
Investor Protection in the NAFTA and Beyond

Private Interest and Public Purpose

Alan S. Alexandroff
Editor

Policy Study 44
The Border Papers

C.D. Howe Institute

C.D. Howe Institute publications are available from:
Renouf Publishing Company Limited, 5369 Canotek Road, Unit 1,
Ottawa, Ontario K1J 9J3
phone: (613) 745-2665; fax: (613) 745-7660;
Internet: www.renoufbooks.com

This book is printed on recycled, acid-free paper.

Library and Archives Canada Cataloguing in Publication

Investor protection in the NAFTA and beyond: private interest
and public purpose / Alan S. Alexandroff, lead author ; Barry Appleton,
author ... [et al.] ; Alan S. Alexandroff, editor.

ISBN 0-88806-653-8

1. Investments, Foreign--Political aspects--North America.
2. Investments, Foreign--Law and legislation--North America.
3. Canada. Treaties, etc. 1992 Oct. 7. 4. Canada--Trade and/or investment policy.
I. Alexandroff, Alan S. II. Appleton, Barry III. C.D. Howe Institute

KDZ744.I58 2006

382'.917

C2006-900721-7

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Cover design by Diane King.

On the cover: the World Trade Organization symbol and the flags of the three NAFTA
countries: Canada, the United States and Mexico.

Printed in Canada by Ricoh, 205 Industrial Parkway North, Aurora ON L4G 4C4
March 2006.

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Foreword

One of the important — and controversial — legal rights provided by the North American Free Trade Agreement (NAFTA) was accorded to investors residing in one NAFTA country and investing in another. The trade pact provides opportunities for foreign investors from a NAFTA country to sue governments for compensation when a host country discriminates against them. Since NAFTA was concluded, this right has been both praised and condemned. Does this provision limit government's ability to regulate in the public interest? Or does it enhance sovereignty by ensuring that governments follow rules laid out by the treaty?

The contributions in this book suggest that the tribunals have made judgments that are largely fair to both investors and governments. Canadian investors in Mexico and the U.S. have been able to protect their investments, while foreign investors in Canada have done likewise.

Protection of investor rights will continue to be an important issue in current and future trade negotiations throughout the world. The ability of foreign investors to seek compensation if their rights are violated enables businesses to operate in jurisdictions with some confidence. Not only is this a topic discussed at the World Trade Organization but it has also been discussed in many bilateral negotiations. Canada's experience in NAFTA may be a useful guide to Canada and other countries as they develop treaties in the future.

This book, which is based on a conference held by the C.D. Howe Institute and the Munk Centre for International Studies at the University of Toronto, provides a good review of the various cases and issues that have arisen from the investor protection provisions of NAFTA. I wish to thank Alan Alexandroff, our Fellow-in-Residence on international policy, who organized both the conference and the book. I also wish to thank the participants who have provided thoughtful discussion of this provision and its implications for Canada's public policies. Thanks to Kevin Doyle,

Sheila Protti, James Fleming, Wendy Longsworth and Diane King for editing and preparing the manuscript for publication.

The C.D. Howe Institute gratefully acknowledges the Donner Canadian Foundation for its support of the Institute's *Border Papers* and in particular the conference on investor protection at the Munk Centre for International Studies that was the original impetus for this book.

As usual, the views expressed in this book are those of the editor and authors and should not be attributed to the C.D. Howe Institute or its Board of Directors.

Jack M. Mintz
President and
Chief Executive Officer

Acknowledgments

This book, or at least the idea for it, began some time ago. Yet completion turned out to be much longer than I anticipated in the spring of 2001 when I formally initiated *Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose*. Since then, the pace of investor claims in North America has slowed noticeably, as have the decisions arising from the tribunals established to hear the complaints. Thus, the examinations by our authors of the tribunal judgments remain focused on the critical tribunal decisions. Most importantly, the political and civil society contention surrounding investor protection remains, even though the public debate has muted. The examination in this volume, in fact, strips away what now appears to have been excessive rhetoric to reveal some of the positive aspects of investor protection and questioning, in particular some of the tactics and strategy of the Canadian government.

On a personal level, the idea to examine investor protection grew out of both private experience and public activity. For a number of years I acted as outside Counsel to Appleton & Associates. Barry Appleton, the managing partner of the firm, early on saw the possible protections for foreign investors in North America under the investor-state provisions in Chapter 11 of the North American Free Trade Agreement (NAFTA). In fact, as early as 1996, Ethyl Corp. engaged his law firm to examine its rights under these investment protection provisions. A Notice of Intent to Submit a Claim was served on the Government of Canada on September 10, 1997 and a Statement of Claim was served on October 2, 1997.

With this action underway, something of a phenomenon in Canadian public policy and politics was born. What had begun as a little heralded section of NAFTA quickly gained notoriety — much of it negative. Indeed the investor complaints and tribunals that followed, despite being confidential (an issue itself of concern raised by civil society groups), gained Chapter 11 much public attention in all three North American polities. A rising chorus of comment, indeed alarm, issued from a variety of civil society interests especially but not only from the environmental community.

The governments, or NAFTA parties as they are formally known, began to discuss between themselves and in public the cases and rights afforded by the Chapter 11 provisions. This rising clamor from the public, the government, as well as legal and public policy analysts also caught my attention. In what I had perceived to be a rather arcane area, investor protection rights seemed transformed almost overnight into the 'infamous Chapter 11 cases'.

In the summer of 2000 I approached Jack Mintz — a friend and colleague and the CEO of the C.D. Howe Institute — to suggest that the Institute examine the question of investor protection. He, along with senior staff at the C.D. Howe but especially Senior Vice President Bill Robson, was then just organizing what became the Border Papers. This series examines Canadian policies in the North American economic context. Jack and Bill suggested that we organize a conference on investors, investments and investment protection in NAFTA. That proposal initiated the activity that has now finally led to this book.

To plan a conference where a variety of views over investor protection could be aired, I turned to Professor Lou Pauly, Chair of the Centre for International Studies at the Munk Centre for International Studies at the University of Toronto. With his assistance we organized a conference which included then-minister of international trade, Pierre Pettigrew. It is always somewhat daunting to include public officials, given their demanding schedules, so we decided to hold a preliminary meeting for Minister Pettigrew alone and then organize a subsequent full conference.

On September 28, 2001, Minister Pettigrew, just a little over two weeks after the terrible shock of September 11, addressed a public audience to deliver the speech on investor protection found in this volume. With the minister's speech, planning for the full conference was well underway. On May 3, 2002, participants gathered at the Vivian and David Campbell Conference Centre at the Munk Centre for International Studies to discuss investor protection. The conference was sponsored jointly by the C.D. Howe Institute and the Centre for International Studies at the Munk Centre for International Studies at the University of Toronto. The early part of the conference focused on what I call in this volume the

micro aspects of investment protection, including the substantive and procedural aspects of NAFTA Chapter 11 itself as well as the arbitral and legal decisions and interpretations of the Chapter 11 cases. Related to those micro aspects, participants also discussed Canadian policies towards investor protection and the influence of investor protection cases on those policies. Finally, towards the end of the day participants explored investment protection beyond North America — what I call the *macro* aspects of investor protection. Indeed, this final session examined the question of investment and investment protection in the multilateral setting, particularly the WTO.

It was this last arena — the multilateral negotiations over investment — that was responsible, in part, for the delay in bringing the book to completion. By the fall of 2003 we appeared to have reached a moment of closure on multilateral investment: The breakdown in negotiations at Cancun. The tortured path of multilateral negotiation did, however, give us the chance to reshape a few contributions. We added some comments, even though they had not been presented at the conference, in order to fill out some of the subjects we had explored initially at the conference.

Despite the lengthy gestation period for the book, its appearance is opportune. After the first series of disputes against Canada were launched, a significant number of studies have been published.¹ The Government of Canada supported a number of inquiries and public discussions. For example, the Department of Foreign Affairs and International Trade (DFAIT), as it was previously called, supported a conference on NAFTA's Chapter 11 at the

1 The number of legal articles has increased over the years since NAFTA came into force. The volume is far too numerous to catalogue here. I shall note only a few recent examples here. Reference should be made to legal periodicals to examine the full extent of legal analysis: Marcia J. Staff & Christine W. Lewis, "Arbitrations Under NAFTA Chapter 11: Past, Present, and Future," *Houston Journal of International Law*, Vol. 25 (2003), Chris Tollefson, "Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-States Claim Process," *Minnesota Journal of Global Trade*, Vol. 11 (2002), David Gantz, "Reconciling Environmental Protection and Investor Rights under Chapter 11 of NAFTA," *Environmental Law Reporter*, Vol. 31 (2001), ...

Centre for Trade Policy and Law in January 2002, which resulted in a full volume on Chapter 11 cases. On a formal level, the Government began to explore possible changes or clarifications to Chapter 11. After several meetings of the NAFTA Free Trade Commission (FTC), the Commission published *Notes of Interpretation of Certain Chapter 11 Provisions* in July 2001. This action undertaken by the trade ministers of the NAFTA parties, pursuant to Chapter 11, sought to clarify a number of provisions including the meaning of the minimum standard of treatment and the provisions for transparency under Chapter 11. This has not, however, ended the FTC's or the NAFTA parties' review of the operations and implementation of the investment chapter. The parties established the NAFTA Investment Experts Group (IEG), composed of government officials from the three NAFTA parties, to conduct a review. Among other things, the IEG decided to seek civil society views, and so, Canada hosted a trilateral multi-stakeholder consultation in Montreal in May 2003. This broad expert and civil society con-

footnote 1 cont'd

... Todd Weiler, "NAFTA Article 1105 and the NAFTA Free Trade Commission: Just Sour Grapes, Or Something More Serious?" *International Business Lawyer*, Vol. 29 (December, 2001), Todd Weiler, "Metalclad and the Government of Mexico: A Play in Three Parts," *Journal of World Investment*, Vol. 2 (2001) and Todd Weiler, "The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come," *American Review of International Arbitration*, Vol. 34 (2001). From a business and management perspective Professor Alan Rugman has been an acute observer of the impact of investment protection on business strategies: see his edited volume *Foreign Investment and NAFTA*, (South Carolina Press, May 1994). More recently a series of volumes have appeared that attempt to evaluate the consequences of investor protection pursuant to Chapter 11 NAFTA. These volumes include: International Institute for Sustainable Development, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*, (Winnipeg, Manitoba: International Institute for Sustainable Development and the World Wildlife Foundation, 2001), Laura Ritchie Dawson with an introduction by Donald M. McRae, ed., *Whose Rights?: The NAFTA Chapter 11 Debate*, (Ottawa: Centre for Trade Policy and Law, 2002) (*Whose Rights*), Julie Soloway, Chris Tollefson, "NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest," *Choices: IRPP*, Vol. 9, No. 2 (March, 2003) and Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (New York: Transactions Publishers, 2004).

sultation addressed both procedural and substantive issues. In addition, the three governments carried out various domestic consultations. The Canadian government organized an expert group, the Ad Hoc Expert Group on Investment, to assist the government in considering recommendations for changes to Chapter 11 and other investment agreements.

For now, we appear to be in a hiatus or quiescent period concerning NAFTA Chapter 11 and investment protection generally. An assessment of where investment protection is going in the multilateral context is necessary for an understanding of the path and consequences of investment protection in the North American economic space. At least for the immediate future, and given the results and follow-on from the Cancun Ministerial, there will not be a multilateral agreement on investment in the WTO. In addition, Canada's minister of international trade, responsible for trade and investment policy from 1999 through the end of 2003, departed office with the defeat of the Liberal government in 2006. Pierre Pettigrew was a vocal international trade minister. He spoke widely on Canada's trade and investment policies (and, as mentioned, participated in the activities that led to this publication).² Now is a good time to assess trade policy during his tenure and to look forward to its likely development in the years ahead.

Finally, some of the broader public debate has quieted down. What is left, however, is a trail of, in some instances, quite voluble criticism and evident concern about investment protection generally and about Chapter 11 specifically. In addition, there has already been a significant public examination. The Standing Committee on Foreign Affairs and International Trade undertook a parliamentary inquiry of North American trade, holding extensive hearings that enabled many civil society groups to speak out. That inquiry specifically examined NAFTA Chapter 11, among other areas. The Committee's report was released in December 2002 and made a specific recommendation for Chapter 11. The government responded to this recommendation in June 2003. Given these air-

2 In addition, Minister Pettigrew examined the current context of Canadian politics in a book. See *The New Politics of Confidence* (Toronto: Stoddart, 1999).

ing of views, we can assess the Chapter 11 cases and the consequences of Chapter 11, as conference participants and other authors do in this volume.

A book like this cannot appear without the effort of many people. Obviously my first thank-you goes to all the speakers at the Munk Conference Centre and all the authors in this volume. I appreciate their patience greatly. I especially would like to thank Minister Pettigrew. Though we have been friends over many years, he had a hectic schedule and I appreciate his willingness to make himself available. I would also like to thank members of his staff, Jim Anderson and Andre Albinati, for ensuring that the minister made it to the Munk Centre with remarks in hand. I also want to express my gratitude to many at the Munk Centre. I would like to thank in particular the Director of the Munk Centre for International Studies, Dr. Janice Stein, for making the Conference facilities available. I appreciate the cooperation and co-sponsorship of Dr. Lou Pauly, the Director of the Centre for International Studies (CIS). Lou not only worked through ideas on investment protection, but also contributed directly to this volume. On the administrative side, I would like to thank in particular Tina Lagopolous of CIS and Mary Lynne Bratti of the Munk Centre for International Studies.

