

NAFTA, MEXICO & METALCLAD: UNDERSTANDING THE NORMATIVE
FRAMEWORK OF INTERNATIONAL TRADE LAW

By

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Abstract

This thesis is an attempt to unpack and explain the outcome in the NAFTA investment dispute, *Metalclad v. Mexico*. It looks at the surrounding circumstances, principles, and relations that, when combined, assist in shedding light on the specific result in *Metalclad* and the difficulties embedded within the international trade legal regime under which this decision was made.

Chapter one discusses the tendency for the regulation of economics and markets to be elevated from the domestic sphere into the international arena. I argue that once a dispute is in the international sphere, it is more difficult to question the normative assumptions underlying the governing laws. This is due, in part to the development within international trade law of an insider network with technical expertise who assume trade law is outside of politics and therefore not open for political debate. I also question the free choice developing countries had to join the international trading system, when freeing markets came to be seen during the 1980's and 90's as the only way toward economic prosperity. I highlight that contesting international trade law is difficult because there is little opportunity for the public, whose lives are affected by the decision to become involved in the decision-making process.

Chapter two looks at the facts and values behind the law of NAFTA by exploring Mexico's specific history with foreign investment and relations with the U.S. It traces Mexico's almost revolutionary transition to a neo-liberal economy and embracing of the of the 'free trade' philosophy, the pinnacle of which was the signing of the NAFTA. The NAFTA negotiations are examined in order to inquire into the power relations and attitudes of each party towards the other that then found their way into the text of the treaty. The aim of this chapter is to see how history has shaped current interpretations of the NAFTA by arbitrators, which is exemplified in the *Metalclad* case.

Chapter three then looks at specific problems inherent in the NAFTA treaty and the Chapter 11 process. In this chapter, the NAFTA is described in general terms as is Chapter 11. I present some broad difficulties embedded within the treaty. The arbitral process that decides Chapter 11 disputes is discussed, focusing on problems with the process that could lead to unpredictable decisions or the tribunal being heavily weighted in favour of the investor.

Chapter four examines the case of *Metalclad v. United Mexican States* through the lens which has been constructed in the first three chapters. I discuss the Tribunal's perceptions of both *Metalclad* and Mexico that are perhaps a product of the narrow economic focus of international trade law, the specific history between Mexico and the U.S. that shaped current interpretations that the Arbitrators gave to events and the structure of Chapter 11 itself and its dispute resolution mechanism that perhaps contributed to the result in the Award. An important part of this chapter is an examination of the troubling informal jurisprudence that is the legal legacy of this case.

Chapter five synthesizes the major findings of each chapter and offer some ideas about ways to address some of the concerns highlighted through the *Metalclad* case.

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Chapter One: The *Metalclad* Story – The Big Picture

This case highlights how an international trade agreement like NAFTA¹ threatens democracy. We're talking about a Mexican municipality that denied a permit for a toxic waste dump. What is worst about this case is that the decision to deny a permit was made after local citizens mobilized to protest the landfill as a threat to their health. Then a faceless NAFTA panel awards damages because local officials listened to their citizens." If that's not an attack on democracy, I don't know what it is.

- Judy Darcy, National President of the Canadian Union of Public Employees (CUPE)²

This is just the kind of case for which the NAFTA was enacted, why standards of treatment, including due process and fair and equitable treatment, and why specific criteria for a taking by the government including payment of full and fair compensation are codified therein.

- Mr. Clyde C. Pearce, Counsel on behalf of Metalclad³

I. Introduction

The *Metalclad*⁴ story began when a small American-based company, Metalclad, wanted to operate a previously Mexican owned and contaminated hazardous waste treatment facility in the municipality of Guadalcázar in the Mexican state of San Luis Potosí. Metalclad had been given assurances from the federal Mexican government that they could build and operate on the site. However, a local municipal permit was also needed, and when Metalclad applied for this permit (after they had begun to build on the site), the municipal governor flatly denied the permit on the grounds that the local community opposed the re-opening of the site and that there was an environmental risk because there

¹ North American Free Trade Agreement, in force January 1, 1994 (1993) 32 I.L.M. 612 [hereinafter *NAFTA*].

² Cited in "NAFTA Challenge Highlights Threat to Environment and Municipal Decision Making" Greenpeace Canada, February 19, 2001, online: Greenpeace Canada Homepage <<http://www.greenpeace.ca/e/feature/archive/010219.html>>

³ The World Bank Group International Centre for Settlement of Investment Disputes (ICSID), In the Matter of Metalclad Corporation, Claimant v. United Mexican States, Respondent, Case No. ARB(AF)/97/1, Transcript of Hearing prepared from tape recording, Volume 1, Monday August 30, 1999, Washington D.C., Opening Statement by Clyde Pearce [Hereinafter *Metalclad Transcript*] at 13.

⁴ *Metalclad v. United Mexican States* (2000) (ICSID Additional Facility Case No. ARB(AF)/97/1) online: ICSID Homepage <<http://www.worldbank.org/icsid/cases/mm-award-e.pdf>> (International Centre for Settlement of Investment Disputes, Arbitrators: E. Lauterpact, B. Civiletti & J. Siqueiros) [hereinafter *the Award*].

was already 20,000 tons of toxic waste spilled on the site. Metalclad sued Mexico under NAFTA's Investment Chapter (Chapter 11) claiming that the local municipality's denial of a permit was "tantamount to expropriation" under Article 1110 of the NAFTA.

Metalclad also claimed they had not been given fair and equal treatment by Mexico under Article 1105.⁵ The three-person NAFTA arbitral tribunal found for Metalclad and awarded them \$16,685 million in compensation.

Why write a thesis on the *Metalclad* case? When I first read this NAFTA Chapter 11 Tribunal's Award, my initial reaction was that it did not seem right that the Mexican Government was ordered to pay an American company because one of their local municipalities denied it a construction permit on the ground that there was an environmental risk and the community did not want the site in their backyard. I was not alone. Commentators such as Professor Christopher Tollefson noted that the ruling could be characterized as "a direct attack on the right of municipal governments to make decisions on development proposals that conflict with local priorities and concerns."⁶ Tollefson further noted, that "no arbitral decision under the NAFTA, indeed few arbitral decisions of any kind, have garnered attention rivaling that rendered in *Metalclad*".⁷ Was this seemingly unfair result a one-off occurrence, or indicative of larger issues? The more I investigated this case, the more complex layers I uncovered to explain the result. And

⁵ For a full explanation of the *Metalclad* case, see Chapter four of this thesis.

⁶ Christopher Tollefson, "*Metalclad v United Mexican States* Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process," (2002) 11 Minn. J. Global Trade 183-231 [hereinafter *Tollefson*]. See also Lucien J. Dhodge, "The North American Free Trade Agreement and the Environment: The Lessons of *Metalclad Corporation v. United Mexican States*," (2001) 10 Minn. J. Global Trade 209, 214-59 at 257-58.

⁷ *Tollefson, ibid.* at 183-4.

the more I read articles examining the *Metalclad* case, the more I felt that an analysis of the background facts, relations, history, and discourse were absent from most of the examinations of the case.

This thesis is an attempt to unpack and explain the outcome in the *Metalclad* case by looking at the surrounding circumstances, principles, and relations that, when combined, assist in shedding light on the specific result in *Metalclad* and the difficulties embedded within the legal regime under which this decision was made. This work is also a modest attempt at suggesting possibilities for looking beyond *Metalclad* to possible changes within NAFTA's Chapter 11 that may ensure the circumstances and result in *Metalclad* are less likely to be repeated.

My central thesis is that the *Metalclad* case occurred as a result of the increased scope, created by international laws, for economic decisions to effectively be removed from the jurisdiction of national government and into the international sphere. This is a troubling trend as important local details are lost in the translation of the story into the international arena. The development of international trade law, (as opposed to the development of most national laws as a whole) has had a particularly narrow economic history, which means the values and normative underpinnings that are present in modern international trade law that now govern important aspects of many people's lives do not incorporate values related to the general well-being of society. This, combined with the specific history of relations between the U.S. and Mexico, the height of which was the signing of the NAFTA in 1991, and the private commercial origins of investment law principles

embedded into Chapter 11, begins to give us a picture of why the result in *Metalclad* favoured investor's rights over those of the national government and the people whose lives were affected by the decision.⁸

The first part of this chapter explains the methodological tools that I use in this thesis to think about the law. I will then go on to look at the historical origins of the discourse of international trade to explore the facts and values that underlie modern international trade law. I will consider how free the choice of developing countries was to join the international trading system. I will then question the modern method of doing international trade, which makes it an increasingly technical discipline. This, I will argue, has the effect of keeping politics separate from international trade, even when it can have a profound effect on people's lives. This chapter then goes on to explain why contesting international trade law is so difficult and why there is such fierce opposition to both sides of the debate. Finally, I will outline my line of inquiry in the rest of the thesis, which is intended to examine other facts, values, politics, and history that I believe helped to shape the result in *Metalclad*.

II. Methodology

Scholars must intelligibly construe law from the perspective of those who create and use it, before they can identify and analyze its social and ideological dimensions.

- Joel Bakan⁹

⁸ As will be seen in Chapter four, it is not so much that the Tribunal in *Metalclad* found against Mexico as it was the method by which they did so. One of the major flaws in this case is that the Tribunal did not seem to even consider Mexico's evidence on the facts and believe Metalclad's construction of the facts and the law.

⁹ Joel Bakan, *Just Words: Constitutional Rights and Wrongs*, (Toronto: University of Toronto Press, 1997) [hereinafter *Bakan*] at 5.

While much of society's law is evident in the opinions of judges and bills passed by legislatures, the scholar who looks to these sources is looking for law in all the wrong places today because we have been looking there for too long. It is now time to recognize that the social reality of particular laws and the stature of law generally are evident in the shared practices that we find throughout [our] li[ves]...

- John Brigham¹⁰

Americans [and others within the Common Law tradition] often look too hard for law, and, consequently, we tend to look past it. We expect laws to be tucked away in the inner offices of law firms, in difficult-to-access law libraries, or in obscure professional practices. But law also hides beneath our noses, in social and cultural practices. This law that we don't notice is powerful.

- John Brigham¹¹

In this thesis, I want to analyze the law for the effect that it has on society. The following section is intended to explain why I think it is important to use historical, political, and social values to analyze the law in the *Metalclad* case.

The concept of law in many circles is no longer the solid objective and (almost) scientific notion it was once held up to be by liberal positivist legal and social science scholars. Increasingly, it has been acknowledged that law is socially constructed. It is made by individuals who cannot escape their own experiences, interests, and biases. Law then, is the product of the development of shared norms. And norms are found within social practices.

1. A Constitutive Approach to Law

Many scholars now recognize that law is found in places other than that which is formally written in by legislatures, courts, and treaties.¹² Law is all around us. As Brigham reminds us, "even when we don't notice law, we are in the landscape."¹³

¹⁰ John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York: New York University, 1996) [hereinafter *Brigham*] at 25.

¹¹ *Ibid.* at 129.

¹² Boaventura de Sousa Santos, *Toward a new common sense : law, science and politics in the paradigmatic transition* (New York: Routledge, 1995); Coombe, 1995; Merry 1988

A positivist conception of law sees it as generated from the sovereign. Since at least last century, conventional representations of law have understood it to be an “autonomous, self-contained system of rules”¹⁴ The discourse of positivism treats constitutions, treaties, and official government holdings as law. Legal reasoning is presented as almost scientific in nature. It is expected to conform to standards of coherence and objectivity, that is, it is understood to be capable of unbiased objective adjudication. People outside these legal institutions are generally seen by positivists/conservatives as receiving law but not as generating legal authority.¹⁵ They may advocate for change, but their advocacy is not itself understood as law. In this way, the advocacy is seen as political and therefore set apart from law. It factors into legal outcomes but does not determine what law is. When law is studied as separate from society, it necessarily means that insights into the social reality of laws are limited.

In my view, law, politics, and social life are intrinsically connected in a complex web of sites and meanings. Inherent in this approach is recognition that law has a constitutive power to reach into and shape social and political aspects of people’s lives.

I am also interested in the influences on law that go unnoticed. The law influences people’s identities, (how people see themselves) and how those in power to make legal decisions see people. The ability of the law to characterize a person/group/country and

¹³ *Brigham, supra* note 10 at 129.

¹⁴ Ruth Buchanan & Rebecca Johnston, “Getting the Insider’s Story out What Popular Film can Tell Us about Legal Method’s Dirty Secrets.” (2001), 20 Windsor Y.B. Access Just. 87 [hereinafter *Buchanan & Johnston*] at 89.

¹⁵ *Brigham, supra* note 10 at 6-7.

therefore reconstruct their meaning is an important observation. In this way, the law is much more than a “truth-finding” institution, it is also “meaning-making.”¹⁶ For example, the ability of the *Metalclad* arbitrators to construct the Guadalcázar local environmental protest as *staged* by the governor and therefore not a real concern had the effect of erasing those people’s beliefs and the cause for which they fought.¹⁷ Accordingly, the law (through these arbitrators) has reconstructed these people as the governor’s puppets who were induced to stage a protest. If one is to believe the *Metalclad* Tribunal, the majority of the local population supported Metalclad re-opening a hazardous waste facility in their local area.¹⁸ In the eyes of the law, the *Metalclad* Award has forever enshrined the people of Guadalcázar as frauds.

Legal positivists tend to want to distinguish facts from values. However, the reality is, as Brigham notes, “all our judgments...are imbued with both facts and values; the “real” and the “ideal” are inextricably linked.”¹⁹ Once this is acknowledged, an examination of the values behind facts both in the texts of international laws, such as the NAFTA and the pages of judgments like the *Metalclad* Tribunal become not only possible, but also essential to a critical assessment of the fairness and validity of the international legal regime under which our lives are increasingly governed.

¹⁶ Buchanan & Johnston, *supra* note 14 at 89.

¹⁷ At paragraph 46 of the *Metalclad* Award, the Tribunal inserts Metalclad’s assertion that “the demonstration was organized at least in part by the Mexican state and local governments, and that the state troopers assisted in blocking traffic into and out of the site.” However, Mexico led much evidence to prove that the concern of the community was genuine and that there was a long history of protest around the hazardous waste site even before it was purchased by Metalclad. See Chapter four of this thesis.

¹⁸ *Counter-Memorial* by United Mexican States to the Tribunal in the case of *Metalclad Corporation v. The United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/97/1.) [hereinafter *Counter-Memorial*] at paragraph 34.

¹⁹ Brigham, *supra* note 10 at xii.

At the same time that I am interested in the values behind the law,²⁰ I also want to look at the power that arbitrators give to the law in practice. Dezalay and Garth urge us to do just this:

refocus the lens on the players, these “merchants of law,” in this international marketplace of ideas to reveal how their individual backgrounds, training, career strategies and ambitions have led them to function as agents of transmission and transformation in both national and international legal fields.”²¹

Examining the NAFTA treaty from the perspective of negotiations and the provisions enshrined in the NAFTA is one aspect of my project, but how the NAFTA is interpreted in practice is the real act that defines who we are legally. Therefore, this thesis attempts to examine both facts and values behind the legal texts of international trade law, and *also* to look at the social practices – the way things are done in the real world - as tools for a more full understanding of how the law simultaneously affects us and is affected by us.²²

My project seeks to look at how international trade laws intended to protect investors have the ability to prioritize economic trade and investment goals over other legal, social, and environmental issues. This is not an objective standard, but rather a choice about

²⁰ For example, how certain values dominated the NAFTA negotiations and were enshrined into the text, and how values about the priority NAFTA tribunals give to the rights of foreign investors and the belief that the legal systems of developing countries are deficient influenced the outcome of the *Metalclad* case.

²¹ As cited in Ruth Buchanan “Constructing Virtual Justice in the Global Arena” (1997) 31(2) Law and Society Review 363-375 at p 365.

²² For the parties to the dispute and those third parties that are effected by *Metalclad* and the NAFTA in general (potentially everyone in Canada, the U.S. and Mexico), there is a “mutually constitutive process whereby groups who are seeking to influence the law are themselves influenced by the way they understand it.” In this way, “law and legal forms constitute social relations and political practice by delineating possible movement action and determining movement practice.” *Brigham, supra* note 10 at x. In other words, I want to look at how legal norms and legal practices work in specific places to help or hinder particular struggles.

which of the competing priorities within this discourse prevail. As will be seen, the *Metalclad* case is a good example of how this exercise of priority works on the ground. The law operates hegemonically – it is at work shaping the social world of meaning – not only when it is institutionally encountered, but when it is consciously and unconsciously apprehended.²³ Coombe suggests that the hegemonic power is operative not only when litigation is instigated, but also when threats of legal action are made. So, people's imaginations and anticipations of how laws such as NAFTA's Chapter 11 will operate may be a shaping force in the activities that potentially violate it, and also what shapes law and the property rights it protects.²⁴ In *Metalclad*, the American company's expectations of the way the Mexican law should have treated them had a large role in the interpretation that the Tribunal gave to the Articles of the NAFTA under which *Metalclad* bought their action. In this case, the law can be seen as a site of struggle over the meaning of social activities.²⁵

2. Justification of my Approach

After having looked at the history of political and social relations that shaped the legal landscape of NAFTA's Chapter 11, in chapters three and four of this thesis, my approach will be to closely examine the legal texts of NAFTA's Chapter 11 and the *Metalclad*

²³ Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, (Durham and London: Duke University Press, 1998) at 9.

²⁴ *Ibid.*

²⁵ For example, the Tribunal went so far as to forge a new duty of transparency under Chapter 11 that was not previously considered to be contained in this Chapter. It agreed with *Metalclad*'s assertion that the Mexican government had a duty to make clear all legal channels they must explore to operate the hazardous waste site, which denied the existence of ordinary business due diligence or the prior knowledge of *Metalclad* of the need for a local construction permit. The imposition of the duty of transparency on the Mexican federal government was found to be in error by Justice Tysoe in *United Mexican States v. Metalclad Corporation*, (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950 [hereinafter *Judicial Review*] See Chapter four of this thesis.

Award. This recognizes the “centrifugal influence in the forms [of laws] produced by governing institutions.”²⁶ However, my approach attempts to avoid what Bakan calls a purely ‘internal analysis’ of the NAFTA or of *Metalclad*, which may be in danger of “implicitly defend[ing] a method that presumes rather than questions, the law’s autonomy from politics and society.”²⁷ Postmodern theorists have shown us that unmediated access to absolute truth is impossible. Both Alan Hunt and Joel Bakan note that the process of gaining knowledge about the world is one of ‘*successive approximation* to reality’.²⁸ Thus, it is useful to try to understand a practical reality in order to engage politically in its transformation while still avoiding “all the dangers and pretensions of positivist and empiricist social science.”²⁹

Further, following Bakan, my intention is to be skeptical rather than cynical.³⁰ Criticism, in my view, is essential. The criticism of existing social and political conditions can help to create a better future. As Bakan notes, “criticism of [laws] at least provokes reflection, asking people to question what they might otherwise take for granted.”³¹ Bakan’s use of criticism is one to which I also aspire: “[t]he purpose of criticism is not to prove that nothing is possible, but rather to understand what is.”³²

²⁶ *Brigham, supra* note 10 at x.

²⁷ *Bakan, supra* note 9 at 6.

²⁸ *Ibid.* at 8.

²⁹ *Ibid.*

³⁰ What is known as an ‘external’ analysis of law is often criticized for being ‘cynical’ as well as ‘nihilistic,’ ‘pointless’ and ‘perverse’ and ‘irrational, if not explicitly insane’ because it seeks to define the limits of law rather than reveal its alleged potential. Cited in *Bakan, ibid.* at 11. My approach is modeled on Bakan’s emphasis on skepticism as opposed to cynicism.

³¹ *Bakan, ibid.*

³² *Ibid.*

Accordingly, I want to understand the ways in which law has the power to constitute complex hierarchies of dominance through its' choice of competing priorities both within national societies and international spheres. My aim is not to seek to destroy the NAFTA or deny that it has some value. I do not think there should be a protectionist retreat from an open system. Rather, I want to question the underlying assumptions and premises of the NAFTA and challenge NAFTA governments and Chapter 11 tribunals to be more aware of the effect of this law on social aspects of people's lives.

With this methodological toolkit in mind, I will begin this thesis by examining the larger context in which the *Metalclad* decision is situated. In order to get at the values behind the law, my exploration of *Metalclad* necessarily begins in this chapter with a discussion of globalization and the international trading regime. The focus will then be sharpened in the following three chapters. Chapter two will look at the specific circumstances that led to Mexico signing the NAFTA, and how social relations simultaneously shaped the law and were changed by it. Chapter Three then examines elements within the NAFTA (particularly Chapter 11), and problems with how they work in practice that help to shape people's expectations of what the law says and how it might be used. With this background in mind, I will then analyze the *Metalclad* case in detail, focusing on the most problematic parts of the case. I believe this approach will allow me to gain a more full understanding of the result in the Award and the legal regime under which it operates.

III. International Trade Law – an Emerging Site of Power

Importantly, a discussion of the increasing power of international trade law instruments and tribunals to reach in and shape people's lives should begin by situating international trade law in larger conversations about globalization.³³ Although popular, the term 'globalization' does not seem to have one fixed meaning that is recognizable by all.³⁴ People's experiences of globalization may vary depending on factors such as their global and local location and social position. For the purposes of this discussion, I am using one specific aspect that is generally associated with globalization: the increasing tendency for the regulation of economics, markets, trade, and investment to be taken out of the domestic sphere and into the realm of international governance.

The discourse of international trade law is an important site of struggle about the meaning and effects of globalization; particularly over how far into the social lives of people it should and does reach. The effect that international trade law has on a society goes far beyond the texts of treaties or the decisions of international arbitral bodies and courts.

Although this critique of positivism has long been made in domestic contexts,³⁵ there

³³ For a good introduction to the large body of scholarship on this important and prolific topic see: Held, D., McGrew, A., Goldblatt, D., & Perraton, J., *Global Transformations: Politics Economics and Culture* (Oxford : Polity Press, 1999) [hereinafter *Held, McGrew, Goldblatt & Perraton*]; J. Mittleman, *The Globalization Syndrome: Transformation and Resistance*, (Princeton: New Jersey, Princeton University Press, 2000); Paul Hirst and Grahame Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance*, (Cambridge: Polity Press, 1996); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996); Jane Jenson & Boaventura de Sousa Santos, *Globalizing Institutions: Case Studies in Regulation and Innovation*, (Aldershot: Ashgate, 2000) [hereinafter *Jensen & Santos*]; and Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, (New York: Cambridge University Press, 1996).

³⁴ Differing views about the impact of globalization have been usefully grouped into 3 camps (hyperglobalists, skeptics and transformationalists), by *Held, McGrew & Goldblatt & Perraton, ibid.* at 2-10.

³⁵ See e.g. Brigham, *supra* note 10; Alan Hunt, *Explorations in law and society: toward a constitutive theory of law*, (New York, N.Y. : Routledge, 1993); Stewart Macaulay, Lawrence Friedman & John Stookey, (eds.) *Law & Society: Readings on the Social Study of Law*, (New York & London: W.W. Norton & Company, 1995).

seems to have been less critical work done on international trade law and thus requires urgent attention from scholars.³⁶

A critical examination of international trade law is an important subject of study because in a post-cold war era, it has emerged as a new site of power over many areas of social, political, and of course economic life. During the 1980's and beyond, the tendency of global economics and markets to reign over previously considered 'domestic' matters has been increasing in scope. This point is significant in its own right. When it is connected with the proud claim within the conventional discourse of international trade law that it is apolitical and objective, (and perhaps innocent), this becomes particularly dangerous because it tends to preclude questioning of the normative assumptions of international trade law.

³⁶ It is pertinent at this point to acknowledge the excellent work of scholars who have begun the difficult task of providing a critical look at international economic law and/or institutions. See e.g. Ruth Buchanan, "Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place," (1995) 2 *Ind. J. Global Legal Stud.* 371-392 [hereinafter, *Buchanan* 1995]; Howse, Robert, "From Politics to Technocracy and Back again: The Fate of the Multilateral Trading Regime," (2002) 96(94) *Am. J. Int. Law* 94-117 [hereinafter, *Howse*]; David Schneiderman, "Taking Investments Too Far: Getting to Know NAFTA Expropriations Rule" (unpublished manuscript used with permission of author) 1-18 [hereinafter, *Schneiderman, Taking Investments too far*]; David Schneiderman, "NAFTA's takings rule: American Constitutionalism Comes to Canada", (1996) 46 *U.T.L.J.*, 499-537 [hereinafter *Schneiderman, 1996*]; Sundhya Pahuja, "Trading Spaces: Locating Sites for Challenge Within International Trade Law", (2000) 14 *A.F.L.J.* 38 [hereinafter *Pahuja, Trading Spaces*]; Sundhya Pahuja, "Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide" (2000) 13 *Leiden Journal of International Law* 749-813 [hereinafter, *Pahuja, Technologies of Empire*]; Anne Orford, "Locating the International: Military and Monetary Interventions after the Cold War," (1997) 38(2) *Harv. Int'l L.J.*, 443-485 [hereinafter, *Orford 1997*]; Anne Orford, "Contesting Globalization: A Feminist Perspective on the Future of Human Rights" (1998) 8(2) *Transnational Law & Contemporary Problems*, 171-198 [hereinafter *Orford 1998*]; D. Trubek, Y. Dezalay, R. Buchanan & J. Davis, "Global restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas" (1994) 44(2) *Case Western Reserve Law Review* 407 [hereinafter *Trubek et. al.*]; Rodrik, Dani, "Trading in Illusions" (2001) 123, *Foreign Policy* 54 [hereinafter *Rodrik, Trading in Illusions*]; Rodrik, Dani, *The Global Governance of Trade as if Development Really Mattered*, (United Nations Development Programme, October 2001) [hereinafter *Trade as if Dev't Mattered*]; Daniel Tarullo, "Logic, Myth and the International Economic Order" (1995) 26(2) *Harv. Int'l L.J.* 533 [hereinafter *Tarullo*]; Jane Kelsey, *Reclaiming the Future: New Zealand and the Global Economy*, (New Zealand: Bridget Williams Books, 1999), [hereinafter *Kelsey*].

Moreover, an increasingly narrow focus on international markets has placed regulators in a market of their own, “competing for favours of fickle financiers.”³⁷ The capacity for corporations to move their businesses to wherever is most profitable has reduced incentives for national governments to legislate for the good of their people on social, health or environmental issues. If a company does not like a country’s local laws it has the freedom to move to a country that has less restrictive standards that allow the business to operate. Some economists describe this mobility of finance as a “virtual senate” because through their shifts of funds social and economic policies are determined.³⁸ This produces one of the most detrimental effects of globalization: the reduction in the practical function of national, state, and local governments to make laws that affect people’s lives.

Further, since the establishment of the World Trade Organization (WTO),³⁹ the international trading system has given an even higher priority to economics over competing values within its rules and panel rulings that favours free trade over environmental/labour or social concerns.⁴⁰ The NAFTA is one of the starkest examples

³⁷ David Kennedy, “Receiving the International” in Frank Fleerackers, Evert van Leeuwen and Bert van Roermund, eds., *Law, Life and the Images of Man: Modes of Thought in Modern Legal Theory*, (Berlin: Dunker & Humblot, 1996) [hereinafter *Kennedy*] 393 at 395.

³⁸ Transcript of an interview with Noam Chomsky in April 1998 edited by Normand Baillargeon, “From Bretton Woods to the MAI :Finance and Silence”, *Le Monde Diplomatique* January 1999. Online at: <http://www.globalpolicy.org/socecon/bwi-wto/mai4.htm>

³⁹ See online: World Trade Organization homepage <<http://www.wto.org>>

⁴⁰ Some argue that after *Shrimp-Turtle* decision, (*United States-Import Prohibition of Certain Shrimp and Shrimp Products* Report of the Appellate Body, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), available at <http://www.wto.org/English/trato_e/dispu_edistabl_e.htm>[hereinafter *Shrimp-Turtle*]) this could be changing. Panels are perhaps beginning to turn against the norm of prioritizing trade over all other

of an international trade agreement that gives priority of economics and markets above other competing goals.⁴¹

Given the potential of international trade law to have a large impact on people's lives while limiting the ability of governments to counter this impact, it is worth paying close attention to the origins of these laws and in particular, the ways in which their underlying normative frameworks have developed over time.

IV. An Historical Look at the Norms of International Trade Law

Looking into the history of the creation of international trade law helps us to understand the ways in which personalities, politics, power, and economics have all worked together over time to form the values behind the discourse of international trade law that is used and applied today. I used this historical approach to make sense of how the discourse of international trade law became understood primarily as a technical science and how it came to be a priority over other competing interests which began with an equal voice, but seemed to be obscured from view.

The international trading regime was first established under the GATT in 1947.⁴² One of the principle assumptions upon which the post-war trading regimes was based was that

concerns. See *Howse*, *supra* note 36. See also Philippe Sands, "Turtles and Torturers: The Transformation of International Law," (2000-2001) 33 N.Y.U. J. In'tl. L. & Pol. 527 [hereinafter *Sands*].

⁴¹ *Howse*, *ibid.* at 102-3. That is not to say that it does not address competing goals at all. For example, the NAFTA Side Agreements on Labour and the Environment do attempt to address the concerns of the public over social values. However, in the context of Chapter 11, they do not have any effect on the decisions of tribunals. See *North American Agreement on Environmental Cooperation* and *North American Agreement on Labor Cooperation*, 1 January, 1994.

despite the set of legal prohibitions against trade barriers or restrictions, there will always be a potentially large number of possible non-trade or explicitly trade-based policies that nation states can implement which may have the effect of restricting market access in that country, but are allowed because they are for the good of their society. The GATT, says Professor Jane Kelsey, “sought to balance multilateral trade rules and the need to maintain domestic stability.”

The compromise was an international trade regime that was multilateral in character, but predicated on domestic interventionism and a shared commitment by member countries to a set of social objectives...⁴³

Professor Robert Howse argues that within a couple of decades after World War II the principle players formed a general understanding which international relations specialist John Gerald Ruggie describes as “embedded liberalism.”⁴⁴ This entailed addressing the question of how trade affects other aspects of governance of societies as manageable mainly by technocrats and experts *within* the system.⁴⁵ However, the system was complex and messy. One of the elements of this understanding was the establishment of global governance institutions that would determine the appropriate perimeters of domestic legislation.⁴⁶ Further, a non-discrimination norm, national treatment was

⁴² General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 55 U.N.T.S. 194, T.I.A.S. No. 1700. See “Legal Texts: GATT 1947” online: WTO Homepage <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> [hereinafter *GATT*].

⁴³ Kelsey, *supra* note 36 at 6.

⁴⁴ John Ruggie, “Embedded Liberalism and the Postwar Economic Regime’s” in *Constructing the World Polity: Essays on International Institutionalization*, (London ; New York: Routledge, 1998) at 62. Ruggie argued that the greatest threat to the post world war II compromise between international and domestic goals was to come not from protectionism, but from ‘the resurgent ethos of neo-laissez-faire.’ (at 84.)

⁴⁵ Howse, *supra* note 36 at 96.

⁴⁶ Other solutions were the insertion of Article XXIII into the GATT that allowed a general right of compensations for domestic policy change of another country that affects trade; and Article XX of the GATT which allowed for discrimination to pursue non-trade goals. See *GATT*, *supra* note 42; See also Howse, *ibid*.

adopted to distinguish acceptable from unacceptable non-trade domestic policies.⁴⁷

Howse notes that the fact that this system operated relatively smoothly until the 1970's was a "miracle of 'embedded liberalism.'"

Trade liberalization was embedded within a *political* commitment, broadly shared among the major players in the trading system of that era, to the progressive, interventionist welfare state; in other words, to a *particular* political and social vision, including at the same respect for diverse ways of implementing this vision...⁴⁸

Howse even goes so far as to say that there was "a trust that emerged from this basically shared vision that produced acceptance of the differences in approach to the mixed economy and welfare state as between the United States, Europe and Japan."⁴⁹ In other words, the framers of the world trading system had a common understanding of domestic law-making being outside the scope of trade even if it affected trading policies. The only time domestic legislation could be scrutinized and overridden was if it was used for a purely protectionist goal.

Howse further argues that the success of this embedded liberalism led to amnesia about its political foundation that is the interaction between free trade and the welfare state.

The onset and continuation of the cold war served to focus international governance on peace and security and the development of the international trading system was

⁴⁷ Howse argues that this nondiscrimination norm has "a certain durability and putative legitimacy...[because it is] consistent with a wide scope for regulatory diversity and allows discipline of "cheating," while minimizing the need for interference with the substance of domestic regulatory choices.

Ibid. Footnote 10, at 97.

⁴⁸ *Ibid.* at 97.

⁴⁹ *Ibid.*

increasingly left (entrusted) to a specialized policy elite who were insulated from (and disinterested in) the larger political and social conflicts of the day.⁵⁰

These are the conditions under which an “insider network”⁵¹ of trade policy specialists developed. Howse notes that whilst his description is somewhat stylized, it should be thought of as an “epistemic community.”⁵² This insider network tended to understand the trade system in terms of the policy science of economics, not a grand normative political vision as the founders of the post-war trading regime had done. These insiders proudly proclaimed that an international regime could be developed that was *above* politics and was grounded in the insights of economic “science”. Because of this, the insiders

⁵⁰ Not only was there a collective forgetting of the foundations of the modern international trading system, but also there was a seeming ignorance of history. Karl Polyani's account of the rise and fall of the laissez-faire economy in Europe in the late nineteenth century and early twentieth centuries reveals a similar trend to discount the need for governments to regulate for the good of their society that occurred prior to the great depression of the 1930's. It seems that history is doomed to repeat itself. At the turn of the century, the prevailing view was that social matters were seen as being able to be regulated purely from an economic stance. Just as modern economists of the 1970's, 1980's and 1990's claim, nineteenth century free marketeers tried to separate economic activity from society and politics. However, it became apparent that society, politics and social relations were not heterogeneous. Unregulated markets produced socially unacceptable outcomes, which in turn had political consequences. Hence, during the 1930's, came pressures to re-regulate to include the social within economics. See K. Polyani, *The Great Transformation: The Political and Economic Origins of our Times*, (Boston: Beacon Press, 1957) cited in Kelsey, *supra* note 36 at 4. For Polyani, the ‘counter-movement’ of the need for protection of society was, the final analysis, incompatible with the self-regulation of the market and thus with the market system itself. Polyani at 143 cited in Kelsey, *ibid.* at 5.

⁵¹ The “insider network” consisted of former or current governmental trade officials; GATT-friendly academics who often sat on GATT/WTO dispute settlement panels and were invited to various conferences and meetings of the GATT/WTO; international civil servants in other organizations (especially the World Bank, the Organization for Economic Co-operation and Development and the International Monetary Fund) preoccupied with trade matters; and a few private attorneys, consultants and former politicians. Howse, *supra* note at 98. A similar network relating to the NAFTA is described by Trubek et. al.. They call them the “Trade Bar” and note that it consists of “a relatively small sector of the corporate elite of the American legal profession, who were instrumental in the process of drafting the NAFTA.” Trubek et. al., *supra* note 36 *Ibid.* at 469. They note that “in playing an active role in the process of North American economic and legal restructuring, they are ensuring for themselves and their colleagues an even larger slice of the pie.” *Ibid.*

⁵² Ruggie has used this term borrowing the term “*episteme*” from Michel Foucault to refer to “a dominant way of looking at social reality, a set of shared symbols and references, mutual expectations and a mutual predictability of intention. Epistemic communities, then, may be said to consist of interrelated roles that

claimed that the international trading regime was not vulnerable to the open-ended normative controversies and conflicts that permeated through other international institutions.⁵³

A dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the “outside” world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships. GATT operatives became a classical “network”...⁵⁴

This, argues Howse, is how the “embedded liberalism” began to be re-inscribed as purely about free trade economics.⁵⁵ The political vision of embedded liberalism was converted “into an apparently timeless truth or dogma, (that free trade promotes growth which is (eventually) good for everyone)” valid across regimes, and more or less valid regardless of changed or changing economic and social circumstances, or changing public values.”⁵⁶

By the end of the 1970’s, changing political and economic circumstances, such as the world oil crisis and the ‘economic conservative revolution’ of Reagan and Thatcher meant that the multilateral trading system was being re-thought. Howse argues that the U.S. was interested in re-writing the rules of the game so they could prosper above their wartime enemies, Germany and Japan. These two countries had competed successfully in the multilateral trading market until that time. Further, newly industrializing developing

grow up around an episteme: they delimit for their members the “proper” construction of social reality.”

Howse, *supra* note 36 at Footnote 13 at 98.

⁵³ *Ibid.* at 98.

⁵⁴ Joseph Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement’ in *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, (Roger B. Porter, Pierre Sauve, Arvind Subramanian & Americo Beviglia Zampetti eds, 2001) at 336-7, cited in Howse, *supra* note 36 at 99.

⁵⁵ For a description of how the insider network could turn a blind eye to the issues of distributive justice, see *ibid.*

countries (such as Mexico) had also been able to compete successfully in highly labour intensive industries such as textiles.⁵⁷ Howse observes how barriers in various countries hampered America in exploiting its comparative advantage in knowledge intensive industries and services. In many instances, a business presence was needed in the other country in order for the US to fully exploit its comparative advantage but American firms faced severe foreign investment restrictions. These problems and the emerging conservative discourse on economy were to set the agenda for the 1986-94 Uruguay Round of GATT negotiations, which established the WTO.⁵⁸ These new WTO rules enhanced market access into previously closed markets. However, the rules were questioned by many as being narrowly focused on economics without due consideration for the social and environmental factors affected by the trade rules.⁵⁹

V. Developing Countries and International Trade Law

It is significant to note for the purposes of the *Metalclad* case study, that during the same period of the late 1970's and early 1980's, developing countries were adopting a series of neo-liberal conservative reforms (with liberalized trade as one of the major policy changes) that were revolutionizing their economies.⁶⁰ What is distinctive about this new

⁵⁶ *Ibid.* at 100.

⁵⁷ *Ibid.* at 102

⁵⁸ For the legal texts of the WTO agreements that were the results of the Uruguay Rounds see online: WTO homepage <http://www.wto.org/english/docs_e/legal_e/legal_e.htm>

⁵⁹ See e.g. M. Damina & J.C. Graz, "The World Trade Organization, the environment, and the ecological critique" (2001) 170 *International-Social-Science-Journal* 597-610; Ala'i, Padideh, "A human rights critique of the WTO: some preliminary observations," *Geo. Wash. Int'l L. Rev.* 33(3-4); C. Helm, "Transboundary environmental problems and new trade rules", (1996) 23(8) *International-Journal of Social Economics*, 29-45; J. Howard, "The lessons of Seattle for social development," 2000; 43(2) *Development* 91-93.

