

SYSTEMIC OR SURGICAL? POSSIBLE CURES FOR NAFTA'S INVESTOR-STATE DISPUTE PROCESS

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I INTRODUCTION

As a political economist, I try to understand the relations between states and markets in order to locate specific issues of public policy within their power systems. So, in applying my craft to Chapter 11's radical innovation of investor-state dispute settlement, I will first locate the framing document, the North American Free Trade Agreement (NAFTA) within its international context. Once having established its genealogy, we can then consider its now notorious process for investor-state arbitration.

My argument in a nutshell explains NAFTA as the offspring of crises experienced by its three signatories in the late 1980s and early 1990s. Because its gestation was forced and its negotiation precipitate, many of its features were so hastily conceived that their implications were imperfectly understood. They nevertheless comprised so substantial an addition to Canada's legal order that they can be seen as introducing an external, quasi-constitutional overlay on top of the country's existing constitutional framework. Indeed, implementation of Chapter 11's dispute provisions turned out directly to challenge some fundamental components of Canada's legal and political value system. With low legitimacy and high potential for continuing controversy, finding a cure may be necessary. If analgesics cannot do the trick, the question then becomes whether the treatment should be systemic or surgical.

II HISTORICAL CONTEXT: CRISIS AS CATALYST FOR TRADE NEGOTIATION

To understand the trilateral NAFTA and its bilateral forebear, the Canada-United States Free Trade Agreement (CUFTA), we need first to recall the trend in the global power relations that so dismayed Americans in the early 1980s and then to remember how Canada, and subsequently Mexico, proposed trade negotiations as a solution for acute crises in their own regimes.

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1. The United States: Core Hegemon

Already by the late 1970s the United States felt its economic hegemony was being threatened by the resurgence in both Europe and Asia of rival states, which had been using public policy to create competitive advantages for their national champions. To confront this challenge, the United States adopted a triple strategy that called for the use of unilateral, multilateral and bilateral measures to beat back what it considered foreign governments' excessively interventionist policies and to force open their markets for those sectors where American transnational corporations (TNCs) had developed global superiority. These measures took the following forms.

Unilateral Measures. In an attempt to maintain its economic position, Washington had been strengthening its already powerful unilateral measures, such as retaliatory powers to strongarm individual countries into changing policies it felt were too restrictive for American exporters or investors and too generous to the host country's own national enterprises. Ultimately this overbearing strategy of making threats on a country-by-country basis proved unsatisfactory. This was because it contradicted the general American support for the rule of universal legal norms, generated disproportionate amounts of ill will, was decreasingly effective, and could sometimes even be counterproductive. More effective would be creating new global rules that universalized the rules under which US TNCs wanted to function.

Multilateral Measures. At the international level, Washington hoped to exploit for the 21st century the USA's comparative advantage in high-tech and knowledge-driven industries by expanding the scope of the global trade rules administered by the General Agreement on Trade and Tariffs (GATT). It wanted to extend global trade rules to cover foreign investment so as to improve conditions for US TNCs' overseas investments, to allow these companies to sell their services in countries which had hitherto provided them through state monopolies, and to extend intellectual property protections (IPP) to prevent the piracy of US information-based products, such as recordings, videotapes, and software.

In the early 1980s, the prospects for such a transformation of the international economic order were bleak. GATT's 1982 ministerial meeting had proven unyielding in the face of US pressure. Years went by without even a consensus emerging in favour of *starting* a new B the eighth B round of GATT's multilateral trade negotiations. This blockage at the GATT suggested a third possibility.

Bilateral Measures. With GATT in gridlock, a second-best expedient for Washington was to use bilateral negotiations with compliant partners in its own immediate sphere of influence. By this tactic, Washington intended to establish important precedents that would create the agenda for the multilateral talks if and when they started up again. Although Israel was the first state with which Washington negotiated a bilateral

free trade agreement in this period, its provisions were neither earth-shaking nor precedent-setting. Far more promising for Washington was the prospect of entrenching its new trade rule program in a deal with its immediate neighbours who had traditionally been sensitive about encroachments on their sovereignty. Such an eventuality depended on these countries experiencing crises sufficiently acute to push them into thinking the previously unthinkable: getting into bed with their overpowering neighbour whose domination they had previously resisted to a greater (Mexico) or lesser (Canada) degree.

2. Canada and Mexico: the Peripheral Players

While the challenges facing the US focused on its external problems, Canada in the mid-1980s was experiencing a crisis in its domestic political economy. The Trudeau government had expended a decade's effort since the first OPEC crisis of 1973 to develop a more national mode of regulation for the economy. The Canada Development Corporation (CDC) was set up to act as a holding company to repatriate ownership of selected TNCs. Petro-Canada, a crown corporation, was mandated to allow the federal government to play an entrepreneurial role in the oil and gas industry. The Foreign Investment Review Agency (FIRA) would screen incoming foreign direct investment (FDI) in order to negotiate greater benefits from proposed new investments or takeovers of Canadian corporations. The National Energy Policy would shift the balance of control from foreign to Canadian-owned corporations.