From the C.D. Howe Institute, I appreciate especially the patience and support of Jack Mintz, the Institute's President and CEO, and Bill Robson, Senior Vice President and Director of Research. Without their support this project would not have finally come to fruition. I would also like to express my appreciation to Institute Senior Policy Analyst Danielle Goldfarb for her willingness to consider new ideas for the volume on any given day. Finally, I would like to express my thanks to Kevin Doyle and Sheila Protti for their excellent editorial work, and to Wendy Longsworth and Diane King for preparing the manuscript for publication. Their work has improved immeasurably the quality of the volume.

I am unable to utter the usual disclaimer that the views expressed here are mine alone and that I am responsible for any errors or omissions. It is, of course, not possible in such an edited

book. I do express my responsibility for the introduction and conclusion. Any errors or omissions in both are mine and mine alone and not the responsibility in any way of the authors of other chapters.

Alan S. Alexandroff
Editor

Introduction

Alan S. Alexandroff

If the authors in this volume had written or talked about the North American Free Trade Agreement's (NAFTA) Chapter 11 less than 10 years ago, the legal expert for sure, but just as likely the man in the street, would have assumed that the focus of this book concerned questions of insolvency and bankruptcy under United States law. Today in Canada, however, that is certainly not the case. For experts and the public alike, Chapter 11 references invoke almost instant response about the now rather infamous chapter in NAFTA on investment.

The essays in this volume concern investor protection. Investor protection and the national and international regulations that cover such protection are related to, though distinct from, investment and investment agreements. There are numerous statutes that examine and regulate investment. In Canada's past, for instance, there are a number of such statutes such as the *Foreign Investment Review Act* (FIRA) (c. 46 as amended), which became the *Investment Canada Act* (ICA) (c. 20 as amended).¹ These laws regulate investment in Canada. FIRA was particularly noteworthy in its screening of foreign investment and efforts to extract benefits for Canadians in agreements with foreign investors. Indeed, these benefits are what current investment protection statutes refer to as performance requirements. Unlike the earlier statutes, investment protection regimes target performance requirements and endeavour to restrict governmental action.

1 Stephen Brereton, the then-Director of the Investment Trade Policy Division of the Department of Foreign Affairs and International Trade (DFAIT), in his chapter in this volume, notes that the current threshold of review for WTO countries is at about \$218 million in company assets.

The essays here are concerned with the protection of investors and their investments in the three NAFTA members — the United States, Canada, and Mexico. The rights and obligations have been articulated in international law principally through bilateral investment treaties.² Notwithstanding some recent legal argument these obligations are not particularly controversial.³ They include non-discrimination provisions such as national treatment and most favoured nation treatment, minimum standard of treatment (MST) provisions, prohibition against certain performance requirements, expropriation and compensation provisions, and finally and significantly some form of investor dispute settlement provisions extending a right to investors to seek compensation where the investor believes that its investment has been harmed substantially. Though these substantive rights and obligations are non-controversial, the protections afforded foreign investors through NAFTA's Chapter 11 are controversial. Chapter 11 is embedded in a major trade agreement and has engendered controversy in no small measure because it imposes on each NAFTA member — technically referred to as a party — positive obligations and proscribes certain government behaviour while at the same time affording private parties the opportunity to seek compensation through arbitration. As the authors of this volume describe, there are a variety of concerns raised by the governments and national civil society interests over these investor-state provisions. But generally the wide opposition to these provisions arises because there are private protections, often more pointedly identified as corpo-

2 A number of the papers in this volume note the enormous increase in the number of what Americans call bilateral investment treaties (BITs). These same agreements in Canada are called foreign investment promotion and protection agreements (FIPAs). As Brereton indicates at the beginning of his chapter, though there were fewer than 400 BITs at the beginning of the 1990s, by 2003 the total had surpassed some 2,200 bilateral agreements. As of 2005, Canada had 22 FIPAs in force.

3 The controversy was addressed in the interpretation by the three member countries as the Free Trade Commission in the July 31, 2001 *Notes of Interpretation of Certain Chapter 11 Provisions*, (Interpretive Note). Its interpretation, in part, concerns the scope of rights and obligations related to the Minimum Standard of Treatment (NAFTA 2001).

rate rights, that in some manner do or might limit public — that is, governmental — behaviour, objectives, and purposes.

As we will see, the controversy of private rights in the context of public purpose and objectives has not only been raised in the NAFTA context, but more recently has been extended in regional trade and investment negotiations such as the Free Trade Area of the Americas (FTAA), Asia Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN), and the Southern Cone Common Market (MERCOSUR). The controversy has also reached the multilateral settings, including the defunct Multilateral Agreement on Investment (MAI) in the Organisation for Economic Co-operation and Development (OECD), and in the World Trade Organization (WTO) in the discussion of investment in the Doha Development Round of negotiations.

While investor rights protected in NAFTA are not in any way unique, placing these rights in the context of a major trade agreement is, or at least was. In addition, in applying these investor protections to foreign investors in developed settings — here in Canada, and the United States — Chapter 11 is set off from the multitude of bilateral investment agreements.⁴ The failure of the MAI, the lack of an FTAA⁵ or the threat to exclude the Singapore

4 Possibly the oddest of these is the newly minted United States-Australia Free Trade Agreement, which came into force on January 1, 2005. While investors receive substantive investment protections, they are not accorded specific dispute settlement procedures — namely investor state arbitrations. On the U.S.-Australia Free Trade Agreement, the United States Trade Representative's (USTR) *Trade Facts* notes that due to the "long-standing economic ties," "shared legal traditions," and the "confidence of their investors in operating in each others' markets," the parties agree not to provide such an arbitration procedure (USTR 2004). In other words, investors are reliant on U.S. and Australian courts and state-to-state dispute settlement procedures at least for now. While the full story is still emerging, it appears that Australian negotiators were adamant that investors only have recourse to national courts or, in the alternative, substantive protections would be provided through a state-to-state dispute-resolution procedure.

5 This failure to complete the FTAA was underscored in the November 2005 meeting of Western Hemispheric leaders in Mar del Plata, Argentina. The summit broke up without a clear agreement even on how to resume stalled talks.

6 Arising from the 1996 Singapore Ministerial, the "Singapore Issues" are investment, competition, government procurement, and trade facilitation.

issues⁶ including investment from the current multilateral trade negotiations at the WTO, means that NAFTA provides an almost singular opportunity to evaluate investor protection in a developed country context.

This book is divided into a number of distinct subject areas. The first involves the micro issues. Without any pejorative connotation intended, the first set of authors, Barry Appleton, managing partner of Appleton & Associates; Milos Barutciski of Davies Ward Phillips and Vineberg LLP; and Ian Laird, formerly of Appleton & Associates, and currently at Davis and Company, focus on the Chapter 11 complaints and disputes against the three NAFTA parties, but examine most closely the cases against the Canadian government. Ian Laird, in fact, tackles a major Canadian government assertion that Canada's trade and investment policy relies on and supports a rules-based global trade regime. In that regard Mr. Laird's arguments represent a bridge to Canadian government policy over investor protection. Professor Stephen Clarkson of the University of Toronto places his argument in a broader context. He examines the impact of Chapter 11, and indeed the entire NAFTA treaty, on Canadian government policy. He argues that Chapter 11 and other aspects of NAFTA constitute a taking of a different sort. Professor Clarkson argues forcefully "...that NAFTA so closely conforms to the conventional notions of what comprises a constitution that it can best be understood as creating an external constitution for its signatories."

A second area of examination analyzes the effort in and possible consequences for advancing investment protection through a multilateral context — what is referred to elsewhere as the macro issues. Investment and investment protection have not been contentious issues only in the North American context. It has been for some time a much fought over issue multilaterally. In this volume, John Hancock, Counsellor in the Trade and Finance Division of the WTO Secretariat, and Professor Lou Pauly, Director of the Centre for International Studies at the Munk Centre for International Studies, University of Toronto, examine the future of investment protection in the multilateral setting.

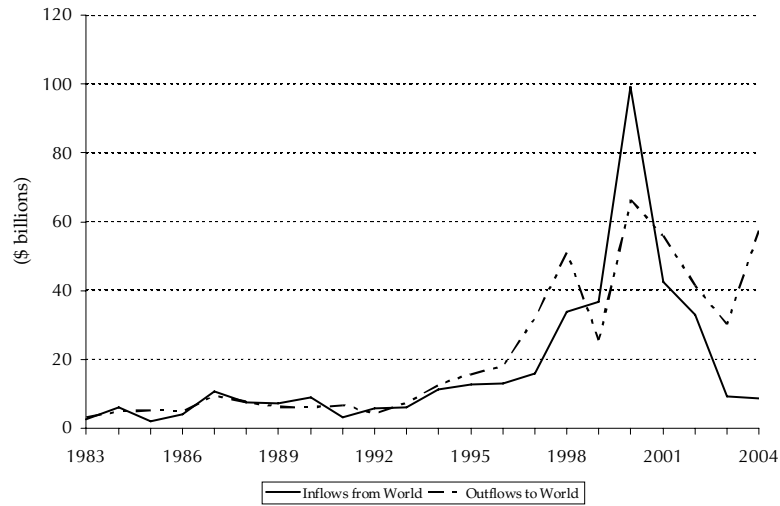
The final subject area focuses on Canadian government policy toward trade and investment generally, but particularly with respect to investment protection under Chapter 11. While this volume, and the 2002 Munk Centre Conference that convened earlier, did not specifically focus on Canada's trade and investment policy, the two analyses bookend the tenure of International Trade Minister Pierre Pettigrew, as noted in the Foreword. A number of the chapters focus on the declared Canadian trade and investment policy or on Ottawa's defence of actions and alleged behaviour raised by investor complainants, or shortcomings described by critics of the federal government and its trade and investment policy. This section includes the speech by then-Minister Pettigrew, delivered at the Munk Centre for International Studies, a chapter by Stephen Brereton, then-Director, Investment Trade Policy Division in the Department of Foreign Affairs and International Trade (DFAIT) (since possibly divided into the foreign affairs department and the international trade department), and a critical examination of the Canadian government's policies towards Chapter 11 by Professor Gilbert Winham, Eric Dennis Memorial Professor of Government and Political Science, Dalhousie University.

Trade and Investment Context

Figures 1 through 4 display Canada's foreign direct investment flows over the past two decades. These emphasize how the United States represents the dominant investment market for Canada. As Table 1a and 1b set out, the United States represents 43.6 percent of the stock of Canadian direct investment abroad, followed distantly by the UK, ranked as second, with a little under 10 percent of the stock of Canadian direct investment abroad. In terms of foreign direct investment in Canada the United States is even more dominant with more than 65 percent of the stock, followed distantly by the UK. The UK possesses about 8 percent of the stock of FDI in Canada.

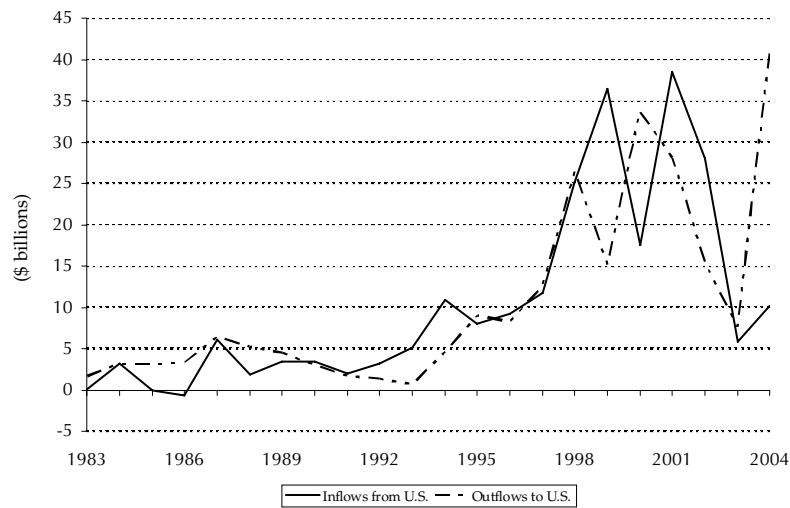
In summary, the trade and investment statistics underline that Canada is a highly open economy. As our politicians and trade negotiators constantly point out, we are one of the most open

Figure 1: *Foreign Direct Investment — Canada and the Rest of the World (1983 – 2004)*



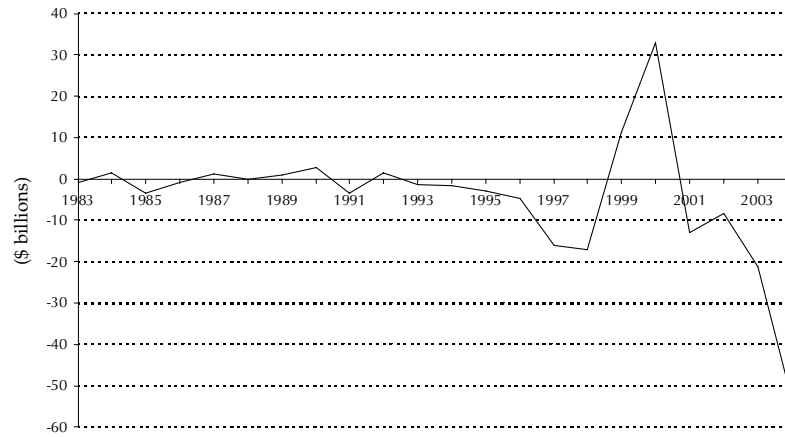
Source: Statistics Canada.