⁶⁰ This is significant for the *Metalclad* case because Mexico is a prime example of where a developing country has had to adjust to becoming a member of the international trading system. Chapter two will discuss Mexico's transition to a neo-liberal economy in detail.

era of economic policies, is that governments felt compelled to pursue a similar, “orthodox” direction of reform based on common core principles (or values) of macroeconomic management known as the “Washington Consensus.”⁶¹ The influence that the IMF and World Bank had in ‘encouraging’ developing economies to adopt the “Washington Consensus” cannot be underestimated.⁶² “In this way,” says Canadian political scientist Judith Teichman, “the international context has narrowly circumscribed the policy options available in... [highly indebted countries] after 1983.”⁶³ Howse notes that developing countries considered access to debt markets were now limited, so the only way to finance economic growth seemed to be through foreign investment.⁶⁴ This led many developing countries to join the global trading regime whereas previously they had resisted becoming members⁶⁵ or had participated in regimes such as UNCITRAL but had

⁶¹ Stephan Haggard & Robert Kaufman, “Introduction: Institutions and Economic Adjustment” in Haggard and Kaufman, eds., *The Politics of Economic Adjustment*, (Princeton: Princeton University Press, 1992) 3 cited in Larry Diamond and Marc F. Plattner, *Economic Reform and Democracy*, (Baltimore and London: The John Hopkins University Press, 1995) [hereinafter Diamond & Plattner] at xxii. The “Washington Consensus” describes a series of measures that US leaders and those in the powerful official lending institutions, the World Bank and the International Monetary Fund (IMF) presumed would lead developing countries to greater wealth and prosperity. It was a theory of reliance upon market forces and the reduction of state intervention and minimum level state spending. It included fiscal discipline, liberal trade, competitive exchange rates, secure property rights, broad tax bases with efficient administration, privatization of state enterprises, and a general preference for the market rather than the state in determining prices, interest rates, and capital flows. US economist Paul Krugman explained the name ‘Washington Consensus’ was because Washington is where the major economic institutions and the US government are located, and where important people in international economic affairs meet most often. See *Kelsey, supra* note 36 at 32.

⁶² See *Pahuja, Technologies of Empire, supra* note 36.

⁶³ Judith Teichman, *Privatization and Political Change in Mexico*, (Pittsburgh and London: University of Pittsburgh Press, 1995) [hereinafter *Teichman 1995*] at 4.

⁶⁴ *Howse, supra* note 36 at 103.

⁶⁵ As will be seen in Chapter two, Mexico had resisted joining the GATT in the 1970’s as it was contrary to their economic policy of Import-Substitution Industrialization (ISI), which was designed to develop national economies by manufacturing consumer goods internally that had previously been imported. However, after its’ transition to a neo-liberal economy, it joined the GATT in 1986 on less favourable terms than would have been available to them previously.

the power to form a powerful trading block that had the power to create treaties that suited their economic policies.⁶⁶

It is important to ask how free the choice was to participate in the global trading regime for some developing countries. In recent years, there seems to be a “remarkable consensus on the imperative of global economic integration.”⁶⁷ Rodrik argues that openness to trade and investment flows has “mutated into the most potent catalyst for economic growth known to humanity.”⁶⁸ Some scholars argue that developing countries joined the international trading regime because they considered the costs of exclusion from the world of competitive trading blocks were too high.⁶⁹ This view presumes that countries have accepted this type of globalization as inevitable. This may well help to explain why many developing countries that were previously opposed to liberalization are now part of the GATT/WTO and some regional agreements.⁷⁰

Importantly, becoming part of the international trading system tends to mean subscribing to an orthodox way of running the economy that is embedded within the international trading system. Within this system is an “almost total neglect of both alternative

⁶⁶ See Chapter two of this thesis.

⁶⁷ Rodrik, *Trading in Illusions*, *supra* note 36 at 54.

⁶⁸ *Ibid.*

⁶⁹ For example, Robert Keohane’s argument is that the costs of exclusion in a world of competitive trading blocks could make small countries willing to give up independence rather than risk being left out. He says that this aptly captures part of the logic of Mexico’s NAFTA initiative. See Keohane, R., “El concepto de interdependencia y el analisis de las relaciones asimetricas.” in *Interdependencia: ?Un enfoque util para analisis de las relaciones Mexico-Estados Unidos?* Torres, B ed. (Mexico City: Colegio de Mexico, 1990). The same point is made more emphatically by Krasner in “Interdependencia simple y obstaculos para la cooperacion entre Mexico y Estados Unidos” in Torres B. ed. (above).

⁷⁰ As of January 2002, the WTO had 144 members. See “Members and Observers” online: WTO homepage <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>

approaches to the economy and to criticism of its theoretical, empirical, and policy stances.”⁷¹ Margaret Thatcher’s TINA principles⁷² seem to be adopted by the developing world after they have become a part of the international trading system. Gustav Ranis argues that “the [World] Bank has paid relatively little attention to the output of other national and international organizations...Indeed even much relevant output by academia is largely ignored.”⁷³ Consequently, alternative models of development were seen as irrelevant or utopian. Social democratic and socialist political views of development, like those of some Nordic countries, were dismissed as local peculiarities that could not be replicated elsewhere.⁷⁴

This previous section has discussed the history of the values that have been embedded into the discourse of international trade law and has highlighted those values that have been excluded. The next part discusses some particularities of modern international trade law which were a factor in the way the NAFTA was structured and, in turn, contributed to the way in which the law was analyzed and interpreted in the *Metalclad* Award.

⁷¹ Ben Fine, Costas Lapavistas, & Jonathan Pincus, *Development Policy in the Twenty-First Century: Beyond the post-Washington Consensus*, (London & New York, Routledge, 2001) [hereinafter *Fine et. al.*] at 21.

⁷² See online: The Media Channel homepage <<http://www.mediachannel.org>> cited in U. Franklin, “Liberty Technology and Hope” (Viscount Bennett Lecture, Faculty of Law, University of New Brunswick, February 2000).

⁷³ Gustav Ranis, “The World Bank Near the Turn of the Century” in Culpeper Roy, Albert Berry and Frances Stewart eds., *Global Development Fifty Years After Bretton Woods: Essays In Honour of Gerald K. Helleiner*, (London: Macmillan in association with North South Institute, 1997) 75.

⁷⁴ *Jensen and Santos*, *supra* note 33 at 20.

VI. Questioning the Method Within International Trade Law

I have already highlighted that part of my methodology is to question established principles rather than take laws for granted. What then are the perceived dangerous elements within international trade law that seem to be rooted in unquestioned and natural assumptions about the international trading order? Where do the problems lie? One of the major difficulties is the view that international trade law is technical and outside of politics.

1. *The Claim that 'Politics has Happened Somewhere Else' – The Increasing Technicality of International Trade Law*

The political has become technocratic [with the internationalization of public life]. The government exists only to serve the market. Together the cosmopolitan and metropolitan sensibilities seem to have gutted the regime of any site for political engagement and turned it over to the logic of international commerce.

- David Kennedy⁷⁵

The separation of law from politics preserves the innocence of law,⁷⁶ and ultimately the dominance of convention.

- John Bringham⁷⁷

International trade law is constituted by discourses about law that presume that trade and investment (and, in a more general sense, economics) are not only all-important but do

⁷⁵ Kennedy, *supra* note 37 at 412.

⁷⁶ Peter Fitzpatrick discusses "the innocence of law" in his article: "Racism and the Innocence of Law" (1987) 14(1) Journal of Law and Society at 119- "Liberal cosmology provides a particular protection of law's innocence. Law is radically separate from 'material life' and can also act on and order that life: with liberal society "[p]articular self-interest must be constrained by universalistic legal and motivational structures; in this sense, the formal rationality of civil society must dominate the substantive rationality of material life."

⁷⁷ Bringham, *supra* note 10 at 19.

not intersect with social or political life. For example, Trubek et al. talk about how there was a dichotomy in the debate over NAFTA about the line between law and politics:

By casting NAFTA as merely a set of legal rules for the handling of international commercial transactions, vehicles for the facilitation of commercial relations between parties and means for increasing the predictability and hence the efficiency of transactions, commercial lawyers can maintain their hegemony over the drafting, interpretation and manipulation of those rules. Moreover, because it stresses that NAFTA is not just law, but *international trade law*, this vision also justifies the closed and secretive nature of the drafting process, in which industry but not the public is consulted on various aspects of the Agreement. Thus, this vision helps to justify moving questions from the open "civic culture" of national legislatures to the closed "trade culture" of international negotiation, and thus to an arena in which the advantages lie with those familiar with the trade culture.⁷⁸

It is apparent from the way in which a law such as NAFTA's Chapter 11 has been constructed, that trade insiders see these international trade laws as a "non-political" alternative. Thus, the effect of separating the law of international trade from its effect on social life is to exclude anyone without technical qualifications or connections from being able to influence the law. It seems that the discourse of international trade law has, like legal positivism itself, failed to acknowledge that laws affect society and vice-versa. The discourse of international trade law is "anchored in and help[s to] sustain specific patterns of social relations and political order."⁷⁹ My previous discussion has already demonstrated that the historical role of politics in constituting international trade law has been gradually forgotten by those on the 'inside' of the discourse. Said suggests that this is a false consciousness:

...what I am...suggesting is [that] the general liberal consensus that "true" knowledge is fundamentally non-political (and conversely, that overtly political knowledge is not "true" knowledge) obscures the highly if obscurely organized political circumstances obtaining when knowledge is produced. No one is helped in understanding this today when the adjective "political" is used as a label to discredit any work for daring to violate the protocol of pretended suprapolitical objectivity.⁸⁰

⁷⁸ Trubek et. al., *supra* note 36 at 470.

⁷⁹ Bakan, *supra* note 9 at 4, citing Eagleton 1991, 8.

By using Said here, I want to suggest that attempting to view a law such as NAFTA as a non-political instrument necessarily silences those who wish to question its normative assumptions or provide an alternative viewpoint.

The next logical (and troubling) step that flows from this view of international trade law as non-political and objective is the replacement of national public politics as it relates to markets and trade with an international commercial technocracy. In this vision, national political elites would be used to further the objectives of international commerce, which display a preference for many types of political activities and regulations to either be eliminated or downplayed insofar as they are a hindrance to the market. International trade law is established to encourage 'normal' economic activity (i.e., open, structured, and pursued by private actors without government intervention) and to punish and root out the deviant economic activity (subsidies, dumping, cartels, dependence, instability, state trading, price supports, etc.).⁸¹ As agents of commerce prefer to bargain the rules as if the parties were private contractors, they see governments' role as either to stay out of the bargaining process or if it is involved, to strengthen national commitments to ensure that the private international law regime functions to support rather than hinder commerce.⁸² It is important to note that government action which may impinge on free

⁸⁰ Edward, Said, *Orientalism*, (New York: Vintage Books, 1979) [hereinafter *Said*] at 10.

⁸¹ *Kennedy*, *supra* note 37 at 401.

⁸² This view is inherent in various commentator's calls to *extend* the rights of private companies to sue governments under Chapter 11 of NAFTA. See Robert K. Paterson, "A New Pandora's Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement," (2000) 8(2) *Willamette Journal of International Law and Dispute Resolution* 77-124 [hereinafter *Paterson*] at 120; and Hart, Michael M., & Dymond, William A., "NAFTA Chapter 11: Precedents, Principles and Prospects" Conference Paper delivered at "NAFTA Chapter 11 Conference," Friday January 18, 2002, Carleton University, online: Carleton University Homepage <<http://www.carleton.ca/ctpl/chapter11/>> [hereinafter *Hart & Dymond*] at 3. A critique of this view can be found in Chapter three of this thesis.

commercial exchange (such as the Guadalupe municipality's denial of Metalclad's construction permit) is seen as exceptional and undesirable. Thus, the state's role in international trade law is either passive or facilitative. "In this sense, the international [trading] regime is tilted against innovative national regulatory initiatives and brings deregulatory pressure to bear on the national political decision-making. National social or consumer protection or environmental policy seems automatically at risk of seeming to be an impediment to the "needs" of international commerce."⁸³

The perceived forces of globalization seem to assist in legitimating this mastery of economic expertise within the national political sphere. It has been asserted by Orford, Trubek et. al. and others that governments, such as those in the UK, Australia, New Zealand, and the United States, that came into power in the 1970's and 1980s, used a sense of national crisis in the face of changes to the global economy as a tool to delegitimize popular participation in decision-making about vital political issues, which are now "re-characterized as purely economic and technical."⁸⁴

2. *Contesting International Trade Law*

The resulting inability of most people to contest and challenge decisions about many issues that touch and indeed shape their lives is presented as inevitable; a natural consequence of the disciplines and requirements of international competitiveness and globalization. What results is the rise of a "technocratic vision" of governments and experts being engaged in the management of the economy and "politics is treated as

⁸³ Kennedy, *supra* note 37 at 402.

having somehow already happened elsewhere...⁸⁵ That is, the opportunity to become involved in the political decision making process is taken out of the equation. The name developed for the phenomenon where institutions privilege new forms of administrative governance that are geared towards ensuring a smooth ride through their geographic space over concepts of parliamentary sovereignty and political participation is “democracy deficit.”⁸⁶

Accordingly, international trade law is often seen as an authentic knowledge, an objective truth. This is problematic for those who wish to challenge the notion of international trade law being outside of the politics neo-liberal consensus with stories of human experiences which do not fit the understandings envisioned by the principles of the international trading system. These experiences, says Lisa Philipps, “may be discounted [by trade law] as belonging to another mentality, one that is primitive, irrational, custom-based, mythical, ideological and biased.”⁸⁷

Yet, despite difficulties in challenging international trade law, it is perhaps the “archetypal, emblematic area around which there are deep divisions and where certainly the rhetoric is the fiercest.”⁸⁸ Ravi Kanbur, former Director of the World Bank’s World Development Report on Poverty (2000-2001), provides a useful analysis of this divide

⁸⁴ Orford 1997, *supra* note 36 at 476; See also Trubek *et. al.*, *supra* note 36.

⁸⁵ Kennedy, *supra* note 37 at 412.

⁸⁶ *Ibid.* at 412-3.

⁸⁷ Lisa Phillipps, “Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy” (1996) 11(1) C.J.L.S. 141 [hereinafter *Phillipps*] at 149 quoting J.F. Lyotard, *The Postmodern Condition*, (Minneapolis: University of Minnesota Press, 1984).

and reasons why the two groups' (international trade/economic experts and civil society advocates, whom he diplomatically calls Group A and Group B) views are polarized to such an extent that one side often does really hear the other's arguments. In addition to the presence of power dynamics, Kanbur argues the divide has to do with the different language and frameworks that each side uses to discuss the same issue. On one hand, free trade advocates argue that global prosperity will be increased when the global market, instead of nation states are the main way for regulating trade & investment flows. Critics of this view are concerned about the assumption of a level playing field and the limits on the capacity of the markets and international bodies to regulate both social and economic policy. He suggests that those in policy making and implementing institutions should try to recognize and understand legitimate alternative views on economic policy and be open and nuanced in their messages rather than being closed and hard. This, asserts Kanbur, makes both good analytic and *political* sense.⁸⁹

During the negotiations over the NAFTA, there was much public debate around the predicted effects of economic internationalization. Governments and business communities in all three countries heavily promoted NAFTA, saying the increased trade would create jobs and stimulate the economy. On the other side, a wide range of groups from labour unions, environmental, religious, consumer, women's, development, and human rights NGO's worked together to oppose the NAFTA claiming it would lose jobs etc. The debate about NAFTA (which can also be found in other 'free trade' debates) is

⁸⁸ Ravi Kanbur, "Economic Policy, Distribution and Poverty: The Nature of Disagreements" Working Paper, January 2001, online: Ravi Kanbur's Homepage on the Cornell University Homepage <<http://www.people.cornell.edu/pages/sk145/>> [hereinafter *Kanbur*] at 3.

often posed as being about “free trade” versus “protectionism.” However, Trubek et al. argue that it is really about “the kind of market and society that will emerge from internationalization.”⁹⁰ They note that most participants in the debate accept that increasing economic integration of North America was virtually inevitable. But NAFTA represents a series of choices about the type of market economies the countries choose to collectively pursue. The very term “free trade,” which suggests a market liberated to follow its own logic obscures the extensive amount of regulation (law) that is needed to construct a market economy. As Trubek et al. note: “NAFTA’s hefty two thousand pages would not be required if it were truly a “free” trade arrangement; a single page would do.”⁹¹ Indeed the rules contained in the NAFTA represent choices about which interests ought to be encouraged and protected. Given that NAFTA was created to protect certain (elite) interests but has the power to profoundly affect all citizens within North America, it is little wonder the debates were so fierce. As we will see in the *Metalclad* case and discussions over the problems with Chapter 11, some fears were well founded.

VII. Concluding Remarks About This Chapter

In this first chapter, I have outlined my methodological approach, which aims to understand not only the text of treaties and arbitral decisions but looks at how law affects society and how society has an influence on the way law is shaped. A major part of my method is to examine the power that arbitrators give to the law in practice, which is an important part of what the law is. Part of this approach is to examine the values that go

⁸⁹ *Ibid.*

⁹⁰ Trubek et al., *supra* note 36 at 467.

⁹¹ *Ibid.* at 468.

into the making of the laws and their subsequent interpretation by arbitrators, judges and others.

Accordingly, my investigation of the *Metalclad* case began in this chapter with a look at the discourse of international trade law and the tendency for the regulation of economics and markets to be elevated from the domestic sphere into the international arena. This helps to explain how the *Metalclad* dispute found its way to an international arbitral tribunal rather than a Mexican court. Once a dispute is in the international arena, I argue it is more difficult to question the normative assumptions underlying the governing discipline. This is because there has been a development of an insider network with technical expertise that assume that international trade law is outside of politics and therefore it is not necessary to involve political debates in technical trade decisions. Further, developing countries, which are now a part of the international trading system, may have been constrained in their decisions about trade liberalization. This is partly because free trade came to be seen during the 1980's and 1990's by influential institutions in Washington such as the World Bank and IMF as the only way toward economic prosperity.

The technical business of trade is carried through into the way in which modern international trade law is interpreted today. As will be seen, this approach was at the heart of the *Metalclad* tribunal's decision-making method. Any argument that was not related to the laws under which the claim was brought was not understood as having any relevance in the result of the case. This is unfortunate because had consideration been

given to social and environmental aspects of the dispute, the result may have been different. I have argued here that contesting international trade law has proved to be difficult as the current legal regime allows little opportunity for the public, whose lives are affected by the decision, to be able to influence the decision-making process. It is hoped that chapter five of this thesis will provide some hope for change post-*Metalclad*.

VIII. Where Does this Thesis go From Here?

The remainder of this thesis will further investigate the possible influences on the way in which the *Metalclad* decision was made. Each chapter will become more specific in scope, until in Chapter four, the *Metalclad* case itself will be analyzed.

In attempting to look at the facts and values behind the law, Chapter two will explore Mexico's specific history with foreign investment and relations with the US. It will look at Mexico's almost revolutionary transition to a neo-liberal economy and embracing of the 'free trade' philosophy, the pinnacle of which was the signing of the NAFTA. The NAFTA negotiations will be examined in order to inquire into the power relations and attitudes of each party towards the other that then found their way into the text of the treaty. The aim of this chapter is to see how history has shaped current interpretations of the NAFTA by arbitrators, which is exemplified in the *Metalclad* case.

Chapter three will then look at specific problems inherent in the NAFTA treaty and the Chapter 11 process. In this chapter, I will describe the NAFTA in general terms and present some broad difficulties embedded within it. I will then go on to look at Chapter

11 in general detail. The arbitral process will be discussed, focusing on problems with the process that could lead to unpredictable decisions or the tribunal being heavily weighted in favour of the investor.

Chapter four will examine the case of *Metalclad v. United Mexican States* through the lens which has been constructed in the first three chapters. I will tell the *Metalclad* story and outline the Award of the Tribunal, and then go on to analyze what I consider to be the most problematic elements of the Award. I will then look at possible perceptions of both *Metalclad* and Mexico that are perhaps a product of the narrow economic focus of international trade law, the specific history between Mexico and the U.S. that shaped current interpretations that the Arbitrators gave to events and the structure of Chapter 11 itself and its dispute resolution mechanism that perhaps contributes to the result in the Award. I will then explore what was left out of the Award, the most glaring detail being the local environmental dispute that was a major reason for the governor's denial of the construction permit. An important part of this chapter is an examination of the troubling informal jurisprudence that is the legal legacy of this case.

Chapter five will synthesize the major findings of each chapter and offer some ideas about ways to address some of the concerns highlighted through the *Metalclad* case. This includes a caution to governments to fully assess the impact of future trade agreements on its citizens *before* the agreement is signed and some suggestions for improvement to NAFTA's Chapter 11's dispute resolution mechanism that may make it more inclusive and go some way to rectifying the democracy deficit that is so glaring in the current

scheme. It will conclude that it is possible to re-imagine an international economy that is mindful and inclusive of social factors, in other words, more holistic: an international economy that considers economic affects on society.

Chapter Two: Mapping Mexico-U.S. Relations - Foreign Investment

Poor Mexico, so far from God and so near to the United States.

- Porfirio Diaz⁹²

We have come together as leaders of Canada, Mexico, and the United States, North American neighbors who share common values and interests. The ties that link us - human, social, cultural, and economic - are becoming stronger. Fully realizing the tremendous potential of North America is a goal we all share.

- Joint Statement by Prime Minister Jean Chertier President Vicente Fox, and President George Bush at the Summit of the Americas⁹³

Looking to North-South relations, the NAFTA legacy extends far beyond an agreement on trade. NAFTA represents a commitment by Mexico to modernize - politically and economically - and a commitment by the United States and Canada to support this great change. NAFTA links Mexico to North America and at the same time helps the United States and Canada realize the full potential of a new, larger North America.

- Robert B. Zoellick, U.S. Trade Representative at the National Foreign Trade Council⁹⁴

I. Introduction

The NAFTA in general, and Chapter 11 in particular, represent a radical departure from previous Mexican foreign policy towards the United States, its economic policies on free trade and foreign investment, and the Mexicans' specific view on expropriation of the property of foreign nationals. This chapter attempts to look at some reasons why this transformation occurred and what effect such a radical change in economic and foreign policy had on the internal politics of Mexico. Further, it looks at how international institutions and the U.S. assisted in facilitating this change.

Through examining these questions, I want look at the ways in which the NAFTA text and decisions are imbued with historical significance, which create meanings and

⁹² Quoted in R. Ruiz, *On the Rim of Mexico: Encounters of the Rich and Poor* (Boulder, CO: Westview Press, 1998).

⁹³ Quebec City, Quebec, Canada. April 22, 2001, online: United States Embassy in Mexico Homepage <<http://www.usembassy-mexico.gov/bfnafta.htm>>

underlie ways of knowing in both Mexico and the U.S. Once these meanings and methods are laid into the foundations of the NAFTA text, they seem to have become embedded within the formula of decision-making of Chapter 11 arbitrators in subsequent cases.⁹⁵

This inquiry takes a constitutive approach to the law of NAFTA;⁹⁶ I want to understand some of the history, personalities, politics and power relations that made up the law of NAFTA.⁹⁷ Importantly, this chapter will provide a lens through which to look at how the NAFTA is applied in practice by arbitrators in Chapter 11 cases. Instead of assuming that it is a standard, objective legal text, this chapter reflects the view that the law of NAFTA is imbued with certain values and also is to be found in the way it is applied. Therefore, it is important to look into the values and relations that went into the construction of the text in order to understand the way it is now being used by Chapter 11 arbitrators.

I will argue that the historical memory of the U.S. about Mexico's previous economic policies, particularly relating to foreign investment, formed part of an underlying 'fear' about the Mexicans that created a discursive negotiating strategy. This strategy required Mexico to be willing to accept the U.S. method of doing free trade. Further, Mexico was

⁹⁴ Washington, D.C. July 26, 2001, online: United States Embassy in Mexico Homepage, <<http://www.usembassy-mexico.gov/bfnafta.htm>>

⁹⁵ See Chapters three and four of this thesis.

⁹⁶ For more on the constitutive approach to law, see Chapter one of this thesis. A constitutive approach to law is that law is intrinsically linked with politics and social life. See also, *Brigham*, *supra* note 10.

⁹⁷ It is noted that this line of inquiry is a whole thesis in itself. Accordingly, this chapter does not attempt to explain every detail and event, but rather use some specifics to paint a general picture of how the NAFTA was constructed in order to provide a lens through which to look at the *Metalclad* case study in Chapter four of this thesis.

influenced by the U.S.-dominated International Monetary Fund (IMF)⁹⁸ and advice from the U.S. government. U.S.-style free trade policies were an also influence on future Mexican leaders through their education at U.S. Ivy League universities. Mexico's new elite group of neo-liberal leaders seemed to want to discipline Mexico's economic policies in order to gain foreign investment dollars, which it had decided was the only option for economic growth.

The relationship between Mexico and the US is an interesting one because of their relative power in both of their worlds. The U.S. is clearly the leader of the First World⁹⁹ and Mexico has been seen for many years as one of the most powerful Third World¹⁰⁰ states. Further, there seems to be an interdependence between the two neighbouring countries that has characterized their relations during the last decade and a half. For example, one of the reasons the IMF was so interested in helping the Mexicans out of the 1982 debt crisis was because there was a significant amount of American money invested in the Mexican economy, which if lost could have potentially led to an economic crisis in the U.S.

⁹⁸ See IMF online: IMF Homepage <<http://www.imf.org/>>

⁹⁹ The term "First World" is also used interchangeably in this thesis as: "Industrialized States," "The West," and "The North". For the purposes of this chapter, it includes the several states of Western Europe, the United States, Canada, Japan, Australia and New Zealand. American Law Professor Gloria Sandrino notes that the term, "Industrialized States" roughly coincides with the membership of the Organization for Economic Cooperation and Development (OECD). However, they do all vary in the extent to which the governments of these countries interfere in the economy, however, to a greater or lesser extent, these countries have embraced neo-liberal economics. Gloria Sandrino, "The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective," (1994) 27(2) Vand. J. Transnat'l L. 259-327 [hereinafter, *Sandrino*] at 262.

¹⁰⁰ In this thesis, I acknowledge that Third World states are by no means all the same. They consist of a diverse group of countries at various levels of industrialization. Mexico is often referred to as a "newly industrialized state." However, it is still part of the Third World. Although Third World states are economically, socially and politically diverse, they usually feel the need to maintain a united front when

This chapter concludes that the history and circumstances of Mexico's radical change in foreign policy and economy, and the act of binding themselves to a very powerful country like the U.S. has created a disadvantage for Mexico in how the NAFTA now operates in practice through Chapter 11 disputes between states and foreign investors. This limitation is difficult to overtly identify, but can be found underlying the texts of arbitral awards, such as the *Metalclad* decision, which are heavily weighted in favour of the investor.¹⁰¹

This chapter will begin with a framework for analyzing the 'fear' that helped to shape the discursive bargaining strategy of the U.S. during NAFTA negotiations. I will then look at the historical origin of this fear, which I believe is Mexico's post-revolutionary policy in regards to relations with the United States, foreign direct investment and expropriation. Mexico's leadership of the Third World in trying to control foreign investment from the Industrialized world and the breakdown of that attempt with the move towards Bilateral Investment Treaties (BITs) will be outlined. The chapter will then go on to explore Mexico's radical transition towards a neo-liberal economy and its change in policy regarding free trade and foreign investment. This will bring me to look at the NAFTA negotiations and specifically, negotiations on investment in order to examine the

dealing with industrialized states whom they see as having taken advantage of them in the past. See J. Aronson, *Trade Talks: America Better Listen* (1985) at 98. Cited in *Sandrino, ibid* at 261-2.

¹⁰¹ As argued in Chapter one of this thesis, part of the reason for the preference towards the investor in *Metalclad*, is to do with the weight that the decision makers of international trade law disputes give to free trade over the rights of governments. However, in this chapter, I will also argue that another part of Mexico's disadvantage in *Metalclad* has to do with the wording of the text and the way that text is interpreted by arbitrators, which is infused with historical rememberings about Mexico's previous conduct

discursive strategies and dynamics that went into the enshrining of the NAFTA text. This chapter will conclude by looking at the significance of the NAFTA for the Third World.

II. The "Fear-Factor" in U.S.-Mexico Relations

Mexico is an interesting member of the Third World because it is a leader of developing countries and aspires to be considered an industrialized state,¹⁰² but is still considered underdeveloped.¹⁰³ It is thus, simultaneously powerful and disadvantaged. This complicates an assumption that the NAFTA is just one in a series of stories about unequal North-South relations, where the U.S. dominates over a weaker state.¹⁰⁴

Nevertheless, I think one *can* recognize North-South inequalities in the US-Mexico relationship, particularly with regard to foreign investment. However, they are difficult to pinpoint, because they seem to operate under the surface of the relationship. Law Professor Sundhya Pahuja argues in relation to the IMF, that certain international economic norms are born of fear of the Third World, which play beneath the surface of IMF discourses and that these fears resonate with older fears about the Third World.¹⁰⁵

and a fear by the U.S. of doing business with a country that is perceived as less stable and normal than a first world state in its dealings with foreign investors.

¹⁰² According to the World Bank, Mexico is the world's 13th-largest economy, its eighth-largest exporter of goods and services, and fourth-largest oil producer. See "Mexico Country Brief" online: World Bank Group, Mexico Homepage

<<http://lnweb18.worldbank.org/External/lac/lac.nsf/d5c7ea5f4536e705852567d6006b50ff/b32b6c2eebdccb8f852567ea0006a0ca?OpenDocument>>

¹⁰³ For example, Marcel M. Giugale, Oliver Lafourcade & Vinh H. Nguyen (eds.), *Mexico: A Comprehensive Development Agenda for the New Era* online:

<<http://lnweb18.worldbank.org/External/lac/lac.nsf/Publications/9364AB8A25BABD6085256A4C004B3963?OpenDocument>> The fact that this World Bank report recommends a "five-point" development agenda indicates that the World Bank views Mexico as underdeveloped.

¹⁰⁴ A further complication is that Mexico *initiated* NAFTA negotiations and seemed more than willing to launch neo-liberal reforms in its economy after 1982. This will be discussed in more detail below.

¹⁰⁵ Pahuja, *Technologies of Empire*, *supra* note 36 at 785.

Pahuja characterizes these fears as the 'fear of entry,' or the fear of the inclusion of the Third World into the international society of states and the 'fear of exit.' Both these fears hinge on the fear of difference.¹⁰⁶ This generates particular strategies that are used to manage this fear. Professor Pahuja's article looks at the ways in which those strategies mimic particular discursive mechanisms used during moments of overt imperialism of the North over the South.¹⁰⁷ In other words, she looks at how modern discursive mechanisms are used by the North to re-dominate the Third World as a method to control their fears.

The fear of difference is based on the certain "truths" and "knowledges" (or representations) about the South that have been generated by the North. These representations are based on what Law Professor Daniel Tarullo calls "the myth of normalcy," that is, the assumption that any difference from the 'norm' (i.e., an industrialized nation with a capitalist, welfare-state economy) is seen as temporary departure from a normal state.¹⁰⁸ In this way, Third World states are not known for their own individual attributes, but by how they vary from the First World. Edward Said's seminal work, *Orientalism*¹⁰⁹ showed us that the Orient was a concept constructed by the Occident, which defines the Orient by how it differs from the Occident. This dualism between the Standard and the Other¹¹⁰ is framed within the European/Northern

¹⁰⁶ *Ibid.* at 784.

¹⁰⁷ *Ibid.*

¹⁰⁸ Tarullo, *supra* note 36 at 547. In this article, Tarullo uses the analogy of the temporary states of sickness, or adolescence to explain the expectation of the First World that the Third World will one day catch up with the rest and become normal or adult or healthy.

¹⁰⁹ Said, *supra* note 80.

¹¹⁰ Law Professor Dianne Otto provides an excellent background to this term. She describes how structuralist linguist Ferdinand de Saussure revealed how language creates meaning through patterns of dualistic relationships between "signs." See Ferdinand de Saussure, *Cours de Linguistique Generale* (Tullio de Mauro ed., 2nd ed, 1985) cited in Otto, D., "Rethinking Universality" (1997) 29 (1) Colum. H.R. L. Rev.

imagination. As Ranajit Guha argues: "all other difference is relegated to a shadow world of superstition, randomness or criminality because it is incommensurable with the European [and Northern] frame."¹¹¹ In the field of international law/relations, the Third World has been represented as a series of "quasi-states,"¹¹² (as opposed to real states) who are possessed of negative sovereignty (as opposed to positive sovereignty). Quasi-states are perceived as having international legitimacy, but lack national capability and are characterized as a people who are divided ethnically into several publics by widespread corruption and incompetence.¹¹³ Political Science Professor Robert Jackson asserts that quasi-states are maintained by the benevolent courtesy of international society, without which quasi-states could not survive.¹¹⁴ This set of assumptions or understood facts about societies, individuals, cultures and progress has characterized

1. Further, poststructural linguist Jacques Derrida shows us how the binaries which create meaning and knowledge are infused with the power hierarchy of domination (the Standard) and subordination (its Other). These dualisms created by language exist in a codependent relationship of opposites. For example, the concept of the dominant Man depends on its contrast with the subjugated idea of Woman; the notion of the "civilized" Occident relies on the "undeveloped" status of the Orient and vice-versa. See Jacques Derrida, *Positions* (Translated by Alan Bass) (Chicago: University of Chicago Press, 1981) at 41. Derrida notes the violence that is involved in the exclusionary force used to marginalize, debase, or disqualify the subordinated term. See Jacques Derrida, "Force of Law: The 'Mystical' Foundation of Authority," 11 (1990) *Cardozo L. Rev.* 1042-43. Referenced in Otto, *Ibid.* at 20.

¹¹¹ Ranajit Guha, "The Prose of Counter-Insurgency", in Ranajit Guha & Gayatri Chakravorty Spivak (ed), *Selected Subaltern Studies* (New York: Oxford University Press, 1988).

¹¹² Jackson describes the reason the Third World deserves to be seen as quasi-states. He portrays an image of the Third World state as "consisting not of self-standing structures with domestic foundations—like separate buildings—but of territorial jurisdictions supported from above by international law and material aid—a kind of international safety net. In short, they often appear to be juridical more than empirical entities: hence quasi-states" Robert Jackson, *Quasi-states: Sovereignty, International Relations and the Third World*, (Cambridge University Press, 1990, reprinted in 1996) [hereinafter *Jackson*] at 5.

¹¹³ Roxanne Doty uses Foucault's observation in his study of madness that one structure of exclusion creates niches for others. Thus, the charge of incompetence and corruption takes the place that was previously occupied by the uncivilized and unfit for self-government. Roxanne Lynn Doty, *Imperial Encounters: The Politics of Representation in North-South Relations*, (Borderlines, Volume 5) (Minneapolis & London: University of Minnesota Press, 1996) [hereinafter *Doty*] at 155.

¹¹⁴ *Jackson*, *supra* note 112. See also *ibid* at 150-151.

North-South relations, which operate in the background of the “textual network between North and South.”¹¹⁵

This fear of difference and subsequent ‘othering’ can be seen in doubts of many in the U.S. about Mexico’s capacity as a sovereign state. One of the major concerns in the U.S. about linking their country with Mexico in the NAFTA was the difference in legal systems between the two countries.¹¹⁶ Critical commentary on the Mexican legal system is common in the United States and has been the theme of several congressional hearings.¹¹⁷ For example, during the Senate Finance Committee Hearing on NAFTA, the Freedom House survey for 1991-1992 states that: “although it is nominally independent, the (Mexican) judicial system is weak, politicized and riddled with corruption.”¹¹⁸ This characterization of Mexico’s legal system underlies a broader attitude about Mexico as a “quasi-state.” This concern or fear then contributed to the underlying method for the U.S. NAFTA negotiating strategy. This, in my view, provides evidence for why a chapter on investment and a dispute resolution mechanism was inserted into the NAFTA. The Americans did not trust that the Mexican court system would deliver their investors justice. Economics Professor Joseph McKinney notes, “[a] major purpose of the investment provisions of NAFTA was to assure a climate of stability and to reduce

¹¹⁵ *Pahuja, Technologies of Empire*, *supra* note 36 at 789.

¹¹⁶ A random example of this concern is the first sentence on a website explaining the Mexican legal system, which begins, “Contrary to the beliefs widely held in the U.S. regarding the nature and function of Mexico’s legal system, Mexico does, in fact, enjoy a highly evolved and organized legal system.” [Emphasis added] See *Panoramic View of the Mexican Legal System*, by Jamie Berger, online at: <<http://tijuana.infosel.com.mx/berger/panoram.htm>>

¹¹⁷ James F. Smith, “Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA.” *United States-Mexico Law Journal* (1993) 1(1), 97-8 [hereinafter *Smith*] at 91

uncertainty concerning decisions of whether to invest in partner countries [namely Mexico].”¹¹⁹ To some degree, it is arguable that the Mexicans took on this characterization of their country as a quasi-state as part of their own identity and strived to allay the fear of the Americans by adjusting their economic policies, sometimes specifically to provide comfort to the U.S. in order to receive their approval and foreign investment dollars. In fact, in January 1991, the then Mexican president Carlos Salinas embarked on an unprecedented expenditure of government funds (more than \$6 million) on public relations and media firms, aimed at garnering support for the trade agreement and improving Mexico’s image in the United States.¹²⁰

Some argue that despite North-South dimension of their relationship, both the U.S. and Mexico are in a mutually beneficial relationship where one needs the other. Mexico has become the second most important trade partner of the United States. In the 1990’s, the rate of growth of U.S. exports to Mexico exceeded the rate of growth of U.S. exports to the rest of the world. Mexico’s financial markets are linked with the United States.¹²¹

“For better or worse, Mexico and the United States are wedded to each other. They share one of the planet’s longest land boundaries.”¹²² This interdependence is surprising given

¹¹⁸ Senator Daniel Moynihan, *Freedom in the World, Political Rights and Civil Liberties* 328 (1992) cited in *ibid.* at 91. See also, Boris Kozolchyk, “Mexico’s Political Stability, Economic Growth and the Fairness of its Legal System” 18 (1987-88) Cal. West. Int’l L. J. 105, 110-117.

¹¹⁹ J.A. McKinney, *Created from NAFTA: The Structure, Function, and Significance of the Treaty’s Related Institutions*, (Armonk, New York, London: M.E. Sharpe, 2000) [hereinafter *McKinney*] at 224.

¹²⁰ Jacqueline Mazza, *Don’t Disturb the Neighbours: The United States and Democracy in Mexico, 1980-1995*, (New York and London: Routledge, 2001) [hereinafter *Mazza*] at 84-5; See also T. Barry, H. Browne, and Beth Simms, *The Great Divide: The Challenge of U.S.-Mexico Relations in the 1990’s*, (New York: Grove Press, 1994) at 401.

¹²¹ Jorge I Dominguez and Rafael Fernandez De Castro, *The United States and Mexico: Between Partnership and Conflict*, (New York and London: Routledge, 2001) [hereinafter *Dominguez et al.*] at 1

¹²² *Ibid.*

the troubled history between the two nations. In the 1970's and the early 1980's, few would have forecast that these two countries would have signed and ratified a document as comprehensive as the NAFTA, or that official Mexico would have chosen to portray itself as "North American."¹²³

The next section traces Mexico's historical policies towards the U.S. and foreign investment, which perhaps helps to explain the genesis of some of the U.S. fear underlying their conduct during the NAFTA negotiations.

