presidents Salinas and Bush met at Camp David and pressed the negotiations, announcing publicly that they were committed to a free trade agreement.[68] In January at Georgetown, Washington, D.C., the working groups worked on producing the first bracketed composite text in which the preferred elements and language of each country were arranged next to each other.[69]

Despite pressure from the three ministers, momentum seemed to be flagging until the pivotal four day session in Dallas, beginning on February 17th. Referred to as the "Dallas Jamboree," this meeting was aimed at resolving those areas where the negotiators seemed closest to agreement.[70] The Dallas meeting marked a turning point, but the Dallas composite (which was leaked to the press) did not address major areas like energy and autos.[71] It also still included 1,200 brackets, each containing the preferred (sometimes conflicting) text of the three parties.[72]

The momentum established in Dallas did not endure very long. By July, President Bush's declaration that negotiations were in the "ninth inning" was belied by major differences and increasing frustration among the negotiators.[73] Only on August 12th, after a final, extended (and acrimonious) push at the Watergate Hotel, did consensus form as to the most controversial terms of the agreement.[74]

In the area of investment, the issues at stake in negotiation were various and contentious. Generally, Canada wanted to keep Chapter 11 as close to CUFTA provisions as possible. Early bracketed texts were dominated by Canadian exceptions and limiting clarifications. The US was interested in expanding even beyond the measures included in its maximalist bilateral agreements, and insisted from the beginning on starting from scratch, rather than building on CUFTA.[75] Canada wanted especially to maintain the right to review certain foreign investments present in CUFTA.[76] The United States was

66. *Id.*
67. *Id.* at 38.
68. *Id.*
69. *Id.*
70. *Id.* at 39. Competing text presented by each party was included in most of the negotiating drafts within brackets, and usually marked with an abbreviation denoting the state party that had suggested the language presented.
71. *Id.*
72. *Id.*
73. CAMERON & TOMLIN, *supra* note 21, at 174.
74. *Id.*
75. *Id.* at 77, 100.
76. *Id.* at 100.

hoping to avoid such a provision in NAFTA.[77]

Compensation for expropriation was a particularly fraught issue for Mexico. Typically, bilateral trade agreements negotiated by the US contain a clause insisting that in the event of expropriation, compensation must be "prompt, adequate, and effective."[78] This was the specific language with which the United States had opposed Mexico's expropriation of American interests in the Mexican petroleum industry in 1938.[79] This language was bound to be problematic for Mexico. At the same time, the United States insisted on including provisions establishing a cause of action for individual investors against member states and a mandatory arbitration procedure. Arbitration of course had a very different historical valence for developing countries such as Mexico, who had suffered under unfair and colonialist arbitration treaties, as is evinced by the inclusion of the Calvo Clause in Mexico's constitution. At the same time, in its eagerness for foreign investment, Mexico was willing to deal. Even more fundamental to the achievement of consensus was the definition of investment in the chapter. The United States wanted the broadest possible definition of both investment and expropriation.

Surprisingly, as negotiations went forward Mexico and the US became closer. Both wanted very limited restraints on investment, although for different reasons. According to a Mexican negotiator, Canada was a more reluctant player throughout: "Mexico was closer to the US than Canada. We wanted more discipline than Canada. Canada based its position on the Canada-USA FTA, which for us had little substance. Canada was more afraid of foreign investment. What Mexico wanted was more foreign investment and, while the constitution created limits, Mexico was open to strong disciplines."[80]

At the February Dallas meeting, Mexico's openness to "strong disciplines" and Canada's ambivalence became more pronounced. It was here that Mexico agreed both to arbitration between states and individual investors and to rules regarding expropriation.[81] However, significant wrinkles remained to be ironed out between both Canada and Mexico. The United States pressed Canada on the issue of review of foreign investment, trying to reduce the scope of review allowed in CUFTA. CUFTA had allowed government review of direct acquisitions over CAN$150 million.[82] Canada's economy was already heavily, some said too heavily, transnationalized, making the Canadians extremely reluctant to concede on this issue.[83]

That February, US negotiators continued to clash with Mexico on the sticky

77. *Id.*

78. See, for example, United States State Departments 2004 Model BIT, art. 6, available at http://www.state.gov/documents/organization/38710.pdf (last visited Mar. 17, 2006); *see also* NAFTA Chapter 11 draft, Jan 16, 1992 (Georgetown Composite), at 16.