Figure 2: *Foreign Direct Investment — Canada and the United States (1983 – 2004)*



Source: Statistics Canada.

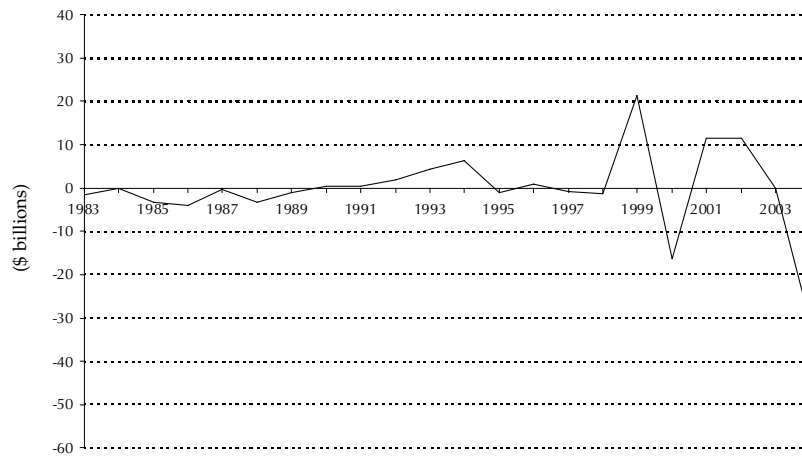
Figure 3: *FDI Balance* — Canada and the Rest of the World*
(1983 – 2004)



Source: Statistics Canada.

Note: *A positive balance means that inflows from all countries are larger than outflows to all countries.

Figure 4: *FDI Balance* — Canada and the United States*
(1983 – 2004)



Source: Statistics Canada.

*A positive balance means that inflows from the U.S. are larger than outflows to the U.S.

developed economies in the global trading system. Thus, Canada's trade-to-GDP ratio is approximately 80 percent; in the U.S., it is around 25 percent. As a result, these same politicians and trade officials often describe Canada as a global trader. However, the global statistics make clear that Canada trades primarily with one country — the United States. Trade statistics underline this highly integrated trade pattern. In 2004, almost 80 percent of Canada's total exports of goods and services went to the United States (in 1989 the figure was 71 percent).⁷ Furthermore, all regions of the country have significantly increased trade with the United States, as have most industrial sectors. Analysts have noted the growing percentage of provincial trade directed to the United States for sev-

7 This statistic has to be understood in the context of the growing integration of the three NAFTA countries. There has been a significant integration of North American transportation, including the major railroads, since the signing of NAFTA. As a result, Canadian goods bound for the rest of the world are increasingly moving through U.S. ports. The trade statistics do not differentiate between goods from Canada that have the U.S. as a final destination and goods destined for the rest of the world. The Fourth Annual Report on Canada's State of Trade states:

Data on Canada's exports to the United States, which are compiled from U.S. import data sources, are overstated as they include shipments to third countries via the United States often referred to as trans shipments. As a result, Canada's exports to the rest of the world are correspondingly understated. (Canada 2003a, ch. 1, fn. 2)

NAFTA@10 describes an effort to reconcile the effect of transshipments on overall trade patterns (Canada 2003b, 61). The estimate identified is 1.2 percentage points. However; the possible underrepresentation does not stop at transshipments. As I note later, trade is increasingly a matter of intra-corporate trade in goods. And in the manufacturing sector, goods are assembled in a series of back-and-forth border assemblies between related and unrelated companies. Customs officials, however, count the good as an import on each entry in its entirety and not just with respect to the value-added from the previous crossing. As a result of both the counting of transshipments and cross-border assembly, bilateral trade is overrepresented and misallocated, with estimates of that representation ranging as high as 5 percent of Canada's trade with the U.S.

Table 1a: *Top Five Destinations for Canadian Direct Investment Abroad (Stocks), 2004*

Rank	Country	% of Canadian Direct Investment Abroad
1	United States	43.6
2	United Kingdom	9.9
3	Barbados	6.9
4	Ireland	4.6
5	Bermuda	2.6

Total Canadian Direct Investment Abroad (Stocks) = \$445 billion

Table 1b: *Top Five Sources of Foreign Direct Investment in Canada (Stocks), 2004*

Rank	Country	% of Foreign Direct Investment in Canada
1	United States	65.1
2	United Kingdom	8.1
3	France	7.6
4	Netherlands	4.0
5	Japan	2.9

Total Canadian Direct Investment in Canada (Stocks) = \$366 billion

Sources: Department of Foreign Affairs and International Trade, author's calculations.

eral years.⁸ The size ranges from a high of over 90 percent of Ontario's trade with the United States to a low of 59 percent for Saskatchewan (Courchene 2002). But as *NAFTA@10* concludes, "Canada now exports more manufacturing to the U.S. than it consumes domestically." Canada is an open economy with significant trade (*NAFTA@10* estimates that C\$1.9 billion of goods and services cross the Canada-U.S. border every day (Canada 2003b, 3)) and investment flows. But that openness is heavily tilted towards the United States.

8 A significant debate has taken place quietly about the impact of trade flows and whether the border matters. As early as 1996, Greg Ip wrote in the *Globe and Mail* that trade was increasingly being reoriented in a North-South direction at the expense of east-west trade. Ip said that almost all provinces ...

What is less apparent from these aggregate statistics is the changed structure of production that has accompanied these flows and that reinforces the growing economic integration between the United States and Canada. There is now a large body of literature that describes and accounts for the cross-border production structure that has emerged with the growing trade and investment flows. Increasingly, production in North America and globally, as well, has fundamentally altered the character of trade. In the years and decades after World War II trade was largely arms-length among independent companies in a variety of countries. But by the 1970s, the composition and character of trade began to change. Trade has been altered fundamentally, as described by Michael Hart and Bill Dymond, former Canadian trade negotiators:

The evolution of international trade rules, in particular their extension to a growing range of public policies hitherto the exclusive preserve of domestic governance, reflects fundamental changes in the nature of the global economy. The old model of international trade involved inter-industry, arms-length exchanges of goods between autonomous firms operating from behind national borders. The new model of international exchange is characterized by intra-industry transactions, the increasing importance of trade in intermediate inputs, and the growing share of global business taking place on an intra-firm, intra-network, or other interrelated corporate basis. ...In the new, global economy, trade agreements address not only the relation-

footnote 8 cont'd

exported more to the United States than they exported to other provinces (Ip 1996, 1). The Ip article was a journalistic foray into a discussion begun by a number of academics in what I have called the "border matters debate." John Helliwell and John McCallum (before he went off to politics) focused on the continuing impact that the border had on trade flows in North America. As McCallum noted in early analyses, the provinces traded 14 times more with each other than they did with states of comparable size and distance. What was less well reported was the fact that the ratio had declined from 20-to-1, even by the time of the "border matters debate" (McCallum and Helliwell 1994, 44-48; McCallum 1995, 615-619; and Helliwell 1996, 507-516). A later piece by Helliwell for the Brookings Institution in Washington, D.C. said that the border effect had been reduced to 12:1 by 1996 (Helliwell 1998).

ship between nation states, but also the investment interests of TNCs, as well as the governance of related domestic economic policies. (Hart and Dymond 2002, 131)

Economists stopped talking about traded and non-traded goods and services. They stopped characterizing trade in classic arms-length flows. In fact, in current Canada-U.S. trade, “over 40 percent of U.S. trade with Canada is intra-firm — trade occurring between parts of the same firm operating on both sides of the border. The automotive industry is a prime example of the integration of production in North America. Every vehicle assembled in North America now contains nearly US\$1,250 of Canadian-made parts” (Canada 2003b, 13).

Current and former politicians have not been quick to grasp the close relationship of trade and investment in the cross-border relationship, let alone in the larger global trading system. Canadian politicians face some very tough political decisions. Even as sophisticated a politician as former Alberta Premier Peter Lougheed has attempted to avoid the trade-investment nexus. In an effort urging the then-prime minister to create a closer collaboration with the United States, Lougheed wrote:

Make no mistake: Foreign ownership is a legitimate issue. It is, however, a separate issue from free trade, which aims to build stronger economic ties between both countries. (Lougheed 2004, A19)

But today investment protection is a central issue in trade agreements. In the architecture of production, trade, and investment, FDI has become the principal pathway of exchange for the global trading system as opposed to the earlier and formative pattern of trade. While FDI may not lead to a buy-out of Canadian companies and the loss of Canadian ownership, there is little doubt that investment is a foundation of global trade. What is true for the global system is even more dramatically the case for cross-border exchange particularly between Canada and the United States but also between the United States and Mexico. Trade and investment are now considered complements to each other, rather than substi-

tutes (OECD 2003). The reality is that investment and investment protection is as central a feature in deeper integration as trade was in the past.

As Barry Appleton writes in his chapter in this volume, "Investment agreements form the bedrock of international economic relations and as such they reside at the heart of the globalization debate." In fact, the breadth of critique and opposition to investment protection pursuant to Chapter 11 represents and heralds a debate more about loss of sovereignty and the threats to national autonomy through the forces of globalization than it does about the procedural and substantive matters in the investment chapter.

The Chapter 11 debate should be seen in a broader context of debate and dispute that have swirled around trade and investment in Canada, the United States, North America, and beyond. The battlegrounds are extensive.

This volume is one of the C.D. Howe Institute's *Border Paper* series. In the inaugural piece Wendy Dobson (2002) discusses the challenge to Canada's productivity and prosperity that current barriers between Canada and the United States have created. These obstacles were evident before September 11, 2001, but the terrorist attack and U.S. efforts to respond to future threats exacerbated the challenges to Canada's living standards and its economic position. Whether Canada and the United States take action to overcome the barriers and to move to deeper integration have become matters of some debate, at least in Canada. In the United States, meanwhile, in the midst of soaring trade deficits with China, anemic job creation and large and increasing budget deficits, trade and investment are subject to political critique and attack. Free trade generally, and NAFTA in particular, became much-maligned notions among the various political challengers to George W. Bush in the last presidential election. U.S. politicians have rushed to the microphones to declare their opposition to the original NAFTA, or any number of so-called free trade agreements that have been signed since NAFTA.

Not only that, the trade and investment debate is also raised in the regional and multilateral contexts. The investment protection

debate is a serious issue in the regional free trade discussions, as well, most notably in the FTAA and in the WTO. In the former, then Canadian Minister of International Trade Pierre Pettigrew raised concern over supporting an investor-state dispute settlement procedure during the investment discussions on the FTAA. While permitting a dispute settlement procedure in recent Canadian bilateral accords, such as that with Chile, Canada has shown reticence in extending investment protection to the entire Western Hemisphere, excluding Cuba. Meanwhile, the United States incorporated investment protections, including investor-state dispute settlement procedures, for its Central American Free Trade Agreement (CAFTA) and bilateral accords, including those with Chile and Singapore, though not in the U.S.-Australia Free Trade Agreement as noted earlier.

In the multilateral context, investment has been a contentious issue in the Doha Development Round — at the WTO. Even though investment had been identified as a possible issue for negotiation for several years, including investment in the negotiation was continually opposed by member countries such as India. Civil society global interests, expressed largely in the streets in various meetings from Genoa to Miami, voiced heated opposition to the negotiation of a new multilateral investment agreement.

These civil society groups have opposed investment protection in their wide-ranging opposition to many aspects of the Doha Development Round. In the September 2003 ministerial session in Cancun, Mexico, investment once again failed to gain member-country support for inclusion in the negotiating round. The opposition to investment protections has thus migrated across the spectrum from the bilateral and cross-border discussions with the United States to the multilateral and larger examination of Canada's role in world. Directly or indirectly the investment protection debate is part of the regional versus multilateral debate and it is raised in the yet unanswered debate about the leading role that Canada plays or might play in a multilateral institutional setting, especially in the WTO and G-8. As a result, the Chapter 11 debate has become a part of larger, wide-ranging discussions and inquiries. I now turn to an examination of the chapters in this volume.

The Micro Aspects of Chapter 11

The first section of this volume examines the micro aspects of Chapter 11. This analysis focuses on investment protections prescribed by Chapter 11 itself. Much of the micro debate consists of a legal analysis of the procedural, substantive, and consequential aspects of the NAFTA investment chapter. It is, however, also a policy discussion. The policy debate emerges partly out of the legal analysis, though it is also concerned with the larger impact of the legal cases and their claims on government actions, especially government freedom of action. For instance, a variety of civil society groups, notably environmental ones, allege that the investor protection provisions safeguard corporations and their investments in Canada through Chapter 11. In addition these groups raise concerns that governments in Canada at all levels are restrained from taking legitimate action because of investors' threats to begin an investor-state action pursuant to Chapter 11 NAFTA.