III. Mapping the History of Mexico's View on Foreign Investment, the U.S. and Managing the Economy

[F]ew things were more divisive in U.S.-Mexican relations during the post-World War II period than trade policy. The United States was the principal international force behind trade liberalization and the strongest supporter of GATT. Mexico developed a highly protectionist trade regime and did not join GATT until four decades after its creation. These divergent trade policies were a constant source of mutual recrimination and misunderstanding between the United States and Mexico.¹²⁴

It is important to understand Mexico's historical relations with the U.S. and position on trade and foreign investment to fully grasp why the radical change in Mexico's economy during the last two decades is so significant. Before discussing Mexico's change in economic policy, or the difficulties Mexico experiences with the NAFTA, it is useful to step back and look at the evolution of Mexico's approach to foreign investment and its policies prior to its neo-liberal economic reform. NAFTA is often looked at in isolation of its evolution and without consideration of how such a deal came to be agreed upon. An historical genealogy of these events and policies may alter our understandings of

¹²³ *Ibid.* at 7.

international trade law in general, and NAFTA specifically because it provides a background to the text and shows how the text may be interpreted in the future.

1. Mexico's History With Foreign Direct Investment

...[I]n both domestic and international politics and law, nineteenth-century Mexico was trapped somewhere in between colonialism and Western European-style nation-statehood.¹²⁵

Ever since independence from Spain in 1821, Mexico has been of strategic interest to industrialized states, particularly the U.S. and Britain. Political Scientist Professor Julie Erfani asserts that the U.S. government sought rapidly to recognize a newly independent Mexico in order to achieve the major U.S. objectives of a treaty of limits; to claim more territory for the United States; to gain commercial access to Mexico once Spain no longer claimed exclusive economic rights to its colony; and to displace European political influence in the Americas by encouraging Spanish-American independence and the formation of new, republican governments rather than conservative-monarchical regimes.¹²⁶

Shortly after the U.S. had recognized Mexican independence, the U.S. Congress passed The Monroe Doctrine,¹²⁷ the purpose of which was expanding U.S. political influence over the Americas and safeguarding U.S. commercial access to the newly independent countries in the region. Despite U.S. government's rhetorical respect for the legal

¹²⁴ *Ibid.* at 63.

¹²⁵ Julie Erfani, *The Paradox of the Mexican State: Rereading Sovereignty from Independence to NAFTA*, (Boulder, London: Lynne Rienner Publishers, 1995) [hereinafter *Erfani*] at 11.

¹²⁶ *Ibid.* at 13.

sovereignty of new states in Spanish America, it was quick to dispute Mexican territory and question Mexico's commitment to protecting foreign-owned property in Mexico.¹²⁸

Erfani notes:

[d]uring the first four decades of Mexico's independence, Mexico lost half of all its territory to the United States and was charged with massive foreign debts due to an inability to protect the lives and private property of foreigners in Mexico.¹²⁹

It was said that the expectation of U.S. and European investors was that foreign property should be protected more effectively than the property of Mexico's own citizens.¹³⁰

Thus, for both the British and U.S. governments, the recognition of Mexico's legal sovereignty represented a new opportunity to dominate Mexico commercially and, in the U.S. case, militarily in order to expand their territories.¹³¹

During the administration of Porfirio Diaz (1876-1911), foreign direct investment reached heady proportions. Diaz's thirty-four year dictatorship saw the implementation of liberal economic policies managed by científicos,¹³² who among other things,

¹²⁷ The Monroe Doctrine was expressed during President James Munroe's seventh annual message to Congress on 2 December 1823. The text of the doctrine can be found online: <http://www.law.ou.edu/hist/monrodoc.html>

¹²⁸ Similarly, the British commercial interests in Mexico often outweighed British respect for the Mexican state's legal sovereignty. The British preferred Mexico to have a centralist-monarchical government rather than the US preference of a republican government. The British were convinced that the U.S. government intended to restrict British commercial access to newly independent Mexico. They feared the Monroe doctrine was passed to bar European colonization of the Americas and to divide and separate the Old World from the new World in order to obstruct European commercial access to Latin America. The British thought that the U.S. support for liberal governments in Latin America was an attempt to establish governments that would enter into exclusive commercial treaties with the United States. See J. Fred Rippy, *Rivalry of the United States and Great Britain over Latin America (1808-1830)*, (Baltimore: The John Hopkins University Press, 1929; New York: Octagon Books, 1964) at 112-116.

¹²⁹ Erfani, *supra* note 125 at 13.

¹³⁰ Stuart MacCorkle, *American Policy of Recognition Towards Mexico* (New York: AMS Press, 1971) at 41. Cited in *ibid.* at 13.

¹³¹ *Ibid.*

¹³² The 'científicos' were a group of highly educated and modern government managers, who were convinced of the need to achieve economic growth and development through foreign investment and other scientific economic policies. Sandrino footnote 70. It is noted that strong parallels can be drawn between

welcomed foreign investment. Diaz believed that substantial investments in mining, utilities and basic industries would put Mexico in a similar position to industrialized states.

...by the end of the Diaz era, foreigners probably owned over half of the total wealth of the country and foreign capital dominated [nearly] every area of productive enterprise....¹³³

During the Diaz regime, Mexico entered a period of sustained economic growth like never before.¹³⁴ However, the Diaz regime's process of modernization, which prioritized the integration in the world market and foreign control of vital sectors of the economy created a "dependant economic structure that limited the Mexican government's control over these sectors and limited the Mexican government's ability to direct economic development."¹³⁵ The presence of foreign investors during the Diaz regime was one of the major sources of discontent among Mexican revolutionaries, who saw foreign investment as largely to blame for many of Mexico's economic problems.¹³⁶

The Mexican Revolution laid down a new Constitution in 1917. This Constitution embodied the anti-foreign sentiments of the Mexican revolutionaries and emphasized

the científicos and the economic managers of the Salinas administration in the 1980's. See discussion below.

¹³³ Harry Wright, *Foreign Enterprise in Mexico: Laws and Policies*, (Chapel Hill: University of North Carolina Press, 1971) at 53. In 1897, thirty-eight percent of all foreign investment in Mexico was from the United States, and twenty-nine percent of all United States foreign investment was in Mexico. *Sandrino*, *supra* note 99 at footnote 72.

¹³⁴ Michael Meyer & William Sherman, *The Course of Mexican History*, (5th ed. New York, Oxford: Oxford University Press, 1995) [hereinafter *Meyer & Sherman*] at 439. Further, Mexico's payment of its foreign debt to the US and participation in international conferences abroad meant that Mexico "ceased to be the butt of jokes." On the contrary, foreign governments were lavish in their praise for the Diaz regime and he began to receive medals and decorations from foreign governments. *Ibid* at 442.

¹³⁵ *Sandrino*, *supra* note 99 at 283.

¹³⁶ For more on the causes of the Mexican revolution of 1911, see *Meyer and Sherman*, *supra* note 134, Part VIII The Revolution: The Military Phase, 1910-20 at 483-568,

Mexican sovereignty and independence from foreign economic control.¹³⁷ It established a framework for a strong interventionist state and reserved exclusive control over the Mexican economic system.¹³⁸ In relation to foreign investment, it placed restraints on foreign economic advantages and foreign land ownership.

Until the economic debt crisis of 1982, Mexico was able to structure a pattern of policies that allowed for some foreign investment, but did not “reflect passive submission to the preferences of foreign investors.”¹³⁹ Foreign investment was limited to sectors defined by the Mexican government. The most important articles against foreign investment are Articles 27 and 28 of the Constitution.¹⁴⁰

2. *Historical Expropriations*

¹³⁷ *Sandrino, supra* note 99 at 281.

¹³⁸ Articles 25, 26 and 28 of the Mexican Constitution establish the role of the Mexican state in the economy and lay the foundation for the economic, political, and social structure of the state

¹³⁹ Van R. Whiting Jnr., *The Political Economy of Foreign Investments in Mexico: Nationalism, Liberalism, and Constraints on Choice*, (Baltimore: Johns Hopkins University Press, 1992) [hereinafter *Whiting*] at 53.

¹⁴⁰ For example, Article 27(1) vests the right to own land, waters, and their appurtenances solely in Mexican nationals. The Mexican state can grant ownership rights to foreigners if they promise not to invoke the protection of their governments. (This is a “Calvo Clause.”) The Calvo Doctrine reflects this right to settle disputes in national courts. It is present in the Mexican Constitution and is a principle in many Latin American states. This doctrine was developed by Argentinean jurist Carlos Calvo, and states that “as a matter of international law, no state may intervene, diplomatically or otherwise, to enforce its citizens’ private claims in a foreign state.” This general principle has subsequently been written into investment contracts and national constitutions. However, as a constitutional clause, its meaning has varied. The Calvo Doctrine maintains that “aliens are only entitled to those legal rights and privileges enjoyed by nationals, and hence may seek redress for grievances only before local authorities and to the extent permitted by local law”. As a result, Latin American states held firmly to the position that “disputes involving a Latin state, including arbitrations to which a state is a party, must be adjudicated in accordance with local law.” Calvo himself argued that local rules and judicial decisions regarding foreign investment were “affaires interieures.” Carlos Calvo, *Le Droit International* 348 (5th ed, 1896). Cited in *Sandrino, supra* note 99 at 276, footnote 52.

These Constitutional articles induced a series of government expropriations during the late 1930's in the energy, transportation, and agricultural sectors, which it is said, "deterred most foreign investment in the Mexican economy for many years."¹⁴¹

One of the most significant expropriations was the Mexican nationalization of the United States and British-owned oil industry in 1938.¹⁴² This occurred after the foreign-owned oil companies refused for decades to negotiate with the Mexican government on issues such as taxation, drilling permits and replacement of fee simple title by concessions. The nationalistic administration of President Lazaro Cardenas (1934-38) with the slogan: "Mexico for the Mexicans"¹⁴³ expropriated the foreign-owned oil companies in 1938.

This event was significant because it directed United States policies toward nationalization and formed its policy towards 'prompt, adequate and effective' compensation. The traditional U.S. view on international expropriation is reflected in the *Restatement (Third) of Foreign Relations Law of the United States*.¹⁴⁴ After lengthy

¹⁴¹ *Ibid.* at 287.

¹⁴² See Wendell Gordon, *The Expropriation of Foreign-Owned Property in Mexico* (New York: Arno Press, 1976). An account of the Mexican viewpoint can be found in Jesus Herzoz, *Historia De La Expropiacion de Lavs Empresas Petroleras*, (1964) cited in *Sandrino, supra* note 99 at 287.

¹⁴³ One of Cardenas's aims was to loosen the hold of foreigners on the country's economy. He was suspicious of foreign monopolies and blamed Mexico's economic problems on foreign investments. *Ibid.* at footnote 126.

¹⁴⁴ Section 712 Reporter's Note 1 (1987). A state is responsible under international law for injury resulting from:

1. a taking by the state of the property of a national of another state that
 - a. is not for a public purpose, or
 - b. is discriminatory, or
 - c. is not accompanied by provision for just compensation. For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of the taking, or within a reasonable time thereafter with the interest from the date of taking, and in a form economically usable by the foreign national;
2. a repudiation or breach by the state of a contract with a national of another state
 - a. where the repudiation or breach is (i) discriminatory; or (ii) motivated by noncommercial considerations, and compensatory damages are not paid; or claim of

negotiations over the 1938 expropriations, the Mexican government rejected the United States rule of just compensation having a present effective value and argued among other things that United States investors were not entitled to higher compensation than Mexican owners.¹⁴⁵ Sandrino asserts that the opposing views of the two governments over this issue "would characterize their respective positions for almost the entire century."¹⁴⁶

Mexican intentions of limiting foreign investment have, over the years, gradually been eroded. Amendments to the Constitution in 1983,¹⁴⁷ on one hand gave the government broad powers to direct the national economic development, on the other hand meant that after the 1982 economic crisis, it could adopt broad measures to reorient the principles governing the actions of the state and private individuals, which in recent years have emphasized the role of private investment as the basis for economic development. This means the modern Mexican government has actively promoted foreign direct investment as a critical feature of its plan for the growth of the Mexican economy.¹⁴⁸

3. *Foreign Investment Challenged at the Multilateral Level by the Third World*

repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred; or

3. other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

¹⁴⁵ They also responded that nationalization of the oil industry was a legitimate exercise of its sovereign right to restructure its economy; and that the compensation demanded by the United States would constitute an inadmissible fetter upon this right: "[T]he future of the nation could not be halted by the impossibility of immediately paying the value of the property belonging to a small number of foreigners who only seek a lucrative end." *Sandrino, supra* note 99 at 291.

¹⁴⁶ *Ibid.*

¹⁴⁷ Amendments to the Constitution, approved February 2, 1983, reprinted in Federal Official Gazette, D.O., Feb 3, 1983 (amending arts 16, 25, 27(ssXIX, XX), 28, 73 (ssXXIX-A, XXIX-E, XXIXF) of the Mexican Constitution.

¹⁴⁸ *Sandrino, supra* note 99 at 285.

Mexico's historically strong position against unfettered foreign investment was further evidenced by their leadership of the Third World during the 1960's and 1970's in questioning the legal rules and principles on foreign investment in the multilateral arena.¹⁴⁹ As newly independent states were unable to challenge these rules unilaterally, they formed a block in multilateral arenas such as the United Nations. In 1962, developing states created a caucus called the 'Group of 77,'¹⁵⁰ which was aimed at creating solidarity amongst the Third World in order to use their voting strength to secure the establishment of the United Nations Conference of Trade and Development (UNCTAD).¹⁵¹ UNCTAD was designed to be a forum for newly independent states to bargain collectively with developed states for more preferential terms of trade. However, it also became the forum for developing states to discuss a collective negotiating strategy and formulate a unified Third World position on important matters.¹⁵²

In 1974, using their majority in the United Nations, developing states succeeded in passing the United Nations General Assembly resolutions on the Establishment of a New International Economic Order (NIEO).¹⁵³ One of the main features of the NIEO is the

¹⁴⁹ The challenge from the Third World to foreign investment was particularly an issue for newly independent states after World War II, who attempted to assert their economic independence from the former colonial powers and restructure their economies.

¹⁵⁰ It was called the Group of 77 because when it was first established, there were 77 members. The name remains even though there are now more than 77 members. The caucusing mechanism has become an important vehicle for securing and maintaining cohesion among the Third World states that they feel is necessary for dealing with developed states. See G77 online: G77 Homepage <<http://www.g77.org/index.htm>>

¹⁵¹ See UNCTAD online: UNCTAD Homepage <<http://www.unctad.org/>>

¹⁵² See Diego Cordovez, *The Making of UNCTAD, Institutional Background and Legislative History*, 3 J. World Trade Law 243.

¹⁵³ Resolutions 3201 (S-VI) and 3202 (S-VI) adopted by the General Assembly of the United Nations (1 May 1974), containing the Declaration and Programme of Action of a New International Economic Order.

Charter of Economic Rights and Duties of States,¹⁵⁴ which was proposed by Mexico. A major principle of this charter is Article 2(2), which confers the right of every state to regulate foreign investment, including the activities of trans-national corporations (TNCs) within its national jurisdiction. It also confers the right to nationalize alien property upon payment of adequate compensation.¹⁵⁵

Accordingly, the Charter can be seen to challenge traditional principles of customary international law governing foreign direct investment, such as determining compensation for expropriation or nationalization and settling foreign investment disputes.¹⁵⁶ It is also a challenge to United States law, which prefers full and adequate compensation for any expropriated party.¹⁵⁷

Further, Industrialized States have opposed the position outlined in Article 2 of the Charter of Economic Rights regarding the settlement of foreign investment disputes, preferring settlement by international arbitration and adjudication.¹⁵⁸ By contrast, since the end of the nineteenth century, Latin American states have challenged the resolution of

¹⁵⁴ Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR 29th Sess., Supp.No. 31, at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975).

¹⁵⁵ Article 2(2)(c) declares that every state has the right: "[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

¹⁵⁶ Sandrino, *supra* note 99 at 274.

¹⁵⁷ See Restatement (second) of the Foreign Relations Law of the United States 166, 185 (1965).

¹⁵⁸ Charles Jones, *The North-South Dialogue: A Brief History*, (London: Frances Pinter, 1983) [hereinafter Jones] at 1-3.

disputes by an independent international authority¹⁵⁹ and it has generally been rejected by Third World states.¹⁶⁰

In the aftermath of the NIEO and the Charter of Economic Rights, it is apparent that very few results have been realized. The framework for negotiations between the Third World and Industrialized nations served to coin the phrase, 'North-South dialogue'. It has since been called the 'North-South stalemate.'¹⁶¹ Third World states have tried to introduce new legal norms, including the creation of international agreements and codes of conduct to regulate the activities of TNCs, to govern foreign investment to protect their economic interests.¹⁶² Interestingly, in more recent years, the Third World has recognized that national regulation, unaided by some international mechanism, is clearly inadequate to deal with the global strategies of TNCs.

The formation of the Group of 77, UNCTAD and the NIEO is perhaps a vivid illustration of the underlying fear felt by First World/Northern states when allowing entry of Third World States into the international society of states. Developed states perhaps perceive an atmosphere of instability, or systematic breakdown:

[t]o draw a very simple analogy, consider the idea of a game being played according to established rules. When new players are admitted and then begin to challenge those rules, such as the Third

¹⁵⁹ Aron Broches, "The Experience of the International Centre for Settlement of Investment Disputes", in *International Investment Disputes: Avoidance and Settlement*, 75 (Seymour J. Rubin and R. Nelson eds., 1985) cited in *Sandrino*, *supra* note 99 at 276.

¹⁶⁰ See Alden F. Abbott, "Latin America and International Arbitration Conventions: The Quandry of Non-Ratification" (1976) 17 *Harvard Int'l L.J.* 131 at 137.

¹⁶¹ *Jones*, *supra* note 158 at 81-114.

¹⁶² See Timothy Stanley, "International Codes of Conduct for MNC's: A Skeptical View of the Process", (1981) 30 *Am. U.L.Rev.* 973 at 974.

World did when it challenged the equity of the prevailing economic order, the fear is that there exists the possibility that the game will no longer be sustainable on its old terms...[T]he existence of the sovereign [Third World state] is the potential for it to cause systematic breakdown.¹⁶³

Sandrino argues that prior to 1987, the decline in foreign investment of industrialized states in the Third World was due in part to the perception (especially in the U.S.) that the legal standards for protection of foreign investment in developing states were unstable after the call in the Third World for a NIEO. As a consequence TNCs from the industrialized world tended to invest in other developed states instead of the Third World.

Further, this lack of investment and a financial crisis throughout the Third World during the mid-1980's led Third World states to negotiate Bilateral Investment Treaties (BITs) with developed states,¹⁶⁴ despite their preference for negotiation at the multilateral level where they had more power. However, most of the more developed of the Third World States, like Mexico did not sign BITs.

The move to BIT's has effectively removed the issue of foreign direct investment from the multilateral arena where developing countries had more power to negotiate favorable terms. Sandrino argues that developed states, who are greatly outnumbered in the multinational arena sought the BIT route as a way of reaffirming the traditional principles of customary international law on protection of alien property, effectively circumventing

¹⁶³ *Pahuja, Technologies of Empire*, *supra* note 36 at 794.

¹⁶⁴ The BIT movement began slowly, and grew dramatically in the 1990's. By 1991, there were more than three hundred treaties including nearly all the Western industrialized states and over ninety developing states. Mohamed I Khalil, "Treatment of Foreign Investment in Bilateral Investment Treaties" (1992) 7 ICSID Rev. Foreign Investment Law Journal 339. See also Jeswald Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 Int'l. Law 655.

concerns of Third World States.¹⁶⁵ This, he says, has forced Third World states to “utilize the constraints of the old economic order.”¹⁶⁶ Further, he says, international agreements such as the GATT (WTO) and the IMF have facilitated the flow of foreign investment and the development of TNCs, so that “international minimum standards of state responsibility protect these entities and thus erode the gains of the NIEO and the Charter of Economic Rights.”¹⁶⁷ In this way, the gains at the multilateral level by the Third World have been diminished somewhat by a discourse established by the Developed World that perhaps contains an underlying fear of the power of a collective Third World in the international arena. Industrialized States have sought to control their fear by controlling the forum and making the rules under which trade and investment is facilitated. The Third World, whilst being allowed in to the multilateral arena, are still considered ‘quasi-states’ and are perceived by international society as dangerous and a hindrance to “progress”. So allowing ‘quasi-states’ to have sovereignty and then receiving demands by them for the NIEO, represents a potentially destabilizing situation to the international society. It is perceived that the South (or Quasi states) demands are made because of its own lack of modernity. Therefore the demands are seen as a threat.¹⁶⁸ As will be shown in the next section, after the 1982 financial crisis, the Mexicans seemed to take on the idea that they needed to modernize to harmonize their economy in line with Western economies.

IV. Mexico Before and After the ‘Radical’ Economic Transformation

¹⁶⁵ *Sandrino, supra* note 99 at 278.

¹⁶⁶ *Ibid.* at 278-9.

¹⁶⁷ *Ibid.* at 279.

An historically significant occurrence that characterized the NAFTA relationship between the U.S. and Mexico was Mexico's transformation of their economy from statist-run to a neo-liberal free-market economy. The circumstances under which the transformation took place go further in helping to explain why Mexico is in a relatively weaker position vis-a-vie the NAFTA. Its economy and policies are new and have caused internal strain on Mexico's political system.

We've taken our old photos of Zapata [hero of the Mexican Revolution] off our office walls and put up Adam Smith.

- Mexican Economist¹⁶⁹

Mexico has evolved from being one of the most closed economies in the world only a few years ago to one of the most open today.

- World Economic Forum¹⁷⁰

Traditionally, the Mexican government took an active, interventionist role in economic development. Vested with exclusive constitutional rights in key economic sectors, the state had many legal duties to ensure social justice through economic intervention.¹⁷¹

¹⁶⁸ Pahuja, *Technologies of Empire*, *supra* note 36 at 792.

¹⁶⁹ Quoted in Howard Handelman, *The Challenge of Third World Development*, 2nd ed. (New Jersey: Prentice Hall, 2000) 225-6.

¹⁷⁰ World Economic Forum, *The Competitiveness of the Mexican Economy: A Progress Report*, (1999).

¹⁷¹ Articles 25 and 26 of the Constitution envision the state as the primary planner and promoter of the economic development of Mexico. Article 131 of the Constitution authorized the Mexican executive to regulate the import, export, and transport of goods and to regulate foreign commerce and the "stability of national production." James Smith argues that the Mexican Constitution could be contrary to the spirit of the North American Free Trade Agreement (NAFTA) and if so, in the words of renowned Mexican jurist Cesar Sepulveda, "in general, international law is superior to the norms of the Mexican State." See Smith, *supra* note 117 at 97-8. Conversely, Julie Erfani argues that despite the legal duties enshrined in the Mexican Constitution, neo-liberal rhetoric and the policies of NAFTA essentially undermine the Mexican state's legal authority to intervene in the economy on behalf of average Mexicans. Erfani, *supra* note 125 at 172-3. In addition to constitutional power, laws passed prior to the 1982 reforms, also vested power in the state to intervene in the economy. For example, the *Law of Executive Economic Prerogatives* authorized the executive to "participate in industrial and commercial activities related to the production, distribution,

Prior to the economic crisis of 1982, Mexico's statist policies seemed to generate enough wealth to legitimate its method.¹⁷² It was labeled by some as an economic miracle.¹⁷³

Part of the strong role of the government was to stimulate private sector growth and industrialization. One of Mexico's primary economic strategies was to implement the program of Import-Substitution Industrialization (ISI). ISI was designed to develop national economies by manufacturing consumer goods internally that had previously been imported.¹⁷⁴ Energy – oil and electricity – and railroad transportation were often provided by state-owned entities at subsidized rates, while cheap credit was available from Nacional Financiera, the state development bank. Further, through control over the trade union movement, the government could guarantee labour peace.¹⁷⁵

and consumption" of "food, clothing, essential materials for national industries and products of fundamental industries."

¹⁷² From the mid-1950's to the early 1970's, Mexico's economy grew, by an average of 6.5 percent per year. Marc Eric Williams, *Market Reforms in Mexico: Coalitions, Institutions, and the Politics of Policy Change*, (Lanham: Rowman & Littlefield Publishers Inc., 2001) [hereinafter Williams] at 5; Alan Riding, *Distant Neighbors: A Portrait of the Mexicans*, (New York: Vintage Books, 1989) [hereinafter, Riding] at 134.

¹⁷³ There were of course, tens of millions of Mexicans who suffered from malnutrition, underemployment, illiteracy and slum housing conditions. However, a large industrial sector emerged, millions of jobs were created, and a big-spending middle class appeared. Key government, business, and labour elites were enriched. The Mexican government also maintained a large system of subsidies that cushioned ordinary Mexicans against the harshest forms of poverty. The majority of the population expected that redistribution of this wealth would come to them eventually, which initially kept harmony between the political and economic systems, creating stability. Riding, *ibid.* at 134.

¹⁷⁴ Foreign and domestic investors were encouraged, but high import tariffs were imposed. Foreign investment was restricted to 49 percent. During the latter part of this era, local industry was protected by a complex system of import licenses. Manufacturers were protected from competition by imported goods. In 1973, legislation was passed that sought to control foreign investment. It reserved certain activities entirely for the state (petroleum, basic petrochemicals, radioactive minerals, nuclear and electrical energy and certain mining activities). Judith Teichman, "Dismantling the Mexican State" in Richard Grinspun and Maxwell Cameron (eds.) *The Political Economy of North American Free Trade* (Montreal & Kingston, London: McGill-Queen's University Press, 1993) [hereinafter Teichman 1993], 178.

¹⁷⁵ Riding, *supra* note 172 at 136.

The Mexican political system was highly centralized with enormous power vested in the presidency and the level of pluralism was extremely limited.¹⁷⁶ Mexico's presidents ruled virtually unchallenged in regular but non-renewable six year cycles (*sexenios*).¹⁷⁷ It was Jose Lopez Portillo's presidency (1976-1982) that led Mexico to unparalleled spending.¹⁷⁸ Although national income was not sufficient to cover the costs, Mexico's vast petroleum reserves meant the international banking community was willing and eager to extend large loans.¹⁷⁹ The rationale for Mexico's large deficit spending was that continuing rises in the price of oil would allow the country to generate new wealth and repay its foreign obligations. However, oil prices did not rise as expected. The world oil glut of the early 1980's saw oil prices decline. Inflation rose dramatically and the value of the peso decreased. Once labeled an "oil miracle," it had now become an oil nightmare.¹⁸⁰ Portillo responded to the crisis by accusing the private banks of looting and disloyalty when they allowed investors to pull their money out. In September 1982, without consulting his cabinet, he dramatically nationalized 59 of the country's banks.¹⁸¹

¹⁷⁶ For more on "Mexico's special brand of federalism," see Victoria Rodriguez, *Decentralization in Mexico: From Reforma Municipal to Solidaridad to Nuevo Federalismo*, (Boulder, Colorado: Westview Press, 1997) [hereinafter *Rodriguez*] at 17-37; See also, Roderic A. Camp, *Mexico's Leaders: Their Education and Recruitment*, (Tucson, Arizona: The University of Arizona Press, 1980).

¹⁷⁷ Since the 1930's, the PRI ensured that almost all of its presidential candidates won 85 percent of the total vote.

¹⁷⁸ Government construction, public works, social welfare projects and government subsidies of consumer goods all meant an increased government participation in the economy.

¹⁷⁹ *Meyer & Sherman, supra* note 134 at 683. In the 1970's Mexico was one of the largest suppliers of oil to the world market. Prices of oil from 1973-1981 rose dramatically. Mexico appeared to U.S. bankers to be an almost risk-free borrower – it had enormous amounts of oil and ambitious modernization plans. *Rodriguez, supra* note 176 at 40.

¹⁸⁰ *Myer and Sherman, ibid.* at 683.

¹⁸¹ However, this was not a solution to Mexico's economic woes. In fact, the banks were in such bad financial shape, that nationalizing them was like "putting chains on the national economy". *Ibid.* at 684.

As Portillo departed the presidency and the country for an extended vacation in Europe, he left behind the worst economic crisis in Mexican history.¹⁸²

By 1982, Mexico found itself saddled with an international debt load it could not service.¹⁸³ Mexico, which had for years been proud to be one of the most stable Latin American economies, was now viewed by the international community as a 'problem country.'¹⁸⁴ This was the scenario Miguel de la Madrid (1982-1988) faced when he assumed the presidency in 1982. In his inaugural address, he acknowledged the seriousness of the crisis and vehemently stated, "I will not allow the country to come apart in my hands!"¹⁸⁵

The IMF and international bankers were quick to provide advice to de la Madrid on economic recovery: end the ISI, reduce the size of the public sector, and cease other interventionist policies. De la Madrid was faced with a stark choice: open up and 'modernize' the economy in order to earn foreign exchange to service Mexico's debt, or continue along the old path and repudiate the debt.¹⁸⁶ Grinspun and Kreklewich argue that the debt crisis:

¹⁸² *Ibid*, 684.

¹⁸³ Mexico's biggest national industrial conglomerates had borrowed heavily on the international market. Mexico had a manufacturing sector that could not compete, a large public sector, and a business sector that had lost confidence in Mexico's ability to recover. The standard of living for most ordinary Mexicans was cut in half.

¹⁸⁴ Michael Hart, *A North American Free Trade Agreement: The Strategic Implications for Canada* (Ottawa: Centre for Trade Policy and Law, 1990), [hereinafter *Hart*] Chapter three, "The North American Trade Regime."

¹⁸⁵ Rodriguez, *supra* note 176 at 39.

¹⁸⁶ See Sidney Weintraub, "Mexican Foreign Trade: Policies, Results and Implications" in *Mexican Trade Policy and the North American Community*, (Washington: Center for Strategic and International Studies, 1988).

created a new combined conditioning framework in which the World Bank, the IMF, private creditor banks in the North and the Paris Club of official creditors shaped economic, political and social developments in the debtor countries to assure a continuous flow of resources from the South to the North.¹⁸⁷

In their opinion, Mexico 'gave in' to the U.S. and international institutions and became less able to withstand pressures from the IMF, the World Bank and the creditor banks.¹⁸⁸

I would argue that this is a large reason for the radical transformation, but not the whole story. As will be seen below, there was also a change in the economic views of the leadership of Mexico, who made a commitment to economic change.

Shortly before de la Madrid stepped into office, he signed a "letter of intent" with the IMF calling for a reduced budget deficit, diminished state subsidies, and lower real wages in order to lessen inflation.¹⁸⁹ He committed the country to strict austerity in return for a loan of \$4 billion.¹⁹⁰ The Western-educated incoming presidential team had a neo-liberal monetarist predisposition that was given further impetus by the need to adhere to the 1982 IMF agreement. De la Madrid had worked in the Federal Reserve Bank, the Secretariat of the Treasury, and as Secretary of Planning and Budgeting. He was the first president to come from a finance ministry rather than the internal affairs ministry.¹⁹¹ His

¹⁸⁷ Ricardo Grinspun, & Robert Kreklewich, "Consolidating Neoliberal Reforms: "Free Trade" as a Conditioning Framework." (1994) 43 *Studies in Political Economy* 33-61 [hereinafter *Grinspun & Kreklewich*] at 38.

¹⁸⁸ *Ibid.* at 39.

¹⁸⁹ Howard Handelman, *Mexican Politics – The Dynamics of Change*, (New York: St. Martin's Press, 1997) at 126; Robert Looney, "Optimal IMF-Type Stabilization Programs during the de la Madrid Presidency, 1983-87" in Looney, Robert, *Economic Policymaking in Mexico: Factors underlying the 1982 Crisis*, (Durham, NC: Duke University Press, 1985) [hereinafter *Looney*] at 260-275.

¹⁹⁰ Judith Teichman "The Mexican State and the Political Implications of Economic Restructuring" (1992) *Latin American Perspectives*, Issue 73, 19(2) 88-104, [hereinafter *Teichman 1992*] 91.

¹⁹¹ This is significant because it is an obvious sign that outgoing President Lopez Portillo knew that he must go against tradition and select a presidential successor who could speak the language of economics in order to be able to negotiate effectively with the IMF and steer the country out of financial crisis. Previous

economic philosophy was based on faith in the strict, orthodox economic guidelines recommended by the IMF.¹⁹²

However, even at this early stage in Mexico's economic transition, there was "widespread opposition" to an IMF agreement from labour and political parties.¹⁹³ Despite this political opposition, De la Madrid continued the economic liberalization by introducing privatization, a fundamental tenet of the Washington Consensus.¹⁹⁴ The effect of this and other initial economic changes was that economic activity contracted, public spending was slashed, the country's workers accepted a sharp reduction in real wages and business people struggled to live with huge debts and falling sales. Under the de la Madrid administration, all of the economic portfolios were put into the hands of technocrats who had risen through the finance sector. The government systematically excluded political bureaucrats with a statist/nationalist bent from high public office.¹⁹⁵

governments had prioritized a more populist presidential candidate who could appeal to various interests in society.

¹⁹² For information on IMF standards and codes online see the IMF Homepage:

<<http://www.imf.org/external/standards/>>

¹⁹³ Looney, *supra* note 189 at 261. The IMF "letter of intent" signed in 1982 sought to reassure the public that the reform program would be guided "by a criterion of social equity and protection of lessor income groups" and would include wage increases "to protect the standard of living of the working class."

¹⁹⁴ His desire to undo the nationalization of banks motivated his joint private-public ownership of certain financial institutions. Roderic Ai Camp, *Politics in Mexico: The Decline of Authoritarianism*, 3rd ed., (New York & Oxford: Oxford University Press, 1999) [hereinafter *Camp*] at 230.

¹⁹⁵ Those politicians who reflected these nationalist populists were known as the "Democratic Tendency". The Tendency stressed its links to the PRI's populist past, calling for an end both to austerity and to the economic restructuring program. It saw this program as producing a host of economic woes: a reduction in living standards, increased economic and social inequality, inflation, the dismantling of national industry, and "subservience to the IMF." De la Madrid set about taking measures to expel the Tendency from the PRI. *Teichman 1992, supra* note 190 at 97. The Youth section of the PRI also made demands very similar to those of the Tendency. The PRI greeted these demands by dismissing the youth section's executive. But this did not quell their demands for reform and its attempts at peaceful demonstration were met with threats of violence from the police.

The turnaround in Mexican economic policy is often referred to as the new "Southern Liberalism".¹⁹⁶ From 1983 onward, the Mexican government divested hundreds of state-owned enterprises, deregulated dozens of economic sectors, and transformed the economy from being highly protected to one of free trade.¹⁹⁷ Although economic liberalization proceeded slowly in 1983-84, renewed economic shocks in 1985, such as the deterioration of petroleum prices and increased interest rates followed by an earthquake, propelled the economic liberalization program forward.¹⁹⁸

In 1988, when de la Madrid's carefully chosen PRI presidential candidate, Carlos Salinas de Gortari won the presidential elections, he received (a highly questioned) 51 percent of the vote.¹⁹⁹ Yet Salinas' economic policies moved even more firmly in the direction of increasing the opening of Mexico to foreign capital,²⁰⁰ while the divestiture of state enterprises increased. His economic goals were to reform the Mexican economy through privatization,²⁰¹ internationalization, and foreign investment; to attain a high level of

¹⁹⁶ "Mexico has become a leader in advocating and implementing southern liberalism." V. Whiting, *The Political Economy of Foreign Investments in Mexico* (1992) p 238. Cited in Sandrino, *supra* note 99 at 300.

¹⁹⁷ Williams, *supra* note 172 at 3.

¹⁹⁸ Teichman 1993, *supra* note 174 at 179.

¹⁹⁹ Rodriguez, *supra* note 176 at 38.

²⁰⁰ During President Salinas' term, recourse to foreign capital was increasingly perceived as the way out of financial trouble. His term saw the signing of the North American Free Trade Agreement, a free trade agreement with Chile, a reciprocal trade liberalization agreements with other Latin American countries, which further propelled the opening of the Mexican economy. To raise foreign investment, the 1989 regulations of the Foreign Investment Law removed the 49 percent restriction on foreign ownership for all industries reserved neither exclusively for the state nor for Mexican nationals under certain specified conditions. Teichman 1995, *supra* note 53 at 183. Foreign investors were no longer required to ask permission to take over Mexican firms, and export companies and *maquiladoras* did not need official authorization for their establishment. This effectively gave foreign capital access to areas from which it had previously completely excluded or restricted.

²⁰¹ For example, it sold several major corporations such as: Telefonos de Mexico (Telmex), which had a monopoly on telephone communications in Mexico and Mexicana Airlines, one of the two major domestic lines. Of the 1,155 firms that the government owned in 1987, it retained control of only 286 in 1992 (a drop of 80 percent). *Ibid.* at 231.

economic growth and regain the standard of living attained in the 1970's and to restructure the political system in order to provide both immediate legitimacy and assured future hegemony.

1. Mexico Joins the International Trading System

True to these goals, in 1986, Mexico re-applied for entry into the General Agreement on Tariffs and Trade (GATT),²⁰² which spurred an even more concerted effort to encourage export competitiveness.²⁰³ World Bank President Barber Conable characterized Mexico's program as "one of the most ambitious, courageous and determined programs of economic reform and institutional change recently undertaken in any country."²⁰⁴ Mexico was determined to take the necessary steps to bring its regime into compliance with GATT obligations.²⁰⁵ The government was also taking an activist role in the promotion of manufactured exports from the private sector. It introduced new legislation

²⁰²The GATT evolved into the World Trade Organization on 1 January, 1995. See <<http://www.wto.org>>. Interestingly, Mexico had negotiated a protocol of accession to the GATT in 1979. (See The report of the Working party, *GATT, Basic Instruments, Selected Documents*, Vol 26, (Geneva, 1981), 238.) However, at the time there was growing opposition to foreign entanglements as well as the degree of adjustment that GATT membership would require. Critics emphasized that GATT was a creature of the U.S. and GATT membership would mean increased American influence on Mexican life. President Portillo (1977-82) withdrew Mexico's application to the GATT and instead maintained its highly interventionist trade and economic regime. See Dale Story, "Trade Politics and the Third World: A Case Study of the Mexican GATT Decision," (1982) 36(4) *International Organization*.

²⁰³ *Teichman 1993, supra* note 174 at 179.

²⁰⁴ Barber Conable quoted in *The Financial Post*, (21 March 1990) 12.

²⁰⁵ In contrast to 1979, in 1986, there was little public debate about Mexico's entry into the GATT although it's entry was under less favourable conditions than in 1979. It was seen as part of the government's general economic policy that sought the structural adjustment of the productive sector toward an export-oriented strategy. See Nisso Bucay and Eduardo Perez Motta, "Trade Negotiation Strategy for Mexico," in John Whalley, ed., *The Small Among the Big*, (London: Centre for the Study of International Economic Relations, 1988).

to further promote the *maquiladora* industry,²⁰⁶ and established a commission to provide technical and financial support for enterprises wishing to export.