These essentially *national* efforts were being made at the very time that the Canadian regime of capital accumulation was becoming more *continental*. In addition to decades of playing host to FDI, Canada was increasingly becoming a *home* economy, exporting Canadian direct investment abroad (CDIA). In fact, the outgoing flow of CDIA had exceeded the inflow of foreign capital since 1975. Given that CDIA was shifting away from the USA and towards non-OECD countries B primarily Asia and Latin America -- Ottawa's trade officialdom became concerned about protecting the interests of Canadian investors against mistreatment by third world governments which were receiving over 30 percent of CDIA.

Given this disjuncture between the national focus of the Trudeau Liberals' policy thinking and the global thrust of Canadian capital, federal bureaucrats, who had been largely sceptical about their political masters' nationalist concerns, adjusted their approach to embrace both sides of the new phenomenon. By expanding Canada's international economic policy beyond its traditional emphasis on exports, they actively pursued the strengthening of investment rules, bilaterally and multilaterally, and hoped both to support the country's exporters by encouraging trade liberalization and to protect its investors by securing trading partners' acceptance of such principles as national treatment.

Following the decisive defeat of John Turner's Liberal Party in 1984, the

Progressive Conservatives under Brian Mulroney began the process of rejecting the Grits' active government paradigm in favour of retrenching the state. This apparent sea change was actually more like a changing of the guard. Had Turner defeated Mulroney, his government would probably have made the same shift in orientation, because it had as much to do with global trends (such as the wave of Reagan- and Thatcher- induced neoconservatism sweeping the Western world) as with changes in Canada's domestic politics. Under this revised conception of the Canadian state, the Department of Finance and the Department of External Affairs (then increasingly dominated by its newly arrived trade commissioners) became the principal players setting the external agenda for the Canadian government.

Two key moments in Ottawa's shift toward trade liberalization were the Department of Finance's *mea culpa* review of the government's disastrous addiction to deficit budgeting (which was published over Michael Wilson's name in the fall of 1984) and the report of the Royal Commission on the Economic Union and Development Prospects for Canada, which Donald MacDonald delivered the following September. When the MacDonald Report declared Trudeauite industrial policy a failure and recommended free trade as the only viable option, US protectionism became Ottawa's official bugbear. Fearing that US antidumping and countervailing duty actions would blight Canada's prospects for exporting its way to prosperity, the Mulroney government adopted the position that it needed institutionalized access to the US market that was enhanced by the reduction of American tariffs but, more importantly, was secure from the harassment of American trade laws. The hoped-for means to this end were for Washington to renounce anti-dumping actions as inappropriate within a free trade area and for both countries to adopt a comprehensive subsidy code that would serve to neutralize US countervail measures. With Mulroney declaring Canada to be desperately in need of a trade deal and with Congress committed to retaining every clause and comma of its trade remedy legislation, it was no surprise that Ottawa failed utterly to achieve its main negotiating objective. When CUFTA went into effect on January 1, 1988, it marked a turning point in North America's integration.

The second phase of North America's evolution as a trade bloc represented a simultaneous broadening and deepening of the system already established by CUFTA. The broadening was made possible by another crisis, in this case the dire economic straits experienced by Mexico in the early 1980s. In the wake of what they considered to be the failure of the postwar decades' attempt to build a modern economy through import-substituting industrialization, the younger elites coming to power within the ruling PRI (*Partido Revolucionario Institucional*) turned to the American economic model whose nostrums they had absorbed in graduate school at MIT and Chicago. Once they took radical measures in the late 1980s to open up and liberalize their economy by joining GATT, cutting tariffs, privatizing parastatal entities, reducing controls on foreign direct investment, and freeing communally held peasant *ejido* lands for private acquisition, Mexicans were deemed by Washington to deserve special consideration. An economic

integration arrangement would 'lock in' this welcome counter-revolution by exchanging a commitment to make further neoconservative reforms for what Mexico wanted most:-- guaranteed access to the American market.

Canada and Mexico had reached similar conclusions about how best to improve their respective economies. By widening and securing access to the American market, both governments were hoping to improve their capacity to attract FDI, achieve economies of scale, and exploit their comparative advantage. In contrast, the Americans' primary goal was to liberate American TNCs from irritating regulations in their neighbours' economies and to make progress with their agenda on services and IPP. While the three negotiating parties were pushed towards trade integration by their own economic crises, the party's degree of influence varied considerably. The bargaining table was heavily tilted in favour of the United States. The asymmetrical relationship among the US as the core and Canada and Mexico as the peripheral players was duly reflected in the agreement that was forged. By favouring US demands, NAFTA extended *de jure* the formerly *de facto* unbalanced nature of the North American system.