As noted, the criticisms directed towards Chapter 11 investment protection have become louder and more pointed, without sacrificing their more wide-ranging aspects. Criticisms include at least the following major issues:

- The investment protections offered to foreign investors under Chapter 11 are unique. In Canada and, more recently, in the United States critics have argued that they provide protections to foreign investors that have been denied to domestic ones;
 - Chapter 11 tramples on Canada's sovereignty in a variety of significant and harmful ways. The most significant criticism is that Chapter 11 imposes a regulatory chill on the Canadian government. Officials, according to proponents of this view, are reluctant to undertake environmental policies, for instance, out of fear that investors will claim that such policies have taken away their investment. As well, there have been charges that investor protection provisions threaten the continuance of the public provision of a variety of services, including such critical ones as health and educational services;
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- There are many procedural criticisms raised by those concerned over the scope of the investor protection provisions of Chapter 11. Perhaps the most persistent is the alleged lack of transparency. The procedural provisions in Chapter 11 are built on the foundation of private arbitration protections. As a result, there are limits to the public's right to examine such elements as the legal documents, evidence in the cases, attendance at the hearings, or interventions from third parties. Government responses to the international tribunal determinations on liability and damages further fuel the debate. The Mexican government sought judicial reviews of the tribunal decisions in both the *Metalclad* and *Feldman* cases.⁹ The Canadian government has sought judicial review in the *S.D. Meyers* decision. Broadly, governments have argued that these tribunals have overstepped their authority and rendered excessively broad interpretations, and in doing so legitimate public policy objectives could be thwarted; and
- There are also complaints over the substantive provisions of Chapter 11 investor protections. In this area, the criticisms include at least the national treatment provisions, the minimum standard of treatment provisions, and the expropriation provisions of Chapter 11. For each of these provisions, arguments have been raised over the scope and meaning of each protection.

The first chapters of this section review the major Chapter 11 cases, including all those against the Government of Canada. Barry Appleton tackles up front the critical Chapter 11 cases (he led, and continues to lead, a legal team for the investor and the investment in a number of these Chapter 11 disputes). In addition, Barry looks at the two specific substantive issues: expropriation and the minimum standard of treatment; as well, he explores the issues and the debate over transparency. Milos Barutciski of Davies Ward Phillips & Vineberg reacts in part to Mr. Appleton's conference presentation and further adds a gloss on these same issues.

⁹ For a listing of the complaints referred to in this publication, please see Table 1 at the end of this volume.

Barry Appleton's presentation supports generally the investor protection provisions and their application through the investor-state arbitration tribunals. Investor protection provisions, in his view, are "far from a new development in international law." The tribunals in the various cases — and in the Canadian cases in particular — have, in his view, zeroed in on arbitrary and discriminatory official behaviour and found the Canadian government in breach when such behaviour has been found. On the scope of expropriation, though he describes the various approaches to defining the process, he suggests that the tribunals all rely on a deprivation that is substantial or significant, underlining the customary international law understanding of expropriation. While Milos Barutciski recognizes that tribunal decisions have generally adopted a conservative approach to the scope of expropriation, he does suggest that the *Metalclad* decision may leave open the prospect of a wider scope for such action. He argues that the tribunal may have focused on interference with some of the attributes of property rights as opposed to the notion of "deprivation" of the totality of property rights. In a similar vein, Mr. Barutciski also raises some concerns over the full scope of "investment" as defined by Article 1139 and given expression by the *Pope & Talbot* tribunal. An overly broad interpretation of investment that possibly overlaps regulatory rights and licences, and a liberal interpretation of expropriation as in the *Metalclad* tribunal's examination, according to him, could arguably provide new ground in the determination of the process.

On MST, Barry Appleton notes the possible distinction between international and customary international law that is at the heart of the Free Trade Commission's *Interpretive Note*. Nevertheless, as Mr. Appleton says, MST, whether defined as international law or customary international law, still encompasses "fair and equitable" and full protection and security treatment, and recognizes that tribunals have determined that MST represents protections of foreign investment that are reasonable under the circumstances. Milos Barutciski also identifies how tribunals have focused on arbitrary or capricious behaviour. He goes on to raise some implications and further questions that the *Interpretive Note* has posed.

Transparency represents a number of serious questions in the administration of Chapter 11, as well as challenging the scope of international law. On the administrative side, Milos Barutciski observes that the *Interpretive Note* has addressed what has been an uneven disclosure of documents to the public. As he points out, many of the procedural aspects have been left to the tribunals, which explains some of the uneven release of information to the public. He notes that there is little basis for limiting the release of documents to the public. Mr. Barutciski also addresses the adequacy or appropriateness of addressing appeals or reviews with domestic courts. The concern was heightened following the decision by Mr. Justice Tysoe of the British Columbia court. However, two more recent dismissals of judicial review applications in Ontario have eased some fears. Ian Laird in his chapter in this volume most directly examines these questions. But Milos Barutciski leaves open the issue of whether a review process needs to be constructed either through a quasi-permanent Chapter 11 appellate body or a multilateral appellate body for matters of international law, housed possibly with the International Centre for Settlement of Investment Disputes (ICSID). Barry Appleton examines the concept of transparency in international law. Mr. Appleton argues for the importance of transparency as an element of fairness in international law. The *Metalclad* tribunal argued that transparency was an essential obligation of international economic law within MST of Chapter 11. Controversy has followed the decision of Mr. Justice Tysoe in his judicial review decision and his explicit rejection of transparency as part of Article 1105. The question of transparency will likely be examined again in a future tribunal.

Barry Appleton in the concluding section of his chapter undertakes a review of the many criticisms raised by opponents of Chapter 11. This section, which gives the title to his chapter, is a review of what he describes as “fact and fiction” in the Chapter 11 discussion. In this wide-ranging review Mr. Appleton tackles many of the strongest Chapter 11 challenges including whether:

- These tribunals can overturn domestic laws of the NAFTA parties;
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- NAFTA gives foreign investors more rights than domestic ones;
- The investor protection provisions have opened a rash of claims, including frivolous ones;
- Chapter 11 limits the ability of governments to regulate in such critical service areas as health and the environment;
- Chapter 11 is transparent and accountable enough to the NAFTA publics; and
- Chapter 11 can restrict government sovereignty and fail to respect law and democracy.

This last issue is an opening view expressed by Professor Stephen Clarkson of the University of Toronto. A major critic of NAFTA generally and the investor-state Chapter 11 provisions in particular, his "Hijacking the Canadian Constitution" chapter chronicles many civil-society criticisms. On Chapter 11 he describes a number of problems specifically linked to investor-state protection, including:

- Transparency;
 - Fairness, particularly because of the exclusion or the limitation on third-party participation;
 - The bias of tribunals where the experts are focused on international law and there is a built-in selection bias against Canadians;
 - The inclusion of a foreign element in the sphere of public law, specifically expropriation;
 - The inclusion of damage awards in the investor-protection dispute settlement procedures, as opposed to the state-to-state dispute settlement arrangements, such as under Chapter 20;
 - A statutory environment where governments are reluctant to act in the face of Chapter 11 litigation;
 - The limited right of judicial review's undermining domestic legal examination and, in his view, subverting the most fundamental notions of justice and leading to the prospect, as occurred in the *Metalclad* decision, where a foreign domestic court, in this case a British Columbia court, is assessing the
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adequacy of a public policy action or actions, in this instance the actions of various Mexican governments; and

- The extension of rights to foreign investors without corresponding obligations to act in the public interest.

Professor Clarkson makes a rather more unique contribution in his chapter in this volume when he looks at the impact of NAFTA generally on Canada. From his perspective, NAFTA's establishment of new and comprehensive disciplines that demand adherence by the NAFTA parties, have imposed an external constitution. This constitution restricts Canadian sovereignty and has several serious implications for the nation and its citizens.

- The constitution is an international agreement prohibiting Canada from exempting itself from international law even where it challenges a Canadian constitutional norm;
- There are inadequate institutions to accompany this external constitution, giving each country a veto over common business and limits on domestic institutions. In addition, there are positive obligations in such areas as intellectual property where NAFTA parties must conform to international NAFTA norms. Proscriptions apply whether Canadian legislatures agree or not, and act or not;
- While there is a formal right of abrogation, the actual changes to laws and management and business practice make it all but impossible to act. As Professor Clarkson says, "the potential impact of a breakdown in trade relationships with the United States would devastate the Canadian economy..."; and
- This constitution effectively extends rights only to corporations and individuals that can claim foreign investor or foreign investment status.

Cumulatively Canadian sovereignty has been significantly impaired according to Professor Clarkson. Canadians and their governments are now subject to foreign intrusion, including norms, rights, and restraints that Canadians never agreed to, though they have great influence over the economic protections and public policy actions of Canadians.

A Canadian Trade and Investment Policy

As noted in the foreword, we were fortunate in having the then-Minister of International Trade, the Honourable Pierre Pettigrew, attend at the university and deliver specific remarks on the theme of the May conference and the book. In addition, the Director of the Investment Trade Policy Division of DFAIT, as it then was, Stephen Brereton attended and spoke at the conference and provided a chapter for this volume. Professor Gilbert Winham, a noted trade policy expert from Dalhousie University, acted as a discussant for the Brereton presentation at the May conference and provides a chapter for this volume. As well, Ian Laird, an international trade lawyer, examines the impact of Canadian government policy and actions over investor complaints pursuant to investor-state provisions of Chapter 11.

The minister's presentation is a wide-ranging analysis and defence of Canadian trade and investment policy. Both the minister's and the director's papers support the recent investment initiatives of the Government of Canada and specifically the investment protection provisions of NAFTA Chapter 11. Both strongly defend Canada's support for such provisions on the classic grounds that:

- Such agreements provide added transparency, non-discrimination protections for Canadian investors, and a minimum international standard of protection in areas where Canadians consider foreign investment, and dispute settlement procedures for the Canadian investor. With Canadians investing more abroad than others invest in Canada, such protections provide, according to Stephen Brereton, a "greater measure of security for Canadian investors through assurances that national policies will not be changed unduly or applied in a discriminatory manner," and
 - Canada has long been a supporter of a rules-based, rather than a power-based, approach to international trade and investment.
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Not surprisingly both officials speak approvingly of the commission's *Interpretive Note*. As the minister stresses in his speech:

I want investors' rights to be clearly stated and agreed upon and I want them to be properly interpreted....It is equally important that the ability of governments to regulate in the public interest not be compromised by unintended interpretations of investment rules.

The minister implies here, and states elsewhere, that tribunals have made errors and that, as a result, the NAFTA parties have found it necessary to take steps — the *Interpretive Note* — to insure that "...tribunals interpret Chapter 11 as its drafters intended" (Pettigrew 2001).

Ian Laird, in his chapter, speaks to the federal government's behaviour and policy, as well as its approving statements, suggesting that Chapter 11 disputes are a "source of irritation" for Canadian officials. That irritation has driven the government to clarify and re-clarify the balance between private interests and public purpose, in Mr. Laird's view. Further, he argues that the effort by the Canadian government and other NAFTA parties appeases certain U.S. interests and Canadian antiglobalization interests. The NAFTA parties have, through their interpretive efforts, in fact, undermined the rule of law which, from Ian's point of view, is particularly egregious for a "middle power" like Canada. But Canada's undermining of the rule of law goes further by supporting and launching its own judicial reviews in Canadian courts. according to Mr. Laird, the Canadian government has shown little respect for these international tribunals by, among other things, arguing for a low standard of review for the decisions of these tribunals.

Professor Gilbert Winham examines two issues. The first is an analysis of how extensive private rights are in the face of the government's public purpose. In part relying on the preliminary decisions of the tribunal in the *Ethyl* case, Professor Winham makes clear that investment protections extend to any law that has provisions that affect foreign investment, except for those excluded by the Annexes. The second issue addressed by Professor Winham is

the matter raised by Minister Pettigrew and Director Stephen Brereton — that mistakes have been made in Chapter 11 and should be addressed by the NAFTA parties. Professor Winham looks at the judicial review decisions and whether a formal review process is required. While he appears to support an appeal process to possibly eliminate the variability in some of the early decisions, he is concerned about the use of national courts by the various governments to review tribunal decisions. The appeal to national courts, in his opinion, will greatly diminish the guarantees of investor protection. As serious, in his view, is the recourse to national courts by Canada. He strongly echoes the view of some others in this volume that Canada, as a middle power, may well not benefit from such a legal approach: “This could neutralize and render ineffective an internationalized dispute settlement mechanism.”

Multilateral Trade and Investment Policy — The Macro Issues

The final area of inquiry concerns the extension of multilateral investment protections. This part examines efforts to extend investment protections multilaterally, as well as regionally and bilaterally.

John Hancock tries to understand why investment has become such a contentious issue in the organization of the global trading system. His analysis returns us to the changed architecture of international economics. As Hancock acknowledges, investment has become the key driver of international economic integration and the main basis of exchange in the global trading system, as global supply production by multinational corporations drives global trade.¹⁰ Mr. Hancock chronicles in some detail the develop-

10 In UNCTAD's World Investment Report, the following describes the central driver of global investment:

The fundamental economic forces driving growth remain largely unchanged. Intense competition continues to force TNCs to invest in new markets and to seek access to low-cost resources and factors of production. (UN 2003, 11).

ment of investment protections from BITs, through the current multilateral investment protections from services (General Agreement on Trade in Services), intellectual property (trade-related aspects of intellectual property rights (TRIPS)), trade-related investment measures (TRIMS), and investment measures in the Agreement on Subsidies and Countervailing Measures. While a comprehensive multilateral agreement on investment is now available in the Doha Development Round the question remains as to whether a multilateral investment agreement is ultimately required. John Hancock describes the global trading pressures that have brought investment protection to the multilateral negotiating table. He appears to describe an environment where markets at the commanding heights of the international economy will lead either to a much more comprehensive multilateral investment agreement or generate an ever more complex system of bilateral and regional investment agreements. Lou Pauly explores how we might get from here to there. Are global investment rules a consequence of market driven forces or do they remain very much the product of deliberate national cost-benefit analysis? If it is fewer markets and more deliberate national decisionmaking, then a realist perspective suggests that multilateral rules will await the appropriate political agreement. When the political moment arrives, according to Professor Pauly, we will likely see the trading of market access for guarantees of foreign direct investment. When will that political moment arrive? That also is hard to determine. It is the stuff of another volume on investment protection.