An important aspect of Salinas' presidency was the influence on economic policy of the U.S. Although there was no direct role in policy formulation of Mexico, both Regan and Bush pushed a more orthodox economic policy domestically and similar policies abroad, including Mexico. "The best way to encourage change in Mexico is by having initiatives appear home-grown," remarked Robert Zoellick, U.S. Trade Representative at the National Foreign Trade Council.²⁰⁷ Throughout the 1980's, the United States expressed serious concern about Mexico's stability and its economic political future. The American financial community, which held large portions of the Mexican government's debt portfolio, echoed this concern.²⁰⁸ They were fearful that Mexican default on its debt would lead to a "domino effect" in the rest of Latin America. This would have had drastic consequences for the already shaky U.S. financial structure and the U.S. economy.²⁰⁹ However, the U.S. financial community responded favourably to Salinas's policies of privatization and tariff cuts.²¹⁰

²⁰⁶ A *maquiladora* is a Mexican Corporation which operates under a maquila program approved for it by the Mexican Secretariat of Commerce and Industrial Development (SECOFI). A maquila program entitles the company, first, to foreign investment participation in the capital -- and in management -- of up to 100% without need for any special authorization; second, it entitles the company to special customs treatment, allowing duty free temporary import of machinery, equipment, parts and materials, and administrative equipment such as computers, and communications devices, subject only to posting a bond guaranteeing that such goods will not remain in Mexico permanently. See "What is a Maquiladora? Manufacturing In Mexico: The Mexican In-Bond (Maquila) Program" online at: <
<http://www.mexconnect.com/business/mex2000maquiladora2.html>>

²⁰⁷ Interview with Robert Zoellick, 12 June, 1997 in *Mazza*, *supra* note 120 at 88.

²⁰⁸ Camp, *supra* note 194 at 230.

²⁰⁹ *Ibid.*

The centrepiece of Salinas' reforms was the NAFTA. Political scientists Ricardo Grinspun and Robert Kreklewich argue that agreements such as NAFTA serve as "conditioning frameworks" to promote and consolidate neo-liberal restructuring. However, they note, that compliance with new policies is not usually dictated from outside. It is often the case that "domestic elites manipulate...international obligations to impose policies that would not otherwise meet with general support." As an international arrangement with binding obligations, conditioning frameworks are "an ideal tool in the hands of domestic forces for imposing and locking-in neo-liberal reforms."²¹¹ Thus, it could be argued that the signing of the NAFTA was a way for Mexican leadership to entrench neo-liberal reforms and bind future governments to a similar economic agenda.

V. NAFTA Negotiations

Given the above historical account of Mexico's attitudes towards foreign investment and nearly a century of keeping the U.S. at arm's length, it is relevant to ask: how did free trade come to be on the agenda of Mexican-American relations?

Part of the answer lies in the neo-liberal restructuring itself. As mentioned in Chapter one of this thesis, free trade is a fundamental tenet of the Washington Consensus and therefore, it stands to reason that given the other neo-liberal reforms in Mexico, that free trade would also be on the reform agenda. However, NAFTA is the first regional trade

²¹⁰ Editorials in business-oriented publications such as the *Wall Street Journal* praised Salinas. *Business Week* predicted a boom period for Mexico which helped to make it attractive to investors.

²¹¹ Grinspun & Kreklewich, *supra* note 187 at 34.

pact between a Third World state and two industrialized states, which had to overcome many fundamental differences.²¹² Given Mexico's political and economic position vis-a-vis the other two states and its' historical policies regarding foreign investment and trade, it is important to inquire into why President Salinas decided a regional trade pact with the most powerful economy in the world was best for the Mexican economy.

It has been argued that the costs of exclusion in a world of competitive trading blocks could make small countries willing to give up independence rather than risk being left out, which is perhaps why Mexico initiated NAFTA negotiations. Dominguez et. al. also assert that one of Mexico's motivations for initiating the NAFTA was defensiveness. Part of their reasoning was to ensure that its exports would not be locked out of the U.S. markets. This was a response to fears about the implications for Mexico of the U.S.-Canada agreement and a perceived protectionism in the U.S.²¹³ Another reason, as mentioned above, was the dramatic new economic policy in Mexico - NAFTA was the cornerstone in a series of reforms designed to open up Mexico's economy and bring it into line with the policies of industrialized countries. "Mexican officials soon realized that the only way to secure the country's new outward oriented economy was to seek a special agreement with its number one market, the United States."²¹⁴ Further, Salinas and

²¹² These included "vastly disparate levels of economic development," thoroughly different cultural formations, the distance of the countries in terms of their separate histories, and different domestic interests to satisfy and different negotiating styles, with Mexico's decision making quite centralized and the US way is more decentralized. Herman von Bertrab, *Negotiating NAFTA: A Mexican Envoy's Account*, (Westport: The Center for Strategic and International Studies, 1997) [hereinafter *von Bertrab*] at ix-xi.

²¹³ *Dominguez et. al., supra* note 121 at 27.

²¹⁴ *Ibid.* at 64. Earlier in their book, Dominguez et. al. note that it is significant that Mexico chose to forge closer ties with the U.S. and not Latin America. Mexico had played a leading role among Latin American countries in the 1970's and it initiated the Latin American resistance to U.S. policies in Central America in the 1980's. However, at the end of the 1980's, Mexico felt that Latin America did not provide practical

his reformers wanted to use NAFTA to root out opposition to the new economic model.

The Secretariat of Trade and Industrial Development (SECOFI) was given the mandate to bring other government agencies into line with NAFTA.²¹⁵ Some say that the Mexicans had a stronger genuine belief in free trade than the Americans and the Canadians put together.²¹⁶ Mexican NAFTA negotiator Hermann Von Bertrab notes of the negotiations,

[t]he Mexican government on its own and apart from any negotiation consideration would have made some of the changes toward modernization that it also used as bargaining chips. The Americans were sometimes at a loss to know whether they were pushing for something the Mexicans themselves already wanted but were using as a negotiating tool.²¹⁷

With Mexico in crisis, President Salinas was looking for ways to build up Mexico's economy. He decided that foreign investment in Mexico was the best way to grow the economy among all of his policy alternatives. With this goal in mind, President Salinas had attempted to attract foreign investment in Mexico on a trip to Europe in 1990. This effort had been a failure. It seems that the Europeans, who were more focused on the collapse of Eastern Europe after the Cold War, were indifferent to Mexico's urgent need

solutions to Mexico's economic problems. Further, there was a decline in importance of the Mexican foreign ministry, which had been "the flag-bearer of Third Worldism in the Mexican government." This meant that the position of those who advocated relations with the U.S. strengthened and those who wanted to be close with Latin America declined. Nevertheless, Dominguez and De Castro speculate that "many Mexicans would prefer to strengthen their bonds of affection and identity with other Latin Americans but have difficulty finding practical ways of doing so." They predict that debates about Mexican identity in the Western Hemisphere will be a significant focus of public concern in the twenty-first century. *Ibid.* at 24-25.

²¹⁵ Maxwell Cameron, & Brian Tomlin, *The Making of NAFTA: How the Deal Was Done*, (Ithaca & London: Cornell University Press, 2000) [hereinafter *Cameron & Tomlin*] at 227.

²¹⁶ Interestingly, both former President De la Madrid and Salinas had formerly objected to forming a commercial trading block with the United States. In 1987 President De la Madrid declared to *The Economist* that a free trade zone between Mexico and the United States was not possible because Mexicans were not prepared to surrender their economy and society to United States hegemony. See *CQ Researcher*, Volume 1, Number 1, 19 July, 1991. In mid-1989 President Carlos Salinas, responding to an initiative on a common market between Mexico, the United States, and Canada presented by a business leader, said that Mexico did not belong nor did it want to join any economic zone or political block. See J. Valderrama, & E. Jimenez, "Mexico no Pertenece ni Quiere Asimilar a Bloques: CSG," *Excelsior*, 27 June, 1989. Cited in R. de la Garza & J. Valasco, *Bridging the Border: Transforming Mexico-U.S. Relations* (Lanham, Boulder, New York & Oxford, Rowman & Littlefield Publishers Inc., 1997) [hereinafter *Garza & Valasco*] at 37.

for foreign capital.²¹⁸ During that same year at the World Economic Forum²¹⁹ in Davos, Switzerland, President Salinas and his Mexican delegation became acutely aware of the new global realities that were changing the framework of international relations. Herman von Bertrab, who coordinated the Washington office of the Mexican negotiating team during the NAFTA, tells a story of how the Mexican secretary of commerce, Jamie Serra Puche was dozing in his hotel room in Davos with the door ajar. "To his [Serra's] amazement, the president [Salinas] walked in and, standing in front of him in his nightgown, asked: "Jamie, what do you think about asking the United States to enter into a Free Trade Agreement?" This decision was motivated by the perceived need to take dramatic action to increase Mexico's appeal to foreign investors. They reasoned that not only would they need to unilaterally liberalize trade, but they also considered it beneficial to join a regional trading block as that seemed to be the way the world was headed after the consolidation of the European Union. Ambassador Negroponte remembers that Salinas "concluded he needed something dramatic. He wanted something to consolidate domestic [economic] reforms."²²⁰

Armed with that new resolve, Salinas and Serra approached U.S. Trade Representative Carla Hills the next day in a lobby. Von Bertrab says that Mrs Hills' wide-eyed response was: "Well Jamie, we ought to talk about that with President Bush."²²¹ This was the point at which Mexican society was forever changed:

²¹⁷ *Von Bertrab, supra* note 212 at 40.

²¹⁸ *Ibid.* at 2.

²¹⁹ See online: World Economic Forum homepage <<http://www.weforum.org/>>

²²⁰ Negraponte Interview, 30 May, 1997 cited in *Mazza, supra* note 120 at 70.

²²¹ *von Bertrab, supra* note 212 at 2.

Salinas had made a momentous decision [when he began NAFTA negotiations] that would reverse the policies of all previous Mexican presidents since the 1910 revolution and profoundly affect the course of his people's lives.²²²

When the Mexican Senate recommended negotiations toward a free trade agreement with the United States and Canada, it stated: "This agreement —contrary to a common market— would preserve the political and economic sovereignty of the country and would leave Mexico completely free to design its trade policy with the rest of the world."²²³ It seems that the public at the time agreed that the NAFTA would provide benefits to Mexicans without losing their sovereignty. In 1990, polls taken of public opinion about the NAFTA showed strong support among Mexicans of all walks of life, largely, says Cameron & Tomlin, because "the myths and symbols of the revolution had begun to stand in increasingly sharp contrast to the reality of everyday life for ordinary Mexicans."²²⁴ Further, it seemed many entrepreneurs thought the benefits to them of NAFTA would depend on how well the Mexican team negotiated with the United States and Canada.

The NAFTA was negotiated at an historical moment in time when the Mexican public felt confidence in President Salinas' image of a youthful, educated, modernizing technocrat who challenged the corrupt, populist bosses and 'inward-looking dinosaurs' in the

²²² Cameron & Tomlin, *supra* note 215 at 4.

²²³ *La Jornada*, "Mexico y el Mundo, por un Comercio Mas Intenso y Mas Benefico" Conclusions from the *Foro de Consulta sobre las Relaciones Comerciales de Mexico con el Mundo*, 27 May 1990. cited in Garza & Valasco, *supra* at 37.

²²⁴ Cameron & Tomlin, *supra* note 215 at 4.

bureaucracy who had ruled Mexico for over a century.²²⁵ Further, the period between 1988 and 1992 was a brief window of opportunity when the three North American heads of government not only favoured closer ties, but had a good chance of gathering support domestically to deliver such an agreement.

During this period, all three leaders, Mulroney, Bush and Salinas, as well as senior members of their entourages, enjoyed a friendly diplomatic relationship. They seemed to genuinely get along and like each other. They went fishing together during vacations and communicated regularly:

Beneath the fraternity of personal contacts lay a common ideological bond, a shared vision of the future of the North American economy, and a political convergence of interests that served both domestic and international purposes. The initializing of NAFTA...was the final act of political unity among this fraternity of North American leaders. From that point onward, after the electoral defeat of Bush, relations among leaders of the three countries would become considerably more tense and difficult.²²⁶

Despite the collegiate environment between national leaders, it is important to remember that Mexico was the country where NAFTA would make the most significant impact on its economy, legal system and society. This meant that Mexican negotiators were anxious to finalize the NAFTA. Accordingly, they may have had to give away their positions on various provisions, which perhaps put them at a disadvantage. What follows is a closer look at the NAFTA negotiations. It is an attempt to understand why certain provisions were inserted into the NAFTA text and inquire as to whether the dynamics present during

²²⁵ Mexico's negotiators were also a new breed who were dissatisfied with the many of the old traditions of governance. *Von Bertrab*, *supra* note 212 at 42.

²²⁶ *Cameron & Tomlin*, *supra* note 215 at 181. The ascendancy of President Clinton in the Whitehouse saw a push for the NAFTA side agreements on Environmental and Labour Standards that almost broke the deal. See Chapter eight "End Game at the Watergate" in *Ibid.* at 151-207.

the negotiations have any flow-on effects for how the NAFTA is interpreted by arbitrators sitting on Chapter 11 tribunals.

1. *Negotiations generally*

International treaty negotiation is an art, not a science, and the results are usually finely-balanced, living documents that often have to respond to different constituencies in a number of jurisdictions with different concerns and policy priorities.²²⁷

The first point to note is that “[m]arket power remains the basic prerequisite to gaining concessions, the more concessions one has to offer, the more concessions one is likely to gain.” says Canadian trade negotiator, Michael Hart²²⁸ In this regard, the U.S. had an advantage as their economy and market power is much larger than that of Mexico.

Also, the patience (or lack thereof) of negotiators and their attitudes towards taking risks are an important part of the negotiation process. Some argue that Mexico was more impatient and felt like it had more at stake during the negotiations as it had decided there was no attractive alternative to a trade deal with the United States. The United States and Canada, on the other hand, already had an existing trade agreement (the Canada-U.S. Free Trade Agreement (FTA), and thus, were said to be more patient during negotiations.²²⁹

One of the major factors making Mexico vulnerable during the negotiations was the fact that it had decided that free trade and foreign direct investment was its only method for

²²⁷ Christopher Wilkie, “The Origins of NAFTA Investment Provisions: Economic and Policy Considerations” Conference Paper delivered at “NAFTA Chapter 11 Conference,” Friday January 18, 2002, online: Carleton University Homepage <<http://www.carleton.ca/ctpl/chapter11/>> [hereinafter *Wilkie*] at 18.

²²⁸ *Hart, supra* note 184 at 41.

²²⁹ *Cameron & Tomlin, supra* note 215 at 16.

economic growth. It was argued earlier that Mexico had the most to gain politically, because a free-trade deal with the U.S. and Canada would give its modernization process powerful thrust. However, this was a gamble, as President Salinas had departed from commonly held traditions and as such, Mexico also had more to lose.²³⁰ Mexico would have to pay the highest cost in adjusting to the competition that would be unleashed if the NAFTA negotiations were successful. The difference in economic size of the two countries also made a difference. "Mexico...represented by far the weakest and least developed economy with many internal disequilibria."²³¹ Another important point was that the Mexican delegation had the least experience in trade negotiations. Many of the negotiators were fresh out of university with knowledge of economic principles and theories but little experience of how they work in practice.

NAFTA broke new trade policy ground because it brought Mexico into a trade agreement that originally had been crafted to govern trade relations between two advanced industrial economies. And yet, although Mexico was afforded some latitude in the agreement for adjustment to a liberalized relationship with these more efficient and productive economies, it was the United States that secured for itself not only broad access to the Mexican market, but also a number of safeguards that would permit it to manage the changing trade relationship in its favour.²³²

It is important to remember that NAFTA was an especially big deal for Mexico because it applied broad new disciplines and obligations to the Mexican economy. However, despite Mexico's obvious vulnerability and repeated insistence at every stage of the negotiations that it have status as a developing country, the US rejected any special consideration of Mexico as a less-developed country (LDC) and argued that the NAFTA would have to break new ground in order to set a precedent for other trade

²³⁰ von Bertrab notes an indicator of how much was at stake was the nervous reactions of the Mexican stock market during the negotiations. *von Bertrab, supra* note 212 at 39.

²³¹ *Ibid.*

²³² *Cameron & Tomlin, supra* note 215 at 33.

negotiations.²³³ Cameron and Tomlin note that the power of the United States meant that it could "use its bilateral leverage to open a developing country market in ways that would be impossible in multilateral negotiations dealing with large coalitions of LDC's."²³⁴ This ties in with my previous discussion about the historical trend away from negotiations over foreign investment at the multilateral level towards BITS in the last 20 years.

Despite Mexico's disadvantages and vulnerabilities, the Mexican objective in the negotiations was to maximize political support in the United States at minimal cost in Mexico. One area where it could be said they had an advantage was in the decision-making process. Because of the highly centralized nature of the Mexican political system, their negotiators came from SECOFI and were headed by Chief negotiator, Herminio Blanco. All information was concentrated at the top whence came directives to the different groups that knew little about the progress made in the other groups. Secretary of Commerce, Jamie Serra Puche had direct and immediate access to President Salinas when it came time to make decisions, which made them easier to make. On the other hand, the United States, which had a more decentralized system took longer to arrive at positions and make decisions.²³⁵

After talks were launched in June 1991, nineteen working groups, established under six major negotiating groups (market access, trade rules, services, investment, intellectual

²³³ See interview with Julius Katz, U.S. Chief negotiator for the NAFTA, in *Mazza*, *supra* note 120 at 71.

²³⁴ *Cameron & Tomlin*, *supra* note 215 at 226.

²³⁵ *von Bertrab*, *supra* note 212 at 41.

property, and dispute settlement), were set up.²³⁶ Each group had its own dynamic and was led by one negotiator for each country.²³⁷ Chief negotiators were Julius Katz²³⁸ for the United States, Herminio Blanco Mendoza²³⁹ for Mexico, and John Weekes²⁴⁰ for Canada, who met regularly to iron out difficult issues. Finally, seven ministerial meetings between Carla Hills,²⁴¹ Jamie Serra Puche²⁴² and Michael Wilson served to review the progress of the negotiations, so as to give the talks some impetus and to resolve the

²³⁶ When negotiations ended on 12 August, 1992, 218,241 group meetings had occurred, 5 of which were plenary sessions held alternatively in the three different countries, and 2710,465 phone calls had been made between delegations. The chief negotiators met 11 times in formal sessions and the ministers met 7 times. *Ibid.* at 37.

²³⁷ The leading departments were the U.S. Trade Representatives (USTR), the Mexican Ministry of Commerce and Industrial Development (SECOFI), and External Affairs and International Trade Canada (EAITC). Both the Americans and the Canadians relied on other departments and gave them responsibility for several groups. The Mexicans assigned most of their leads to SECOFI. Maryse Robert, *Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals*, (Toronto, Buffalo & London, (University of Toronto Press, 2000) [hereinafter *Robert*] at 36-7.

²³⁸ Jules Katz was a most honest and difficult opponent. You would start by hating him, then proceed to respecting and finally liking and admiring him. He brought considerable negotiating experience to the table and know when to brag, when to concede, when to play a weak hand with a poker face, when to be unrelenting and demanding with his face blushing into a vivid red. His honesty was always apparent as he discussed things in a serious manner. Although strong tempered at times, he was never discourteous. He was a man whom his superiors and his opponents could trust." *von Bertrab, supra* note 212 at 45.

²³⁹ "Dr. Herminio Blanco was the real craftsman of the agreement from the Mexican side. His clear intelligence, tremendous hard work, and smooth manner of conducting the negotiations were outstanding. Nobody – in any delegation- had such a grasp of complex issues, such a knowledge of detail, and such a sense of mission. He worked assiduously, was a hands-on, sometimes secretive, manager but always open to ideas and creative. He rarely lost his temper, although he would have had ample opportunities, and maintained his lucid clam and warmth. Sometimes he would come out with his disarming, "Now Jules [Katz], don't give me that..." which made people, even Jules himself, smile and relax." *Ibid.* at 44.

²⁴⁰ "The balanced perspective of John Weeks, always helped to get things back on track. A stable, smiling, and somewhat timid person, he was an honest broker and at times a forceful advocate of his country's positions." *Ibid.* at 45.

²⁴¹ After the negotiations von Bertrab described Carla Hills as follows, "Her clear understanding of the issues combined with an elegant, composed manner balanced the sometimes temperamental displays of Dr. Serra....Her lawyer's mind was sharp at analyzing arguments but was therefore slow at reaching conclusions....Her firm clarity was evident, and she greatly contributed to the final outcome and was personally and forcefully involved in breaking through several impasses. *Ibid.* at 44.

²⁴² "Dr Serra, a highly energetic person, tends to create an atmosphere of excitement wherever he is. It always surprised me to watch him at work. The night before ministerial meetings, we would hold a briefing session for him. He immediately grasped the issue at hand and got involved in deciding what positions to take and which strategy to follow. He produced a continuous stream of creative ideas but kept an open mind to listen to other positions. The next day, as negotiations started, he addressed the issues with the command of someone who had been working at them continuously for a long time. He changed the rhythm when it suited him and played with ease and charm. His enthusiasm, grasp of intricate problems, decision-

toughest issues. Interestingly, the private sector also played a major role in the negotiations, with all three countries consulting their business leaders.²⁴³ The progress achieved by different groups was uneven, depending on how politically sensitive and complex each issue was and the interplay of the personalities involved.²⁴⁴

The first part of the negotiations were the most difficult because as van Bertrab notes, "the requests were outrageously demanding and the restrictions extremely defensive."²⁴⁵ For example, one meeting at Lake Meech, (near Ottawa) was supposed to last a whole day, but was dissolved in 15 minutes because of the intransigence of both the U.S. and Mexican delegations.²⁴⁶

During the middle of the negotiations, there had been some consensus in some particularly difficult areas and the parties had a common text. However, nearly every paragraph was interspersed with brackets that included the diverging positions of each country.²⁴⁷

making ability, and tactical maneuvering amazed me. He was a man his counterparts could not hate and frequently enjoyed his theatrical use of the negotiating table as a stage." *Ibid.* at 43.

²⁴³ In Canada, business leaders were consulted through the International Trade Advisory Committee (ITAC) and the Sectoral Advisory Groups on International Trade (SAGIT). In the United States, seven policy advisory committees, and the President's Advisory Committee for Trade Policy and Negotiations made sure that the interests of the business community were well served. In Mexico, the private sector's input was channeled through the coordinator of Foreign Trade Business Organizations (COECE). *Robert, supra* note 237 at 37.

²⁴⁴ *von Bertrab, supra* note 212 at 37.

²⁴⁵ *Ibid.* at 38.

²⁴⁶ "It was beautiful autumn weather, the Canadian wilderness gloriously adorned in red and gold maple leaves. Buses were to return in late afternoon to drive us back to Ottawa, but meanwhile we were stranded in an isolated, modest-sized mansion embarrassed to speak to members of the other delegations and even finding it difficult to communicate within our own group." *Ibid.*

²⁴⁷ *Ibid.* at 39.

2. *Negotiations over Investment*

Cameron and Tomlin assert that overall, the United States were able in the NAFTA to achieve the investment agreement they could not get in the FTA (between Canada and the U.S.). This was due, in part, to Mexico's determination to do whatever it took to attract foreign investment.²⁴⁸

Nonetheless, investment proved to be a difficult issue in the NAFTA negotiations because all three countries had quite different positions. The United States wanted provisions in Chapter 11 that mirrored their bilateral investment treaties (BIT's), which were negotiated with the main goal of protecting US investors and therefore weighted in favour of the investors. Canada wanted to limit the obligations to what was in the FTA with the US. Both countries tried to persuade Mexico to adopt its position. During the opening rounds of negotiations, Mexican negotiators started with a very strong position on investment. They were concerned about compensation in cases of expropriation because they did not agree to the typical American BIT language of "prompt, adequate and effective" compensation for expropriation. This was unacceptable to Mexico because it was the language the US used against Mexico when U.S. oil companies had been expropriated in 1938.²⁴⁹ Further, the Mexicans also objected to the proposed provisions on arbitration between State and investor because of the Calvo clause in the Mexican Constitution that stated that disputes should be settled in domestic courts. In fact, van

²⁴⁸ *Cameron & Tomlin, supra* note 215 at 41-2. However, Mexico retained restrictions on foreign ownership of its petrochemical industry. This was an issue on which they would not compromise because it is written into their constitution. Their threshold for review of major foreign takeovers was set at U.S. \$25 million. Canada retained its FTA right to review major foreign takeovers above US\$150 million, although acquisitions below that amount can be reviewed in the oil, gas and uranium sectors.

²⁴⁹ See above.

Bertrab notes that the *single most* debated issue that was highly significant to the Mexican legal tradition was related to the Calvo clause.²⁵⁰ Further, the definition of 'investment' was under dispute as the Americans wanted a very broad definition.²⁵¹

Cameron & Tomlin contend that the negotiations on investment contained a paradox. The Mexicans wanted to make Mexico attractive to foreign investment however, their strategy was to resist the Americans' efforts to open their investment market. On the other hand, U.S. negotiators felt that a primary vulnerability of NAFTA in the United States stemmed from domestic fears about an outflow of investment to Mexico (the "giant sucking ground" that Ross Perot had described in his criticism of NAFTA).²⁵² The irony is that while the US was pushing for liberalization for the rules on investment, the Mexicans were resisting that liberalization and those positions were the opposite of domestic consensus on the issues.²⁵³ Both sides were acting out of fear. Further, inherent in the U.S. position was a fear born of historical rememberings about earlier expropriations and fear of their investors being subject to the laws of Mexico unless they were able to establish an international dispute resolution body.

²⁵⁰ He attributes the significance of the strong position of Mexico in relation to not allowing a foreign company operating in Mexico to sue the Mexican government to its historical meaning. This is based on the experience of foreign navies' (French, English, and Spanish) taking over Mexican ports to impose the presumed rights of their national companies (referred to in Mexican history as "Guerra de los Pasteles" or "Pastry War," because some French bakeries were involved.) *von Bertrab, supra* note 212 at 66.

²⁵¹ *Cameron & Tomlin, supra* note 215 at 100-101.

²⁵² "NAFTA makes Mexico investor friendly – a place where U.S. companies can operate under lax government regulations and with high-quality, low-wage workers kept in line by a touch Mexican government. For both investors and companies, NAFTA is a terrific deal. But at a price – the loss of millions of jobs that the United States sorely needs. Middle-class American careers and standards of living are sacrificed and Mexican workers are exploited – all in the name of increasing profits." Ross Perot, *Save Your Job, Save Our Country: Why NAFTA Must Be Stopped – Now!*, (New York: Hyperion, 1993) at 55.

During the next round of negotiations, the Mexicans would make concessions on all of their strong positions on investment in the interests of moving the deal along and securing the Treaty as quickly as possible. One reason Mexico could no longer uphold their strong position on resisting the investment chapter was that the Americans told them there would be no NAFTA without an investment chapter. Further, during the negotiations, the U.S. was also negotiating a BIT with Argentina,²⁵⁴ which contained investment clauses. Once that BIT was concluded, Mexico could not resist the proposed investment provisions on the grounds that the Calvo clause, enshrined in their constitution would prevent them from agreeing. Argentina was the birthplace of the Calvo clause, and if the Argentineans had given it up, the Mexicans could no longer claim that it was impossible to concede to international dispute settlement.²⁵⁵ It has been asserted that the Mexicans gave in too quickly on the points about which they felt strongly because the Mexicans were not patient and they were relatively inexperienced negotiators. However, knowing they were in a weak position, Mexican negotiators worked very hard to prepare for all contingencies. Negotiators worked long hours, with scarcely a free weekend. As a result, they became competent on all the issues. American chief negotiator Jules Katz later said that he was most impressed by the development of the Mexican negotiating team. It seems the U.S. had initially perceived the Mexicans as insecure and easily manipulated,

²⁵³ *Cameron & Tomlin, supra* note 215 at 40.

²⁵⁴ *Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November, 1991 online: <<http://www.sice.oas.org/bits/usaargtc.asp>>

²⁵⁵ I am grateful to Christopher Thomas, Partner, Thomas & Partners, Barristers and Solicitors, for this insight. During the NAFTA negotiations, Chris was a lawyer for Mexico.

but as negotiations proceeded they came to appreciate their quality and professionalism.²⁵⁶

After the Mexicans had backed away from their strong starting position, they accepted the idea of investor/state arbitration and agreed to the rules on expropriation. The agreement on expropriation was reached after crafting language that satisfied the U.S. concerns without contradicting the Mexican constitution. They substituted the words, "prompt, adequate, and effective" for a more palatable concept of "fair market value."²⁵⁷ Article 1110 is seen by some as a remarkable achievement, particularly "in the context of investment relations with Latin American countries, who have been traditionally wary of investment agreements."²⁵⁸

3. *General Conclusions on the Negotiations*

From the above discussion, it seems that there were obvious exercises of power by the United States over Mexico. This was born of the much stronger and self-sufficient economy in the U.S. and the fact that the U.S. was constrained from conceding too much because of domestic pressures from congress and industry groups as well as NGO's and other groups. Further, it has been asserted that the U.S. would have been able to achieve its trade policy goals through the GATT if the NAFTA had not gone through, so there

²⁵⁶ von Bertrab, *supra* note 212 at 48-9.

²⁵⁷ Cameron & Tomlin, *supra* note 215 at 112. Canada was less willing to agree to the concessions on investment because Canada was more ambivalent about promoting foreign investment in their economy that was already heavily transnationalized. On the other hand, Mexico was more willing to make concessions because they were hungry for foreign capital and more willing to do whatever it took to ensure foreign investment into Mexico.

²⁵⁸ Wilkie, *supra* note 227 at 17.

was less at stake for them. In contrast, Mexico had no other viable alternatives, making them more desperate for a deal and quicker to concede points.

Despite Mexico's initial hesitation regarding Chapter 11, they eventually conceded virtually all of their initial objections regarding investments. The effect was that chapter is constructed strongly in favour of investors:

Chapter 11...can...be understood to have been born out of the United States' desire to protect the interest of its investors, especially those operating in Mexico, and Mexico's acceptance of the inevitability of accession to the U.S. demands in order to attract foreign investment. The heavy "North-South" flavour of Chapter 11 is undeniable. In addition to the historical background...it is evidenced by the strong criticism of the Chapter as the embodiment of the institutionalized neglect of development concerns in favour of unfettered trade and of a version of U.S. capitalism that has no concern for the economic health of the countries where it operates.²⁵⁹

As we will see in the next chapter of this thesis, subchapter B of Chapter 11 that establishes a mechanism for the settlement of investment disputes between a NAFTA party and an investor through international arbitration is another feature of NAFTA that represents a significant departure from previous Mexican policies on the settlement of disputes and the role of international law in international economic relations. Chapter 11 represents the first time that Mexico has entered into an international agreement providing for investor-state arbitration.²⁶⁰ In fact, it is the first international treaty (other than BIT's) to do so. As discussed earlier, the Calvo Doctrine is the source of Mexico's distrust of private-state arbitration as it denies that a foreign litigant's state cannot intervene on their behalf against the host state. Investment contracts between states and foreign investors often include a Calvo clause under which the foreign investor agrees, as

²⁵⁹ Ari Afilalo, "Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter" (2001) 34(1) *New York University Journal of International Law and Politics* 1-56 [hereinafter *Afilalo*] at 19.

²⁶⁰ *Sandrino, supra* note 99 at 320.

part of his submission to local law, not to seek the diplomatic intervention of his government in any matter arising from the contract. To the Mexicans, this means that the foreign investor is bound by the local rule of law, even if there is a perceived violation of international law. Accordingly, under the Calvo doctrine, "arbitration is an unacceptable yielding of sovereignty."²⁶¹ Chapter 11 of NAFTA will represent a significant challenge to the Mexican legal tradition of resolving disputes with foreign investors within their own borders.

VI. NAFTA's Effect on Future Investment Treaties

Since the 1960's many BIT's have been signed. Notably, the U.S and other industrialized states have already been using the bilateral approach with Third World states for the last two decades.²⁶² The NAFTA investment chapter is modeled on these BIT's but goes even further in allowing investors to sue governments. Thus, the NAFTA has become the model for the 'new wave' of bilateralism in negotiating future foreign investment regimes in some arenas. Sandrino predicts that the investment chapter of NAFTA is already providing a model for other trade treaties between industrialized countries and the Third World.²⁶³ "NAFTA's strong, unique personality not only is shaping the future of the signatory countries, but is setting global precedents."²⁶⁴ The Multilateral Agreement on Investment, which was negotiated by the Organisation for Economic Cooperation and

²⁶¹ *Ibid.* at 322.

²⁶² *Ibid.* at 325.

²⁶³ *Ibid.* at 324.

²⁶⁴ *von Bertrab, supra* note 212 at xv.

Development (OECD)²⁶⁵ is one example of this phenomenon. In 1995, OECD Ministers launched negotiations on a multilateral agreement on investment (MAI) "with high standards of liberalisation and investment protection, with effective dispute settlement procedures, and open to non-Members."²⁶⁶ The draft MAI contained many provisions that were similar to NAFTA's Chapter 11, including a dispute settlement process.²⁶⁷ The MAI was conceived not only to enshrine many policies already in effect among OECD member-countries, but to devise rules to protect and encourage investment in the developing world. The blueprint for the MAI's provisions would be the investment chapters of the NAFTA, and the WTO would be the model for its scope. Yet the MAI was to go further than both of these agreements.²⁶⁸ However, in April 1998, OECD ministers halted negotiations due to a "global wave of protest [that] had swamped the deal."²⁶⁹ Over 600 international organizations opposed the MAI.²⁷⁰

²⁶⁵ The Multilateral Agreement on Investment, Organisation for Economic Cooperation and Development (OECD) online: OECD Homepage <<http://www.oecd.org/EN/home/0,,EN-home-0-nodirectorate-no-no-no-0,FF.html>>

²⁶⁶ The Multilateral Agreement on Investment, OECD online: OECD Homepage <<http://www.oecd.org/EN/document/0,,EN-document-92-3-no-6-3047-92,00.html>>

²⁶⁷ A Draft of the MAI can be found online at the OECD Homepage <<http://www.oecd.org/pdf/M00003000/M00003291.pdf>>

²⁶⁸ According to a 1995 report on the MAI prepared by the OECD Committee on International Investment and Multinational Enterprises (CIME) and the OECD Committee on Capital Movements and Invisible Transactions (CMIT), the MAI would "go beyond existing commitments to achieve a high standard of liberalization covering both the establishment and post-establishment phase with broad obligations on national treatment, standstill, roll-back, non-discrimination/MFN, and transparency, and apply disciplines to areas of liberalization not satisfactorily covered. . ." (OECD, *A Multilateral Agreement on Investment*, May 1995, pp. 2-3) Cited in Michelle Sforza, "MAI Proposals and Propositions: An Analysis of the 1998 Text," Public Citizen's Global Trade Watch, July 1998, online: Public Citizen Homepage <<http://www.citizen.org/trade/issues/mai/articles.cfm?ID=7415>>

²⁶⁹ Madelaine Drohan, "How the Net Killed the MAI: Grassroots Groups Used Their Own Globalization to Derail Deal" *The Globe and Mail* (29 April 1998). Over 600 organizations opposed the MAI. Among the grounds was that the proposed document elevates the rights of investors far above those of governments, local communities, citizens, workers and the environment. Another grievance was that it excluded developing countries and countries in transition from the negotiations is inconsistent with OECD policy on development partnerships. See, "Over 600 International Organizations Oppose the Multilateral Agreement on Investment – Joint NGO Statement" Press Release, Drafted 27 October, 1997, Updated: 11 February 1998 online: Public Citizen Homepage <<http://www.citizen.org/trade/issues/mai/Opposition/articles.cfm?ID=1676>>

The problem with the continuation of the bilateral approach to foreign investment based on the NAFTA Investment Chapter, is that there are inherent unequal political and economic relations between the Third World and Industrialized states. Whilst this remains the case, investment treaties will continue to prioritize the rights of foreign investors over the economic, political and social concerns of Third World states, particularly in relation to the operation of TNC's in the Third World and concerns of economic development.

The proposed Free Trade of the Americas is based on the extension of the NAFTA rules²⁷¹ and is also using NAFTA's investment chapter as a model for this agreement.²⁷² It is currently being negotiated by 34 countries of the Americas. During the recent Summit of the Americas in Quebec, U.S. President George W. Bush called the proposed Free Trade Area of the Americas a "logical extension" of the North American Free Trade Agreement, which took effect in 1994.²⁷³ The FTAA calls for a free trade zone across the

²⁷⁰ A full discussion of this interesting story is beyond the scope of this thesis. See OECD Symposium on the MAI (1997: Seoul, Korea); *Multilateral Agreement on Investment: State of Play April 1997*, (Paris: OECD, 1997); M. Barlow, *MAI: the Multilateral Agreement on Investment and the threat to American freedom*, (New York, N.Y. : Stoddart ; Buffalo, N.Y. : General Distribution Services [distributor], 1998); A. Jackson & M. Sanger, *Dismantling democracy: the Multilateral Agreement on Investment (MAI) and its impact*, (Ottawa : Co-published by Canadian Centre for Policy Alternatives, and James Lorimer, 1998).

²⁷¹ It was also preceded by other economic agreements such as the Caribbean Basin Initiative (CBI) U.S.-Caribbean Basin Trade Partnership Act of 2000 online <<http://www.mac.doc.gov/CBI/webmain/intro.htm>>; and the Enterprise of the Americas Initiative (EAI) online: USAID Homepage <<http://www.usaid.gov/environment/eai.htm>>

²⁷² See online: FTAA Homepage <<http://www.ftaa-alca.org/>> Note that in the Draft Agreement, there is a chapter on investment and a provision relating to expropriation and compensation that looks remarkably similar to Article 1110 of NAFTA. See Investment Chapter of the Draft Agreement; FTAA.TNC/w/133/Rev.1, July 3, 2001, at 3.12-3.13.

²⁷³ "Americas summit closes as leaders back free trade" 23 April, 2001, online: at CNN Homepage <<http://www.cnn.com/2001/WORLD/americas/04/22/summit.americas.04/>> [hereinafter *Americas summit*]

hemisphere by 2005. The treaty would strike trade barriers across the Americas from the Arctic Circle to Cape Horn -- a region that is home to 800 million people, with a combined GDP of US\$10.3trillion. Many NGO's and grassroots groups throughout the hemisphere have expressed their reservations about this proposed Agreement and are organizing, educating, and mobilizing to defeat the FTAA.²⁷⁴ In addition, certain countries of the Americas have expressed reservations about aspects of the FTAA. For example, Venezuelan President Hugo Chavez told CNN it was unreasonable to expect all countries to have ratified a completed pact by 2005.²⁷⁵

The other significant effect NAFTA may have in encouraging a global atmosphere of bilateral negotiations is that the North-South dialogue in the multilateral arena will have less impact on the laws that are made to govern important areas of inter-state relations. When relations move from the multilateral area, where Third World states have numbers to be on a more equal footing with industrialized states, to the bilateral area,²⁷⁶ where the power dynamics are significantly less economically and politically balanced, it could have a large impact on the nature of the laws and agreements that are generated from those agreements.²⁷⁷

VII. Concluding Remarks About This Chapter

²⁷⁴ See Hemispheric Social Alliance publication: *End Corporate Control Stop the FTAA!: An Organizers Manual*, Fall 2002, at 3.