79. FOLSOM ET. AL., *supra* note 8, at 26.

80. CAMERON & TOMLIN, *supra* note 21, at 101.

81. *Id.* at 112.

82. *Id.*

83. *Id.*

issue of expropriation. Both the US and Mexico were sensitive on this issue. The Calvo Clause in Mexico's constitution allowed expropriation of foreign concerns in the service of the national interest. However, the United States' insistence on "prompt, adequate, and effective" compensation for expropriation was bound to raise hackles among the Mexican delegation.[84] Ultimately, words would prove immensely important. While the current Mexican administration was ready to make concessions, it needed less charged language. Eventually the Mexicans accepted the less historically charged term "fair market value" regarding compensation for expropriation.[85] An anonymous negotiator described the results:

> The trade off in Dallas was crafting a law that does not violate the Mexican constitution. We had to craft the expropriation language not using the words 'prompt, adequate and effective.' There are three paragraphs, and if you read them, you find that what they say is exactly those three words, but in substitute language.[86]

In addition to benefiting from a strong bargaining position, the US also used time to its advantage. The negotiation team from the US had made it known that it was in no hurry. This changed from the Dallas to the Watergate meeting. President Bush announced that he wanted to be able to sign the finished agreement before the presidential election.[87] By law, Bush had to wait 90 days after the conclusion of the negotiations before he could sign the agreement.[88] In order to meet the election-day deadline, negotiations had to be completed by August 5th.[89] Bush's insistence put new power into the hands of the beleaguered Canadians.

At this point, the investment negotiating group was being held back by the issue of right to review. The CUFTA allowed Canada to review direct acquisitions of more than CAN$150 million. The US hoped to dispose of this provision in NAFTA. At the Watergate, US negotiators thought that they could get a Canadian concession on the right to review in return for maintaining the exception on cultural industries in CUFTA. The heavy protection in the film and entertainment sectors remained an obsession for Canada on which the US negotiators had compromised, to the great disappointment of the very vocal and powerful US entertainment industry.[90] The United States disparaged "Canadian culture" as an oxymoron, but ultimately was unable either to omit this exception

84. *Id.*

85. *See* NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Initial Proposal Composite of December 1991, art. 405(1)(d), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/01-December1991.pdf. *Cf.* NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Composite of May 1, 1992, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/08-May011992.pdf. (last visited Mar. 17, 2006).

86. CAMERON & TOMLIN, *supra* note 21, at 112.

87. *Id.* at 151.

88. *Id.*

89. *Id.*

90. *Id.* at 174.

or to leverage it as a means of overcoming the right to review in CUFTA.[91] Canada remained unwilling to offer any quid pro quo for the culture concession it had already secured. When Mexico saw that Canada was unwilling to give up right of review, it refused to give up review as well. The United States was stymied. The final agreement allowed Canada its cultural exception and preserved some right of review, but not without a considerable bitterness on the part of American negotiators.[92]

V.
RESULTS AND CONCERNS

The terms of Chapter Eleven left a lot of room for interpretation, and continue to raise concern among party-states as well as non-governmental groups within party-states. The great irony of the implementation of Chapter Eleven is that contrary to expectations, it is not Mexico that has been subject to the most investor suits nor levied the most complaints, but Canada and the United States, Canadian and American investors have actually filed more claims in total against the two Northern members of NAFTA than against Mexico.[93] While arbitration has historically been used in blatantly unfair ways against developing nations, the tables have turned with Chapter Eleven, with some of as the most strident critiques cominghave come from the more developed host states who are newly that are concerned about their sovereignty.[94] Concerns continue to be raised about the definition of terms such as "fair and equitable treatment," what constitutes expropriation, and when administrative regulations give rise to a compensable taking.