References

- Canada. Department of Foreign Affairs and International Trade. Trade and Economic Analysis Division. 2003a. *Fourth Annual Report on Canada's State of Trade: Trade Update*. Ottawa: Public Works and Government Services Canada. Also online at http://www.dfait-maeci.gc.ca/eet/trade/sot_2003/SOT_2003-en.asp.
- Canada. Department of Foreign Affairs and International Trade. Trade and Economic Analysis Division. 2003b. *NAFTA @ 10: A Preliminary Report*. Ottawa: Public Works and Government Services Canada. Also online at <http://www.dfait-maeci.gc.ca/eet/research/nafta/nafta-en.asp>.
- Courchene, Thomas J. 2002. "NAFTA and the Transformation of North American Economic Space: A Canadian Perspective." A power-point presentation for *NAFTA at 10: Progress, Potential and Precedents*, Wilson Center for International Scholars, Washington D.C., December 9–10.
- Dobson, Wendy. 2002. "Shaping the Future of the North American Economic Space: A Framework for Action." C.D. Howe Institute Commentary 162. Toronto: C.D. Howe Institute.
- Hart, Michael, and William Dymond. 2002. "NAFTA Chapter 11: Precedents, Principles, and Prospects." In Laura Ritchie Dawson, ed., *Whose Rights?: The NAFTA Chapter 11 Debate*, Ottawa: Centre for Trade Policy and Law.
- Helliwell, John F. 1996. "Do National Borders Matter for Quebec's Trade?" *Canadian Journal of Economics* 29, no. 3 (August).
- . 1998. *How Much Do National Borders Matter?* Washington, D.C.: Brookings Institution.
- Ip, Greg. 1996. "The Borderless World." *The Globe and Mail*, July 6.
- Lougheed, Peter. 2004. "Martin Must Shake Up Canada-U.S. dialogue." *The Globe and Mail*, March 2.
- McCallum, John. 1995. "National Borders Matter: Canada-U.S. Regional Trade Patterns." *American Economic Review* 5, no. 3 (June).
- , and John Helliwell. 1994. "National Borders Still Matter for Trade." *Policy Options/Options politiques* 16 (July/August).
- North American Free Trade Agreement Free Trade Commission. 2001. "Notes of Interpretation of Certain Chapter 11 Provisions." *Dispute Settlement: NAFTA – Chapter 11 – Investment*. July 31, 2001. [Cited January 19, 2005.] www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.
-

Organisation for Economic Co-operation and Development. 2003. *International Investment Perspectives: 2003 Edition*. Paris: Organisation for Economic Co-operation and Development.

Pettigrew, Pierre S. 2001. "We Need to 'Clarify' NAFTA to Fix Tribunal 'Errors'." *National Post*, March 23.

United Nations. Conference on Trade and Development. 2003. *World Development Report 2003: FDI Policies for Development: National and International Perspectives*. New York: United Nations.

United States Trade Representative. 2004. *Trade Facts: Fact Sheet*, February 8.

**Conclusion —
Investor Protection in
the NAFTA and Beyond:
Private Interest and Public Purpose**

Alan S. Alexandroff

The authors and their chapters in this book chronicle what in another context was described as a, “sexed-up dossier.” Investment and investment protection provisions are significant and today raise contentious discussions over public policy. Investor protection, principally through the North American Free Trade Agreement (NAFTA), Chapter 11 is the stuff of “above-the-fold” newspaper reading in Canada and increasingly so in the other two NAFTA countries, as well. And this debate is loud. The Canadian parliamentary committee examining NAFTA in late 2002 acknowledged the public emotion over investor protection in NAFTA:

The issue is simply one of policy: how to balance investment protection, including the corollary rights of private investors, with public control over governmental policymaking. The mere fact that Chapter 11 has generated so much widespread commentary — whether based on deep analysis or pure emotion — indicates that something is seriously wrong with the status quo and signals pressing unfinished business within the NAFTA framework. Our hearings emphatically confirmed this message. (Canada 2002, 146)

One might well question the committee’s conclusion that there is something wrong with Chapter 11 based on the volume of public criticism, but the voices of opposition have been heard in the country and certainly in the corridors of Parliament. Many civil society groups and special interests have expressed doubts over Chapter

11 and have done so in the face of what is a rather arcane area of public policy. These voices appear to have been strong initially in Canada and Mexico, but are also evident and growing now in the United States.

If the debate, however, has become a wide public one, how informed is it? So many arguments have been raised over investor protection in the last few years that there is a sense that the debate involves more than just investor protection. As Howard Mann, a severe critic of Chapter 11 says: "For some, Chapter 11 is a vital requirement in promoting the free flow of capital in an increasingly open North American market. For others, Chapter 11 represents another kind of bankruptcy of public policy and international law-making in the era of economic globalization" (*Private Rights* 2001, 1). Many critics raise issues: in this volume Stephen Clarkson focuses on the impact or threatened impact of globalization on national decision-making and national sovereignty. I shall come back to that wider debate. But first let us take a quick look at some of the data on the investor protection cases.

The summary data that follow (current as of the end of October 2005) suggest that the fears and criticisms appear to have been far greater than the actual consequences of the Chapter 11 cases. These tables cast considerable doubt on the civil society concerns. Table 1, for example, identifies the total cases. Over the 11 years and against all three governments, a total of 41 Chapter 11 complaints have been raised. These numbers fail to represent anything approaching a flood of cases. However, even this data summary exaggerates the number of actions against the NAFTA governments. A closer look shows that only 23 have actually reached arbitration stage. And when we identify only the actual decisions, the data reveal that just 15 cases have reached an arbitral decision including two that were settled prior to judgement.

Most telling, however, is the fact that of those cases where a decision has been reached (Ethyl Corp. actually settled before a decision by the tribunal was rendered) only six have resulted in the investor successfully obtaining damages. Moreover, the amounts awarded are limited. Barry Appleton in his chapter writes that the tribunals have awarded some US\$29 million in

Table 1: *Complaints and Decisions under NAFTA Chapter 11*¹

Complaints versus Canada		
<u>Name of Investor</u>	<u>Nationality</u>	<u>Status</u> ³
Signa S.A. de C.V.	Mexican	Not reached arbitration yet
Ethyl Corp.	American	Settled before arbitration's conclusion
S.D. Myers, Inc.	American	Successful claimant award
Sun Belt Water, Inc.	American	Not reached arbitration yet
Pope & Talbot, Inc.	American	Successful claimant award
United Parcel Service of America, Inc.	American	Reached arbitration
Ketcham Investments, Inc.	American	Not reached arbitration yet
Trammel Crow Co.	American	Settled before arbitration's conclusion
Crompton Corp.	American	Not reached arbitration yet
Peter Nikola Pestic	American	Not reached arbitration yet
Complaints versus Mexico		
<u>Name of Investor</u>	<u>Nationality</u>	<u>Status</u>
Halchette Distribution	American	Not reached arbitration yet
Metalclad Corp.	American	Successful claimant award
Robert Azinian et al.	American	Dismissal of claimant
Marvin Roy Feldman Karpas	American	Successful claimant award
Waste Management, Inc. 1	American	Dismissal of claimant
Waste Management, Inc. 2	American	Dismissal of claimant
Adams et al.	American	Not reached arbitration yet
Lomas Santa Fe Investments, L.P.	American	Not reached arbitration yet
Fireman's Fund Insurance Co.	American	Dismissal of claimant
Calmark Commercial Development, Inc.	Canadian	Not reached arbitration yet
Robert J. Frank	American	Not reached arbitration yet
GAMI Investments, Inc.	American	Dismissal of claimant
International Thunderbird Gaming Corp.	Canadian	Reached arbitration
Corn Products International, Inc.	American	Reached arbitration (consolidation rejected)
ADM, Inc.	American	Not reached arbitration yet (consolidation rejected)
Francis Kenneth Haas.	American	Not reached arbitration yet
Texas Water Claims	American	Not reached arbitration yet

Table 1 continues on next page

1 I am grateful to Sergio Puig de la Parra for his willingness to allow me to use some of his data on Chapter 11 that he has gathered for his PhD thesis at Stanford University, tentatively named, "The Impact of NAFTA Chapter 11 Dispute Resolution Mechanism at Ten: Legitimacy, Evaluation and a Claim for Transparency." I have added some data and focus and I have altered the analysis in a number of cases for which he is in no way responsible. However, Sergio undertook the initial data gathering that was then adapted for tables 1 through 4. The cases identified are current cases of October 2005.

Table 1: *Complaints and Decisions under NAFTA Chapter 11 cont'd.*

Complaints versus U.S.		
<u>Name of Investor</u>	<u>Nationality</u>	<u>Status</u>
Loewen Group, Inc.	Canadian	Dismissal of claimant
Methanex Corp.	Canadian	Dismissal of claimant
Mondev International, Ltd.	Canadian	Dismissal of claimant
ADF Group, Inc.	Canadian	Dismissal of claimant
Canfor Corp.*	Canadian	Reached arbitration
Kenex, Ltd.*	Canadian	Not reached arbitration yet
Doman Industries, Ltd.	Canadian	Not reached arbitration yet
Tembec Corp.*	Canadian	Reached arbitration
Glamis Gold, LTD.	Canadian	Reached arbitration
James Russell Baird	Canadian	Not reached arbitration yet
Grand River Enterprise Six Nations Ltd	Canadian	Reached arbitration
Canadian Cattlemen for Fair Trade	Canadian	Not reached arbitration yet
Hemp Oil Canada Inc.	Canadian	Not reached arbitration yet
Terminal Forest Products Ltd.*	Canadian	Reached arbitration

Note: * The three cases — Terminal Forest Products Ltd., Canfor Corporation, and Tembec Inc. were consolidated by an order of the Consolidation Tribunal pursuant to Article 1126 of NAFTA on September 7, 2005.

damages. Unless one suggests that any damages awarded pursuant to Chapter 11 are too much, and I suspect that there are critics who would be willing to do so, the total amount of damages awarded has been modest. Moreover, what is very apparent is that the concerns and the fears expressed appear to be out of proportion to the awards successfully obtained by claimants.

In looking at the cases and the criticisms raised, there appears to be a pattern of attack against Chapter 11. Various interests and other civil society groups appear to focus on complaints where there has been little progress in the case. In other words, criticisms have been built on speculation over the possible results in the cases. Critics have been quick to suggest the worst possible results, without assessing the likelihood of the outcome.² A number of cases have raised serious fears in civil society over such matters as

2 In the Public Citizen Chapter 11 report (Public Citizen 2005, vii), it declares that US\$35 million have been awarded by NAFTA tribunals or governments as part of a settlement to foreign investors, and that US\$28 billion has been claimed by NAFTA investors. The latter amount is simply a compilation of the data of damage relief sought.

the possible impact on the environment. One such case is *Methanex*. This case against the United States concerns the banning of a gasoline additive by the State of California. Yet the case went through an extended jurisdictional phase and the final award rendered on August 9, 2005 dismissed the case with costs to the United States Government. Another case that has raised significant fears has been the *Sun Belt* case. This case against Canada concerns the export of bulk water from British Columbia to the United States — a hot-button issue if ever there was one. Yet by 2005 the case has failed to progress to arbitration.³

Since the tribunals have only the power to award damages, although this is not always made clear by critics, cases are often cited for the damages demanded by claimants. The *Methanex* case, now dismissed, has often been cited as well for the excessive claim — in this instance US\$1 billion. In general, the monetary claims in the pleadings have been the basis accepted by critics, notwithstanding the fact that the cases suggest that in the few instances where tribunals have awarded damages, the awards have been a fraction of the damages sought.

Accompanying this worst-case mentality, critics charge that Chapter 11 has caused a regulatory chill, especially with respect to environmental regulation. Stephen Clarkson argues strongly that Chapter 11 cases have discouraged governmental policymaking. As he writes in his chapter, governments are warned away “from taking policy and regulatory initiatives that respond to democratic demands even if they are entirely legitimate under Canadian law.” Stephen Brereton in his chapter was drawn to rebut such generalized charges. This included a claim that Canada had passed only two environmental regulations through the period. He noted instead that over 40 environmental measures had been put in place by federal authorities by the end of 2004.

The regulatory chill charge is in the end difficult to assess. In determining regulatory chill the analyst is forced partly to prove the negative. One example is the rather infamous cigarette packaging case. Stephen Clarkson makes reference to it. According to

3 The Notice of Arbitration was filed on October 12, 1999 and it appears that no further steps were ever taken in the matter.

Clarkson: "An illustrative case is Ottawa's debacle over cigarette packaging." The critics argue that the federal government considered prohibiting brands, instead of requiring generic packaging for all cigarettes. But, as Clarkson points out, no case was ever raised against the federal authority. He draws the conclusion that the effort was abandoned as a result of manufacturers' threats to undertake a Chapter 11 case. While it is possible that the federal government was deterred by threats of action pursuant to Chapter 11, there are equally plausible alternatives, as well. Not the least of these is that government action could be undertaken without recourse to eliminating cigarette packaging. Still, these alternative explanations have failed to dent the views of those who believe Chapter 11 imposes a regulatory chill.