²⁷⁵ *Americas summit*, *supra* note 273.

²⁷⁶ This is not to say that the NAFTA or the FTAA are strictly bilateral agreements between two countries. The NAFTA includes Canada and the FTAA includes 34 countries in the Americas. Rather, I use the term 'bilateral' to indicate an arena that is not truly multilateral, in that it does not include all Third World states in a setting where the Third World has united power to negotiate on terms that fully include their concerns.

²⁷⁷ *Sandrino*, *supra* note 99 at 325.

The signing of the NAFTA was an historical moment in U.S.-Mexico relations. It signified that both sides are willing to set aside some of the prejudices of the past in order to facilitate free trade in what they saw as an increasingly interdependent world. However, past treatment of both parties by the other was not completely forgotten. This is evident in Mexico's starting position during the NAFTA negotiations regarding foreign investment, reflecting their historical caution against U.S. foreign investment and expropriation. It is also apparent that there is still a 'fear factor' underlying the discourse used by United States during their negotiations. This fear is centered around the question of whether Mexico is a stable place to invest, following Mexico's historical expropriations of U.S. owned oil companies in the late 1930's, and the Mexican Constitutional protection of the right to expropriate foreign property. In this way, the NAFTA text is imbued with historical significance and suspicion, and the power dynamics inherent during NAFTA negotiations which, as will be seen in the Chapter four discussion about *Metalclad*, creates a disadvantage for Mexico in the way NAFTA is applied. Further, Mexico's signing the NAFTA seems to have influenced a trend towards including foreign investment and adjoining dispute resolution mechanisms in other international treaties involving Third World countries.

Mexico's radical economic transformation during the last two decades has ushered in dramatic changes to the way Mexico operates both internally and externally. This transition also puts Mexico at a disadvantage vis-a-vis the U.S. and Canada, whose political and economic system and institutions did not experience the same kind of instability. There is a unified position at the elite level of the Mexican government, but I

question how the free trade agenda of leaders is viewed by Mexican society. The *Metalclad* case is an example of where the local government and local people resisted the notion of free trade when it interfered with their standard of living.

Finally, the disadvantage for Mexico that is now entrenched into NAFTA and influences the way it is applied could be replicated in future agreements such as the FTAA. This has the potential to further embed fear in the First world of the Third World and create disadvantages for Third World states who may bind themselves to future agreements.

Chapter Three: NAFTA's Chapter Eleven

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.

- New York Times, 11 March, 2001²⁷⁸

It is my contention that future trade negotiators should make the development of such private access [to seek binding resolution of disputes involving national obligations under treaty standards] a significant component in their negotiation strategies. This step would be timely given the perceived weakened role of national governments in international economic activity and the parallel growth in strength of private interests – such as multinational corporations and non-governmental organizations. It would seem appropriate, giving this declining importance of the nation state, to enhance the standing of private interests to enforce international standards of business conduct.

- Professor Robert Paterson²⁷⁹

I. Introduction

Commentators' opinions are divided over the merits of the investment chapter of NAFTA. Some see it as an innovative and progressive move towards protecting the rights of investors and others see it as a hindrance to government's ability to legislate for the public good. The divergence of opinion seems to be connected to whether one is in favour of pure unfettered free trade or one feels wary about free markets without governmental controls.

Having discussed inherent problems in international trade law in Chapter one, and the dynamics behind the NAFTA negotiations in Chapter two, this chapter aims to discuss NAFTA's Investment Chapter in detail. The purpose of this chapter is to understand the structural difficulties built into the NAFTA and Chapter 11 and the complexities of

²⁷⁸ Quoted in International Institute for Sustainable Development (IISD) and World Wildlife Fund (WWF), *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*,

interpretation and application of Chapter 11. I also aim to analyze Chapter 11 for the ways in which it has the troubling potential to produce outcomes like the one in the *Metalclad* case. This approach stems from the understanding that the law is to be found, not only in what is written down, but how it is used by litigants and how it is applied by decision-makers, who may go beyond the intentions of the negotiators. Further, the ways in which Chapter 11 is used and interpreted in present cases affects not only the outcome in future cases, but also the behaviour of governments, who may become cautious, about a particular law's potential to attract litigation from foreign investors under Chapter 11. Chapter 11 cases could also affect the behaviour of investors, who have noted the types of successful claims and may use creative lawyering to cover what may otherwise ordinarily be left to business risk. The resulting structural difficulties, coupled with the unpredictable way Chapter 11 is interpreted, has the potential to create uncertainty within a NAFTA government and with the public who are affected by the Chapter 11 decision.

The next two chapters will provide a close textual analysis of NAFTA's Chapter 11 and the *Metalclad* case. This examination is intended to ground my critiques of international trade law in Chapters one and two in a concrete example of a site of struggle where the text of the law and the way it has been interpreted served to hinder the environmental struggle of a local community in Mexico. In this chapter, a major objective is not only to set the scene for the *Metalclad* case in Chapter four, but also to identify potential

(Mannitoba: International Institute for Sustainable Development, 2001) [hereinafter *Private Rights, Public Problems*] at vii.

²⁷⁹ Paterson, *supra* note 82 at 79.

difficulties the NAFTA could present to other prospective disputes which come under this treaty.

What follows is a description of the NAFTA in broad terms and some general difficulties embedded within it will be presented. I will go on to look at some of the specific problems with Chapter 11. The arbitral process will then be discussed, focusing on problems with the procedure that could lead to unpredictable decisions or the tribunal being heavily weighted in favour of the investor.

II. NAFTA – a Constitution-like Document

This underlying distrust of Mexican courts, and the moving of foreign investment disputes into the international arena is now embedded within a treaty that is difficult to change. This makes the negotiations, the text and the interpretation all the more important, because NAFTA will be governing North American trade and investment relations for years to come. As mentioned in Chapter two, the NAFTA was signed at a unique moment in the history of U.S.-Mexico-Canada foreign relations, where all three leaders got along and had similar goals. The climate of collegiality amongst leaders in the three NAFTA countries has undergone a number of transformations since the Bush (Snr.)-Salinas-Mulrooney friendship of the early 1990's.²⁸⁰ Further, the NAFTA was

²⁸⁰ At the time of writing this thesis, the relationship between President George W. Bush, President Vicente Fox and Prime Minister Chretien seems to also be amicable, particularly between the United States and Mexico. For example, in September 2001, President Bush declared on welcoming Mexican President Vicente Fox in a ceremony in the White House grounds that the U.S. had "no more important relationship in the world" than with Mexico. Graham Jones, "The End of a Special Relationship?" September 6, 2001, online: CNN Homepage <<http://www.cnn.com/2001/WORLD/europe/09/06/bush.europe/>>.

signed at a time when the neo-liberal consensus about the virtues of unfettered free trade was at its' peak. There has since been a rethinking of strict neo-liberal policies, which did not consider a role for government in regulating the market. Even in the World Bank, there has been an acknowledgement that there is a need for government intervention in the economy to protect its citizens.²⁸¹ This all means that the NAFTA is a snapshot taken in 1991 that binds future generations, who may have evolved their insights or have changed circumstances.²⁸² Indeed, some argue that this constraint was the precise intention of the conservative governments who negotiated the NAFTA. "The aim [of conservative governments]" says Professor of Political Science, Stephen Clarkson, "was to let market forces do their economic job free of political control and prevent future politicians of a different persuasion from messing things up ever again."²⁸³

²⁸¹ The sea-change in the thinking of World Bank policy can be defined by a speech made in early 1998 by the then Senior Vice President and Chief Economist to the World Bank, Joseph Stiglitz which noted:

[The Washington consensus] held that good economic performance required liberalized trade, macroeconomic stability, and getting prices right. Once the government handled these issues – essentially once the government 'got out of the way' – private markets would produce efficient allocations and growth... But the policies advance by the Washington consensus are hardly complete and sometimes misguided. Making markets work requires more than just low inflation, it requires sound financial regulation, competition policy, and policies to facilitate the transfer of technology, to name some fundamental issues neglected by the Washington consensus.

Joseph Stiglitz, "More instruments and broader goals: Moving toward the Post Washington consensus," the 1998 WIDER Annual Lecture, Helsinki, 7 January 1998, available online at: <<http://www.worldbank.org/html/extdr/extme/js-010798/wider.htm>> Cited in *Fine et al. supra* note 71 at 2. Interestingly, Stiglitz left the World Bank in 2000 as he became increasingly disillusioned at the tendency of the IMF and other major institutions to put corporate interests ahead of the plight of developing nations. His book, *Globalization and its Discontents* (New York: W.W. Norton & Co., 2002) offers a compelling account of the inside of global economic policy making.

²⁸² Examples of the evolution of thinking about free trade can be seen in the failure of negotiations over the MAI, and the impact the failure of the Seattle WTO Ministerial meetings. Trade institutions have begun to respond with actions such as attempting to be more inclusive of the views of so-called 'civil society'. An example of this response can be seen in that the WTO website now has an area especially dedicated to "Community Forums." The blurb at the top of this page reads, "This area of the website is for the media, NGOs and the general public. It provides an opportunity for the public to comment on the WTO, its activities, and the trading system." Online: WTO Homepage <http://www.wto.org/english/forums_e/forums_e.htm>

²⁸³ Stephen Clarkson, *Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty?* (Canadian Centre for Policy Alternatives, 2002), online: Policy Alternatives Homepage <<http://www.policyalternatives.ca>> [hereinafter *Clarkson*] at 3. He further goes on to say: "[T]his is what

Professor Schneiderman has argued that NAFTA “poses a serious challenge to sovereignty²⁸⁴ and domestic constitutionalism.”²⁸⁵ He concurs with others who assert that NAFTA is “like a new economic constitution.”²⁸⁶ Further, he asserts, like most domestic constitutions the NAFTA commits the federal government (and the local government even though they are not parties to the treaty and therefore have no say in policy formulation or alteration). NAFTA, he says, like constitutions, may “set in motion irreversible processes which, in turn, necessarily box in future generations.”²⁸⁷

Another problem with the constitution-like nature of NAFTA is that national state/provincial and local governments are bound by a set of rules within the international trade treaty, which mostly have international economic goals at heart and for which the other levels of government are not a party. “[W]hat the trade agreement [NAFTA] takes away from local governments, at both the national and sub-national level, it does not give

defenders of free trade meant when they described NAFTA as ‘locking in’ the neo-conservatism currently practiced in Ottawa. Even if more activist political parties were to win power, they would find their hands tied by these externally defined but domestically implemented limits to which their predecessors had committed them.” *Ibid.* at 7.

²⁸⁴ By the word, sovereignty, Schneiderman means “the idea that political communities are self-determining in regard to those fundamental subjects around which their legal and political communities are organized: that “political authority with a community has the undisputed right to determine the framework of rules, regulations and policies within a given territory and to govern accordingly.” Schneiderman quoting David Held, “Democracy, the Nation-State and the Global System” (1991) 20 *Economy and Society* 138 at 150. See David Schneiderman, “Canadian Constitutionalism and Sovereignty After NAFTA” Constitutional Forum 93 [hereinafter *Canadian Constitutionalism*]. See also G. B. Doern & B. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991).

²⁸⁵ *Canadian Constitutionalism, ibid.*

²⁸⁶ Stephen Clarkeson, “Disjunctions: Free Trade and the Paradox of Canadian Development” in D. Drache and Meric S. Gertler, (eds) *The New Era of Global Competition: State Policy and Market Power*, (Montreal & Kingston: McGill-Queen’s University Press, 1991) at 116 cited in *Canadian Constitutionalism, ibid.*

²⁸⁷ *Canadian Constitutionalism, ibid.* at 95 quoting Stephen Holmes, “Recommitment and the Paradox of Democracy” in Jon Elster & Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) at 195.

to a supra-national institution.”²⁸⁸ Ari Afilalo expresses similar reservations. He describes the integration of Europe as supported by sophisticated political and judicial institutions, which operate at both the national and supranational level.²⁸⁹ The ‘democracy deficit’ that has resulted from the NAFTA is a dangerous development in the evolution of the governance of nation states. Scheiderman notes that political forces, which prior to the NAFTA, affected social change in the national sphere may now be rendered less effective because the number of forums for debate, persuasion and pressure are lessened.²⁹⁰ This gap may mean that domestic political pressure groups will need to form transnational alliances in order to be heard. This is already occurring in relation to issues such as the environment and labour.²⁹¹ If social change has historically been achieved through social confrontation,²⁹² then it is important that interest groups find a new method of pressuring governments to take account of social considerations.²⁹³

²⁸⁸ *Canadian Constitutionalism*, *ibid.* at 98. Schneiderman acknowledges that NAFTA sets up an apparatus of eighteen standing committees, as well as *ad hoc* committees, panels and tribunals. See “NAFTA Institutions: An Organizational Chart,” online: Department of Foreign Affairs and International Trade Canada Homepage <<http://www.dev.dfaif-maeci.gc.ca/nafta-alena/instgraph-e.asp>>

²⁸⁹ Afilalo, *supra* note 259 at 7.

²⁹⁰ *Canadian Constitutionalism*, *supra* note 284 at 98.

²⁹¹ A recent example of a successful transnational alliance is in relation to the plight of Mexican workers of the Kuk Dong maquiladora factory (now named Mexmode) in Atlixco, Puebla. The workers reached out to a global network of anti-sweatshop groups who put pressure on both NIKE and the Mexican government to allow the workers to form an independent union. The success of this campaign has been attributed to the broad-based coalitions involving a range of groups who successfully worked together with quick, accurate and public information from the ground. See “Kuk Dong/Mexmode Struggle” online: Maquila Solidarity Network Homepage <<http://www.maquilasolidarity.org/campaigns/nike/kukdong.htm>> United Students Against Sweatshops Homepage <<http://www.usasnet.org/campaigns/kukdong.shtml>> The American Federation of Labour-Congress of Industrial Organizations (AFL-CIO), “Workers at a Mexican Maquiladora, a Nike Supplier of College Sweatshirts, Gain a Voice at Work” online: AFL-CIO Homepage <http://www.aflcio.org/news/2001/1130_workers.htm>

²⁹² See Francis Fox Piven & Richard Cloward, *Poor People's Movements: Why they Succeed and How they Fail* (New York: Vintage, 1977); Francis Fox Piven & Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* 2nd ed. (New York: Vintage, 1993); and Bryan Turner, “Outline of a Theory of Citizenship” in Chantal Mouffe, ed., *Dimensions of Radical Democracy* (London: Verso, 1992) 33 at 38. Cited in *Canadian Constitutionalism*, *supra* note 284 at 100.

Pressure on governments over the potential dangers of NAFTA's Chapter 11 has increased over the eight years that it has been in operation. There seems to be a rising tide of questioning and dissent that NAFTA governments are starting to consider in their decisions about how to proceed.²⁹⁴ However, at present, citizens do not have a great deal of influence over the way in which Chapter 11 operates. This necessarily means that the public of all three NAFTA countries must rely on the integrity and fairness of the Chapter 11 dispute resolution mechanism. Professor Paterson urges us to "trust our courts" even when "international organizations, agreements and dispute settlement mechanisms may seem beyond our control."²⁹⁵ This is a dubious and worrying prospect if one looks at the *Metalclad* award in the next chapter. It is also a concern when the rules of Chapter 11 are narrowly focused on protecting the rights of investors. What follows is an examination of the Chapter 11 dispute resolution mechanism, identification of problematic areas.

III. NAFTA's Chapter 11

The basic rationale (for investment law) was to overcome deficiencies in national legal regimes as they relate to foreign private capital by *supplementing* domestic regimes with an international law backstop. This rationale was established in the context of developed country investors and developing country host states during an era when nationalization was occurring in many countries, in particular former colonies or dependent territories. Recent investment agreements [such as NAFTA] have expanded far beyond this limited purpose and can now impact on any regulatory decisions that investors may consider undesirable...[T]he supplemental role of investment

²⁹³ *Ibid.* at 98.

²⁹⁴ See for example, the Bill Moyer's Report, "Trading Democracy: The Other Chapter 11" PBS Documentary, online: PBS Homepage <<http://www.pbs.org/now/politics/tradingdemocracy.html>> [hereinafter *Bill Moyer's Report*] Public Citizen's Global Trade Watch Homepage <<http://www.citizen.org/trade/>>; Trade Campaign, online: Council of Canadians Homepage <http://www.canadians.org/browse_categories.htm?COC_token=024ZV24&step=2&catid=64&iscat=1> Julie Soloway describes an "increasingly vocal transnational "anti-globalization" constituency, which regards trade and investment liberalization agreements as creatures of corporate greed and a means by which firms are able to trump the environmental, health and safety measures which may negatively affect profits." Julie Soloway "Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11," (2000) 33 *Canadian Business Law Journal* 92 [hereinafter *Soloway*].

²⁹⁵ Professor Robert K. Paterson, "Free Trade and Public Private Partnerships" Address to Conference on Public-Private Partnerships Vancouver, B.C. May 30, 2002 [hereinafter *Paterson 2002*] at 6.

agreements has now become one of *substitution*: investors can choose one forum and set of rules over the other, as circumstances suit them...[I]nvestment agreements now create a series of international law economic rights for private actors, enforceable as a matter of international law under international processes.²⁹⁶

The investment chapter of NAFTA is unique in that it contains stronger discipline on governments (or in other words, stronger protection for investors) than in the Canada-U.S. Free Trade Agreement²⁹⁷ or any existing BIT.²⁹⁸ As mentioned in Chapter two, the Investment chapter of NAFTA was insisted upon by the U.S. as a means of providing their investors with protection in what is seen as an 'unstable' investment climate in Mexico. Essentially, the dispute settlement provisions of Chapter 11 can be seen as providing foreign investors with an alternative forum to national courts, which in the case of Mexico, are sometimes seen as unpredictable and opaque.

NAFTA's Chapter 11 has been labelled the "quintessential model" of the key elements that have now found their way into an ever-increasing number of investment agreements.²⁹⁹ It has also been called a "bill of rights for investors."³⁰⁰ Under Chapter 11, investors are protected from certain kinds of "measures"³⁰¹ taken by governments.

²⁹⁶ Howard Mann & Konrad von Moltke, "Protecting Investor Rights and Public Good: Assessing NAFTA's Chapter 11" Background Paper to the ILSD Tri-National Policy Workshops, Mexico City: March 13; Ottawa March 18; Washington: April 11 online: IISD Homepage, <<http://www.iisd.org/trade/ILSDWorkshop>> [hereinafter *Mann & von Moltke*] at 5.

²⁹⁷ Whilst the Canada-United States Free Trade Agreement contained provisions on investor protection and on investment liberalization, since Canada and the U.S. had similar legal and economic infrastructures, investor protection was not the key issue. The Canada-U.S. Free Trade Agreement did not contain a binding dispute settlement mechanism between the foreign investor and the host state. *Private rights, Public Problems*, *supra* note 278 at 7.

²⁹⁸ *Ibid.* at 8.

²⁹⁹ *Mann & von Moltke*, *supra* note 296 at 1. By the end of 2001, the number of bilateral or multilateral investment agreements exceeded 2000.

³⁰⁰ *Schneiderman Taking Investments too far*, *supra* note 36 at 1.

³⁰¹ The definition of "measures" is important because governments are many-layered and take many different types of actions. The definition of "measures" under Chapter 11 Article 201 is broad: a measure includes all laws adopted by national, state or provincial legislatures; regulations that implement these laws;

The federal government is responsible for breaches committed by any agency of national or local government. If a violation is found, the federal government is required to pay compensation equal to the loss suffered by the other party. Chapter 11 sets out a number of basic obligations on NAFTA governments concerning the treatment of investors, (such as national treatment and rules concerning expropriation). Some have pointed out that whilst it imposes obligations on NAFTA governments and is an open invitation to investors to sue for alleged breaches, it does not impose any corresponding duty on investors.³⁰² Clarkson further argues along similar lines to Afilalo, that there are no continental-level institutions similar to those of the European Union, who had the clout to regulate tax, or even monitor the newly created continental market that has proceeded to merge.³⁰³

In the next chapter of this thesis, I will discuss Chapter 11 with particular reference to the national treatment rule in Article 1105 and the expropriations rule under Article 1110. As will be seen, these rules are amongst the most controversial articles in Chapter 11 and also the major points upon which the *Metalclad* Tribunal relied to find against Mexico. Importantly, these contentious articles do not reflect settled principles of international law. Different states have their views on what these Articles should mean according to their particular domestic principles. A full discussion of the international jurisprudence

local or municipal laws and bylaws; and policies that affect government interaction with businesses. Chapter 11 also applies to laws and regulations that existed prior to its entry into force, unless these are specifically excluded by being listed in a special annex. Also excluded are all provincial and state laws in force before 1994. *Private Rights, Public Problems*, *supra* note 278 at 9.

³⁰² Jose E. Alvarez, "Critical Theory and The North American Free Trade Agreement's Chapter Eleven" (1996-7) 28(2) *Inter-American Law Review* 303-312 at 309.

³⁰³ Clarkson, *supra* note 283 at 12 citing Stephen Blank and Stephen Krajewski, "U.S. Firms in North America: Redefining Structure and Strategy," (1995) 5(2) *North American Outlook*.

relation to national treatment and expropriation is beyond the scope of this thesis.³⁰⁴

Suffice it to say, these articles are controversial precisely because national governments do not agree on their meaning. This makes it tricky for tribunals to arrive at a commonly understood interpretation of contentious articles.

Thus, Canadian Lawyer Christopher Thomas argued in 1999 that it was premature to seek an answer to the question of “what is covered by Chapter 11 and what is not?” This, he says, is because certain Chapter 11 cases³⁰⁵ that have been brought forward to date are not “of the type anticipated by the [NAFTA Chapter 11] negotiators.”³⁰⁶

...[I]t is not until the NAFTA tribunals are presented with concrete facts and apply the chapter to them that the contours of the Parties’ obligations and investors’ rights will emerge more clearly. What the Parties have intended and what the tribunals decide may be two different things. For several reasons, the adage “to discern the meaning of an agreement, don’t ask the negotiator” could be borne out in the case of NAFTA Chapter 11.³⁰⁷

Since the writing of Thomas’ article, there have been a few more Chapter 11 decisions, including *Metalclad*, which seem to provide an emerging jurisprudence about the boundaries of Chapter 11. It is worth noting that the jurisprudence of Chapter 11 cases is less straightforward than domestic common law or other international law-making bodies because under Article 1136, decisions of NAFTA Chapter 11 tribunals are only binding as between the parties and as such, do not strictly have to be followed by subsequent

³⁰⁴ For discussions on national treatment see J.C. Thomas, “Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators” *ICSID Review – F.I.L.J.* (forthcoming) 21-101 [hereinafter *Thomas, Reflections on Article 1105*]. For discussions on expropriation, see *Schneiderman, Taking Investments too far*, *supra* note 36; *Soloway*, *supra* note 294.

³⁰⁵ Such as the claim that Canada chose to settle: *Award on Jurisdiction in the NAFTA/UNCITRAL Case between Ethyl Corporation and the Government of Canada*, June 24, 1998, 38 I.L.M./ 708 (1999) [hereinafter *Ethyl*]; and *Loewen Group and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 [hereinafter *Loewen*].

³⁰⁶ J.C. Thomas, “Investor-State Arbitration under NAFTA Chapter 11” (1999) *Can. Y.B Int’l L.* 99 [hereinafter *Thomas, investor-state arbitration*] at 101.

arbitrators.³⁰⁸ However, despite Article 1136, previous Chapter 11 decisions have begun to form an “informal body of jurisprudence.”³⁰⁹ Tribunals and commentators have already shown a tendency to examine previous decisions and awards.³¹⁰ However, not all parties may be so concerned with the creation of helpful and clear Chapter 11 jurisprudence. A disgruntled investor’s major concern is financial compensation and the outcome of their particular case rather than jurisprudence. This, combined with the possibility of having arbitrators deciding the case who are perhaps unfamiliar or unconcerned with the development of Chapter 11 jurisprudence could have the potential (as seen in *Metalclad*) to create a decision, which interprets the text placing a further restriction on the ability of NAFTA Parties to govern for the good of their societies in a way that goes beyond the intention of the negotiators of the NAFTA.

It is important to note that the range of ‘measures’ covered by the investment chapter of NAFTA is extremely broad, including laws, regulations, administrative decisions on licences or permits, policies with a direct impact on businesses, or other possible government actions.³¹¹ This applies to actions taken by local, state or provincial governments in addition to national governments. Thus, the potential reach of the law of

³⁰⁷ *Ibid.* at 102.

³⁰⁸ *Thomas, Reflections on Article 1105, supra* note 304 at 90.

³⁰⁹ *Ibid.*

³¹⁰ For example, see the *Lowen* Tribunal’s Decision on Respondent’s Objection to Competence and Jurisdiction, January 5, 2001 online: <<http://www.state.gov/documents/organization/3921.pdf>>, which referred to *Robert Azinian and others v. United Mexican States*, ICSID Case No. ARV/AF/97/2, reprinted in 14 ICSID Rev. –FILJ 538 (1999) [hereinafter *Azinian*]; *Metalclad, supra* note 3; *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2, dated April 10, 2001 [hereinafter *Pope & Talbot*]; and *Ethyl, supra* note 305 cited in *Thomas, ibid.* at 90.

³¹¹ *Mann and von Moltke, supra* note 296 at 9 (footnote 14) point out that since there is only one exception to the definition of covered measures, that is those concerning interest rates for the purpose of

Chapter 11 would seem disproportionate to the minimal amount of input these local, state or provincial governments had in enshrine the NAFTA.

Further, some have cautioned that the threat of potential litigation from foreign investors may inhibit a government from putting forward legislation it perceives might leave it open to challenge. There are already examples where private companies have threatened a Chapter 11 suit over certain governmental actions.³¹² Professor Schneiderman has written about the challenge of two large U.S. tobacco manufacturers to the Canadian Federal government's proposals to mandate the plain packaging of cigarettes. The tobacco companies claimed that the Canadian government would be guilty of expropriation if it went ahead with its plan to reduce tobacco consumption by legislating for the packaging of all cigarettes sold in Canada in plain, brown paper wrapping.³¹³ Although these cases were never actually initiated, there is concern that the use of the threat is enough to deter governments from legislating for the public good if it is likely to affect a foreign investor. This could see government legislation be put through a "trade filter," before it is approved, which is not only undesirable but potentially harmful to democracy.

macroeconomic policy. They say that "[I]n accordance with standard principles of treaty interpretation, by including a single exception the text effectively affirms that no other measure has been exempted."

³¹² For example, there have been reports that the cancellation of contracts to transfer the public property of Toronto's Pearson Airport into private hands and Ontario's proposed public auto insurance plan both triggered threats of Chapter 11 action. See *Globe & Mail*, "U.S. Firm Considers Pearson Challenge" 20 July 1994; and "Bruce Campbell, 'Restructuring the Economy: Canada into the Free Trade Era' in R. Grinspun and M. Cameron, eds, *The Political Economy of North American Free Trade*, (Montreal: McGill-Queen's University Press, 1993) at 92-93 cited in *Schneiderman, Taking investments too far*, *supra* note 36 at 4.

³¹³ *Schneiderman, 1996, supra* note 36.

Further, the case of *Ethyl Corporation v. The Government of Canada* is a concrete example of a government withdrawing an environmental law after it was challenged by a foreign investor, whose profits were affected. In that case, the Ethyl corporation mounted a challenge to a Canadian ban on the import and export of the toxic gasoline additive MMT. Ethyl claimed that the classification of MMT as a dangerous toxin amounted to expropriation under Article 1110 of the NAFTA. Before it went to binding arbitration, the Government of Canada settled the claim with Ethyl for \$U.S.13 million.³¹⁴ As Schneiderman points out, “one reasonably concludes that these threats [by Ethyl] played a role in circumscribing the range of social policy choices available to...[NAFTA] governments.”³¹⁵

Although Chapter 11 is seen by some as “the most innovative provisions dealing with investment flows,”³¹⁶ some also view it as highly problematic. The potential for issues in Chapter 11 cases to touch on matters of public concern, such as the environment, mean that citizens are right to be concerned about the narrowly economic trade focus of the text of Chapter 11. At the moment, our only recourse is to rely on decisions of arbitral tribunals to take these other factors into consideration. This makes the dispute resolution provisions of Subchapter B of Chapter 11 an integral part of the process. The following

³¹⁴ See Michelle Sforza & Mark Vallianatos, “Ethyl uses NAFTA [North American Free Trade Agreement] to sue Canada” (July 1997) 22 *Intervenor* No. 4, 11; “NAFTA Cases – Ethyl Corporation” online: Appleton & Associates International Lawyers Homepage, <<http://www.appletonlaw.com/4b1ethyl.htm>>; “Update on Ethyl v. Canada” online: Center for Economic and Policy Research Homepage <<http://www.cepr.net/globalization/MAI/ethyl898.html>>.

³¹⁵ Schneiderman, *Taking Investments too far*, *supra* note 36 at 4.

³¹⁶ Wilkie, *supra* note 227 at 2.

section deals with some of the most controversial issues relating to Chapter 11's dispute settlement provisions.

IV. Dispute Settlement

A significant feature of Chapter 11 is that it allows foreign investors to use a trade agreement to challenge a host government's investment regulations by taking the matter to binding arbitration.³¹⁷ The addition of a dispute resolution mechanism in Chapter 11 "broke with traditional regional trade agreements in that it provided a system of relief to private investors, independent of any necessary involvement by governments on their behalf."³¹⁸ Some see this as a positive protection for investors:

...[A]rguably, the most innovative feature of the NAFTA investment provisions...is the establishment of dispute settlement processes based on arbitration according to international arbitral rules, in particular those of the International Convention on the Settlement of Disputes (ICSID). The NAFTA Parties consent to submission to arbitration of investment disputes under Chapter 11, at the request of the private investor itself. This makes NAFTA the first comprehensive international trade treaty to provide to private Parties direct access to dispute settlement as of right.³¹⁹

Under Chapter 11, the aggrieved investor must first attempt to settle the dispute through consultation and negotiation.³²⁰ If this process fails, the investor must file a notice of intent to form an arbitral panel.³²¹ As a condition precedent to submission of a claim to

³¹⁷ McKinney, *supra* note 119 at 224. However, it must be noted that the investor may also pursue remedies available in the host country's domestic courts if that seems more appropriate.

³¹⁸ Paterson, *supra* note 82 at 80. He further notes that: "without Section B [providing for dispute resolution], an investor's only recourse to enforce NAFTA investment obligations would be to convince its own government to pursue a claim under Chapter 20 of NAFTA. *Ibid.* at 84.

³¹⁹ M. Trebilock, & R. Howse, *The Regulation of International Trade* (London & New York: Routledge, 1995) [hereinafter *Trebilock and Howse*] at 297. The authors note that the other exception is the Treaty of Rome, but that this is "much more than a trade treaty and which may be rightly viewed as establishing the outlines of a supranational government that in many matters can act directly on individual citizens. *Ibid.* at Footnote 55.

³²⁰ Article 1118, *NAFTA*, *supra* note 1.

³²¹ According to Article 1119, this notice must be ninety days before filing their memorial.

arbitration, the investor must agree to waive the right to pursue their claim through other channels after it has requested a NAFTA Chapter 11 arbitral panel.³²² Further, the case must be filed within three years of the alleged infringement.³²³

Tribunals constituted under subchapter B of Chapter 11 decide claims.³²⁴ Under Article 1123, a Chapter 11 arbitral tribunal is made up of three arbitrators, one chosen by each of the parties and the third arbitrator agreed upon by the parties to the dispute. These arbitrators were intended to be chosen from a pool of 45 arbitrators that were decided by the NAFTA Parties at the time of negotiations. In the end, the NAFTA Parties could only agree on 15 Arbitrators for the pool.³²⁵ However, the way that the choosing of arbitral panels works in practice is that the head arbitrator usually comes from a recommendation from the ICSID Secretariat, who have their own pool of arbitrators. This recommendation is generally accepted by the parties. The parties then both chose their arbitrator in an *ad hoc* fashion basically selecting anyone who they feel is appropriate, whether they are on the list or not.³²⁶ This means that the composition of tribunals is variable. Mann and Moltke find this method of choosing arbitrators unacceptable:

[The choice of arbitrators being left to the parties to the dispute] may be acceptable for commercial disputes but when matters of public welfare are at stake it...contravenes one of the most fundamental principles of jurisprudence, namely that parties to a dispute may not pick their own judges.³²⁷

³²² Article 1121, *NAFTA*, *supra* note 1.

³²³ Article 1116, *NAFTA*, *supra* note 1.

³²⁴ Potential claims could originate from the substantive provisions of chapter 11, section A as well as article 1502(3)(a) (monopolies) and article 1503(2) (state enterprises). NAFTA Articles 1101, 1502(3)(a), and 1503(2).

³²⁵ *NAFTA*, *supra* note 1 at Article 1124(4), states that the Parties shall establish on the date of entry into force of NAFTA, a roster of forty-five presiding arbitrators meeting the qualifications of the ICSID Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The Parties took considerable time to agree on a more limited roster of fifteen people.

³²⁶ *Paterson*, *supra* note 82 at 110.

³²⁷ *Mann and von Moltke*, *supra* note 296 at 21.

I tend to agree that the arbitrators should be more independent of the parties when their decisions affect the public welfare. The arbitrators are required to be experienced in international law and investment.³²⁸ Although the arbitrators chosen to sit on most Chapter 11 arbitrations to date are of high standing, and some have extensive experience as judges, it has not necessarily been in North America.³²⁹ Further, there is no code of ethics under which the arbitrators must operate. This means that if they, for example, disclosed certain facts or hints to the parties prior to their awards, there is no recourse to punishing that behaviour.

The decision rendered by an arbitral panel is automatically enforceable in the domestic courts of the country involved.³³⁰ Further, this decision may only bind the parties to the arbitration.³³¹ It should also be noted that dispute settlement under Chapter 11, coexists with Chapter 20.³³²

Under Article 1120, the complaining investor can choose to have the dispute settled according to three sets of arbitration rules; either by the World Bank's International

³²⁸ Article 1124(4), *NAFTA*, *supra* note 1.

³²⁹ *Mann and von Moltke*, *supra* note 296 at 21.

³³⁰ This is because the NAFTA Parties are signatories to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38).

³³¹ Article 1136(1), *NAFTA*, *supra* note 1.

³³² Article 1115 cited in Timothy Wilson, "Trade Rules: Ethyl Corporation v. Canada (NAFTA Chapter 11) Part II: Are Fears Founded?" (2000) VI(2) *NAFTA: Law and Business Review of the Americas* 205-253 at 210.

Convention on the Settlement of Investment Disputes (ICSID) rules,³³³ the Additional Facility Rules of ICSID³³⁴ or the Arbitration Rules of the United Nations Commission on International Trade Law Arbitration Law(UNCITRAL).³³⁵ These options are not mutually exclusive, they can be chosen even if another is unavailable. Julie Soloway argues that the choice of governing rules is problematic and reflects “the awkward application of commercial dispute process rules to Chapter 11 process.”³³⁶ These rules, she notes, were developed to arbitrate private party commercial contracts rather than public policy issues.³³⁷

Moreover, the NAFTA Secretariat has a limited role in the Chapter 11 dispute settlement process in that it merely maintains a register of notices of arbitration and holds some documents for the record.³³⁸ As of 28 February, 2002, there have been twenty-three claims filed under NAFTA’s Chapter 11, five of which have led to arbitral decisions. The other cases either remain pending, have been settled or withdrawn. Of the twenty-three claims, nine were against Mexico, six against the U.S. and nine against Canada.³³⁹

³³³ Convention on Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, T.I.A.S 6090, 4 I.L.M. 524 [hereinafter *ICSID Convention*]. The United States is the only NAFTA Party that is also party to the ICSID Convention, so these arbitration rules cannot apply to it, and the Additional Facility Rules of ICSID can only apply in a case where one party was the U.S. or a U.S. investor. See Robert Paterson and Martine Band, et al. *International Trade and Investment Law in Canada* (2nd ed. Publisher city 1995), at 4.

³³⁴ *ICSID Convention, ibid.*

³³⁵ United Nations Comm. On Int’l Trade Law: Model Law on Int’l Arbitration, June 21, 1985, 24 I.L.M. 1302.

³³⁶ Soloway, *supra* note 294 at 108.

³³⁷ Whilst some might argue that investor-state litigation does not involve public policy issues, (such as public safety, health and environment), Soloway contends that once an investor challenges a governmental action that is related to the environment or health, it becomes a public policy issue. See *Ibid.*

³³⁸ McKinney, *supra* note 119 at 225.

³³⁹ “Inventory of Chapter 11 Cases (To 28/2/02)” in Hart and Dymond, *supra* note 82 at 29.

Whilst the ICSID dispute settlement rules are not new and have been around since the 1950's, it is important to remember that while a variety of BITs provide for arbitration through the ICSID, "it has rarely been resorted to in order to resolve investment disputes."³⁴⁰ This means that dispute settlement through ICSID is effectively a relatively new process that may have some teething problems.

Further, some argue that the dispute resolution procedure under Chapter 11, Section B is 'de-politicized' because the process affords parties independent dispute resolution.³⁴¹ Canadian trade lawyer, Barry Appelton agrees that NAFTA is a non-political alternative to resolving disputes in court.³⁴² Professor Schneiderman argues that the investment rules of NAFTA's Chapter 11 attempts to isolate economic from political power and is premised on a distrust of political power.³⁴³ He is unconvinced Chapter 11 succeeds in doing this. I too, would view the process as *highly* political. As argued in Chapter one of this thesis, choices about what is included in the law and the values that are prioritized over others is necessarily political. Further, the next chapter on the *Metalclad* case aims to demonstrate the choices the Tribunal made about which story they believed. My coverage of some of the detail left out of this Award will reveal that *Metalclad* was a political decision.

³⁴⁰ According to the New York Times, for 20 years after the ICSID was created in 1966, it established panels that heard on average no more than one case per year. Now, according to ICSID officials, about one case is filed every month. See Antony DePalma, "NAFTA's Powerful Little Secret" *New York Times* (11 March, 2001) [hereinafter *DePalma*] at 4.

³⁴¹ See Paterson, *supra* note 82 at 85; See also, Robert K. Paterson, "Canadian Investment Promotion and Protection Treaties", (1991) 29 Can. Y.B. Int'l L. 373.

³⁴² Barry Appelton in *DePalma*, *supra* note 340 at 5.

³⁴³ Schneiderman, *Taking Investments too far*, *supra* note 36 at 1.

The creation of the dispute settlement procedure meant that negotiators evidently expected it would be used. Paterson argues, “[g]iven the large scale of inter-NAFTA-Party investment, it was predictable that Chapter 11 would attract several claims.”³⁴⁴ However, what was not envisioned was creative lawyering on behalf of investors making innovative arguments about various provisions.³⁴⁵ Further, the negotiators of the investment chapter did not foresee the way that Tribunals would consider creative arguments and ultimately take Chapter 11 jurisprudence.