NAFTA's combination of an investment treaty and a trade agreement led to compromises, especially in those areas where it looked as though Chapter Eleven might conflict with other aspects of the treaty or with issues of sovereignty.[95] The definition of investment is not as broad as the US had wished.[96] Furthermore, Chapter Eleven bows to other chapters in the treaty in part by narrowing the definition of investments to "investment means" rather than "investment includes."[97] In doing so, Chapter Eleven excludes from investment any loans made to state enterprises, as well as money claims arising from contracts for the sale of goods or services or the extension of commercial

91. *Id.*
92. *Id.*
93. Alvarez & Park, *supra* note 9, at 370, Appendix: Score Card of NAFTA Proceedings, 401-07. According to Alvarez and Park, as of 2003, investors had filed seventeen claims against Canada and the United States (nine and eight respectively). Investors had filed 14 disputes (including the twice filed Waster Management claim) against Mexico.
94. *Id.*
95. Chapter 11, for example bows to Chapter 14 on financial services. *See* NAFTA, *supra* note 1, art. 1139; *see also* Alvarez & Park, *supra* note 79, at 393.
96. Alvarez & Park, *supra* note 79, at 389 (citing art. 1139).
97. *Id.*

credit.[98] Intellectual property rights can generally not be the subject of claim of expropriation, nor will non-discriminatory governmental measures of general application be considered expropriatory of a loan or debt security merely because they impose an increased cost that causes debtor default.[99]

Expropriation is also defined more narrowly than the United States would perhaps have desired. The result is a fairly wide area of exclusion or exception. Matters involving tax and finance are not susceptible to arbitration without the express permission of the state-party whose laws are implicated.[100] Taxation has often been used as a means of expropriation. At the same time the ability to tax is central to sovereignty, and taxation always possesses a certain element of expropriation. Who decides what constitutes valid taxation as an expression of sovereignty as opposed to what constitutes abusive and expropriatory taxation? Chapter Eleven assigns the determination to the fiscal administrations of the host and investor countries, in effect giving veto power to the state parties to block the arbitration of the investor's taxation based claim.[101]

Chapter Eleven established a negative deadlock procedure for investor disputes based upon taxation. An investor who wants to make a Chapter Eleven claim against a host state based on a taxation measure must at the time of advising the host state of its intention to arbitrate submit the tax measure to the appropriate fiscal authorities.[102] The investor may proceed to arbitration only if after six months of consideration, the authorities "do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation."[103] The investor's country can protect the investor's right to arbitrate by refusing to join the joint veto. In this area at least, sovereignty concerns of the state parties seem to have won out over the wishes of investors for the broadest possible protections. The limited scale (as well as the awkward quality) of these exceptions, however, suggest that they are, as one US negotiator called them, mere "carve-outs," minor concessions granted on the way to negotiating an otherwise immensely broad agreement.[104]

Perhaps most important to the US negotiators and to investors was the dispute resolution system established by Chapter Eleven. Unfortunately, tracing the development of the negotiations in this area is particularly difficult. Few specific comments were offered by negotiators, and the drafts are ambiguous. In all the composite drafts and lawyers' revisions currently available, the US proposal (which is very close to that eventually adopted) dominates. Canadian and Mexican comments are limited to brief paragraphs. In early composites, Mexico includes two paragraphs insisting that investors either turn to their own

98. *Id.*
99. *Id.* (citing art. 1110(8)).
100. *Id* at 390 (citing art. 2103(6)).
101. *Id.*
102. *Id.*
103. *Id.*
104. Daniel M. Price, *Chapter 11- Private Party Vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 109 (2000).