Environmentalists have been among the most persistent critics of investor protection in North America. Indeed, a number of claims had environmental aspects to them. But as Table 2 reveals, there are a wide variety of measures that have been targeted in the Chapter 11 cases, including tax policy, trade, customs, and procurement policy. Moreover it is often difficult to characterize the nature of the claim. For example, Barry Appleton in his chapter points out that the highly contentious *Methanex* case may have an environmental measure at the core of the claim, but it is also about "a failure to observe due process considerations by the State of California." While recognizing the multiple aspects of many of the cases, it still does not appear that environmental measures are the principal target of investor actions.

Table 3 turns to various government targets. Critics and officials of the sub-national governments of the NAFTA countries have expressed concern that Chapter 11 imposes obligations and restraints on them that they were never asked to assume. Municipalities, in particular, have expressed concern following the *Metalclad* (Final Award, April 25, 2000) case that investors using Chapter 11 will unreasonably impede municipal authorities in implementing measures in the public interest. Yet in only three cases have complainants sought damages from municipal authorities for possible breaches of the NAFTA obligations. And overall, in only eight cases have complainants brought actions against any government

Table 2: *The Sectoral and Policy Focus of Claims under NAFTA Chapter 11**

<u>Name of Investor (Canada)</u>	<u>Sector of Investment</u>	<u>Interest in Dispute</u>
Ethyl Corporation	Energy: fuel additive	Environmental policy, trade policy
S.D. Myers, Inc Pope & Talbot, Inc.	Services: toxic disposal Production: forest products	Environmental policy Administrative regulation
United Parcel Service of America, Inc. Trammel Crow Co.	Services: parcel delivery real estate management procurement policy	Competition
<u>Name of Investor (U.S.)</u>	<u>Sector of Investment</u>	<u>Interest in Dispute</u>
Loewen Group, Inc. Methanex Corp. Mondev International, Ltd.	Services: funeral Energy: fuel additive Services: real estate	Judicial fairness Environmental policy Regulation and public liability Procurement
ADF Group, Inc.	Commercial: steel fabrication	
Canfor Corp.	Production: forest products	Contingent protection: trade policy
Terminal Forest Products Ltd.	Production: forest products	Contingent protection: trade policy
Tembec Corp.	Production: forest products	Contingent protection: trade policy
Grand River Enterprise	Commercial: Cigarette	Competition and regulation of tobacco
Glamis Gold, Ltd.	Production: minerals	Environmental administrative policy

Table 2 continues on next page

below the national or federal level. In addition, Table 3 reveals that the vast majority of cases are targeted at the executive branches of the various NAFTA parties.

Table 4 turns to a summary of the cases and the claims brought by investors against the NAFTA governments. Given the objective of NAFTA Chapter 11, it is not surprising that expropriation has been raised more frequently. What became more contentious, however, with respect to Article 1110 was the use of "tantamount to expropriation" in the provision. Stephen Clarkson, drawing on Schneiderman (1996), argues that this phrase "was itself tanta-

Table 2: *The Sectoral and Policy Focus of Claims under NAFTA Chapter 11* cont'd*

<u>Name of Investor (Mexico)</u>	<u>Sector of Investment</u>	<u>Interest in Dispute</u>
Metalclad Corp.	Services: waste-disposal	Environmental policy
Robert Azinian et al.	Services: waste-disposal	Environmental policy
Marvin Roy Feldman Karpa	Commercial: cigarette exportation	Tax policy
Waste Management, Inc. 1	Services: waste-disposal	Environmental policy
Waste Management, Inc. 2	Services: waste-Disposal	Environmental policy
Fireman's Fund Insurance Co.	Services: insurance	Insurance regulation
GAMI Investments, Inc.	Commercial: sweeteners industry	Agro-commercial policy
International Thunderbird Gaming	Services: wager games	Regulation of gaming
Corn Products International, Inc.	Production: sweeteners industry	Tax policy
Robert J. Frank	Commercial: land developer	Property regulation

Note: * The cases cited here are only those that have settled or reached arbitration.

mount to a new constitutional property right, but one that was only available to NAFTA party subsidiaries of foreign-based [trans-national corporations]." Milos Barutciski in his chapter notes that ambiguity surrounds this right and that the "tantamount" phrase leaves unclear where the line is between expropriation and the government's power to regulate without potential liability for expropriation. He suggests that this phrase raises the prospect, again, of a chilling of government action, thereby possibly inhibiting the exercise of power in the public interest. But as he also observes, despite the fears raised by this phrasing in Article 1110, tribunals have rejected almost all claims for expropriation. Also he notes "that much of the hand-wringing about this issue to date is not warranted by the jurisprudence, which is on the whole quite conservative." Yet Canadian politicians, including former Foreign Affairs Minister Bill Graham, a well known international lawyer, have raised a concern that the expropriation clause is potentially too broad.

Table 3: *Government Respondents**

<u>Name of Investor</u>	<u>Branch</u>	<u>Level</u>
Metalclad Corp.	E	N, P & M
Robert Azinian et al.	E & J	N & P
Marvin Roy Feldman Karpa	E	N
Waste Management, Inc. 1	E	N, P & M
Waste Management, Inc. 2	E	N & M
Fireman's Fund Insurance Co.	E	N
GAMI Investments, Inc.	E	N
International Thunderbird Gaming	E	N
Corn Products International, Inc.	L	N
Robert J. Frank	E	N
Loewen Group, Inc.	J	P
Methanex Corp.	E & L	P
Mondev International, Ltd.	E & L	P
ADF Group, Inc.	E	N
Canfor Corp.	E	N
Grand River Enterprise	E	P
Terminal Forest Products, Ltd.	E	N
Tembec Corp.	E	N
Glamis Gold, Ltd.	E	N & P
Ethyl Corp.	L	N
S.D. Myers, Inc.	E	N
Pope & Talbot, Inc.	E	N
United Parcel Service of America, Inc.	E	N
Trammel Crow Co.	E	N

Note: 'E' stands for Executive, 'L' stands for Legislature, and 'J' stands for Judiciary. Level refers to the level of government. 'N' stands for national or federal; 'P' stands for provincial or state; and 'M' stands for municipal.

* The cases cited here are only those that have settled or reached arbitration.

Perhaps somewhat more surprising are the large number of claims raised over the matter of the minimum standard of treatments. Article 1105 is designed to provide standards of treatment for investors in accordance with international standard. For the NAFTA parties the use of this standard has proven galling. It rep-

Table 4: The Substantive Claims*

<u>Article</u>	<u>Description</u>	<u>% of Claims identifying breach of substantive obligation**</u>
1110 Expropriation and Compensation	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 (...), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); (d) on payment of compensation...	91%
1105 Minimum Standard of Treatment	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.	85%
1102 National Treatment	Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors...	72%
1106 Performance Requirements	No Party may impose or enforce... requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non Party in its territory.	23%
1103 Most-Favorable Treatment	Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party...	22%
Others	1104 Standard of treatment 1405 National treatment in connection with financial services 1502 Monopolies and state enterprises 1503 State enterprises	4%

Note: * The cases included here are only those that have settled or reached arbitration

** Investor claims frequently ground action against State with multiple substantial breaches.

resents an obvious international standard embedded in the overall investor protection provisions. It noticeably irritates the U.S. and the Canadian governments. There appears to be a longstanding view from officials of both countries that the Chapter 11 investor protections were designed primarily to assist investors in Mexico. From this perspective it was more than surprising that investors raised claims against these two developed countries, including the breach of the international standard of treatment obligation. A notable example of this irritation is seen by the U.S. reaction to the Loewen (Final Award, June 26, 2003) case that raised questions about the fairness of the judicial process in the State of Mississippi.

As Table 4 shows, the national treatment provision is the next most frequently used basis of claimed breach of Chapter 11 NAFTA. This section is a traditionally trade-based protection now extended to investment. The other bases of possible Chapter 11 claims drop off significantly in frequency. These substantive protections represent a limited challenge to the measures enacted by the NAFTA governments.

It is hard to summarize the many micro aspects that critics have raised over the Chapter 11 provisions. Legal experts, many civil society groups, and, increasingly, politicians in the three countries have publicized legal and political and policy objections and fears over the Chapter 11 investor protection provisions.⁴ Most recently these criticisms have been expressed in the context of the ten-year reviews of NAFTA. Experts, but especially politicians in all three NAFTA countries, have voiced negative views, particularly with respect to jobs and prosperity, arising presumably from the consequences of NAFTA's implementation in their individual countries. As for specifically Chapter 11, the criticisms, though strong, have somewhat abated. And as noted, an examination of the evidence does little to support the fears expressed over the decade by critics. NAFTA Chapter 11 does challenge government

⁴ The criticism is certainly not dead. Recently in Canada, the Canadian Union of Postal Workers and the Council of Canadians launched a constitutional challenge to NAFTA's Chapter 11 in Ontario's Superior Court of Justice.

action and subject it to wider standards. But as Milos Barutciski points out:

A review of the limited jurisprudence to date suggests many of the fears unfounded that corporations could use Chapter 11 to bludgeon governments into paying massive compensation for implementing programs and legislation in the public interest. ...It is particularly notable that the Chapter 11 right that has been used to the greatest effect to date is the minimum standard of treatment under Article 1105, which has been successfully invoked on several occasions to remedy government conduct that was clearly arbitrary or capricious. That such conduct is constrained by Chapter 11 is most assuredly a positive development.

Fears of the sort expressed over Chapter 11 NAFTA should not be dismissed out of hand. Still, the critique on investor protection does appear to be highly speculative and work exaggerated in the face of the actual course of investment protection cases. Many of the concerns expressed by civil society groups, or their counsel, as well as legal experts, have failed to materialize. The process and substantive protections have been treated generally with a restrained touch by tribunals. Most claimants' successful actions have been grounded on identifiable capricious and arbitrary behaviour by government officials. The chilling effect on governments continues to be asserted; however, government officials reject such charges. At worst, government officials from the three NAFTA parties find it necessary to examine their actions against investor protection claims and, presumably, satisfy themselves that their policy meets the obligations set out in NAFTA. Such an obligation certainly does not appear to be an overwhelming one, especially for a government such as Canada's, where the development of a rules-based system is at least rhetorically strongly supported.

Where Is the Policy in Canada's Trade and Investment Policy?

In the rising criticism and debate over Chapter 11 NAFTA protections, an apparent turning point was reached with the agreement of the three NAFTA parties to interpret Chapter 11 protections pursuant to Article 1131. On July 31, 2001, the commission published its first Interpretive Note (NAFTA 2001). In that announcement the trade ministers of the three NAFTA countries exercised their right to “interpret,” as they saw it, the provisions in Chapter 11. The commission sought to clarify the meaning of the minimum standard of treatment, Article 1105, and to clarify the transparency provisions under Chapter 11. This Interpretive Note came at the end of a series of critical statements over Chapter 11 protections by trade officials, including then-Minister of International Trade Pierre Pettigrew. This action by the trade ministers undermines Canada's long-standing invocation of the first principle of Canada's trade and investment policy — support for a rules-based global trading system and as a central feature of that rules-based global trading system, support for the rule of law.

The Ambivalent Defence of the Rule of Law

Canadian politicians and officials are constantly reminding the public and other nations in the global trading system of Canada's open economy. Stephen Brereton, in his chapter, reviews a variety of figures that reveal Canada is far more dependent on trade than other developed economies such as the United States and even Japan. To underline this evident economic reality, the former Minister of International Trade Pierre Pettigrew, in a moment of hyperbole possibly, in one of his last speeches ministering the portfolio, said of Canada's reliance on trade: “But Canada is a country of trade. I mean we are the trading nation on the planet” (Pettigrew 2003).

Notwithstanding the exaggeration, it is evident that Canada is, and has been, deeply enmeshed in the global trading system over the decades since the end of World War II. While Canada's trade

may be highly skewed in the direction of the United States, the country remains deeply involved as an international trader with an economy highly dependent on export trade. According to Brereton, Canada has sought a level of openness in investment regimes to reflect Canadian interest in direct foreign investment, whether from inflows or Canadian investment abroad. As the minister stated in his speech to our conference:

There is no doubt today that foreign direct investment in Canada ... and Canadian investment abroad have joined the international trade in goods and services to become our vital engine of growth and job creation.

And as a major trading country, but one with something less than major power status, Canada has been a consistent supporter of rules-based (including investment) systems of international governance. Brereton adds that for Canada, as opposed to, say, the United States, our most important trade and investment partner, a rules-based system for investment is the way to “provide a framework of disciplines, and encourage efficient resolution of disputes and greater consistency in legal and policy regimes. These rules also offer a greater measure of security for Canadian investors through assurances that national policies will not be changed unduly or applied in a discriminatory manner.” Then the director of investment trade policy concludes:

Canada has long been a supporter of a rules-based trade and investment system (where agreed rules regulate the flow of goods, services and investment) rather than a power-based one (where economic or military might dictate results), with the objective of bringing the investment regimes in other countries to Canada’s level of openness.

Over the decades Canada has pressed for the development and elaboration of a rules-based global trading system. Our politicians and our government officials are well aware that, as a middle power and in the face of the dramatically greater economic and military power of our southern neighbour, Canada is more advan-

tagged by far when a rules-based system dominates, whether in trade or in investment.