III. CONCEPTUAL CONTEXT: TRADE AGREEMENTS AS CONSTITUTIONAL COMPONENTS

Apart from broadening the economic integration area to include Mexico, NAFTA deepened CUFTA's disciplines on its signatory governments by expanding its institutional structure, adding a chapter creating extensive intellectual property rights, changing the dispute settlement mechanism, altering the Auto Pact, extending the coverage of its investment provisions, and, alongside many smaller changes, adding the subject of the present discussion, a politically explosive power for foreign, but NAFTA, based corporations to sue the signatory governments. The significance of these changes went well beyond simply changing economic policies. NAFTA's new set of formal legal constraints on the three parties created a new legal order by which its member states were to be bound. It is in this sense that North America's new continental governance needs to be considered to have quasi-constitutional weight *within* each member state.

Constitutions, as rule books that determine how organizations operate, have five key characteristics:

(a) *Political Will*. A constitution reflects its founders' will and represents some sort of political consensus among its constituent members.

(b) *Norms*. Understood as regularized constraints on behaviour, supralegislative norms are contained in constitutions to put certain values beyond the reach of legislators and officials.

(c) *Institutions*. Constitutions define the parameters of formal rule-making institutions, complete with a judicial process for resolving disputes, and the coercive

power to enforce the laws and norms of the constitution.

(d) *Limits*. Constitutions also set limits to the powers of the institutions that they create.

(e) *Rights*. The corollary of these limits are the rights with which the system's citizenry are endowed.

(f) *Amendments*. To provide flexibility and the capacity to evolve in response to changing conditions, constitutions contain procedures for amending their rules.

Strictly speaking, the signing of NAFTA altered the Canadian constitution no more than did membership in any other international organization. As long as a treaty which the Canadian government signed has been duly integrated into the country's legal order through appropriate implementing legislation passed by Parliament, its norms become part of the government's legitimately undertaken international obligations. But unlike other international obligations, those contained in NAFTA have a much more powerful effect than, say, the International Labour Organization whose norms (?) Canada can violate with virtual impunity.

1. Limits

What makes NAFTA quasi-constitutional, in the sense in which I am using the concept, is the fact of the signatory governments changing their laws and regulations irreversibly -- until or unless the agreement is abrogated -- through the implementation of various clauses in the NAFTA. Normally, changes in laws and regulations are made by governments within the institutional and legal framework established by their internal constitutions and in response to demands from below by the electorate or specific functional constituencies. NAFTA caused Canadian governments to change various laws and regulations *from above*. Whatever arguments voters or lobbies might make about a specific NAFTA rule producing undesirable results, the legislation cannot be reversed without putting Canada in violation of its new quasi-constitutional obligations. NAFTA's effort to create a single market free of government interference is based on very extensive rules requiring active enforcement by its signatory governments, even in the face of public resistance. It did not so much direct Canadian governments to legislate or regulate in specific ways as to impose, in response to Washington's demands, numerous detailed prohibitions and constraints on governmental behaviour, thereby limiting Ottawa's power to balance the public and private interests.

It is meaningful to talk of NAFTA's constitutionalizing character because its norms have an unusually authoritative character. This is not because they are written in a special language or on a special subject. It is because the United States, as the principal partner in the agreement, exercises a systematic oversight that monitors Canada's conformity with its undertakings. Then, if Washington considers the federal or any provincial government to have deviated from its commitments in a way that prejudices some American economic interest, it can use the force of its hegemonic dominance to require correction of the measure on pain of retaliation, or reparation for the damage done.

The Mulroney government's acceptance of these provisions constituted a loss of powers that for ideological reasons it did not want to use. By bestowing upon American and Mexican companies previously non-existent rights to Anational treatment,@ the Progressive Conservative government committed Canada in perpetuity, as well as the provincial governments and their successors, to desist from the kinds of industrial strategies that had formed the core of much of federal and provincial policy activity for twenty years. If CUFTA or NAFTA tied the government's hands, this was a plus for the Conservative prime minister, not a minus -- a clear illustration of how international agreements can be used to constitutionalize a domestic ideological position.

Having established our historical and conceptual context, we can proceed to look at Chapter 11's investor-state dispute provisions in terms of their constitutional characteristics.