V. Arbitral Process – Problem Areas

In the next section, I will discuss some of the most problematic areas of the dispute settlement process that are perhaps hindering the provision of a balanced forum which hears disputes that are often not just of personal significance to the parties involved, but also affect the wider public. Discussion of the problems of process here is intended to complement the wider normative problems of the establishment of international trade law raised in Chapters one and two of this thesis. In Chapter five, I will put forward my recommendation for changes at the macro and micro levels. My criticism of Chapter 11’s arbitral process is based on the belief that if that if the system gives greater access to those who are affected by the law, there is more possibility that decisions of arbitrators will balance public policy considerations with the rights of investors.

1. *Misguided Criticism?*

³⁴⁴ Paterson, *supra* note 82 at 85-6.

³⁴⁵ Bill Moyer’s report, *supra* note 294.

Before discussing the problems I see with the dispute settlement process, I want to address certain calls for changes to the process, which I feel would make the problems I have described worse, not better. Professor Paterson asserts that a "major breakthrough" in modifications to the NAFTA dispute settlement process would be to afford investors *greater rights* for private parties to sue governments for 'non-compliance' with their NAFTA obligations. He states that "the reluctance of governments to create private remedies in NAFTA seems incompatible with the premise of maximizing the private economic advantage upon which the treaty rests."³⁴⁶ This is justified, he says, because the NAFTA represents a "premise of compromised sovereignty"³⁴⁷ Michael Hart and William Dymond assert a similar view:

A better choice would be to extend rights of private access beyond investment issues to encompass the full range of international economic exchanges and to expand access to those rights to their own citizens, corporate or otherwise.³⁴⁸

I do not agree with Paterson, Hart or Dymond insofar as they would extend greater rights to companies. The premise from which NAFTA's Chapter 11 begins is the priority of protection of the rights of investors over the sovereignty of governments. I do not think investors need any more rights than they are already granted under Chapter 11. To do so would exacerbate the problems I have already outlined. Instead, the dispute resolution process needs amending and the process needs to be adjusted to reflect the reality that many of the issues under dispute relate to governmental measures designed to protect the public good. What follows is a discussion of my view of the major problems with the Chapter 11 dispute resolution process.

³⁴⁶ Paterson, *supra* note 82 at 120.

³⁴⁷ *Ibid.*

2. *Ad hoc Tribunals*

One problem with the process as it stands is the nature of *ad hoc* tribunals. Thomas is cautious about *ad hoc* tribunals and argues that while the cases to date have demonstrated a consistent general approach to the interpretation of Chapter 11 obligations,³⁴⁹ they are unpredictable and lack institutional support.³⁵⁰ According to an article in the New York Times, the ICSID has seven lawyers and four members of its support staff. In addition to NAFTA cases, it also oversees disputes arising from the thousands of existing BIT's that have nominated ICSID as their dispute resolution body.³⁵¹ Thomas notes that this form of arbitration is probably more uncertain and unpredictable than the NAFTA Parties had anticipated when nominating ICSID arbitration as the method of dispute settlement.³⁵² He recommends that the NAFTA Secretariat, should be given a substantial addition of legal resources so as to enable it to provide support to the panels in a similar manner to that of the WTO Secretariat.³⁵³ One of the functions of the WTO Secretariat is to provide legal assistance in the dispute settlement process.³⁵⁴

³⁴⁸ Hart & Dymond, *supra* note 82 at 3.

³⁴⁹ I would argue that Metalclad is an exception to this, most notably in its expansive definition of "tantamount to expropriation" and in construing a requirement of transparency into Article 1105. See Part 11 of Chapter four of this thesis.

³⁵⁰ J.C. Thomas, "The Experience of NAFTA Chapter 11 Tribunals to Date: A Practitioner's Perspective" "NAFTA Chapter 11 Conference," Friday January 18, 2002, Carleton University. Online at: <<http://www.carleton.ca/ctpl/chapter11/>> [hereinafter, Thomas, *The experience of NAFTA*] at 2

³⁵¹ DePalma, *supra* note 340 at 4.

³⁵² Thomas, *The Experience of NAFTA*, *supra* note 350 at 2.

³⁵³ *Ibid.*

³⁵⁴ Other functions of the WTO Secretariat are to supply technical and professional support for the various councils and committees, provide technical assistance for developing countries, monitor and analyze developments in world trade, provide information to the public and the media, and organize the ministerial conferences. It also advises governments wishing to become members of the WTO. See "WTO Secretariat and Budget" online: WTO Homepage <http://www.wto.org/english/thewto_e/secre_e/secre_e.htm>

3. *Arbitrators*

Firstly, the experience and expertise of arbitrators sitting on a Chapter 11 tribunal has an impact on the awards that they render.³⁵⁵ Arbitrators are often technical international trade experts,³⁵⁶ who have knowledge of international law under the GATT³⁵⁷ and the WTO or private international commercial arbitration and international investment dispute settlement under bilateral investment treaties and the ICSID Convention. However, at present, there is little cross-fertilization of knowledge in the arbitrators between the two disciplines.³⁵⁸ Thus, in some cases, arbitrators who are experienced in one field may be presented for the first time with complex issues from a field about which they are unfamiliar.³⁵⁹ Clarkson notes that “the sociology of the panelists’ selection makes it more likely that they will respond to the legal arguments privileging the norms of international commercial law.”³⁶⁰ Other critics further assert that there is a lack of continuity of arbitrators that makes it more difficult to establish a clear precedent.³⁶¹

³⁵⁵ *Thomas, Investor-State Arbitration*, supra note 306 at 102.

³⁵⁶ Phillipps describes those ‘experts’ situated within this space of economics and international trade law, who are often seen as having “a specialized field of knowledge, with their own language, involving a terminology and grammatical style that is not readily accessible to persons without specialized training.” *Phillipps*, supra note 87 at 146. Phillipps also asserts that authority can be given to even the most superficial and oversimplified analyses simply because the authors are deemed to be ‘experts’ who speak the language of jargon and special terms. *Ibid.* at 151.

³⁵⁷ *GATT*, supra note 42.

³⁵⁸ D.M. McRae observed in his lectures to the Hague Academy, “The Contribution of International Trade Law to the Development of International Law” (1996) 260 *Receuil des Cours* 103 at 111: “[W]hy has international trade law had so little influence on the development of international law? Or, to put the question another way, why has the field of international trade law traditionally been regarded as outside the mainstream of international law?” cited in *Thomas, Investor-State Arbitration*, supra note 306 at footnote 12. I suggest this is because international trade law is seen as private (and apolitical) and international law is seen as in the public sphere and highly political. As Pahuja notes, “International trade law is posited by its defenders as regulated only to the extent necessary to remove distortions from the market and let commercial activity take place unhindered by unnecessary regulation.” *Pahuja, Trading Spaces*, supra note 36 at 46.

³⁵⁹ *Thomas, Investor-State Arbitration*, supra note 306 at 102.

³⁶⁰ *Clarkson*, supra note 283 at 17.

Further, arbitrators are paid approximately \$1,500 a day for their work, making it a profitable appointment. Accordingly, the impartiality of arbitrators decisions could be affected by the arbitrator's desire to be appointed again to a future Chapter 11 tribunal. Hart and Dymond acknowledge there is a risk that "party-appointed arbitrators would act as agents for the party that appointed them."³⁶² Clarkson takes this further when noting that "the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values."³⁶³

4. *The Hearings*

Hearings for Chapter 11 cases are often in English and usually held in Washington, (the ICSID occupies offices inside the World Bank's headquarters), which may provide a strange and incomprehensible environment for Spanish speaking witnesses.³⁶⁴ During cross-examination, the nuances of language are very important and can make a difference in how the Tribunal perceives the outcome of a case. Differences in language can sometimes mean that there is no direct translation for a term or word into the other language. It is easy to foresee that this could present difficulties when trying to extrapolate exact details in a hearing. As such, there is a heavy reliance on the translator to interpret the correct phrase or word of the witness and legal counsel.³⁶⁵ The transcript

³⁶¹ *DePalma*, *supra* note 340 at 5.

³⁶² *Hart and Dymond*, *supra* note 82 at 21.

³⁶³ *Clarkson*, *supra* note 283 at 16.

³⁶⁴ Interestingly, during the NAFTA negotiations, each negotiating group started using its own language with the help of simultaneous translation to communicate with participants of other groups, which proved cumbersome. Participants often had to correct translators, and wasteful repetitions occurred. All Mexican participants had an adequate command of English, and thus finally English was used in all private sessions despite fears it could be badly interpreted in Mexico. *von Bertrab*, *supra* note 212 at 41.

³⁶⁵ Even during the NAFTA negotiations, it was acknowledged that minor irritations ensued when an idiomatic expression, translated literally, seemed to convey a different meaning than was intended. "A

of the *Metalclad* hearing provides one example of the difficulties of translating documents and English cross-examination of Spanish-speaking witnesses. When Metalclad's counsel asked Mexican Secretary of State the Secretariat for the Environment, Julia Carabias Lillo to give an opinion on the Mexican General Ecology Law of 1988. Counsel for Mexico drew the Tribunal's attention to the fact that the text of the law in front of the witness was a Spanish translation of an English translation of the law and that the new Spanish translation said something different to the original Spanish text.³⁶⁶ At another point during the cross-examination, when Metalclad's counsel, Mr. Cling asks Secretary Carabias a question,³⁶⁷ she asks him to repeat it. When he repeated it in different words, Secretary of State replies: "I don't understand your question. Maybe you can write it down. Maybe probably that would be easier. It just really doesn't make sense in Spanish."³⁶⁸

Mexican felt hurt when his U.S. colleague told him he would buy him a drink, which the Mexican understood as demeaning! Occasionally similar problems arose of a more serious nature, but all were resolved." *Ibid.* at 37-8.

³⁶⁶Mr Hugo Perezcano, counsel for Mexico, objects, "Mr. President, if I may, it seems to me that this is not the original text of the law in Spanish, but this is a translation of another translation in English...I have the original translation of the law, and if they are going to make reference to the law, I would appreciate it if they would use the original text." President Lauterpacht responds: "Is the text in front of you, Mr. Perezcano different from the Spanish text in the book?" "Yes" responds Mr Perezcano. President Lauterpacht then orders Mr. Perezcano to have the original text photocopied and allows counsel for Metalclad to proceed with their cross-examination about the law. See The World Bank Group International Centre for Settlement of Investment Disputes (ICSID), In the Matter of Metalclad Corporation, Claimant v. United Mexican States, Respondent, Case No. ARB(AF)/97/1, Transcript of Hearing prepared from tape recording, Volume 1, Monday August 30, 1999, Washington D.C. [hereinafter *Transcript*]

³⁶⁷ The question asked by Mr Cling was: "Did you form your opinion, with regard to a municipality's ability to prevent federal decisions from being carried out by denial of the issuance of a local permit, after you dismissed the administrative complaint of the municipality in Guadalcázar in December of 1995?" *Ibid.* at 140.

³⁶⁸ Secretary of State Carabias, in response to questioning by Metalclad's counsel, Mr. Cling. *Ibid.* at 143.

The transcript of the *Metalclad* hearing is full of difficulties such as the examples above. The problems of translation have the capacity to make hearings a time consuming and frustrating process which could have a negative impact on the outcome of the award.

5. *Lack of Transparency*

No transparency requirements are specified in the NAFTA, and McKinney notes that the “paper trail” of Chapter 11 cases is “difficult to follow.”³⁶⁹ In fact, he says, “some of them (Chapter 11 Cases) could go undetected because member country governments conceivably could settle the disputes and compensate the complaining parties without any public notification.”³⁷⁰ This is due to Chapter 11’s origins in private commercial arbitration procedures which aimed to preserve confidentiality in order to encourage conciliation leading to the settlement of disputes.³⁷¹ Further, Chapter 11 hearings are generally closed to the public unless the parties mutually agree to open the hearing. However, the first eight years of Chapter 11 hearings has shown that Chapter 11 tribunals have had to address matters that touch upon issues of broad public concern. Thus, there are good reasons the hearings should be open to the public.

At present, there is no established mechanism for interested third parties to relay their concern to the Tribunal about the issue under dispute in order for it to take it into consideration when making their decision. Hence, the views of NGO’s like Greenpeace or concerned local citizens that would be currently viewed as ‘political’ have tended to be

³⁶⁹ McKinney, *supra* note 119 at 225.

³⁷⁰ *Ibid.*

³⁷¹ Hart & Dymond, *supra* note 82 at 20.

kept out of the arena of technical NAFTA Chapter 11 tribunals. Some argue that the obligation of responding to amicus briefs submitted by third parties, "could overwhelm corporate lawyers, who are already outmatched by the governments they are bringing the claims against."³⁷² I find this argument unconvincing, particularly when weighed against the importance of third-party participation in proceedings that have the potential to have a significant effect on the public good.

Over the past year and a half, it seems that Chapter 11 tribunals and NAFTA governments have begun to recognize the need for transparency in these arbitral cases. The first sign of progress on this issue was when the International Institute for Sustainable Development (IISD) wrote a submission on the right to submit amicus curiae in the preliminary stages of the Chapter 11 hearing of *Methanex Corporation v. The United States of America*.³⁷³ In January 2001, the *Methanex* Tribunal ruled that it does have the authority to accept written amicus briefs and that it is "minded" to accept IISD's petition in the *Methanex* Case.³⁷⁴ It noted that:

There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between private parties. This is not merely because one of the Disputing Parties is a State...The public interest in this arbitration arises

³⁷² Clyde C. Pearce, Counsel for *Metalclad* in *DePalma*, *supra* note 340.

³⁷³ IISD, "Methanex Corporation v. The United States of America – A Backgrounder on the controversial case under NAFTA's Chapter 11, and on IISD's involvement" online: IISD Homepage, <http://iisd.ca/trade/investment_regime.htm> [hereinafter, *Methanex Backgrounder*] Curiously, Mexico formally opposed the intervention. Perhaps they are afraid that changing any part of the NAFTA will impose further restrictions upon their sovereignty?

³⁷⁴ In response to arguments by three US NGO's, that the public interest nature of the litigation in question, challenging the enactment of an environmental protection law, required a greater degree of public access and accessibility than in traditional commercial arbitration cases. Canada and the United States supported this *amicus* petition, whilst Methanex and Mexico opposed it. See *Methanex Corporation v. The United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae"* (15 January 2001) online: IISD Homepage <http://www.iisd.org/pdf/methanex_tribunal_first_amicus_decision.pdf> (UNCITRAL Arbitration Rules, Arbitrators: W. Rowley, W. Christopher, and V. Veerder) [hereinafter, *Methanex*]

from its subject matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the [United States] and Canada: The Chapter 11 arbitral process could benefit from being perceived as more open or transparent, or conversely be harmed if seen as unduly secretive.³⁷⁵

IISD believes that this is an important decision in support of openness in Chapter 11 proceedings.³⁷⁶ David Runnalls, IISD President said, "they have broken new ground by recognizing the important public interest element of this case, and that the Chapter 11 process could benefit from greater openness and transparency."³⁷⁷ This decision seems to pave the way for future participation from members of the public that have an interest in the outcome of the case. Although not legally binding, the precedential strength of this decision is strengthened by the support of the United States and Canadian Governments. It also reveals a recognition that there is a public interest in some Chapter 11 cases, and the private commercial dispute resolution mechanism that has been adopted is not a perfect fit for cases that have issues that are of interest beyond the litigating parties.

³⁷⁵ *Ibid.* at para 49.

³⁷⁶ See *Methanex Backgrounder*, *supra* note 373. See also: Howard Mann, "Opening the Doors, At Least a Little: Comment on the Amicus Decision in *Methanex v. United States*, *RECIEL* 10(2) 2001, pp241-5 online: IISD Homepage <http://www.iisd.org/pdf/2001/trade_reciel_methanex.pdf>; Howard Mann, "Review of the Decision on Jurisdiction of the Methanex Tribunal, 7 August, 2002" online: IISD Homepage <http://www.iisd.org/pdf/2002/trade_methanex_analysis.pdf> Whilst this seems like a progressive step in Chapter 11 Tribunal's practices, I question whether the ability to be an accepted NGO in the *Methanex* case was a result of the fact that the US government is the one being challenged, not the Mexican government. Is there a feeling in *Methanex* that there is more likely to be a legitimate environmental concern behind the measure of the US because it is a more reasonable government, who would only legislate for the common good and not for the purpose of putting up a trade barrier? Are American NGO's seen as somehow more legitimate? Is this because they speak not only the languages of English and common law, but NGO's such as IISD have scientific reasoning behind them? These questions require further investigation.

³⁷⁷ "NAFTA Arbitration Panel Makes Precedent Setting Ruling In Favour of Canadian NGO: Decision favours IISD intervention in upcoming Methanex Chapter 11 Hearing" online: IISD Homepage <<http://www.iisd.org/about/announce/011901.htm>>

The next sign of progress came in the form of a section on transparency in a *Binding Note of Interpretation*³⁷⁸ by the three NAFTA Parties through the Free Trade Commission.³⁷⁹

It essentially says that there is nothing in the NAFTA (with limited exceptions) that

³⁷⁸ Section A. of the *Note* reads: Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
2. In the application of the foregoing:
 - a. In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
 - b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
 - i. confidential business information;
 - ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
 - iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
 - c. The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
 - d. The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

Online: DFAIT Canada Homepage <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp>>
Section B entitled, "Minimum Standard of Treatment in Accordance with International Law" is a clarification of Article 1105 and will be discussed in Chapter four.

³⁷⁹ Under Article 1131(2) of the NAFTA, such an interpretation forms part of the governing law of a Chapter 11 arbitration.

restricts Parties from releasing, or compels them to keep confidential, any documents that are submitted to or issued by a Chapter 11 tribunal. It pledges that the Parties to a Chapter 11 dispute will make available to the public in a timely manner all documents submitted to or issued by a Chapter 11 tribunal (with exceptions). The IISD points out that this latter 'pledge' to make documents available goes beyond even the decision to grant third party access to a Chapter 11 tribunal in *Methanex*.³⁸⁰ IISD further asserts: "clearly the intent of the Ministers is to impose openness on the proceedings" which will encourage government lawyers in subsequent cases to support an open hearing.³⁸¹ This is because it would be embarrassing to put out an interpretive note and then oppose openness. At the very least, says IISD, "this note will precipitate debate amongst the Parties about the drafting of confidentiality orders, where previously secrecy was assumed."³⁸²

Another recent development on the issue of transparency was the *United Parcel Service of America, Inc. v. Government of Canada* (UPS v. Canada) decision on amicus curiae.³⁸³ In this decision, the Tribunal ruled that it had the authority to allow amicus curiae from interested third party³⁸⁴ citing the *Methanex* ruling on amicus curiae,³⁸⁵ a decision from the Iran-U.S. Claims Tribunal³⁸⁶ and one from the WTO Appellate Body as authority.³⁸⁷

³⁸⁰ IISD, "Note on NAFTA Commission's July 31, 2001 Initiative to Clarify Chapter 11 Investment Provisions" online: IISD Homepage <http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf> [hereinafter *IISD, Note*] at 2.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ See *United Postal Service v. The Government of Canada*, "Decision of the Tribunal on Petitions for and Intervention of Participation as Amicus Curiae" 17 October 2001, (Arbitrators: D.R.A. Cass, L.Y. Fortier, and Justice K. Keith) online: DFAIT Canada Homepage <http://www.dfait-maeci.gc.ca/tna-nac/IntVent_oct.pdf> [hereinafter *UPS*]

³⁸⁴ *Ibid.* at para 64.

Another encouraging sign on the issue of closed hearings was agreement of the Parties in the recent *UPS v. Canada* hearing to broadcast the hearing live on 29-30 July 2002 in a room of the World Bank Headquarters in Washington set aside for public viewing (albeit limited seating).³⁸⁸

6. Lack of an Appeal Process

Under Article 1136, a decision of a Chapter 11 tribunal is binding on the parties with limited scope for an *ad hoc* process of judicial review under various local statutes that “vary in scope and quality of review.”³⁸⁹ Chapter 11 does not have a formal appeal process. In contrast, the WTO has an Appellate body, where parties can go if they feel the arbitrators erred in their decision.³⁹⁰ If an appellate body were created in a similar fashion, the worst decisions from Chapter 11 tribunals could be prevented from forming an informal precedent.

7. Lack of Thoroughness of Awards

Thomas notes that there is no requirement for arbitral tribunals to recount the disputing parties’ factual and legal submissions. Having been one of the legal counsel for Mexico,

³⁸⁵ *Methanex*, *supra* note 374.

³⁸⁶ *Iran v. United States* case A/15, Award No. 63-A/15-FT; 2 Iran-U.S. CTR 40, 43.

³⁸⁷ United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom WT/DS138/AB/R, 10 May 2000, online: World Trade Law Homepage <[http://www.worldtradelaw.net/reports/wtoab/us-leadbars\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-leadbars(ab).pdf)>

³⁸⁸ ICSID News Release, *United Parcel Service of America, Inc. v. Government of Canada* NAFTA/UNCITRAL Arbitration Rules Proceeding (28 May, 2001) online: ICSID Homepage <<http://www.worldbank.org/icsid/ups.htm>>

³⁸⁹ *Mann & von Moltke*, *supra* note 296 at 22.

he found this particularly frustrating.³⁹¹ As we will see in Chapter four of this thesis, the *Metalclad* tribunal appeared to ignore virtually all of Mexico's evidence and legal arguments. He notes that a Tribunal giving a full, fair and careful recording of the parties' submissions in an award gives the dispute settlement system integrity:

International disputes are often politically sensitive and States need to be able to explain to their domestic constituents what arguments they made, what evidence they submitted, and why they won or lost. This is all the more important where the dispute settlement process takes place behind closed doors.³⁹²

A requirement that Tribunals give full reasons for their decisions may also encourage tribunals to be full and thorough in their treatment of the legal issues. As will be evident, full reasons for the Tribunal's decision in *Metalclad* would have cleared up much of the confusion and disappointment experienced by Mexico and many concerned members of the public.

VI. Debate in the U.S. Over Chapter 11

It is interesting to note that members of the United States Congress are becoming increasingly concerned about the operation of Chapter 11.³⁹³ It seems that since the U.S. has been sued by foreign investors under the NAFTA, they are starting to realize that the strict disciplines originally intended to provide protection to U.S. investors abroad do also apply at home. U.S. legislators are debating the use of screening mechanisms and legal obligations, as well as better review and appeal against adverse decisions against a

³⁹⁰ See online: WTO Appellate Body Homepage
<http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#appellate>

³⁹¹ Thomas, *The Experience of NAFTA*, *supra* note 350 at 4.

³⁹² *Ibid.*

³⁹³ *Ibid.* at 20.

state.³⁹⁴ An example of this increased attention is that at the recent *UPS v. Canada* hearing at the World Bank in July. While the U.S. is not a party, it had fifteen observers present and the U.S. is not even a party to this proceeding.³⁹⁵ Another example is U.S. Congressman Sherrod Brown's *Questions to Congress on NAFTA's Chapter 11*.³⁹⁶ In this document, he asks questions like:

Question: Isn't it true that only a few NAFTA cases have been filed and not much money is involved?

Answer: The opposite is true. Fifteen investor cases have been pursued to date and \$13 billion has been claimed from taxpayers in the three NAFTA countries.³⁹⁷

And:

Question: Isn't it true that NAFTA's Chapter 11 grants greater rights to foreign investors than exist for U.S. citizens and companies under U.S. law?

Answer: Yes! NAFTA's investment rules provide new rights for foreign investors that go significantly beyond the rights available to U.S. citizens or businesses under domestic law.³⁹⁸

Another example of U.S. Congress concern is the "NAFTA Chapter 11 Resolution" as introduced in the California legislature by Senator Kuehl on 20 March, 2002. The preamble reads:

This measure would memorialize the President and Congress of the United States that the Congress and the United States Trade Representative should preserve the traditional powers of state and local governments by requiring that negotiators of international investment agreements perform specified duties in that regard.³⁹⁹

³⁹⁴ *Ibid.* at 21.

³⁹⁵ In the transcript of the *UPS* hearing, there are 15 United States representatives recorded as being present. These include people from the U.S. Department of Commerce, the U.S. Department of Justice, the U.S. Department of State, the U.S. Department of the Treasury and the U.S. Environmental Protection Agency. To put this in perspective, the representatives of the parties to the case were 22 for the Respondent and 10 for the Claimant. See *United Parcel Service of America, Inc. v. The Government of Canada* Volume 1, Transcript of Hearing, Monday July 29, 2002 at 1-3.

³⁹⁶ Congressman Sherrod Brown's Top Questions for NAFTA's Chapter 11 (3 December, 2001), online: Public Citizen Homepage <<http://www.citizen.org/documents/ACFB1.pdf>> [hereinafter *Brown*]

³⁹⁷ *Ibid.*

³⁹⁸ Congressman Sherrod Brown's Top Questions for NAFTA's Chapter 11 Part 2, 93 December 2001) online: Public Citizen Homepage <<http://www.citizen.org/documents/ACF122.pdf>>

³⁹⁹ "NAFTA Chapter 11 Resolution" as Introduced in the California legislature by Senator Kuehl on 20 March, 2002 Bill Number SJR 40, online: Public Citizen Homepage: <http://www.citizen.org/trade/nafta/CH_11/articles.cfm?ID=7736>

It seems that in the wake of the *Methanex* claim, the U.S. has a heightened awareness of the potential of Chapter 11 to impede the power of governments to govern in certain areas subject to NAFTA claims. It now seems much more likely that improvements will be made to the process in favour of governments. As we have seen, attention is being given to this in the U.S., not just from strong and influential NGO's⁴⁰⁰, but also from the U.S. State Department.⁴⁰¹

VII. A Note on Notes of Interpretation

I would argue that the provision in the NAFTA allowing for the NAFTA Parties to issue a binding *Note of Interpretation* such as the one in relation to transparency and Article 1105, is an important part of Chapter 11's provisions. It is one way to keep the direction of Chapter 11 arbitral decisions from straying too much from what the NAFTA Parties intended during their negotiations. Further, as Chapter 11 arbitral decisions have the potential to infringe upon a NAFTA government's ability to legislate for the public good, this encroachment should be able to be somewhat limited by a government's ability to correct the informal jurisprudence set by Chapter 11 decisions that go too far beyond what the Parties intended. It is hoped that further *Binding notes of interpretation* are issued in the future in relation to other difficulties embedded within Chapter 11's provisions, particularly in relation to Article 1110 on expropriation. IISD argues that the

⁴⁰⁰ Such as the Centre for International Environmental Law (CIEL), online CIEL Homepage
<<http://www.ciel.org/>>

⁴⁰¹ "NAFTA Investor-State Arbitrations" online: US Department of State Homepage
<<http://www.state.gov/s/l/c3439.htm>>

July 31, 2001 note of interpretation is "undoubtedly a testimony to the strength of public concern."⁴⁰²

VIII. Concluding Remarks About this Chapter

It is true that it is early days in Chapter 11 interpretation and litigation. However, through cases like *Metalclad* we have experienced the potential dangers of the process as it now stands. NAFTA has the capability to bind not only future governments, but also local and state governments, none of whom had a say in how the NAFTA was constructed. This necessarily means that the ways in which citizens have the power to control decisions that potentially affect their everyday lives is also limited. There is a growing international coalition of groups attempting, (and sometimes in the case of IISD, succeeding) to have a say in the decision-making process of Chapter 11 tribunals. However, the process is still very much a product of its' private commercial arbitral history. As such, we are asked to put our trust in the dispute resolution mechanism of Chapter 11 to make reasoned and considered decisions. However, the *Metalclad* decision shows us that our trust in the current dispute resolution process may not yet be warranted. The narrow rules of Chapter 11 and the way in which the dispute resolution process is set up hinders consideration of the effect of arbitral decisions beyond the parties to the dispute. We are asked to trust arbitrators who are chosen in an *ad hoc* manner, who are paid for their service and who are not bound by any code of ethics. Further, the closed nature of hearings and the lack of an appeal process, along with the lack of requirement to give reasons for tribunal decisions means that concerned third parties could potentially be locked out of the whole

⁴⁰² IISD Note, *supra* note 380 at 4.

dispute settlement process. This is unsatisfactory when decisions of these tribunals have the potential to reach in and affect people's lives. The US has now experienced the sting of being taken to a Chapter 11 tribunal firsthand through the *Methanex* and other claims. As such, perhaps this is now the era in which the dispute settlement process and reasonable clarification of the Chapter 11 text will begin to improve. As awareness grows of the issues and problems of Chapter 11, I believe we will see greater moves towards improvements such as increasing transparency and definition of contentious terms such as expropriation. However for now, though, the Chapter 11 dispute resolution system is still highly flawed. It poses burdens for NAFTA governments who have to defend claims from disgruntled foreign investors. Moreover, it is still closed to those who wish to have a say in decisions that potentially affect their lives, but are not parties to the dispute.

Chapter Four: Metalclad v. Mexico

This case highlights how an international trade agreement like NAFTA threatens democracy. We're talking about a Mexican municipality that denied a permit for a toxic waste dump. What is worst about this case is that the decision to deny a permit was made after local citizens mobilized to protest the landfill as a threat to their health. Then a faceless NAFTA panel awards damages because local officials listened to their citizens." If that's not an attack on democracy, I don't know what it is.

- Judy Darcy, National President of the Canadian Union of Public Employees (CUPE)⁴⁰³

We don't think that any foreign investment in Mexico should take precedent over environmental and health protections. These protections should be the criteria for [investment] decisions, rather than establishing a precedent of regulatory flexibility that allows Mexico to violate its laws to attract the investment of a foreign firm.

- Fernando Bejarano, Greenpeace-Mexico's toxics program coordinator⁴⁰⁴

This is just the kind of case for which the NAFTA was enacted, why standards of treatment, including due process and fair and equitable treatment, and why specific criteria for a taking by the government including payment of full and fair compensation are codified therein.

- Mr Clyde C. Pearce, Counsel on behalf of Metalclad⁴⁰⁵

I. Introduction

The *Metalclad* case has arguably drawn more attention than any other decision of a trade tribunal to date. Views about the significance of the outcome of *Metalclad* tend to be varied and sometimes polarized. It is the first time a NAFTA Party has been successfully sued under Chapter 11, which seems to have bought home the reality that this controversial chapter is designed to protect the rights of private investors over those of the sovereign state. Some see *Metalclad* as a positive step in ensuring that the climate for foreign investors is stable and predictable and others see it as threatening the rights of national governments to legislate for the good of the population as a whole.

⁴⁰³ Cited in "NAFTA Challenge Highlights Threat to Environment and Municipal Decision Making" Greenpeace Canada, (February 19, 2001) online: Greenpeace Homepage <<http://www.greenpeace.ca/e/feature/archive/010219.html>> [hereinafter *Greenpeace*].

⁴⁰⁴ Cited in Andrew Wheat, "Toxic Shock in a Mexican Village," *Multinational Monitor*, October 1995, Volume 16, Number 10, online: *Multinational Monitor* Homepage <<http://multinationalmonitor.org/hyper/mm1095.07.html>> [hereinafter *Wheat*] at 5.

⁴⁰⁵ *Transcript*, *supra* note 366, Monday August 30, 1999, opening Statement by Clyde Pearce at 13.

Critics invoked the decision [in *Metalclad*] as evidence that NAFTA, and in particular Chapter 11, represented the triumph of international trade law over domestic law. The case, it was said, revealed the Chapter's potential as an "offensive strategic tool" in the hands of foreign investors; allowing them privileged access to and influence within the domestic policy making sphere, and creating formidable new constraints on the ability of governments to balance public and private interests... The ruling was also characterized as a direct attack on the right of municipal governments to make decisions on development proposals that conflicted with local priorities and concerns.⁴⁰⁶

My discussion of *Metalclad* in this chapter will reflect many of these concerns. I will use the *Metalclad* case study as an example that incorporates all of the elements that have been discussed in previous chapters. The *Metalclad* Award and the events leading up to the initiation of the Chapter 11 claim is a story about the globalization of law; it is about the effects of the neo-liberal economic and trade project in both the North and the South. It demonstrates the sometimes-uneasy attempt to reconcile domestic laws with international laws. And importantly, it shows how the economic priorities have the potential to triumph over values such as protecting the environment. This case study helps to demonstrate the ways in which the law (particularly an international trade law) produces certain ways of knowing a situation and obscures others. It also shows how the law has the potential to reach in and shape people's lives, which is troubling when those people have no say in the decision-making process.

This discussion will begin with a description of the story of the *Metalclad* case that led to the claim. The findings of the Tribunal will be briefly explained. I will then highlight what I think are some of the most problematic elements of the Award. Importantly, the way in which both Mexico and *Metalclad* are portrayed in the Award assists in explaining the outcome. The problem of the Tribunal sitting as if it were a constitutional court of

⁴⁰⁶ Tollefson, *supra* note 6 at 184.

Mexico will be noted before going on to discuss one of the most glaring omissions in the Award, the local environmental dispute that led to the denial of the permit in the first place. I will then discuss the Tribunal's findings relating to two of the most controversial sections of NAFTA's Chapter 11, Article 1105 on national treatment and Article 1110 regarding expropriation. The final part of this chapter will reflect on the significance of the *Metalclad* case for broader themes already outlined in this thesis.

II. The Story

If one were to describe this case in quite simple terms, one might say that this is a case about promises made, promises kept and promises broken...This is not a case about national sovereignty and the right of the state to self-governance. If all the paper relating to those matters were stacked up, over a foot high stack of paper represents what this case is not...this case is about assurances made and duly relied upon, not only those in the NAFTA and those of the federal government officials and the highest state officials. It is also a case about what appears to have been for the Government of Mexico a matter of first impression for which that government- federal, state, and municipal was not prepared; a case...that was ultimately complicated by jurisdictional battles and political infighting...This is a case where laws are lacking in apparent clarity and where laws were contradicted and confounded by administrative decisions and practices, measures contrived *ad hoc* and on the run.

- Metalclad's Opening Statement, 30 August 1999.⁴⁰⁷

Mr. Pearce started by saying that Metalclad had made a promise and had kept it to that it would build a hazardous waste landfill. Let me specify and clarify that that was a promise made by Metalclad to its shareholders, not to Mexico. And it made arrangements to build the landfill despite existing Mexican legal provisions and the continuous and legitimate pre-existing opposition of Mexican society. Metalclad has tried to describe its illegal construction effort as a virtuous act.

- Mexico's Opening Statement, 3 September 1999.⁴⁰⁸

The dispute in this case involves the story⁴⁰⁹ of a claim by a U.S. Company, Metalclad Corporation who purchased a hazardous waste disposal site in La Pedrera, a remote

⁴⁰⁷ Opening Statement by Clyde Pearce, *Transcript, supra* note 366 at Volume 1, Monday August 30, 1999, at 21-22.

⁴⁰⁸ Mr. Hugo Perezcano, *Ibid.* at Volume V, 3 September 1999, at 25.

⁴⁰⁹ In summarizing the story, I acknowledge that I am retelling the story not as an objective account, but as one who is highlighting issues which I deem as important.

community in the municipality of Guadalcázar in the State of San Luis Potosí,⁴¹⁰ which had been previously run by a Mexican company called Technical Confinement of Industrial Wastes (COTERIN). Importantly, as will be elaborated upon below, the Site had been contaminated by COTERIN and shut down by the Mexican federal government. Having received Federal permits to build and operate the hazardous waste disposal unit on the Site, (on the condition that they first clean up previous wastes), Metalclad began construction on the Site without the necessary local permits. Metalclad claimed that once they became aware that it was necessary, it applied to the local Guadalcázar Municipality, who subsequently denied it a local permit. The Municipality's reasons were that the site was contaminated by the previous company, COTERIN and unsafe to be opened. Moreover, the Municipality pointed to the local community's opposition to the Site. As a result of this denial, Metalclad initiated a NAFTA Chapter 11 claim alleging the Mexican federal government was responsible under NAFTA for the Municipality's actions, which

⁴¹⁰ [Hereinafter, *the Site*] "The municipality is located in a sparsely populated and highly impoverished region of Central Mexico. Its climate is hot and arid, the flora and fauna characteristic of a desert. There is little commercial activity; local inhabitants subsist through ranching and small scale, communal agricultural production. Much of the Municipality lacks running water. Since the Municipality has no taxing authority and is wholly reliant on state and federal appropriations, there are virtually no public services. The Municipal government's only phone-line is shared with a public payphone; it has one station wagon, a jail and two peace officers." *Tollefson, supra* note 6 citing Petitioner's Outline of Argument, *Metalclad*, (No. L002904) paras 323-327 at 101-102. Mr. Clyde Pearce, counsel for Metalclad described the directions he was given to the Site as: "go to the edge of the earth and turn right." Opening Statement by Clyde Pearce, *Transcript, supra* note 366, Volume 1, Monday August 30, 1999, at 17. Mr. Hugo Perezcano, chief counsel for Mexico in his opening statement noted: "It is true that it's a poor municipality and the local government has a poor structure. It's a rural municipality. It's a municipality of farmers and campesinos in a semi-desert area. However, this is very different from the denigrating description, which Metalclad sets forth in its memorial, and I quote, "The level of education and literacy is very low and superstition is very high. The fact that the governor barely visits the community is viewed as a great honour. For a hazardous waste landfill to operate in a community such as this, it is necessary to obtain the support, the political support of the state, to dissipate superstitions and natural fears about the risk to human life." *Transcript*, Volume V, Friday September 3, 1999, at 20-21.

were a denial of fair and equitable treatment under Article 1105 of NAFTA's Chapter 11 Investor/State provisions;⁴¹¹ and NAFTA, Article 1110.⁴¹²

On September 23, 1997, three days prior to the expiry of his term, the governor of San Luis Potosi issued an Ecological Decree and declared the area (which encompassed the Site) to be a Natural Area for the protection of rare cactus. Metalclad subsequently added an additional element to their claim of expropriation under Article 1110 maintaining that the decree effectively and permanently precluded the operation of the landfill.⁴¹³

Like most complex legal disputes, this story began long before Metalclad filed its claim under NAFTA. However, if one were to read the facts stated in the Award, the background to the Metalclad dispute would not be immediately apparent. This is the first hint that the Tribunal constructed the story in a particular way as to favour their conclusion. Further, there are many murky and messy facts in this case that were submitted in the memorials and during the hearing which makes it hard to attribute complete wrongdoing to either Metalclad, the municipal or federal Mexican governments. In other words, one could also say it makes it hard *not* to allocate blame on all sides. However, reading the Award of the three-person Tribunal, the dispute seems much more cut and dry than it actually was. As will be seen, the Tribunal, seemingly anxious to

⁴¹¹ This article requires each Party to NAFTA to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security"

⁴¹² This article provides that "no Party to NAFTA may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6".

apply straightforward principles of international trade law, attempted to fit this unwieldy and messy dispute into objective technical trade and investment categories. The side effect of this is that many of the important details are lost in the translation. The dispute is taken outside its local time and space into the international realm where the story was recreated in order to apply narrow rules of Chapter 11.

What follows is a discussion of the Award and then an analysis of the characterization of various elements of the story. Inherent in my approach is an attempt to fill in some of the important details that appear to be 'squeezed out' of the Award's story in order to demonstrate the shortcomings of this particular international trade dispute resolution mechanism. I will then go on to reflect on the broader significance of this Award.