Michael Hart, a former Canadian trade negotiator, has summarized Canada's promotion of rules-based global regimes:

Over the past six decades, Canada has been a pre-eminent leader in promoting, negotiating, and accepting a rules and regime-based system for the conduct of international relations. The drivers of Canadian rule-making and institution-building are Canada's perception of itself as a country whose most intimate foreign relations are with powerful countries that, unrestrained, will take little account of, or even damage, Canadian interests. Hence, the instinct to resolve problems through international rules and regimes has been a constant factor throughout the whole range of Canadian foreign policy endeavours. (Hart 2003, 12)

Yet the Liberal government's attitude toward Chapter 11, what I have called elsewhere Canada's *but-approach* to investment protection under Chapter 11 (Alexandroff 2004, 463–474), and the action by the NAFTA governments to exercise their so-called interpretive powers, leaves one gasping at what appears to be the undermining of the rule of law by the Government of Canada. This apparent action against interest is further demonstrated by the Canadian government's seeming eagerness to request judicial reviews of the cases decided against it and to support efforts by other NAFTA governments seeking judicial reviews where tribunal decisions have resulted in judgments against them.

The Canadian federal government has been ambivalent about the investment protection provisions as they apply to it. The chapters by officials in this volume reflect this but-approach. The former minister and his officials were sensitive apparently to the need to protect private investment interests. They insisted that investors need to be protected from arbitrary or discriminatory actions by governments in the NAFTA and beyond. As the minister said at the conference, "This is key to increasing our productivity and our prosperity." On the other hand the minister and his officials were determined to be able to set policy "in the public interest on envi-

ronmental, cultural, and social issues,” and that such powers not be compromised. Such a balance appeared upset as soon as a number of decisions were concluded that led to damages being awarded against the government. As the then-trade minister Pierre Pettigrew wrote in the *National Post*:

We believe that several recent NAFTA tribunals have made errors when dealing with certain Chapter 11 cases, often overstepping their authority and taking unusually broad interpretations. In our view, they have read into the chapter ideas that the NAFTA drafters simply never intended. Some suggest that these misrepresentations, if not corrected, could be used to thwart important public policy objectives. For these reasons, the Government of Canada has taken actions to ensure that decisions of NAFTA tribunals interpret Chapter 11 as its drafters intended. (Pettigrew 2001b)

But how then is the balance to be identified? The mechanism became obvious soon afterwards — motions for judicial review and then the commission’s Interpretive Note. Assuming that the original intent of the drafters is not readily knowable, notwithstanding the commission’s assertions, where is the appropriate line between private and public, and how is it to be assured by the NAFTA governments? The line was hazily drawn in that same newspaper column, with the minister concluding his analysis by saying:

It is very important that investors be protected from arbitrary and unfair actions by governments, but when investors’ interests run contrary to the public interest, public policy — as long as it is openly arrived at and fairly applied — should prevail. (Pettigrew 2001b)

What the minister appeared to be suggesting was that as long as the measure — read that as law, regulation, or policy — was arrived at openly and made transparent, investor claims should not be able to prevail against a NAFTA government. Public pur-

pose, in other words, would trump private interests: a wide ambit indeed that would eliminate all but the most egregious of cases.

As Laird argues in his chapter, the governments appeared intent on righting this balance by way of commission interpretations through Article 1131 and through judicial review motions, a number of which have been taken to Canadian courts as noted earlier. As Laird says, the commission's action was designed to "deflect criticism of NAFTA Chapter 11, and to narrow the playing field for Chapter 11 claimants, current and future, by limiting the substantive legal liability of the NAFTA parties." The NAFTA governments have argued publicly and before the tribunals that the clarifications are binding not just in the future but immediately and to cases under consideration by tribunals. Thus, the clarification and possibly future ones can be directed to alter conclusions where the governments are the respondents to investor claims. It is apparent that the Government of Canada believes that Article 1131 remains an instrument open to governments, in Laird's words, to "ensure that the provisions of the agreement are well understood." Such action by government cannot but undermine the rule of law. Though tribunals have given some indication that they may not be cowed into accepting such commission statements, the actions by the governments do potentially interfere with decisions in which they are a party.

The aggressive use of judicial review by the governments in the face of contrary decisions also is a trend of some concern to those determined to protect investment in the three NAFTA countries. In the case of Canada, the government made submissions on the *Metalclad* review and brought action against the *S.D. Myers* (Partial Award, November 13, 2000) decision. Some have argued of course that it is unreasonable to presume that governments will not act in the face of a right granted through Chapter 11. But the concerns have arisen in part because the reviews appeared more as full appeals. Also, concerns were raised when Ottawa argued in its submissions that these international tribunals should be accorded a minimum of deference. These concerns were only reinforced when a single judge of the British Columbia court, the Honourable

Justice Tysoe, appeared to render a decision that interpreted international law, notwithstanding his injunction against doing so.

The concern of international arbitrators has been somewhat mollified in two Federal Court judicial reviews that dismissed both a judicial review brought by Canada in the *S.D. Myers* case and a Mexican judicial review brought in the *Feldman* case. Nevertheless, the actions by the NAFTA parties, Canada in particular, have raised questions over its commitment to the rule of law in investment protection. The ambivalence of the three governments is captured well by Milos Barutciski in his chapter. He describes the ambivalence as: “the three NAFTA governments — Canada the United States, and Mexico — sit strangely noncommittal on the sidelines and more than a little defensive, making reassuring noises about the importance of investor protection, punctuated by periodic hand-wringing over ‘rogue panels’ and the need for greater ‘clarity’ to reinforce their ‘true intent’ in negotiating Chapter 11.”

The NAFTA parties may indeed believe that there are required clarifications to Chapter 11. If so, the commission should take the necessary steps to set out what it believes to be the appropriate interpretation. And then the commission should forsake additional clarifications to lift the cloud of ever-present action against tribunal decisionmaking by the NAFTA parties. The rule of law would be much better served through such finality.

The “Strange Death of Liberalization” in Canada’s Trade and Investment Policy

With apologies to historian George Dangerfield,⁵ this section tries to understand the ambivalent attitude that has crept into Canada’s policy on investment protection but, as suggested here, even more broadly on Canada’s trade and investment policy. For decades, Canadian policy has favoured trade liberalization and the elimina-

5 George Dangerfield wrote a well-known study of the demise of the Liberal Party in Great Britain at the end of the nineteenth and the beginning of the twentieth centuries (Dangerfield 1961).

tion of barriers that impede the relatively free flow of goods, services, and capital. This is not to suggest that Canada, like other countries, did not do its level best to protect select producer interests whether agricultural, cultural, or other. But overall, the major trading countries, including Canada, could be counted on to make necessary and sufficient sacrifices to advance trade and investment liberalization. Yet the but-approach to investment protection and the emergence of a process and consultation-oriented trade and investment policy signalled an apparent cooling by the Government of Canada towards free trade.

Pierre Pettigrew's tenure as Minister of International Trade bookends the critical multilateral negotiations — the Seattle ministerial meeting in 1999 to the Cancun session in 2003. Both the beginning and the end of his tenure were eventful, as were many of the trade and investment issues that faced the minister and his officials through the turn of the twenty-first century. It is evident from the minister's speeches, however, that the emergence of antiglobalization protests, first at Seattle and then at meetings afterward, shocked him and caused him to reflect on the societal and political forces, as well as trade interests, facing him and his officials. Probably no incident, however, was more striking than the Seattle meeting, which became known as the 'Battle for Seattle.'

Describing Seattle in his Manion Conference speech in 2000, the minister described the Battle for Seattle this way:

What happened in Seattle? What I saw in Seattle is two worlds that met — one might almost say collided. Two international orders finally met: the traditional one, the international world of the states that were getting together to negotiate among themselves the launch of a new trade round and the globalized world. (Pettigrew 2000b)

The minister was aware of the contending approaches between government efforts to extend free trade or more precisely the liberalization of trade and investment and the non-governmental organizations (NGO) and civil society groups vocally, and sometimes physically, opposed to the negotiation of free trade.

Who can deny that the intention at Seattle was to remind us of the human purpose of economic activity? Who can deny that the political leaders there were sent back to do their homework, with instructions to be true to the humanistic values that the West so strives to promote? ... In short, who can deny that a new model came to light in Seattle? (Pettigrew 2000b)

It is the description of that new model by the then-minister that leaves one slightly at a loss as to how a government trade policy was likely to be fashioned from such a difficult and amorphous concept, as described below:

The change we are witnessing could perhaps best be described as a shift from an ethic of justice — cold and technocratic — to an ethic of care. ... I believe that the challenge is less about changing the world and a lot more about being compelled, by the forces of globalization, to change or reshape our lives to adapt to the new era. (Pettigrew 2000b)

Though Pettigrew was searching apparently for a new trade and investment policy that might somehow address the antiglobalization interests and groups, he appeared in the end to abandon the principal motivation underlying Canadian trade and investment-policy trade liberalization:

With regard to the new altruistic values that we have to establish, we must however be realistic and acknowledge that the spirit of free trade will not be much help to us. For objective concurrence between commercial openness to others and the financial advantages of the openness does not exist where the issue is the establishment of new values and the common good, as it did exist when free trade was being established. (Pettigrew 2000b)

The Manion Conference speech was the most dramatic expression of the minister's effort to come to terms with the antiglobalization opposition to trade liberalization. But the minister spoke on a number of occasions subsequently of his changing view of trade and investment policy. In Britain the following year, he continued along a line of thinking that appeared to shift his views of trade

from liberalization to social and political concepts as the foundation for trade and investment policy:

We must demonstrate that once again when we want trade, our goal is not just to benefit the big corporations. It's political stability. It's democracy that we are after when we want to build a strong rules-based system. (Pettigrew 2001a)

These remarks at the Royal Institute for International Affairs were prepared also, it would seem, so that the minister could assess the progress of multilateral World Trade Organization (WTO) talks, as well as regional, primarily western hemispheric talks, on the Free Trade Area of the Americas (FTAA) post-Seattle and then Quebec City. According to the then-minister, broad progress had been achieved in the FTAA talks since Seattle in the area of trade liberalization, but in those areas that, as he put it, "complement freer trade." This progress was something that the multilateral discussions might well take note of in the effort to advance the new round of trade negotiations. Tellingly, Pettigrew then suggested that there were three lessons specifically that he could take from Quebec City:

- A commitment to transparency;
- Increased openness, inclusion, and dialogue; and
- Concerns of less-developed economies.

As is evident, Pettigrew's focus in these remarks was principally on process. In particular, the second lesson focuses on consultation and dialogue with civil society groups and interests. As the minister argued, "Another lesson we have learned is to listen to protesters and their concerns" (Pettigrew 2001a). Not only was the minister trying to grapple with and accommodate the antiglobalization goals that were first openly expressed in Seattle, he was designing a policy that would openly engage these interests.

Such consultation and dialogue with protesters was presaged in the minister's remarks before the Commons Standing Committee on Foreign Affairs and International Trade on April 5, 2000 (Pettigrew 2000a). In those remarks he outlined the various actions

the government was pursuing to engage civil society groups especially in the FTAA process. His remarks, among other things, chronicled the interactions that he and his officials had with civil society groups and the efforts that he had made to convince his hemispheric colleagues to undertake similar consultation and dialogue. As he pointed out in his prepared comments to committee members, he had convinced 22 colleagues at the Toronto FTAA ministerial meeting in November 1999 to join him in meeting civil society groups at the People's Summit that was organized to coincide with this FTAA Ministerial meeting. He noted prior to that meeting that representatives from only five countries had ever met with such groups. From the minister's perspective, this civil society effort was the key to a successful initiative on the government-to-government level — "They can serve as a new model for governments..." as he put it (Pettigrew 2000a).

There is a long list of such encounters over the period described by the minister. He saw such efforts by his officials and himself as promoting "the kind of trade Canadians want, as well as to demystifying the trade negotiating process" (Pettigrew 2000a). One of the consultation initiatives mentioned by the minister was the Seattle consultation meetings. As Pettigrew correctly points out, this was a daily briefing where the official delegation and also NGOs were in attendance before officials. As the minister proudly noted, following the meeting, half the delegation went to the official meetings while the other half "would get up to take their positions outside the convention centre to protest the deliberations! This was a truly Canadian moment!" (Pettigrew 2000a).

While it may well be exactly what the minister suggests, it does not constitute a trade and investment policy. I was fortunate enough to attend many of those Canadian information sessions at Seattle. What was apparent was that while the interests and the civil society groups were in attendance, they were there, principally, to watch and scrutinize every action by the minister and his officials. These groups were insistent before the minister and his officials that no compromises were possible on investment or on the specific agricultural sector they represented, or on a host of other issues including, as they saw it, the environment, labour,

social, and cultural issues. It was these kinds of consultation processes that led my friends and colleagues at Seattle to conclude that the best name for the then nascent multilateral round should have been the Protectionist Round.