state party as a proxy in investment disputes or that they seek relief in the domestic courts.[105] The Mexican article's assurance of "an impartial judicial system," would have been cold comfort to US negotiators and investors.[106] Canada's contribution to the draft is limited to the assertion of an exception for any decisions made under the Investment Canada Act.[107] In the composite draft of May 22, 1992, the Canadian and Mexican articles drop out, and the US version of the dispute settlement procedures is all that remains.[108] While Canada would eventually manage to keep the right of review for certain investments that it had under CUFTA, it appears that the US strategy of starting from scratch with a broad vision of strong investor rights and only conceding the minimal "carve outs" necessary to attain a deal, was largely successful. How it came to be successful is more unclear. Perhaps, as has been suggested by commentators, it is simply more evidence of the power differential between the parties, and Mexico's willingness to submit to "strong disciplines" in return for US investment dollars.[109]

VI.
CONCLUSION

Chapter Eleven continues to be both controversial and influential. It set a new, intensely pro-investor standard for investment protections in international trade treaties. At the same time, it has been a lightning rod for critics of globalization.[110] Negotiations for the FTAA, currently stalled, have suffered

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105. NAFTA, Chapter 11, Composite of May 13, 1992, *available at* http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp, setting forth the following:

MEX [Article: Dispute Settlement

1. (Definition of an investment dispute)

2. In the event of an investment dispute, the investor may send written notice to the Party with which it has the dispute ("the host government"), setting forth the provision or provisions of this Chapter which it believes has been breached and the facts on which its assertion is based. The investor shall simultaneously send a copy of this written notice to the Party of which it is a national ("the home government"). The two Parties shall thereupon immediately refer the matter to dispute resolution under Chapter 23.]

MEX [Article: Domestic Judicial Enforcement of the Rights of

Investors 1. Each Party shall provide investors of the other Parties access to an impartial judicial system with authority to enforce the rights of investors established under this Agreement.]

106. *Id.*

107. "Notwithstanding anything in the Agreement, the provisions of Part 6 shall not apply to any Decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review." NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Composite of January 16, 1992, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/02-January161992.pdf. (last visited Mar. 17, 2006).

108. NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Composite of May 22, 1992, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/10-May221992.pdf.

109. CAMERON & TOMLIN, *supra* note 21, at 101.

110. Public Citizen, *supra* note 4; *see also* NOW: Bill Moyers Reports: Trading Democracy, transcript available at http://www,pbs.org/now/transcript_tdfull.html; Mary Bottari, NAFTA's

from the ongoing critique of Chapter Eleven and NAFTA.[111] At the same time, Chapter Eleven's arbitration policy has proved, in a historical irony, to be at least as troublesome to the United States and Canada as it has been to Mexico. NAFTA represented the first time two G-7 industrialized countries have entered into mandatory arbitration agreements with each other.[112] The result has been a plethora of claims by Canadian investors against the United States and by United States investors against Canada.[113] Reflecting perhaps the law of unintended consequences, the United States, so anxious for a system of strong investment protections and dispute settlement by ad-hoc tribunal has begun to see the political and financial costs of the "level playing field" represented by Chapter Eleven's mandatory arbitration.

Investor Rights: A Corporate Dream, A Citizen Nightmare, 22 Multinational Monitor, *available at* http//:multinationalmonitor.org/mm2001/01april/corp1.html (last visited Mar. 17, 2006.)

111. Patrick J. McDonnell & Edwin Chen, *Americas summit ends in stalemate. US vision for free-trade zone thwarted by 5 of 34 nations; no date for more talks*, SAN FRANCISCO CHRONICLE, Nov. 6, 2005, at A-15, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/11/06/MNGLTFJTDL1.DTL&hw=Free+Trade+Area+of+the+Americas&sn=006&sc=173. (last visited Mar. 17, 2006).

112. Alvarez & Park, *supra* note 7, at 370.

113. *Id.* Appendix: Score Card of NAFTA Proceedings, 401-07.