III. The Award

The Tribunal found in favour of Metalclad, based its principal findings of a breach of NAFTA Article 1105. It held that Mexico had failed to "ensure a transparent and predictable framework for Metalclad's business planning and investment."⁴¹⁴

Moreover, it then found that:

[b]y permitting or tolerating the conduct of Guadalcazar, who denied the permits, Mexico participated or acquiesced in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).⁴¹⁵

⁴¹³ *Award, supra* note 3 at para 59.

⁴¹⁴ *Ibid.* at para 99.

⁴¹⁵ *Ibid.* at para 104. Although it did not consider the matter necessary for its conclusion, the Tribunal also found that an Ecological Decree declared by the state Governor nine months after the filing of the NAFTA claim amounted to a separate expropriation. *Ibid.* at para 109.

The Tribunal held that the ecological decree of the governor of San Luis Potosi, which declared the whole area to be an ecological reserve (including the Site) was a violation of Article 1110. Moreover, the Tribunal also found that exclusive jurisdiction to permit a hazardous waste landfill lay with the federal government of Mexico, and that the municipality had acted beyond the scope of its authority when it denied a construction permit on environmental grounds. The Tribunal awarded Metalclad \$16, 685, 000 in damages including interest and did not award costs.⁴¹⁶

1. Problematic Elements of the Award

The first clue that details were left out of the dispute is that out of some 20,000 pages of evidence and pleadings and a 9-day hearing, the arbitral Award was extraordinarily brief;⁴¹⁷ reduced to a mere 43 pages, 10 of which were the procedural history of the case. The remaining 33 pages were "cryptic in places, engaged in *ex cathedra*"⁴¹⁸ pronouncement with no reasoning in others."⁴¹⁹

This Award is problematic as much for what left out as for what is included in the Award.

Highlighting these difficulties is important because it demonstrates the ways in which a

⁴¹⁶ It is noted that the award of damages by the Tribunal is a much smaller sum than that claimed. In their Memorial, Metalclad claimed over \$90 million in damages. See *Ibid.* at para 114.

⁴¹⁷ Metalclad's own council in a recent article noted that "arguably, the failure of the Metalclad award to emerge unscathed from Judge Tysoe's court had much to do with the economical presentation of reasons to be found in the award." See Jack J. Coe Jr. "Domestic Court Control of Investment Awards – Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA? *Journal of International Arbitration* (forthcoming), at footnote 43 cited in *Thomas, The Experience of NAFTA*, *supra* note 350 at 5.

⁴¹⁸ This literally means "from the chair", a theological term which signifies authoritative teaching and is more particularly applied to the definitions given by the Roman pontiff.

⁴¹⁹ *Thomas, The Experience of NAFTA*, *supra* note 350 at 5.

Chapter 11 arbitral tribunal, using the technical international trade treaty, (NAFTA) can reframe data in a way that purports claims to be objective, but clearly favours a result for the investor. This effect can be attributed to many factors discussed in previous chapters of this thesis such as, the manner in which the discipline of international trade law is constructed, historical attitudes towards Mexico and the narrowness of the text of Chapter 11. All of this seems to have the effect of prioritizing economic considerations over social and environmental concerns and re-enforcing power dynamics between the North and the South.

My aim here is not to make my own judgment on the evidence that was before the Tribunal in *Metalclad*, but to highlight what I see are problematic areas that, had they been fully considered by the Tribunal, may have led to a different result, which in turn may have created a more useful precedent to use in future Chapter 11 awards,⁴²⁰ not to mention a more accurate characterization of the facts of the case.

Before discussing the problematic elements of the Award in detail, it is important to mention that Mexico applied for Judicial Review of this Award in October 2001.⁴²¹ This is the first time an arbitral decision of a Chapter 11 tribunal has been judicially reviewed

⁴²⁰ As mentioned in Chapter three, although decisions of Chapter 11 tribunals are only strictly binding as between the parties under Article 1136, previous chapter 11 awards have tended to comprise an informal body of Chapter 11 jurisprudence.

⁴²¹ Judicial review of Chapter 11 awards is contemplated by Article 1135(3) of the NAFTA which states that a disputing party may not seek enforcement of an award until: (a) in the case of a final award made under the ICSID Convention: (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or (ii) revision or annulment proceedings have been completed, and (b) in the case of a final award under the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules: (i) 3 months have elapsed from the date the award was rendered and no

by a national court.⁴²² Mexico sought a ruling to set aside the Award on the grounds that the Tribunal had exceeded its jurisdiction and that it had erred in its interpretation and application of Articles 1105 and 1110. Further, one of Mexico's principal objections to the Award was that it omitted to record or even allude to the vast majority of Mexico's factual and legal defences. This, says Thomas, "is distressing because knowing that both sides hotly disputed the testimonial evidence, Mexico built its defence on Metalclad's own documents."⁴²³ The review was heard by Justice Tysoe of the British Columbia Supreme Court.⁴²⁴ Whilst I will focus on the Award, I will discuss Tysoe J's judgment with reference to his findings on Article 1110 and 1105 because it is important to be clear on what parts of the Tribunal's interpretations were set aside and which remain informal jurisprudence.

IV. Negative Attitude of the Tribunal Towards Mexico

One of the major problems with the Award is the seemingly negative attitude the Tribunal held towards Mexico. If one were to believe the narrative⁴²⁵ told by Tribunal, one could conclude that Mexico had not contested Metalclad's claim to the Tribunal either on the facts or the law. After the Award was handed down, Mexico was of the opinion that the

disputing party has commenced a proceeding to revise, set aside or annul the award, or (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

⁴²² Liliana Biukovic, "NAFTA arbitration awards in British Columbia courts: the Metalclad (United Mexican States v. Metalclad Corp., (2001) 89 B.C.L.R.3d 359 (S.C.)) case" *The Advocate*, (Vancouver, BC) 60 pt2 Mar 2002. at 259-64 [hereinafter *Biukovic*] at 259. Biukovic argues that the Judicial Review of the Metalclad case indicates a "switch towards greater scrutiny of the reasoning of international tribunals and may perhaps lead to unwillingness or caution on the part of investors to choose or consider choosing Canadian arbitral tribunals" *Ibid.* at 8. It is too early to tell whether either assertion is actually the case.

⁴²³ Thomas, *The Experience of NAFTA*, *supra* note 350 at 4.

⁴²⁴ It was heard in Vancouver because this was the place of arbitration nominated by the parties. *Judicial Review*, *supra* note 25 at para 1.

⁴²⁵ For more on this concept, see: *Buchanan & Johnston*, *supra* note 14.

tribunal had failed to acknowledge many of Mexico's arguments and in a sense failed to perform its' role as an independent arbitrator. In the words of Mexico's lead lawyer, "Mexico can live with adverse results, if a tribunal does its job properly".⁴²⁶

Indeed, it would seem as though the Tribunal not only constructed a truth in favour of Metalclad, but they failed to acknowledge Mexico's central defense. For example, in the section of the award entitled, "Facts and Allegations, the Tribunal records fourteen instances where Metalclad "asserted" or "maintained" certain facts about the case and only five instances presented Mexico's response and on no occasion, do the Tribunal mention Mexico's affirmative factual defenses. In other words, the Tribunal's construction of the facts seems to be based on Metalclad's side of the story without regard to many of the facts presented by Mexico during the hearing and in its memorials.

V. Representation of Metalclad

Metalclad...was a case where a small investor was treated with an abundant lack of good faith by various levels of government in Mexico.⁴²⁷

The *Metalclad* case is a vivid illustration of what critics mean when they charge that free-trade deals amount to a "bill of rights for multinational corporations." Metalclad has successfully played the victim, oppressed by what NAFTA calls "intervention" and what used to be called "democracy."⁴²⁸

When discussing the *Metalclad* case, some people have brought to my attention that critics seem to want to characterize Metalclad as a large, evil, faceless multinational, when in

⁴²⁶ Hugo Perezcano quoted in "U.S. Firm Gets \$16 Million Settlement in First NAFTA Claim", *The National Law Journal*, (15 October, 2001).

⁴²⁷ Paterson 2002, *supra* note 295 at 2-3.

⁴²⁸ Naomi Klein, "Democracy, When You Least Expect it" *Globe & Mail*, (28 February 2001).

fact, it is only a small struggling company. However, Mexico did not represent Metalclad as a large unwieldy multinational. It described it as:

A small under-capitalized company with no experience in the hazardous waste disposal business in the United States, let alone elsewhere, [which] was breaking even or losing money in its existing business of industrial insulation sales and installation. It entered the hazardous waste landfill business (known throughout the world as a highly regulated and difficult business) in Mexico. It had never gone through, in the United States or elsewhere, the process of seeking permits, developing consensus and, as often happens to the most experienced proponents with well-planned hazardous waste projects, failing to win approval needed.⁴²⁹

Nevertheless, I do not believe the size of the company matters. The fact that they are an American company operating in Mexico is the key point that makes this case troubling. As a foreign investor, they had access to remedies that Mexican companies did not have. Big or small, there is no excuse for Metalclad's lack of due diligence.

What is most troubling about the Tribunal's characterization of Metalclad as a small company who did everything possible to ensure they had the necessary permits to operate the Site is that despite overwhelming evidence to the contrary, the Tribunal concluded Metalclad had no prior knowledge of the possibility that a municipal construction permit could be demanded of it. This is evident from paragraph 76 of the Award which states:

...Once the authorities of the central government of any Party...become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all the relevant laws.⁴³⁰

⁴²⁹ *Counter-Memorial*, *supra* note 18 at para 2. Mexico went on to say at para 3: "The Claimant (*Metalclad*) entered Mexico with grandiose plans. It misrepresented its credentials and experience to Mexican officials. It purchased a site with a pre-existing environmental liability. It, in turn, misrepresented its Mexican investments to its investors. It borrowed funds at high rates of interest and under onerous terms. Under pressure to meet its commitments to investors, it acted in inappropriate and, the evidence suggests, unlawful ways." *Ibid.*

⁴³⁰ *Award*, *supra* note 3 at para 76.

However, there was much evidence led by Mexico that Metalclad was fully aware that it needed to apply for a local permit and simply did not do so. Firstly, Mexico's evidence and Metalclad's own documents overwhelmingly suggest that Metalclad *did* have prior knowledge of the need to obtain local permits. They had a 49% interest in a prior hazardous waste incinerator project, called the "Santa Maria del Rio" in San Luis Potosi for which they applied and received permits from the federal, state, and municipal authorities.⁴³¹ Moreover, prior to exercising its option to purchase COTERIN, Metalclad amended the Option to Purchase Agreement to defer payment of three-quarters of the purchase price until:

...the municipal permit for the building of the aforementioned confinement has been obtained by COTERIN, or as the case may be, definitive judgment in a writ of *amparo*⁴³² that allows [the company] to legally proceed with the building of such confinement...⁴³³

Thus, Metalclad's own documents showed it was aware that its' local counsel believed the company needed a municipal construction permit.⁴³⁴ Further, after construction commenced without the permit, the company's local counsel recommended that the company apply in the name of another company other than COTERIN as a permit application by COTERIN had already been denied.⁴³⁵ Metalclad's Chairman's response was that he would rather "ignore the problem than raise it to a level of awareness".⁴³⁶

⁴³¹ This project was subsequently abandoned, but not before they went through all of the aforementioned motions.

⁴³² A Mexican federal constitutional remedy.

⁴³³ Exhibit 3 to *Counter-Memorial*, *supra* note 18 at 7.

⁴³⁴ In a letter dated 16 September 1993, a Metalclad officer wrote: "Our law firm in San Luis Potosi believes that a municipal manifest may be required." Metalclad Court Record, Volume 7, at 7079.

⁴³⁵ Letter dated 17 August, 1994, from local counsel to Metalclad, Court Record, Vol. 12, pp10,864-5.

⁴³⁶ Metalclad Court Record Vol. 12, pp. 10,860-1.

Secondly, it appears to be common business sense that any company wanting to invest in a foreign country performs the necessary due diligence before it pays large sums of money for property and facilities. Their failure to inform themselves of the levels of permits they needed is arguably part of the ordinary business risk that a company takes when it satisfies itself that it has done all that is necessary to ensure a secure investment.

Finally, the failure to obtain local support for hazardous waste facilities is a “universal and commonplace occurrence.”⁴³⁷ It is in fact, the single biggest risk of such a project. It was asserted in Mexico’s Memorial to the Tribunal that “generally, federal governments are more willing to approve such projects as being in the national interest. However, the people who live near the proposed site are naturally the most concerned about it.”⁴³⁸ The Memorial then goes on to give an example of an ambitious plan by the United States Environmental Protection Agency to establish nine regional hazardous waste landfills in the U.S. “Due to local opposition, not a single facility was established.”⁴³⁹ This common fact should have been the first consideration on the minds of the Metalclad executives when considering operating a hazardous waste facility, no matter where it was located.

However, despite all of this, the Tribunal represented Metalclad as having done every thing that a reasonable foreign investor would do, stating it was “entitled to rely on the representations of federal officials and to believe that it was entitled to continue its

⁴³⁷ *Counter-Memorial*, *supra* note 18 at para 8.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

construction of the landfill.” Further, it concluded, “Metalclad was merely acting prudently and in the full expectation that the permit would be granted.”⁴⁴⁰

It appears to me that the only way that the Tribunal could have accepted Metalclad’s argument in the face of the evidence to the contrary would be if it held the underlying view that Mexico was a primitive place to do business and a minefield for honest foreign companies trying to operate through the maze of the Mexican legal system. It has already been highlighted that the U.S. NAFTA negotiators believed that Mexico’s legal system is opaque and corrupt. Similarly, corporate trade lawyers have noted that NAFTA is seen as critical for assisting American business to persuade Mexico to begin to dismantle its restrictions on investment. “We’ve got corrupt courts in a lot of these countries; companies should have the right of honest redress.”⁴⁴¹ Lawyers for Mexico note how important it is to defend against these kinds of allegations in every Chapter 11 case. “Otherwise,” one of them recently noted, “we were going to become the insurer for every investment that goes awry in Mexico.”⁴⁴² Here I do not make a judgment about the legitimacy of Mexico’s legal system but merely wish to highlight the apparent assumption on the part of the Tribunal that Mexico’s regulatory system is opaque even in the face of evidence to the contrary.

VII. A Matter of Mexican Constitutional Law

⁴⁴⁰ *Award, supra* note 3 at para 89.

⁴⁴¹ Quote by ‘an important trade lawyer’ in William Greider, “The Right and US Trade Law: Invalidating the 20th Century” Feature Story, October 15, 2001, online: The Nation Homepage <<http://www.thenation.com>> [hereinafter *Greider*] at 5.

⁴⁴² *Ibid.* at 10.

One of the incredible elements of this Award is the Tribunal's statement about which level of the Mexican government had the authority to rule on matters relating to the environment. The Tribunal preferred to follow Metalclad's 'expert' on Mexican law, deciding that the municipal government had no jurisdiction to rule on matters relating to the environment. At paragraph 86 it stated, "...the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations (not hazardous waste evaluations)"⁴⁴³ In its Memorial, Mexico offered a different interpretation of the division of powers in Mexico. At paragraph 110 of their Memorial, Mexico argues:

Land Use and zoning powers fall within the jurisdiction of State and Municipal governments. These powers are not vested in the Federal Government by the Constitution and thus are reserved to state and local authorities.⁴⁴⁴ As the Mexican legal experts state:

"In general terms, the system of distribution of jurisdictions between the Federation and the States is based on the premise that the latter maintain the powers that have not been expressly granted to the Federation through the federal pact (art. 124)"⁴⁴⁵

Thus, Mexico argued, that the Mexican Constitution empowers municipalities to issue construction permits and that Article 73, section XXXIX-G of the Constitution empowers the Congress of the Union 'To issue laws that establish concurrence of the federal Government, the States governments and the municipalities, within their jurisdictions, concerning environmental protection and preserving and restoring ecological equilibrium.'⁴⁴⁶ The Mexican constitution does not expressly provide for this division of legislative powers regarding environmental matters. Under Article 115, V, the

⁴⁴³ Award, *supra* note 3 at para 86.

⁴⁴⁴ Article 124 of the Mexican Constitution provides that "Powers not expressly vested by this Constitution on federal officials, are understood to be reserved to the States."

⁴⁴⁵ Expert report of Lic. Ulises Schmill Ordonez, Lic. Carlos de Silva Nava and Dr. Jose Ramon Cossio Diaz, numeral 1, at p 4. Cited in *Counter-Memorial* note 18 at para 184, footnote 112.

⁴⁴⁶ *Ibid.* at para 190.

construction does authorize municipalities to issue construction permits and to “control and supervise the use of land within their own territories”⁴⁴⁷

Further, when cross-examined by Metalclad’s counsel, Mr. Cling, Secretary of State of the Secretariat for the Environment, Julia Carabias Lillo contradicted Metalclad’s constitutional interpretation that the local municipality had no right to consider environmental factors in the granting of a municipal permit:

MR CLING: ...Under the General Law of Ecology...jurisdiction for the regulation of hazardous wastes and permitting for hazardous waste facilities is granted to the federal government; is that correct?

MADAM
SECRETARY
CARABIAS:

Correct.

MR CLING: Would you agree, then, that any attempt by a municipality to use the municipal construction permitting process to review or re-examine a hazardous waste project’s compliance with the provisions of the General Law would violate the federal government’s exclusive jurisdiction?

MADAM
SECRETARY
CARABIAS:

I wouldn’t agree with the way the question has put it that it would be a violation, because the federal government in its environmental protection efforts is always receiving input from other sectors and from other levels of government in formulating its position, but its position is taken by the federal authorities, but the environmental authorities.⁴⁴⁸

And later in the same cross-examination, Madam Secretary Carabias clarified that the municipality was entitled to take into account environmental factors when considering a construction permit:

⁴⁴⁷ States have the authority to establish municipalities and to fill out the exercise of municipal power. Schneiderman reminds us that many modern constitutions were enshrined at a time where there was no express provision relating to the environment. This has meant the matter has sometimes been left to the courts to decide. For instance, the Supreme Court of Canada ruled in the 1992 case of *Friends of the Oldman River Society v. Canada* (1992) 22 DLR (4th) 1 at 7 (SCC) interpreted the Canadian constitution to say that where authority over environmental matters is not clearly allocated to either the national or provincial governments, all levels of government would legitimately want to weigh environmental repercussions in the course of government decision making. *Schneiderman, Taking Investments too far*, *supra* note 36 at 8.

⁴⁴⁸ *Transcript, supra* note 366, Volume I, 30 August, 1999, at 68-69.

MR CLING: ...Let me see if I can ask you this in the form of a hypothetical question. I want you to assume that a municipality decides to – municipal government officials decide to use the municipal construction permitting process to review a federal government's decision to permit a hazardous waste facility.

MADAM
SECRETARY
CARABIAS:

That wouldn't be proper.

MR CLING:

Excuse me. I'm not finished. With that assumption in mind, would they have moved out of their proper sphere of jurisdiction as you use the term?

MADAM
SECRETARY
CARABIAS:

If they're reviewing a federal government authorization yes. If they use certain elements of information for their own decision-making process, no.⁴⁴⁹

At another point in her cross-examination, Mrs. Carabias noted, "a building permit is a parallel process that may or may not involve certain aspects that might be under evaluation by another authority. But it's an autonomous process. The federal government does not get involved in the municipal evaluation."⁴⁵⁰ Further, Mr. Hugo Perezcano, Chief counsel for Mexico noted in his opening statement that: "the autonomy of the free municipality plays a very important role within the national structure."⁴⁵¹

This argument was disputed by Metalclad's expert on Mexican law and this was the preferred interpretation by the Tribunal. Referring to the Mexican Federal "General Ecology Law of 1988,"⁴⁵² which grants power to authorize hazardous waste sites to the federal government, the panel found that the federal authority "was controlling and [that] the authority of the municipality only extended to appropriate construction

⁴⁴⁹ *Ibid.* Volume I, 30 August, 1999, at 72.

⁴⁵⁰ Witness cross-examination, *Ibid.*

⁴⁵¹ Mr. Hugo Perezcano, chief counsel for Mexico, *Ibid.* Volume V, Friday, September, 3, 1999 at 10.

⁴⁵² *Award, supra* note 3 at para 86.

considerations.”⁴⁵³ This means that the Tribunal found the municipality of Guadalcázar had no constitutional authority to take into account environmental concerns on the issuance of a municipal construction permit. As Professor Schneiderman notes: “it is remarkable the confidence with which the panel sitting as if it were a constitutional court arrived at definitive conclusions regarding the constitutional authority of Mexican municipal governments.”⁴⁵⁴ As mentioned, Mexico’s own expert offered a very different and in Schneiderman’s opinion more authoritative interpretation of this Mexican constitutional law question. Further, Mexico noted that Metalclad’s expert reports on Mexican constitutional law were prepared by a 1994 graduate of the University of Arizona who was an LL.M. candidate at the Institute of Technological and of Higher Studies of Monterrey (ITESM), Mexico, and two of his colleagues at the ITESM:

The Tribunal should note that the Claimant has submitted two “expert” legal reports, both prepared by the...[Legal Centre for Inter-American Trade and Commerce]. Both are signed, among others, by Mr. David W. Eaton, who is not licenced to practice law in Mexico. Mr. Eaton has no professional studies in Mexico, and cannot be regarded as an “expert” in Mexican law. The report entitled “Lack of Clarity in Mexican Environmental Legislation in the Period of Transition: 1988-1996” is also signed by Dr. Martin Bremer, a geophysical engineer. This is indicative of the frailties of the purported “expert” opinion submitted by [Metalclad].⁴⁵⁵

Mexico argued that, as such a recent graduate, this author would not qualify as an expert on U.S. law, let alone Mexican law. Moreover, Mr. Eaton lacked the necessary credentials required to give an opinion under Mexican law.”⁴⁵⁶

⁴⁵³ *Ibid.*

⁴⁵⁴ *Schneiderman, Taking Investments too far, supra* note 36 at 7.

⁴⁵⁵ *Counter-Memorial, supra* note 18 at Footnote 116.

⁴⁵⁶ “Petitioner’s Outline of Argument” (5 Feb 2001) para 423 cited in *Schniederman, Taking Investments too far, supra* note 36 at 15 (footnote 76).

Thus, it would seem that the Tribunal's reliance on Metalclad's 'expert' interpretation of the division of powers in the Mexican Constitution was manifestly wrong and somewhat puzzling. Secretary Carabias testified for an entire day to the fact that the local municipality had the right to consider environmental factors in the issuance of a building permit. Further, the report on the Mexican constitution was written by inexperienced graduates who were not licenced to practice law in Mexico. To date, there has not been a ruling in the Mexican courts on this constitutional and jurisdictional question with regard to whether the General Ecology Law vests sole power in the federal authority to make decisions on environmental matters. Until this is so, it seems highly inappropriate for an *ad hoc* Chapter 11 Tribunal to rule on a complex matter that has not been settled by Mexican courts.⁴⁵⁷

VIII. Strong History of Democracy in San Luis Potosi

The Tribunal's ruling on which authority had the right to decide environmental matters, also denies the history behind the region of San Luis Potosi and the changes in the relations between Mexican federal government and local (state and municipal) governments during the last two decades. Tamayo surmises that given the Mexican

⁴⁵⁷ In my view, counsel for Mexico, Mr. Hugo Perezcano, was correct when he noted in his opening statement to the tribunal "Municipal autonomy is not unlimited. The municipality is also subject to the rule of law and to legal oversight, and that's what national courts are for. However it is not up to the Tribunal to decide on issues of Mexican Law. The issue is whether fair and equitable treatment was accorded to [the] claimant. The claimant had available jurisdictional resources and remedies. It turned to those remedies, then gave up.." *Transcript, supra* note 366, Volume V, Friday September 3, 1999, at 18-19.

tradition of political centralism, Metalclad was "probably betting on the incapacity of the population of Guadalcazar and the local authorities to oppose the federal government."⁴⁵⁸

This supposition, if true, did not understand the recent political history of San Luis Potosi. Since the 1950's there has been active local resistance to many of the centralist measures taken by Mexico City. Political opposition to the ruling PRI had emerged in the region during the 1950's⁴⁵⁹ and was resurrected in the 1980's⁴⁶⁰ with five municipal governors in a row being elected from opposition parties. Candidates from the PRI who have been elected between 1985 and 1997 have been strongly opposed and have not lasted in their positions to the full term (of six years).⁴⁶¹ Moreover, if there was any assumption that the people of San Luis Potosi were not politically active, it was dispelled during the *Metalclad* hearing when Arbitrator Civiletti asked former governor Ramos what the approximate voting population was in Guadalcazar⁴⁶² Mr. Ramos' reply was:

⁴⁵⁸ Arturo Borja Tamayo, "The New Federalism, Internationalization and Political Change in Mexico: A Theoretical Analysis of the Metalclad Case," Online:

<wysiwyg://89/http://www.geocities.com/aborja2/newfed.html> [hereinafter *Tamayo*]

⁴⁵⁹ In the 1950's, Salvador Nava emerged as the leader opposing the PRI-supported Gonzalo N. Santos. In 1958, Nava was elected as municipal president to the state capital of San Luis Potosi, despite PRI opposition to him. In 1962, Nava participated in the election for state governor as the opposition candidate (supported by the Partido Accion Nacional, PAN). He lost, but many believed that the PRI committed widespread fraud to secure his defeat. *Ibid.* at 7.

⁴⁶⁰ When political opposition to the PRI re-emerged in San Luis Potosi, it was named "Navismo" after Salvador Nava. The man himself was again elected municipal president of San Luis Potosi in 1983, once again defeating the PRI candidate. *Ibid.* at 7.

⁴⁶¹ For example, Fausto Zapato, who was chosen as candidate by former President Carlos Salinas, was strongly rejected by local political forces and stayed in the position only two weeks. See Cabrero, Enrique & Gil Garcia, Carlos, "El Municipio de San Luis Potosi (1989-1999), Gestion Municipal en un Contexto de Alternancias e Ingovernabilidad," Mexico: Documento de Trabajo, Division de Administracion Publica, cide and Santos Zavala, Jose, 1990, "La Administracion Publica en San Luis Potosi: una Agenda para el Cambio," Tesis de Maestria en Administracion Publica, Centro de Investigacion y Docencia Economicas.

⁴⁶² During this question, Arbitrator Civiletti noted that "In the United States of America, out of all of the eligible voters, frequently less than one-third of those eligible actually vote. It's a great shame." *Transcript, supra* note 366, Volume III, Wednesday, September 1, 1999 at 78.

"We've had more than 80 percent of the people voting [in the last elections]"⁴⁶³ This local political context is essential to an understanding of why the municipal governor chose to withstand pressure from the Federal government and listen to his constituent's opposition to the hazardous waste disposal site.

IX. The Local Environmental Dispute in Guadalcazar

Babies were born with health problems. People thought this was connected with earlier dumping at the site. An independent panel raised concerns about possible groundwater contamination and concluded there was an urgent need for remediation.⁴⁶⁴

We have detected four cases of cancer [in the first quarter of 1995] in a very small population. We also have had three babies born this year with birth defects and other respiratory problems. We know that malformations normally come in like one case per 100,000 people. To have three or four in four months is extreme. In the county seat, we are only about 1,500 people.⁴⁶⁵

One of the major difficulties with the Award is the absence of explanation as to why the municipality would deny the local construction permit. The way the facts are constructed in Section Five of the Award, it would seem that the governor had no basis upon which to deny Metalclad a permit to operate the site. There is evidence that Metalclad believes that there was an attempt by the state and municipal governors to maintain a Mexican monopoly over hazardous waste disposal and this 'victimization' seems to be reinforced as truth by the Award. At no point in the Award is Mexico's reason for denial of a permit, the local environmental opposition, addressed or explained. Instead, the Tribunal's only mention of protestors is during paragraph 46, where the Tribunal describes the grand opening of the landfill. The Tribunal prefers to believe Metalclad's

⁴⁶³ Mr. Leonel Ramos Torres, *Ibid.* Volume III, Wednesday, September 1, 1999 at 78-9.

⁴⁶⁴ *Greenpeace, supra* note 403.

story that the demonstration at the opening “was organized at least in part by the Mexican state and local governments, and that state troopers assisted in blocking traffic into and out of the site.”⁴⁶⁶ A relevant question to ask is: were Mexico’s arguments that the municipality’s denial of the permit at the local level was for the purpose of protecting health and safety “brushed aside by the arbitrators as irrelevant.”⁴⁶⁷

In Metalclad’s Memorial to the Tribunal, they claimed that local opposition to the hazardous waste dump was not genuine but rather was contrived by the ‘arbitrary actions’ of the Governor of the Guadalcázar municipality. Moreover, it claimed that there was no major opposition to the project and the majority of the local population supported them.⁴⁶⁸

Mexico strongly denied this. In their Counter-Memorial pleadings to the Tribunal, they present strong evidence to refute this allegation. In one exhibit to the Counter-Memorial, the Governor of the Municipality, Mr. Ramos, asserted that it would be “absolutely necessary to have the agreement of the people of Guadalcázar, who have repeatedly expressed their opposition [to the site] in the media.”⁴⁶⁹ The Counter-Memorial also asserted that Metalclad subsequently responded to this statement by saying: “we agree with you that the consent of the people of Guadalcázar is needed in order to be able to

⁴⁶⁵ Quote by Ermillo Mendez Aguilar, former county official who is active with the San Luis Potosi Ecological Support Group (SLPESG) cited in *Wheat*, *supra* note 404 at 4.

⁴⁶⁶ *Award*, *supra* note 3 at para 46.

⁴⁶⁷ *Greider*, *supra* note 441 at 10.

⁴⁶⁸ *Counter-Memorial*, *supra* note 18 at para 34.

⁴⁶⁹ *Ibid*, Exhibit 4 entitled, “To the Public” Statement by the State Government of San Luis Potosi, January 13, 1994.

construct and operate such a facility".⁴⁷⁰ Moreover, during the *Metalclad* hearing, former governor Mr. Ramos stated: "90 percent of the people of Guadalcasar were against this project, against the landfill. I think that is the will of the majority that makes the decision."⁴⁷¹ The Tribunal heard much evidence of the local opposition to the Site and still chose to believe Metalclad's claim that the opposition was staged.

Further, with a small amount of preliminary investigation into the area prior to investing, Metalclad would have found that a coalition of opposition groups was formed over the Site and the hazardous waste facility at La Pedrera. The coalition comprised the municipal government of Guadalcasar, social organizations from the municipality, and national and international environmental Non Government Organizations (Greenpeace Mexico and a number of local organizations headed by Grupo San Luis Ecologico). By 1995, this coalition had the support of the state government, which also had concerns over the facility. The state government's support must have had to take into account the political costs of not supporting a cause that had become quite prominent in the state and one that had widespread support of the people of San Luis Potosi. This mobilization captured the interest of the local and national media.⁴⁷² The coalition conducted

⁴⁷⁰ *Ibid*, Exhibit 2.

⁴⁷¹ Mr. Ramos, during day 3, 1 September 1999, p 82.

⁴⁷² See eg. Metalclad Corporation, "To the Public Opinion in San Luis Potosi, To the State Governor Horacio Sanchez Unzueta: Enormous Misinformation," *Pulso*, (11 January, 1994); State Government of San Luis Potosi, "To the Public Opinion," *Pulso*, (13 January 1994); Adriana Bermeo, "Opening of the First Toxic Cemetery" *Reforma*, (11 March, 1995); "Totally Legitimate, Citizen's Opposition to the Reopening of the "La Pedrera" Landfill" *Pulso*, (18 March 1995); "Greenpeace Protests in Front of Metalclad Headquarters in Los Angeles, California" *Press Release*, (22 August, 1995); Mexico City Times Staff, "Greenpeace Demands an Answer" *Mexico City Times*, (12 October, 1995) at 2; "SEMARNAP Greenpeace and More than 30 International and National Organizations Request to Convert the Site of the Hazardous Waste Landfill Located in Guadalcasar, SLP, in National Protected Area" Press release, (3 November 1995).

numerous demonstrations in San Luis Potosi and Mexico City throughout 1995.

Greenpeace also submitted a criminal complaint to the Federal Bureau of Environmental Protection.⁴⁷³

Yet, Metalclad claimed it had support of over 90 percent of the population of San Luis Potosi⁴⁷⁴ and the Tribunal believed this story. Whilst the above opposition groups are obvious evidence that Metalclad was not as well supported as it claimed to have been, they did manage to rally public support of some Mexican ecological groups, such as the Mexican Ecological Movement and the National Council of Ecological Industries.⁴⁷⁵

Further, any support they had from the local community was born of the promise of hundreds of jobs in an area where many residents live on a subsistence level. However, Metalclad's project plan listed the on-site jobs at the facility as 33.⁴⁷⁶

⁴⁷³ The argument of Greenpeace was that the federal authorities had not adequately enforced Mexican environmental laws and had actually colluded with the Metalclad Corporation and the former Mexican owners of the Site to get the Guadalcázar site operating profitably. *Tamayo, supra* note 458 at 8; See also, "Greenpeace Submitted Three Claims Against PROFEPA and INE Because of the Authorization of the Toxic Landfill in Guadalcázar, SLP" Press Release, (2 February, 1996).

⁴⁷⁴ At paragraph 75 of its Memorial, Metalclad claimed there exists a poll taken on 6 August 1995, conducted by local economists, disclosed that 97% of the people living near the La Pedrera site favoured the project opening.

⁴⁷⁵ Both of these groups approved the location of the facility and encouraged the construction of other hazardous waste sights in Mexico. *Tamayo, supra* note 458 at 9.

⁴⁷⁶ Respondent's Memorial para 34. Metalclad also had support from the U.S. embassy in Mexico, and several U.S. congressmen wrote letters to the Mexican Ambassador to the U.S., Jesus Silva-Herzog, expressing their view that not allowing Metalclad to operate in Guadalcázar would discourage other American companies from investing in Mexico. A Senator from Illinois, Paul Simon, wrote a personal letter to the Governor of San Luis Potosi, Horacio Sanchez Unzueta demanding that he issue a municipal construction permit. He noted that blocking Metalclad's operations stood in clear contradiction to the spirit of NAFTA regarding favourable regional conditions for foreign investment. Further, then U.S. Commerce Secretary, Ronald Brown made a public statement of support for the opening of Metalclad's facility. *Ibid.* at 9.

Even if it could be said that Metalclad did have some support for their project, it is a stretch to claim that it was the majority of the community. This fact is further strengthened by the history of previous opposition to the site while it was owned by a Mexican company.

X. Long History of Community Concern over Toxic Waste

From the evidence produced by Mexico,⁴⁷⁷ it seems that to many people, the hazardous waste landfill at La Pedrera raised fears of threats to health and safety.⁴⁷⁸ Whilst COTERIN had federal approval to open a hazardous waste transfer station in La Pedrera, it soon became apparent that, rather than storing and transferring the waste as it was authorized to do, COTERIN was disposing of untreated waste on the open land.⁴⁷⁹ COTERIN already had one of their toxic waste dumps in nearby Mexquitic de Carmona County shut down by the government due to complaints from local residents there. The company then reopened their operations in the current site under dispute in La Pedrera. Promising the local community water wells, highways, schools and other benefits, they began to store thousands of barrels of toxic waste on the site, even though it only had permission to operate as a temporary waste transfer site for 90 days. The Site then took in more than 55,000 drums (or approximately 20,000 tons)⁴⁸⁰ of toxic wastes between

⁴⁷⁷ This evidence includes witness statements of local protestors, of advocates for Greenpeace Mexico, and media reports of the opposition.

⁴⁷⁸ The exhibits of letters, media clippings, scientific reports and witness statements attached to Mexico's Counter-Memorial provide fairly convincing evidence that there was a genuine fear in the community and indeed throughout the country about the Site. However, due to space constraints, I cannot reproduce this evidence here in full.

⁴⁷⁹ Tollefson, *supra* note 6 at 188; *Counter-Memorial*, *supra* note 18 at para 40.

⁴⁸⁰ There are allegations that the quantity of waste involved exceeded that spilled in the Love Canal case, which triggered the enactment of the U.S. *Superfund* legislation. For more on this case, see online <<http://web.globalserve.net/%7espinc/atoimcc/lovecana.htm>>

November 1990 and May 1991. The wastes, including some explosive wastes, are buried five meters deep in three pits (or cells) that did not meet federal standards.⁴⁸¹ Evidence shows that the surrounding soil has been contaminated.⁴⁸² Local residents in the area say that this waste storage was illegal and unsafe. "The rains of 1991 carried toxic drums a great distance, most importantly into reservoir that is used in the rainy season to water livestock, crops and people," says Angelina Nunez, a member of the board of San Luis Potosi Ecological Support Group (SLPESG)⁴⁸³ "Several animals died and the people stopped using the water," she said.⁴⁸⁴ Even Elgin Williams, head of investor relations for Metalclad, admits the two toxic pits on the Site that his company purchased were badly mismanaged. "Nobody knows what's in those cells because the [record] logs...it was a joke the way they were taken care of at the end."⁴⁸⁵ After an investigation by the Secretary of Urban Development and Ecology (Sedue)⁴⁸⁶, the Site was ordered to be closed in May 1991. According to one story, although the site was officially closed, semi-trailer trucks continued to unload toxic waste there. Apparently, local authorities ignored the complaints of outraged community members, to the point where citizens mobilized brandishing machetes in September 1991 and prevented tractor trailers from unloading any more toxic waste. Interestingly, the then state representative of Sedue, Rodarte Ramón visited the Site and told the people the trucks posed no threat to their

⁴⁸¹ *Counter-Memorial*, *supra* note 18 at para 40.

⁴⁸² Cited in *Wheat*, *supra* note 404 at 2.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

⁴⁸⁶ This has since been replaced by the Secretary of the Environment, Natural Resources and Fish.

health. Rodarte ended up working for Metalclad, where he “interfaces with all the government people [in Mexico] for us.”⁴⁸⁷

Despite the fact that Metalclad’s venture in purchasing COTERIN was being hailed by leading U.S. and Mexican federal government officials “as a model of how Mexico’s environment can benefit from NAFTA,”⁴⁸⁸ a group of scientists commissioned by Guadalcázar officials studied the site and concluded that the geology of the region was unsuitable to the presence of a hazardous waste facility. Seasonal streams cross the Site, which is a violation of official Mexican regulations. It was found that the soil could cause a leak in the confinement cells (containing the waste) and may cause leakage into the subsoil and floodwaters during the rainy season.⁴⁸⁹

Metalclad acknowledged this danger when, aiming to dispel local fears, it advertised in the local newspapers on January 11, 1994:

“...we recognize that a serious danger exists in the event that the facility approved by the Federal Government, cannot be operated given that the number of containers existing on the site may reach up to 120,000 in number representing close to 30,000 tons of dangerous and toxic waste deposited only in ditches that do not meet the construction standards and are only covered with dirt, without complying with the minimum safety conditions and standards and which may pose a great danger to the health of the inhabitants of the communities.”⁴⁹⁰

Evidence in the Counter-Memorial showed that long before Metalclad arrived in Guadalcázar, the Municipality and eleven other municipalities of the *altiplano* (the highlands) region of San Luis Potosí expressed clear and consistent concerns about the

⁴⁸⁷ Elgin Williams cited in *Wheat*, *supra* note 404 at 2.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.* at 4.