Here then was the new open consultation process. The problem was that most, if not all, civil society groups were there not to advance the trade and investment agenda but to stop the negotiation, or defend against liberalization in their area or in their sectoral interest, if not more widely. The minister and his officials were engaging groups that were opposed largely to advancing the negotiation, or reducing barriers, or indeed liberalizing trade policy — what had been the heart of Canada's policy since the inception of the General Agreement on Tariffs and Trade (GATT). This consultation process, apparently now at the heart of Canada's trade and investment policy, largely rejected efforts to liberalize Canada's policy. In the crafting of Canada's post September 11 trade and investment policy, two long-time trade negotiators, Bill Dymond and Michael Hart, noted the minister's and his officials' focus on groups that had no interest in liberalizing trade:

Part of the government's initial coolness to a Canada-U.S. border initiative is the result of a continued fascination with claims of freer trade's opponents. Protestors, nationalists, environmentalists, human rights activists and other 'civil society' groups have captured the government's attention out of all proportion to their weight in society and their capacity to make constructive contributions. The government has been reluctant to accept that many of these groups are animated by values and preferences that most Canadians do not share and that deny the fundamental tenets of Canadian trade and foreign policy. As a result, during the first two mandates [of the Liberal government], the government sent out confusing signals about the need to accommodate their claims and preferences. (Hart and Dymond 2001, 34)

The substitution of a consultation process for liberalization in Canada's trade and investment policy became even less of a compass as events challenged our U.S., our regional, and indeed our multilateral policy initiatives. There is potentially a wide diver-

gence between our national interest and our national opinion when it comes to, for instance, closer U.S. economic ties, and increasingly on security and border issues. But there appears to be no consistent trade initiative. Thus, at one instance the minister comments on a U.S. trade goal in 2002, saying:

Now many in the business community have been calling for a strategic or a grand bargain with the U.S. Others have called for a common market or a customs union. While there is always room for a healthy debate, and I encourage it, I do not think that there is currently an appetite for such a grand scheme. (Pettigrew 2002)

Having suggested a big trade initiative is not supported by Canadians, he then goes on to identify six goals which, while not creating a customs market or customs zone, certainly would initiate a comprehensive trade program.⁶ And then in contrast to the earlier expressed coolness to a broad U.S. initiative, following the collapse of talks at the Cancun meeting, Minister Pettigrew, in one of his last speeches as trade minister, relates that he turned to Bob Zoellick, U.S. Trade Representative, and said, "Bob, ...Am I glad we have that free-trade agreement with you. Let's deepen that relationship even further. Let's trade with the people who want to trade" (Pettigrew 2003). In these remarks he went on to say:

But when you see the setback we are having in Cancun with the WTO round of negotiation, you do have to realize that even if Canada's cornerstone of our trade policy remains the WTO, it is imperative that, of course, we take very good care of our trading relationship with NAFTA and in particular, with the United States of America. (Pettigrew 2003)

6 The six-point program's elements: (1) increase Canada's share of the U.S. market; (2) increase two-way flows of investment; (3) advance the smart regulation agenda; (4) bring trade remedy practice more in line with growing integration; (5) eliminate the border as an impediment to trade investment and business development; and (6) enhance our representation in the United States.

Towards the end of this speech, the minister once again repeats and offers as Canada's trade objectives, the six-point program he'd articulated the year before.

The attack on investor protection provisions in NAFTA is part of larger debate and protest over greater international economic integration, and the growing influence of global markets and multinational corporations on the lives of citizens. The debate has been loud and persistent. But the government's response — a continuing ambivalence over the consequences for Canada of Chapter 11, a policy that not unreasonably can be interpreted as undermining the rule of law appears inadequate and even a policy against interest.

The challenges posed by antiglobalization demonstrators are real and should be appraised. But in the end, Ottawa is unlikely to square the circle between opposition to liberalization expressed by antiglobalization groups and the broad public's continuing commitment to free trade. For Canada, a middle-ranked, open, developed economy, to appear to question or even potentially rebuff a trade and investment policy that favours continued global liberalization of trade and investment seems unthinkable. Even the appearance of such a strategy could at one and the same time harm our influence in the global trading system and potentially limit Canada's prospects for expanding its economic opportunities and its national prosperity.

Globalization, the Global Trading System and Investment

As much as some, maybe many, politicians might not wish it, investment is now intimately linked to international economic policy and prosperity, as is traditional trade policy.

John Hancock in his conference presentation described what for him at his perch at the WTO is an everyday experience:

Investment is at the epicentre of global economic relations. It touches on — and crosses over into — issues related to trade, capital flows, macroeconomic policy, technology transfers,

domestic regulation, and the complex interface between private and public interests. Increasingly, it is impossible to talk about the management of globalization without talking about global rules to help manage investment and capital flows. Nothing is more 'globalized.' Yet the defining characteristic of today's international investment architecture is its "un-global" nature.

In the multilateral setting, however, it would appear, at least on the surface, that there is strong opposition especially from the developing and least-developed member states to the extension of the covered agreements at the WTO to include investment protection in some form. Opposition to the so-called Singapore issues, including investment, has been significant.⁷ Indeed it would appear that investment policy was a major stumbling block at the WTO ministerial meeting at Doha in 2001 and certainly at Cancun in 2003. At Doha, India took the lead in efforts to preclude investment from the Development Round. Strong opposition continued at Cancun. As a result, as described by John Hancock in his Prologue, a multilateral investment agreement cannot be negotiated as part of the Doha Development Round.

Certainly globalization or more precisely antiglobalization perspectives lie at the heart of opposition to investment protection and more broadly against traditional free trade agreements. Stephen Clarkson chronicles some of the many arguments against both investment protection and free trade. At the heart of his and other opponents' arguments lies opposition to international limitations on national decisionmaking that such agreements bring, as well as to the protection of foreign corporate investors. In describing Chapter 11 as an extra-constitution, Clarkson concludes, "The impact is to constrain the authority of Canadian governments at all levels as definitively, but more arbitrarily, than do the norms and limitations imposed by Canada's constitution and its common law."

The antiglobalizers emphasize the power of market forces and transnational corporations to constrain governments to the detriment of local governmental policy, broad social, as well as the

⁷ The Singapore issues include investment, competition policy, procurement, and trade facilitation.

political and cultural forces in the many member states of the global trading system. It is arguable, and taken up by both Lou Pauly and John Hancock in their chapters, whether it is market forces and economic integration that inevitably drive multilateral investment protection. Though there is a view that deeper economic integration drives multilateral investment protection, Pauly argues that political realism and the conditions negotiated by governments will inevitably determine the nature of the multilateral bargain.

*Sex without Love —
Extending Investment Protection
One Way or the Other*

The visible multilateral resistance to investment protection is evident and widely acknowledged. Many member countries expressed pleasure that the Singapore issues were blocked from inclusion in the Development Round at the Cancun meeting in 2003. But there exists another reality. In the 1990s, there was a wide expansion of bilateral investment treaties (BITs). The United Nations Conference on Trade and Development estimates that there are now well over 2000 BITs, some 1,800 having been negotiated in the last ten years. More recently, the United States in particular, but other developed countries as well, have negotiated and signed bilateral free trade agreements, principally with countries in Latin America and in Asia.

These agreements generally include investor-protection provisions. And in the regional agreements being negotiated, or completed, the 2004 Central America Free Trade Agreement (CAFTA) and the much larger FTAA,⁸ investor protection is included or at least on the negotiating table. So, though many countries took apparent delight in the blocking of the Singapore issues, many of these same nations are busily signing investor-protection provisions on a bilateral and regional basis. While this may satisfy a

8 Following the disastrous 4th summit at Mar del Plata, Argentina, it would appear that a hemispheric free trade agreement among the 34 countries of the Americas is unlikely to be concluded any time soon.

number of audiences inside and outside these governments, such action appears to harm those most in need of strong investment protection regimes. It creates an institutional structure that is overly complicated, opaque, and likely to undermine stability by creating the continuing generation of competitive preferences that may well distort economic allocation. Such a global economic system is likely not to favour those countries that are today most opposed to multilateral investment and yet most in need of investment. John Hancock in his conference remarks summarizes the dilemma of this possible patchwork of investment protection:⁹

The bigger danger arises when regionalism becomes a substitute for multilateralism — or worse when it serves as an instrument for carving out preferential access to key global markets. In a world where investment is key, not just to capital flows, but to flows of production, technology, and trade, regional arrangements that are discriminatory — in terms of rights of establishment, licensing requirements, certification, regulations and standards, and the movement of people — can give rise to conflict and impact negatively on global economic stability.

A Final Salute to Investment Protection

Christopher Wilkie, Deputy Director of the International Investment and Services Policy Division of Industry Canada, reviewed the Chapter 11 NAFTA investor protection provisions (Wilkie 2002). He argued in his review that the evidence makes it impossible to conclude that the investor provisions “have contributed to increasing investment flows to and from Canada” (Wilkie 2002, 33). In the current global trading system, governments benefit from a generalized business belief that most governments in the international economy are unlikely to act in a way that would fundamentally harm direct foreign investment. There is a general consensus that investors are unlikely to see their business opportunity

⁹ In a recent report to former Director General Supachai Panitchpakdi, the panel took a rather dim view of the spreading regional agreements (Consultative Board 2005).

expropriated or to have governments act in such a desultory way as to interfere fundamentally with the foreign business enterprise in the target market.

Though Wilkie may be right that it is not possible to show the relationship between investor country choice and the availability of strong investment provisions, it remains likely that poor treatment directed at foreign investors is a significant deterrent to continuing foreign direct investment flows.

For a country such as Canada, now a significant investor abroad and at the same time determined to be an attractive destination for direct foreign investment, behaviour that may colour country or regulatory risk would be, or should be, avoided by officials. Especially in the post-September 11th world, Canada has to be alert to any negative policies that might amplify the concerns already raised by heightened cross-border security steps. Such security concerns might already have weakened foreign investors' appetites to invest in Canada as opposed to the United States.

Thus, behaviour that might add to the uncertainty and increase investment risk to a foreign investor's decision seems an unhelpful approach by trade officials. It is disconcerting, then, to witness the ambivalence created around the but-approach to investor protection and principal Canadian values, especially protection and support for the rule of law. The trade ministers' continued use of Article 1131, especially for cases pending, is extraordinary. The right to interpret, or more likely, reinterpret what the substantive provisions of Chapter 11 originally meant is a right that North American governments generally, and Canada in particular, should forego. To encourage investors to continue to regard Canada favourably as an investment destination and to maintain and even improve the climate of treatment for Canada's investments abroad, politicians and Canadian officials must become unalloyed supporters of investment protection in North America and throughout the global trading system.

References

- Alexandroff, Alan S. 2004. "Concerning the 'But-Approach' in Investment Protection." In Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*. Ardsley, New York: Transnational Publishers, Inc.
- Canada. Parliament. House of Commons. Standing Committee on Foreign Affairs and International Trade. 2002. *Partners in North America: Advancing Canada's Relations with the United States and Mexico*. Report of the Standing Committee. Ottawa: December. Also available online at www.parl.gc.ca/InfoComDoc/37/2/FAIT/Studies/Reports/fairtp03/03-cov2-e.htm. [Cited January 25, 2005.]
- Consultative Board. 2005. *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. Report by the Consultative Board to the Director General Supachai Panitchpakdi. Geneva: World Trade Organization.
- Dangerfield, George. 1961. *The Strange Death of Liberal England*. London: Capricorn Books.
- Hart, Michael. 2003. *A New Accommodation with the United States: The Trade and Economic Dimension*. Paper presented at the IRPP Conference on Art of the State II: Thinking North America: Prospects and Pathways, Fairmont Le Chateau Montebello, Montebello, Quebec, October 16–18.
- Hart, Michael, and William Dymond. 2001. *Common Borders, Shared Destinies: Canada, the United States and Deepening Integration*. Ottawa: Centre for Trade Policy and Law.
- NAFTA Free Trade Commission. 2001. "Notes of Interpretation of Certain Chapter 11 Provisions [online]." *Dispute Settlement: NAFTA – Chapter 11 – Investment*. July 31, 2001. [Cited January 19, 2005.] www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.
- Pettigrew, Pierre S. 2000a. "Notes for an Address by the Honourable Pierre S. Pettigrew to the Standing Committee on Foreign Affairs and International Trade." Ottawa: April 5.
- . 2000b. "Seattle: The Lessons for Future Governance." The 2000 John L. Manion Conference, Ottawa, Ontario, May 4.
- . 2001a. "From Pre-Seattle to Post-Quebec: Regaining the Trade Initiative." Notes prepared for an address to the Royal Institute of International Affairs Roundtable Discussion, London, England, June 22.
- . 2001b. "We Need to 'Clarify' NAFTA to Fix Tribunal 'Errors'." *National Post*, March 23.
-

-
- . 2002. "The Canada We Want in the North America We Are Building." Notes for presentation at the eighth Annual Canadian-American Business Partnership Forum in Toronto, October 16.
- . 2003. "Dancing with the Elephant: Contending with an Assertive Superpower in Trade and Global Diplomacy." Address to the Empire Club of Canada. Toronto: September 25.
- Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*. 2001. Winnipeg: International Institute for Sustainable Development and the World Wildlife Fund. [Cited January 25, 2005.] <http://biodiversityeconomics.org/pdf/topics-408-00.pdf>.
- Public Citizens Global Trade Watch. 2005. *NAFTA Chapter 11 Investor-State Cases: Lessons for the Central American Free Trade Agreement*. Washington, D.C.: Public Citizen Publication. Also available at http://www.citizen.org/documents/NAFTAReport_Final.pdf [Cited April 11, 2005.]
- Schneiderman, David. 1996. "NAFTA's Takings Rule: American Constitutionalism Comes to Canada." *University of Toronto Law Journal* 46:535.
- Wilkie, Christopher. 2002. "The Origins of NAFTA Investment Provisions: Economic and Policy Considerations." In Laura Ritchie Dawson, ed., *Whose Rights? The NAFTA Chapter 11 Debate*. Ottawa: Centre for Trade Policy and Law.
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