⁴⁹⁰ *Counter-Memorial*, *supra* note 18 at Exhibit 1.

site.⁴⁹¹ Further, Mexico asserted that, "...[t]he extent of local opposition and the previous denial of the municipal permit was a notorious fact that would be evident to any investor that performed even a modest amount of due diligence."⁴⁹²

Why did the tribunal not mention the historical and ongoing opposition on environmental grounds as an important reason that the Municipality denied the permit? While seeming to ignore evidence to the contrary,⁴⁹³ the Tribunal chose the story that "the Site was feasible and the environmental impact was consistent with Mexican standards"⁴⁹⁴

Moreover, it asserted that the Municipality "lacked any basis for denying the construction permit."⁴⁹⁵ It mentioned "[d]emonstrators (that) impeded the "inauguration" [of the Site] block(ing) the exit and entry of buses carrying guests and workers, and employed tactics of intimidation against Metalclad."⁴⁹⁶ Yet, it provided no explanation in the Award as to why there would be protesters at the Site. Accordingly, the Tribunal observing the presence of protesters in this part of the Award seems absurd and appears to contribute to Metalclad's argument that it must have been contrived. Instead of acknowledging there could be a legitimate reason for the protests, the Tribunal prefers Metalclad's assertion that the demonstration was staged by the state and local governments. Metalclad, now

⁴⁹¹ *Ibid.* at 11. Exhibit 9 contains letters written by regional authorities and community leaders from 1991 to 1995 requesting the site be cleaned and not re-opened.

⁴⁹² *Ibid.* at 13.

⁴⁹³ For example, evidence in the Counter-Memorial shows that the Guadalcázar Municipal President wrote to a local scientist asking him to prepare a soil and subsoil study of the site. This scientist concluded that the ground was not suitable for the proposed hazardous waste landfill. Moreover, under an audit agreement between Metalclad and the federal agency, PROFEPA, an audit of the site would be conducted. The results were that while the site was adequate, the buried waste was highly toxic and explosive, the cells were substandard and leaking and the costs of remediation would be substantial.

⁴⁹⁴ *Award, supra* note 3 at para 32.

⁴⁹⁵ *Ibid.* at para 41.

⁴⁹⁶ *Ibid.* at para 46.

the victimized company, "was thenceforth effectively prevented from opening the landfill."⁴⁹⁷

XI. Troubling Legal Precedents – Article 1105 and 1110

Another troubling aspect of the dispute is the Tribunal's interpretation of both Article 1105 (national treatment) and 1110 (expropriation). In order to find in favour of Metalclad, it seems as though the Tribunal expanded the definition and scope of these articles beyond what the NAFTA Parties had intended during their negotiations and beyond customary international law norms. The alleged mistreatment of these articles became one of the major grounds upon which Mexico based its application for Judicial Review. I will discuss these articles in turn.

1. Article 1105 – Minimum Standard of Treatment

Article 1105(1) of NAFTA states that:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

As mentioned above, the *Metalclad* Tribunal found that Mexico had violated this Article based on a *lack of transparency* in Mexican domestic law and a finding of an improper

⁴⁹⁷ *Ibid.* Counsel for Mexico, Mr. Hugo Perezcano also had this conclusion when he stated in his opening statement: "It's as if Metalclad were a victim of other people's actions. Did Metalclad believe that its actions would not elicit any consequences? The early announcements about the operation of the landfill which provoked a reaction on the part of the governor, the municipality, and the local community, the building that ignored the wishes of the community and of the local authorities, the war of newspaper communiqués against the governor, the municipality, the application of pressure through the United States Embassy on the Mexican government are simply a few examples of this sort of attitude." *Transcript, supra* note 366, Volume V, 3 September, 1999, at 21.

denial of a municipal construction permit by a municipality that opposed the federally authorized hazardous waste landfill in its territory.⁴⁹⁸

Whilst this Article may seem upon first reading to be fairly straightforward, its meaning, particularly the extent of protection accorded to investments of foreign investors, is “arguably vague”⁴⁹⁹ and has been interpreted in radically different ways by various Chapter 11 arbitral tribunals.⁵⁰⁰ Thomas has stated: “[t]o the surprise of many, Chapter 11 tribunals have posited a higher standard of conduct than that posited by the decided cases and by the leading treaties writers.”⁵⁰¹ The *Metalclad* Award is certainly evidence of this trend. In this case, the Tribunal found a duty of transparency in Article 1105 by citing an article in Chapter 18 rather than Chapter 11. The Tribunal referred to Article 1802, which requires each NAFTA Party to:

ensure its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement...[to be] promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.⁵⁰²

The Tribunal then used Article 102, which is in the ‘objectives’ section of the NAFTA, and states:

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored nation treatment and transparency, are to:
 - (c) increase substantially investment opportunities in the territories of the Parties.⁵⁰³

⁴⁹⁸ Thomas, *The Experience of NAFTA*, *supra* note 350 at 4-5.

⁴⁹⁹ Wilkie, *supra* note 227 at 16.

⁵⁰⁰ Thomas, *Reflections on Article 1105*, *supra* note 304 at 22; Professor J. Anthony VanDuzer, “NAFTA Chapter 11 to Date: The Progress of A Work in Progress” Conference Paper delivered at “NAFTA Chapter 11 Conference,” Friday January 18, 2002, Carleton University, online: Carleton University Homepage <<http://www.carleton.ca/ctpl/chapter11/>> at 25.

⁵⁰¹ Thomas, *The Experience of NAFTA*, *supra* note 350 at 11.

⁵⁰² Article 1802, *NAFTA*, *supra* note 1.

⁵⁰³ Article 102, *Ibid*.

At paragraph 75, the Tribunal elaborated on the effect of NAFTA's Preamble and Article 102(c):

An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives. (NAFTA Article 102(1)).⁵⁰⁴

In the Judicial Review, Mexico asserted that the Tribunal had converted the objective to "increase substantially investment opportunities in the territories of the Parties," into an obligation of result, namely to ensure the successful implementation of investments.⁵⁰⁵

The Tribunal also interpreted "transparency" to be an "objective" of the Agreement when Article 105 actually stated that transparency, together with national treatment and most-favoured nation treatment are principles and rules of the agreement, not objectives.⁵⁰⁶

Mexico argued that the Tribunal had legislated a new transparency duty where no such duty is to be found in Chapter 11. It asserted that the Tribunal had gone outside the scope of Section A of Chapter 11 to knit together the duty and had gone further than the NAFTA Parties themselves had been prepared to agree to when negotiating transparency obligations.⁵⁰⁷ Mexico further argued that the NAFTA Parties had not consented to investor-State arbitration of NAFTA obligations except for alleged breaches of Section A of Chapter 11 (and two paragraphs of Chapter 15). Thus, Mexico argued, Article 1105 could not be used to encompass all of the NAFTA Parties' conventional international law obligations (such as those in Chapter 18) and thereby expand what was intended to be a

⁵⁰⁴ *Award*, *supra* note 3 at para 75.

⁵⁰⁵ The word "ensure" comes from the Preamble where it is stated that the Parties are resolved to: "ENSURE a predictable commercial framework for business planning and investment."

⁵⁰⁶ Chapter 11 does not contain a chapter-specific obligation on transparency. *Thomas, Reflections on Article 1105*, *supra* note 304 at 28.

⁵⁰⁷ *Ibid.* at 85.

limited jurisdiction given to Chapter 11 tribunals.⁵⁰⁸ Justice Tysoe agreed with Mexico on this point:

[T]he right to submit a claim to arbitration is limited to alleged breaches of an obligations under Section A of Chapter 11 and two articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of the provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other than the obligations imposed by Section A of Chapter 11 and tow Articles of Chapter 15, the investor would have to prevail upon its country to espouse an arbitration on its behalf against the other Party.⁵⁰⁹

Further, Justice Tysoe found that the Tribunal had gone outside its limited grant of jurisdiction when it relied upon Articles 102 and 1802 to forge the duty of transparency that it found Mexico had breached:

[t]he basis of its [the Tribunal's] finding of a breach of Article 1105; namely, Mexico had failed to ensure a transparent and predictable framework for Metalclad's business planning and investment... This was a matter beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11.⁵¹⁰

It is noted that Metalclad's arguments to the Tribunal treated transparency as a "cardinal objective of the mutual promises made by the NAFTA Parties."⁵¹¹ Mr. Pearce, counsel for Metalclad goes on to say in his opening statement to the Tribunal: "Fair and Equitable Treatment requires it, [transparency] and where transparency is not, fair and equitable treatment are not."⁵¹² These kinds of statements, may have convinced the Tribunal that there was or should be a transparency requirement in Article 1105. ⁵¹³

⁵⁰⁸ Thomas, Reflections on Article 1105. p 86-87. Thomas cites *Marin Roy Feldman Karpa v. United Mexican States*, (ICSID Case No. ARB/AF/99/1) which noted in its Interim Decision on Jurisdiction, dated December 6, 2000: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. Other than that, the Tribunal is not authorized to investigate alleged violations of either general international law or domestic Mexican law.

⁵⁰⁹ Metalclad judicial review para 57-8.

⁵¹⁰ Metalclad judicial review, para 72.

⁵¹¹ *Transcript, supra* note 366, Mr. Clyde Pearce, Volume I, 30 August, 1999 at 51.

⁵¹² *Ibid.* at 51-52.

⁵¹³ *Ibid.*

Professor Paterson argues that “while customary international law may only insist on a basic minimum standard of treatment, the provisions of Article 1105, interpreted in the light of Chapter 18, probably establish a higher standard.”⁵¹⁴ Thomas would disagree with this interpretation. He points out that states did not enter into “unqualified national treatment obligations” in the NAFTA, but rather considered it appropriate to put limits on the parts of their economies that were for the exclusive participation of their own nationals.⁵¹⁵ Annex 1 to the NAFTA contains a list of federal measures that would otherwise be seen to be contrary to the Investment chapter.⁵¹⁶

During the negotiations, there was concern that national treatment would still mean that a country that treated its own nationals badly would leave a foreign investor with no protection. Hence, the inclusion of the phrase, “in accordance with international law” to ensure the treatment did not fall below an international minimum standard.⁵¹⁷

However, it has been argued that Article 1105 contains a much stricter standard. One Chapter 11 award (*Pope and Talbot*⁵¹⁸) agreed with this higher standard before they retreated from this reasoning after the issuance of the binding *Note of Interpretation* of

⁵¹⁴ Paterson, *supra* note 82 at 97.

⁵¹⁵ Thomas, *Reflections on Article 1105*, *supra* note 304 at 26.

⁵¹⁶ These reservations and exceptions are listed in various Annexes to the NAFTA (especially Annexes I-III) and in the case of Mexico include measures related to the following sectors: transportation, telecommunications, petrochemicals, the postal service, professional services, and social services. Canada and the United States have also included reservations with respect to some of these sectors in Annex II, in some cases out of specific policy concerns and in others simply to preserve reciprocity or symmetry between the obligations of Mexico and its NAFTA Parties. Trebilcock and Howse, *supra* note 319 at 926.

⁵¹⁷ Thomas, *Reflections on Article 1105*, *supra* note 304 at 26. In the words of one former U.S. negotiator there would be, “a residual, but absolute minimum, degree of treaty protection to investments, regardless of possible vagaries in the host Party’s national laws and their administration, or of a host party’s lapses with

Article 1105 by the NAFTA Parties.⁵¹⁹ Nevertheless, this higher standard was picked up by some academic writing and continues to be cited. It is beyond the scope of this chapter to go into each Chapter 11 case's interpretation of Article 1105, suffice it to say that various tribunals have interpreted it in different ways.⁵²⁰

In fact, the unclear interpretation of Article 1105 led the three NAFTA governments through the Free Trade Commission to write a *Binding Note of Interpretation*⁵²¹ on 31 July 2001, which clarifies and reaffirms the meaning of Article 1105.⁵²² This *Note* is consistent with the Supreme Court of British Columbia's judgment in the *Metalclad* Judicial Review in that it sets the minimum standard of treatment as that which is

respect to treatment of its own nationals and companies." P. Gann, "The U.S. Bilateral Investment Treaty Program, 21 Stan. J. Intl. L. 373 (1985) cited in *Ibid.* .

⁵¹⁸ *Pope & Talbot*, *supra* note 310.

⁵¹⁹ *Ibid.* On May 31, 2002, the Tribunal reexamined their Award in their *Award on Damages* in light of the binding *Note of Interpretation* issued by the parties. Applying the customary international law standard, they found that Canada's action violated Article 1105.

⁵²⁰ The *Azinian*, (*supra* note 310) and the *C.S.D. Myers Inc. v Canada* tribunal considered the meaning of Article 1105 as did the *D. Pope & Talbot, Inc. v. Canada* tribunal. See Thomas's discussion of the case law in *Thomas, Reflections on Article 1105*, *supra* note 304 at 59-90.

⁵²¹ For the full text of this Note of Interpretation see online: DFAIT Canada Homepage <<http://www.dfaity-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp>> Interestingly, until very recently, Mexico has strongly resisted the suggestion that interpretive statements could be used to clarify the meaning of Chapter 11 provisions. Tollefson suggests that since the election of President Fox, Mexico has adopted a more conciliatory approach to this question which directly resulted in this Note of interpretation. See *Tollefson*, *supra* note 6 at 223; *Mann and von Moltke*, *supra* note 296 at 10.

⁵²² The Note of Interpretation contains two sections. Section A is about "Access to Documents," the significance of which will be discussed below. Section B. is entitled "Minimum Standard of Treatment in Accordance with International Law" and sets out the understanding of Article 1105 between the three NAFTA Parties:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

consistent with customary international law and no more.⁵²³ Whilst IISD sees this interpretive note as a positive step, it notes that “it is far from clear how successful this statement will be in opening up the process of arbitration,” noting that the answer will only be given over time.⁵²⁴

2. *Article 1110 - Expropriation*

The *Metalclad* award’s expansive definition of Article 1110’s expropriation provisions⁵²⁵ is also troubling – perhaps even more so than Article 1105, because as will be shown, it

⁵²³ Thomas, reflections on Article 1105 of NAFTA p 91. In this article, Thomas devotes substantial space to explaining the customary international law standard on minimum standard of treatment through international jurisprudence on the subject.

⁵²⁴ IISD Note, *supra* note 380 at 3.

⁵²⁵ Article 1110 states:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:
 - a. For a public purpose;
 - b. On a non-discriminatory basis;
 - c. In accordance with due process of law and the general principles of treatment provided in Article 1105; and
 - d. Upon payment of compensation in accordance with paragraphs 2 to 6.

Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation had become known earlier. Valuation criteria shall include going concern value, asset value (including declared tax value of tangible property) and other criteria, as appropriate to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.
4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment thereof.
5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on that date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
6. Upon payment, compensation shall be freely transferable as provided in Article 11-9.
7. This article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights or the revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).
1. 8. For purposes of this Article and for greater clarity, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt

was not entirely clarified by Justice Tysoe in the Judicial Review and there has as yet, been no interpretive note about the intentions of the NAFTA Parties. It is suspected this latter interpretation has not occurred because the Parties have trouble agreeing with the scope of the definition of expropriation given their differing legislative histories with the concept.⁵²⁶

The Tribunal's interpretation of Article 1110 is as follows:

Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁵²⁷
[Emphasis added]

This effectively means that in the Tribunal's view, nondiscriminatory exercises of regulatory power (i.e., legitimate legislation for the good of the public) may give rise to compensation where the reasonable expectations of profit are deprived by the action.⁵²⁸

Thomas notes:

This statement [Para 103 of the Award above] is the entirety of the Tribunal's reasoning on the scope of Article 1110. There is no reference to any authority, to any dictionary, or any attempt to parse the words of the article. Yet, the Award's use of the word "thus" suggests that the conclusion set forth in paragraph 103 follows inexorably from the language of Article 1110. However, in my respectful view, the Tribunal conflated two distinct legal concepts, *expropriation*, on the one hand, and *interference with property rights* on the other hand.⁵²⁹

security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

⁵²⁶ See Chapter two of this thesis. As was shown in that Chapter, the U.S. law on expropriation is significantly broader than Mexico's laws on the subject.

⁵²⁷ *Award*, *supra* note 3 at para 103.

⁵²⁸ *Schneiderman, Taking Investments too far*, *supra* note 36 at 7. It is noted that during the hearing, counsel for Metalclad described the expropriation provisions in NAFTA as a "quite apparent generous statutory provision." See *Transcript*, *supra* note 366, Opening statement by Clyde Pearce [Emphasis mine] Volume 1, 30 August 1999 at 52.

⁵²⁹ *Thomas, The Experience of NAFTA*, *supra* note 350 at 18-19. Thomas goes on to note that Article 1139 of the NAFTA, which defines the types of interested that can be considered an investment for the purposes of chapter 11, extends Chapter 11's protection to "real estate or other property...acquired in the expectation or used for the purpose of economic benefit or other business purposes," but does not go further and

The Tribunal also added that the issuance of the Ecological Decree alone would have amounted to an expropriation requiring compensation.⁵³⁰

When this interpretation was taken to Judicial Review by Mexico, Justice Tysoe ruled that the question of the scope of Article 1110 was a question of law that could not be disturbed. In other words, he did not feel he had the power to rule on its meaning.

However, he did note in *obiter dicta* remarks that the Tribunal gave an “extremely broad” definition to Article 1110,⁵³¹ which would seem to indicate that he was “clearly skeptical” of the interpretation.⁵³² Despite this, Justice Tysoe’s view was “the Tribunal’s conclusion that the issuance of the Decree was an act tantamount to expropriation is not patently unreasonable.”⁵³³ It is troubling to note that the broad definition of expropriation survived the Judicial Review and is therefore part of the emerging Chapter 11 jurisprudence.

This is a perplexing development if it was to be argued by other investors and/or followed by future Chapter 11 tribunals because it may cause governments to think twice before enacting legislation that may have the side effect of taking the profits of a foreign company, who may then threaten litigation under Chapter 11. As mentioned before, this filter of legislation through a trade lens is undesirable because governments should be

identify a “reasonably-to-be-expected economic benefit” of the property itself to be a protected investment. *Ibid.* at Footnote 76.

⁵³⁰ *Award*, *supra* note 3 at para 111.

⁵³¹ *Judicial Review*, *supra* note 25 at para 99.

⁵³² *Thomas, The Experience of NAFTA*, *supra* note 350 at 20.

free to make legislative choices based on the public good. Canadian International Trade Minister Pierre Pettigrew stated that: "...the ability of governments to regulate in the public interest not be compromised by unintended interpretations of investment rules."⁵³⁴ The scope of expropriation provisions has been one of the most controversial aspects of foreign investment over the past century and looks like it will continue to be so until the issue of the scope of the definition is clarified.

A note of interpretation similar to the one about Article 1105 is badly needed in order to elucidate the scope of expropriation under Article 1110. Tollefson argues that now that the NAFTA Parties have displayed a willingness to use interpretive statements, and Justice Tysoe's reluctance to consider the issue has shown the limited role of judicial review in constraining the interpretive discretion of Chapter 11 tribunals, there will be increased pressure to develop a statement on Article 1110.⁵³⁵ This interpretive note could specifically exclude from challenge non-discriminatory measures for a legitimate public purpose.⁵³⁶ When considering environmental measures that are alleged to be discriminatory, the interpretive statement could direct the tribunal to consider a number of factors before concluding that Article 1110 has been breached. As Tollefson suggests, they could include:

⁵³³ *Judicial Review*, supra note 25 at para 100.

⁵³⁴ Pierre Pettigrew, Notes for an address to the CD Howe Institute/Munk Centre for International Studies, University of Toronto special meeting on "Investor Protection in the NAFTA and Beyond: Private Interest Public Purpose", Address to the CD Howe Institute, 28 September, 2001. Cited in *Wilkie*, supra note 227 at 18.

⁵³⁵ *Tollefson*, supra note 6 at 223-224.

⁵³⁶ Article 915(1) of the NAFTA sets out legitimate objectives that such regulations and measures may validly serve. They include: (a) safety; (b) protection of human, animal or plant life or health, the environment or consumers...; and (c) sustainable development, considering among other things, where

1.) the investment's location and likely environmental impacts; 2) the local environment's carrying capacity; 3.) the current state of relevant scientific knowledge; and 4.) the need for governments to employ a precautionary approach to development.⁵³⁷

XII. Significance of this Case/ Concluding Remarks

The *Metalclad* case is significant on many levels. It says much about the potential dangers of allowing an international tribunal of technical trade experts to decide a matter of national, political, social, and legal significance. It demonstrates how the Chapter 11 process seems to be weighted in favour of investors. It is a stark example of how the story of an investor is believed over much evidence from the NAFTA Party to the contrary. Although difficult to pinpoint, I believe it also demonstrates how the process is weighted against Southern governments, whose legal systems are presumed to be at the very least opaque and at worst corrupt.

This case also shows how a local protest over the environment, when taken out of time and place, can seem absurd, arbitrary, and irrelevant. When one looks into the matter a little further, one can see that Guadalcázar is not just a little place in the middle of nowhere where nothing happens as Metalclad seemed to presume and the Tribunal believed. It is a hotbed of emerging Mexican democracy, the people are politically active and concerned about what happens in their community. One of the major failings of Chapter 11 at the moment is that even if matters of environmental and social concern come before it, Tribunals seem to feel bound to view arguments before them through a technical trade lens, which necessarily precludes a reasoned decision based on all factors

appropriate, fundamental climatic, or other geographical factors, technological or infrastructural factors, or scientific justification but does not include the protection of domestic production.

affecting the case and in this instance, all evidence put before them. The *Metalclad* Award is also a stark example of the potential dangers of allowing an international trade tribunal to decide a matter that is of central local importance to the lives and well being of people, but who are not parties to the dispute. Ultimately, in practical terms, the hazardous waste facility that may have caused more damage to people's health was prevented from opening by the Ecological Decree. However, the waste still exists. This makes it difficult to pinpoint winners and losers in this case. Metalclad's CFO, Anthony Dabbene said last year that his company "really lost because the court ruled there were limits on the right of investors to contest rules that are not consistent and legally transparent."⁵³⁸

One of the legacies of this case is the informal legal jurisprudence it leaves behind which may enable a future claim from an investor based on successful arguments by Metalclad in this case. However, it is hoped that the Tribunal's finding of a breach of Article 1105 based on a lack of transparency will not be followed in future cases after Justice Tysoe qualified that the Tribunal went beyond its jurisdiction in finding a breach. Further weight to this hope is the *Binding Note of Interpretation* put forward by NAFTA Parties last year, which also limits the scope of Article 1105. What is a more troubling legacy is the expanded definition of "tantamount to expropriation." At present, there is no clear definition on the concept of indirect expropriation at international law. This means that a

⁵³⁷ Tollefson, *supra* note 6 at 224.

⁵³⁸ "Questions Remain After B.C. Supreme Court Upholds Metalclad Victory in Mexico Case", *Mexican Forecast*, 15 May, 2001, at 1 cited in *Biukovic*, *supra* note 422.

wide variety of measures are susceptible to lead to indirect expropriation.⁵³⁹ The *Metalclad* Award does nothing to clarify this uncertainty. Perhaps a future note of interpretation from NAFTA governments on expropriation such as the one described in Part XII 2) of this chapter would assist in solving this problem.

⁵³⁹ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhof Publishers, 1995) at 100 cited in *Schneiderman, Taking Investments too far*, *supra* note 36 at 3.

Chapter Five: Post- Metalclad - Conclusions and Implications

I. Introduction

This chapter will synthesize the major arguments in each chapter and make a modest attempt to suggest a way forward in addressing some of the concerns highlighted by the *Metalclad* case study.

II. Thesis Conclusions

This thesis, anchored in the *Metalclad* case, demonstrates the inability of the present institutions and laws of the international trading system to deliver social justice. When I first read the *Metalclad* case, I wondered if this adverse result was part of the false dichotomy embedded within international trade treaties between economic and social life. I believe my instincts were correct. This thesis demonstrates the difficulty of influencing and contesting international trade agreements and decisions, even when they directly affect people's lives. I have also argued that *Metalclad* epitomizes the potential problems faced by Southern governments when acting within a particularly Northern framework such as the international trading regime.

The methodological tools I have used to examine these issues were centered around the insight that law is not objective, but is constructed by the values and priorities of the dominant discourse. These tools also allowed me to examine not only the text of laws and decisions, but also the influence of history, politics, and society on those laws. Further, I have shown that the power that arbitrators give to the law in practice is an important part of what the law is.

My inquiry revealed an increasing trend for laws relating to economics and markets to be elevated into the jurisdiction of the international sphere. Often, when the law is taken out of the national sphere, the ability for people to have a say in the way in which these international laws are made and applied tends to be diminished leaving a “democracy deficit” in the supranational arena. Instead, the field of international trade law is dominated by a small number of technical trade experts who seem to view the discipline of international trade law as an almost scientific endeavour. Thus, to trade insiders, these objective principles can be consistently applied to every trade law dispute in a similar manner. Chapter one of this thesis uncovered a notion inherent within international trade law that economics and markets are separate from politics and social life and therefore, one does not need to intersect with the other. Put another way, a look at international trade law reveals that economics is prioritized over social and political concerns. The way in which social and political issues become excluded from international trade law establishes a barrier to achieving social justice.

There is a growing awareness amongst scholars, NGO’s, governments and society in general, that cases before international trade tribunals *do* intersect with social life and have an affect on people who may not necessarily be parties to a trade dispute. Yet the makers of international trade law seem slow to respond to this awareness. Current international trade texts, such as NAFTA reveal the underlying normative bias in favour of economics that is embedded into the way these documents are worded. Further,

current practices of international arbitrators in interpreting these laws still contain a narrow economic focus.

There is another aspect to the *Metalclad* story and NAFTA's Chapter 11. That is the North-South dimension. In Chapter one, I questioned how free the leaders of developing countries felt in their choice to become a part of the international trading system, when the prevailing wisdom seemed to be that free trade was the only way to develop their economies. Countries that were not a part of the international trading system would be left out of receiving the economic prizes that come from opening their markets.

Mexico, albeit a leader of the developing world, is nevertheless not as economically powerful as the United States or Canada. However, Chapter two revealed that through the process of neo-liberal reform, opening its economy to foreign trade seemed like the only option for Mexico to promote economic growth. I explored the extraordinary nature of Mexico's economic transition by looking at its history in relation to its economic development, its attitudes towards the United States, and Mexico's views about foreign investment. Further, I have shown that there is a specific history of distrust in relations between Mexico and the United States, which has served to create a unique treaty that is imbued with each country's understanding of the other. This history shapes the way in which negotiators sought to enshrine certain principles and articles into the NAFTA that now influence the ways in which arbitrators interpret and apply the text in Chapter 11 decisions. I argued that the *Metalclad* case demonstrates that Mexico is at a disadvantage in the way Chapter 11 is applied. This case shows us the 'fear factor' is still present in

the way in which Mexico is characterized. Further, Mexico's relative economic, political and social instability in relation to the United States and Canada is another disadvantage that caused the NAFTA treaty to have a larger impact in Mexico than the other two states.

The surrounding circumstances that went into the enshrining of the NAFTA were the subjects of Chapters one and two. In Chapters three and four, I looked at how the text and application of the law of NAFTA perpetuates Mexico's disadvantage in arbitral hearings. Further, I revealed the constitution-like nature of the NAFTA treaty. The NAFTA is a snapshot of political, economic, and social relations in 1991. It binds not only state and local governments but also future governments. These actors, who were not parties to the negotiations are now barred from being able to change the NAFTA in any significant way. However, the normative foundations upon which the NAFTA operates is from the prevailing wisdom of the early 1990's of neo-liberal reform based on virtually no government intervention and free reign of the markets. This thinking has since evolved and will no doubt continue to change. Further, the NAFTA disadvantages local and state governments because it tends to prioritize the economic interests that are built into the international trade law system over local concerns such as the environment and public health. Currently, international trade law precludes the local government or ordinary people from being able to participate in the ways in which the laws of NAFTA affect their lives. Certain groups, such as IISD are succeeding in putting forward their concerns in Chapter 11 tribunal hearings. In the *Methanex* claim, they are attempting to encourage the Chapter 11 tribunal to consider the wider issues of public health that are affected by Methanex's claim of expropriation under Article 1110 and a breach of

national treatment under Articles 1102 and minimum standards of international treatment in Article 1105. However, it is still rare that citizens are able to influence how the law of NAFTA is applied in Chapter 11 cases. This has to do with the private commercial origins of Chapter 11's arbitral rules and procedure, which sees the dispute as a conflict between two private interests that does not affect any other party. However, as we have seen, the issues before Chapter 11 tribunals often do have a substantial element of public interest. Nevertheless, we are left to trust that arbitrators will apply the law in a way that is fair and considerate of all surrounding interests, even though they are selected by the parties to the dispute on an *ad hoc* basis, are paid for their services and are not bound by any code of ethics. The *Metalclad* case shows us that this is a problematic proposition.

The international trade Tribunal in *Metalclad* applied the technical rules of Chapter 11 to a messy dispute that went much deeper than the treatment afforded to it by the Tribunal. *Metalclad* highlights the "democracy deficit" which has been discussed by many as the biggest problem with international trade laws as they currently stand. A local community, with a long political activist history protested the operation of a hazardous waste facility in their local area. This caused the municipal governor to deny Metalclad a construction permit on the grounds that it was unsafe and the community did not want it there. Had the Tribunal considered Mexico's evidence about the local community's opposition, rather than narrow questions about whether the profits of a foreign company had been taken, the result may have been less alarming.

Metalclad also displays hints of a biased attitude towards Mexico. The willingness for the Tribunal to believe *Metalclad*'s side of the story in the face of overwhelming evidence to the contrary seems to indicate the Tribunal's distrust of Mexican law and government. Perhaps to some degree, the Tribunal considered Mexico a quasi-state that was imbued with negative traits, such as corrupt courts and internal confusion about the jurisdiction of different levels of government rather than positive sovereignty. Moreover, in Chapter two, I argued that the 'fear factor' that has been present in the U.S.-Mexico relationship over the last century was embedded into the NAFTA in articles, such as the one on expropriation, and is now present in how current arbitral tribunals interpret NAFTA's Chapter 11. I have attempted to demonstrate this by outlining how the Tribunal characterized Mexico, its' legal system and the local people of Guadalcazar. Further, the fact that the Tribunal believed *Metalclad*'s story over that of Mexico's also indicates how the Chapter 11 dispute resolution mechanism is weighted to favour of the investor, which seems highly problematic when the cases involve questioning governmental measures intended to protect the public good.

III. A Way Forward?

My insights into the inherent structural and normative difficulties embedded within the international trading system, and specifically in the NAFTA, may leave the reader looking for a call for revolutionary change. My boldest recommendation (although perhaps not quite revolutionary) is in relation to future trade and investment treaties. I would urge governments, particularly those in the South, to carefully consider the social, political and economic implications of trade and investment agreements with Northern governments

(especially the United States) very carefully *before* signing them. A potential trade and investment agreement needs to be examined by prospective signatories for its ability to deliver social justice for that state's people, not just for its promise of short-term economic gains. The treaties establishing the NAFTA and the WTO and their subsequent dispute settlement jurisprudence provide some useful precedential material for states that are assessing these issues. For example, the investment chapter of the proposed FTAA promises to further entrench the principles and normative assumptions that underlie NAFTA's Chapter 11 into a treaty that binds 34 countries of the Americas. This can only mean that the problems Mexico has faced in operating under the NAFTA will be exacerbated for the countries of Latin America under the FTAA. Unless the investment chapter is substantially re-written to carve out legitimate government measures from falling under the scope of private investor complaints for issues such as national treatment and expropriation, I would advise governments of the Americas to unite in an attempt to re-negotiate this chapter to incorporate significant changes. If this is not practical, I would say do not sign the FTAA.

On the other hand, increasing globalization or internationalization of our economies through closer trade links with the rest of the world may be a reality that we all face. This is not necessarily a bad development *per se*. However, awareness is emerging that an important element within international trade law is that there needs to be a counterweight to governments and corporations and their interests. Those in power need to be able to be prepared to reform the existing global trading system so that it can incorporate necessary elements of social justice. Despite the narrow normative foundations of international

trade law, I believe it is possible for trade insiders to acknowledge that trade and economics and even law do not operate in isolation of politics and they have the potential to have an effect on people's lives. However, change from within needs to be encouraged by the wider society. We are already seeing this occur in the protests of 'progressive civil society',⁵⁴⁰ which have been present at every international trade meeting since Seattle in 1999. It is hoped, as Ravi Kanbur suggests, that both sides will begin a more receptive dialogue with each other in the future.⁵⁴¹

In relation to Investor-State arbitration in NAFTA's Chapter 11, I believe that the most hopeful forum for reform is the strengthening of the Chapter 11 dispute resolution mechanism. In the past, decision-makers have shown they can use the law to keep up with society's evolving beliefs.⁵⁴² Scholars such as Philippe Sands describe a growing awareness within international law that the discipline should serve a broader range of societal interests and it now connects with a wider range of actors and subjects.⁵⁴³ Further, international trade law decisions such as *Shrimp-Turtle*⁵⁴⁴ are beginning to emerge. In this case, the WTO Appellate Body ruled in favour of the U.S. ban on the import of Shrimp from four Asian countries on the grounds that the shrimp were captured

⁵⁴⁰ It is important to note that this is an imprecise term. Commentators often disagree about the meaning of 'civil society.' A good point that I recently heard at a conference was that the National Rifle Association and the Klu Klux Klan are part of civil society. Therefore I insert the word 'progressive' before the term 'civil society' to mean NGO's and citizens concerned with the inclusivity of social and environmental justice in international trade agreements. It is noted this term needs further study and clarification.

⁵⁴¹ Kanbur, *supra* note 88.

⁵⁴² I am thinking here of decisions such as the U.S. Supreme Court's decision in *Brown v. Board of Education* 37 U.S. 483 (1954) USSC which was a watershed for the rights of African Americans in the U.S., and *Mabo and Others v. Queensland*, (No. 2) 175 CLR 1 F.C. 92/014 where the Australian High Court recognized for the first time that indigenous people existed on the land prior to British Colonization (ie that Australia was not *terra nullius* when the British arrived).

⁵⁴³ Sands, *supra* note 40 at 527.

in a manner that was dangerous to endangered sea turtles. The *Shrimp-Turtle* decision suggests that some international trade decision-making bodies are willing to consider broader sets of values beyond the texts of international treaties such as the GATT. It illustrates that there is perhaps a willingness in some instances to establish procedural changes which accommodate the views of non-state actors in international legal processes.⁵⁴⁵

I want to suggest that NAFTA Chapter 11 arbitral panels, like the WTO Appellate Body, could take similar kinds of social values into account when making their decisions. We are perhaps beginning to see traces of this approach in Chapter 11 cases such as *Methanex*, where for the first time, the submission of amicus curiae has been allowed. However, this hope is somewhat diminished by the private commercial law origins of NAFTA's Chapter 11 dispute resolution mechanism. Chapter 11 differs from the WTO in that it involves an individual suing a state, rather than a state-to-state dispute. This is exemplified by rules such as NAFTA's Article 1136, which constrain the application of the decision of the tribunal solely as between the parties. Nevertheless, as mentioned in Chapter three of this thesis, there is a growing acknowledgement that decisions of Chapter 11 tribunals are becoming an informal body of jurisprudence. This phenomenon may fuel the call for consideration of the broader implications of the dispute beyond the interests of the two parties involved in the case.

⁵⁴⁴ *Shrimp-Turtle*, *supra* note 40.

⁵⁴⁵ *Sands*, *supra* note 40 at 543. This was the first WTO or GATT case in which written statements of NGO's became part of the written record on the basis of which the Appellate Body reached its decision. See Dukguen Ahn, "Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case," (1999) 20 Mich J. Int'l L. 819 at 839-41.

If we are to trust arbitrators to apply the NAFTA and fill in the gaps in the text in a manner which reflects the evolution of thinking about international trade law, the process needs to be improved. The first way in which this could be done is to compile a list of arbitrators which includes more candidates who have had practice experience in Mexico. This would perhaps assist in addressing the underlying attitudes of tribunals toward Third World States. Also, including arbitrators that have experience in incorporating social and environmental factors into economic decisions would be helpful. This is a challenge, because the arbitrators still need to understand the trade rules which will remain the framework under which the parties will outline their arguments. Further, there is no guarantee that even a liberal-minded arbitrator would feel that they had any scope to apply non-trade principles or values to trade disputes. There is no getting around the fact that the rules of Chapter 11 contain a narrow economic focus. It would be an interesting area of future research to study whether liberal-minded arbitrators produced trade decisions that incorporated broader social principles into trade disputes. Another way to increase our confidence in the competence of arbitrators is to lay down a code of conduct that arbitrators must follow. In the event that an arbitrator breaches this code, there would be a mode of redress under which that arbitrator could be punished.

During treaty negotiations, it is difficult for negotiators to predict exactly how a treaty will be used in practice. Further, NAFTA parties and their future successors are bound to the treaty once it is signed and, in the case of Chapter 11, they have effectively offered an invitation to private individuals to sue them without imposing any corresponding duty on

the plaintiff. Given these factors, it is important for the NAFTA Parties to be able to clarify the dimensions of the rules under which they intend to be bound. Issuing more binding notes of interpretation may help to clarify certain concepts or articles that are causing interpretive problems for the informal jurisprudence emerging from Chapter 11 arbitral tribunals. The first *Binding Note of Interpretation* concerning Article 1105 and transparency provisions seemed to be a helpful guide to arbitrators in illuminating the intention of the three NAFTA Parties when they negotiated these elements of the NAFTA. It remains to be seen whether arbitrators will follow these guidelines in future Chapter 11 cases.

In addition, I would also recommend procedural changes that may address some of the concerns about the dispute resolution process I described in Chapter three. In order to incorporate social values into trade decisions on a procedural level, reforms such as allowing amicus curiae from concerned third parties is one way to address a number of perspectives on a dispute. Further, opening the hearings to the public who are interested in the outcome of the decision because it affects their lives is a promising development. Moreover, broadcasting hearings and making court documents available to the public is another way to make the process more open and transparent. Adding an appeal process and requiring full reasons for arbitral decisions does not address the structural inequalities that operate on a discursive level in the NAFTA. However, a more open process where their decisions are subject to greater scrutiny may encourage arbitrators to give careful consideration to how they apply the law and take into account the consequences of their

decision on the informal jurisprudence in the law of NAFTA. This would go some way to addressing the problematic nature of awards such as *Metalclad*.

Our domestic legal systems are far from perfect. But they do seem to contain more scope for active participation from concerned citizens that are affected by the outcome of a legal decision. If it were possible to allow more space for participation in international trade law and a more holistic look at the way trade has an impact on other goals, I believe we would be able to create a fairer system that is more socially just and, in my view, more civilized.

If we see globalization as a two way force which perhaps started out being imbued with Western values but is now being challenged and changed by participants in the system who have different values and experiences, perhaps we can entertain the notion that international trade law will not be a rigid and static discipline, but one that takes into account changing values and is a hybrid of the policies and values of all members of the system, not just the dominant ones.

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