Under prior international commercial law, a company whose business was hurt because of a foreign government's action either had to defend itself within that state's legal system or prevail on its own government to launch a trade complaint through the GATT on its behalf. Transnational corporations were not happy with this dependence on government action. They wanted to enjoy high-standard protection, not just from outright nationalization but from the normal regulatory actions of a state using its sovereign discretion to legislate within its own borders. NAFTA's major innovation in the service of corporate empowerment was to extend investors' rights to include the capacity of a firm from a partner state to challenge a government's domestic legislation for virtually any measure that jeopardizes the company's profitability.¹

Like CUFTA's Chapter 16, NAFTA's Chapter 11 contains the agreement's investment provisions. Like CUFTA's Chapter 16, NAFTA's Chapter 11 has a clause forbidding any party from nationalizing or expropriating an investment of another party or taking measures "tantamount to an expropriation." When the United States insisted that rules to protect its investments be incorporated in CUFTA, it was evidently satisfied that, once entrenched in the Canadian legal order through the agreement's implementation legislation, these new suprallegislative norms would be appropriately applied in the Canadian legal system. When negotiating NAFTA, however, the US did not extend this same confidence to the Mexican legal system, whose dominant norm for dealing with foreign investments was contained in the Calvo Doctrine, which insisted that they be treated according to national norms and through national legal processes. Fearing that Chapter 11's norms would not be satisfactorily applied to US transnational corporations by Mexican courts, Washington insisted that a measure be imported into the agreement from the standard bilateral investment treaties that it had signed with dozens of other third-world countries. This was the procedure allowing an American corporation in conflict

¹ Richard C. Levin and Susan Erickson Marin, "NAFTA Chapter 11: Investment and Investment Disputes," *NAFTA: Law and Business Review of the Americas* 83:2 (Summer 1996), 90.

with a signatory government to have the dispute arbitrated by a tribunal under the auspices of the World Bank's or United Nation's facilities for mediating private corporate conflicts at the international level.

2. Institutions

As with other trade treaties, NAFTA has no enforcement capacity apart from the parties' sense of their long-term self-interest in trading within a rules-based system. If one member state does not comply with the judgments of dispute panels, it cannot expect its partners to continue to do so. In the background, there remains the possibility that one or other party will resort to its economic muscle. Under North America's conditions of extreme asymmetry, the hegemon remains able to defy the trade agreement's rules when they do not suit it and to prevail by imposing its will, as it has done in the long-standing disputes over Mexican trucking, Canadian softwood lumber, and American split-run magazines.

Chapter 11's investor-state dispute process introduces private international commercial legal processes into the sphere of Canadian public law. In effect this dispute mechanism destatizes an aspect of public law by privatizing and internationalizing the legal process which previously dealt with conflicts over public policy. This new zone of largely secretive adjudication has radically politicized issues that would previously have escaped most public notice. Not only has Chapter 11 added a new corporate property right of unequal application to the Canadian constitution. It has imported an existing arbitration mechanism designed to handle international intercorporate disputes, turning it into a device to constrain governments' public policy-making capacity. Investor-state disputes initiated against a municipal, provincial or federal government are not heard before a Canadian court using Canadian jurisprudence. Rather they are heard before an international panel operating by rules established under the aegis of the World Bank or the United Nations for resolving international disputes between TNCs.²

3. Rights

The only 'citizens' whose rights in Canada were extended by the two trade agreements are corporations based in the US or Mexico. The requirements of national treatment and the right of establishment make it easier for firms owned in one country to do business throughout the continent. The corollary of the new disciplines that Chapter 11 imposed on governments was the new freedoms it gave corporations. No longer could NAFTA states impose performance requirements on foreign investors in order, for

² Chapter 11 disputes are governed and administered by one of three multilateral conventions: the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID); the Additional Facility Rules of ICSID (provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention); or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Gary Horlick and F. Amanda DeBusk, "Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID," *Journal of World Trade* 27:1 (Feb.1993), 52.

instance, to achieve environmental goals or to promote indigenous peoples' welfare. Beyond having to determine whether they could afford a measure or had enough public support for it, the federal and provincial governments now had to live with the most extensive rights and remedies for foreign investors ever set out in an international agreement.³

Article 1110 provides that no government may directly or indirectly expropriate or nationalize, or take a measure tantamount to expropriation or nationalization except for a public purpose, on a non-discriminatory basis, in accordance with the due process of law and minimum standards of treatment, and on payment of compensation.⁴ While not appreciated at first by most observers, including the Canadian government officials who signed off on the clause, this innovation has given American and Mexican firms the right to challenge almost every Canadian regulatory action that might 'expropriate' their future earnings. This prohibition of actions 'tantamount to expropriation' has proven to be the most controversial of NAFTA's provisions, because it gives non-Canadian NAFTA corporations the power to overturn the legislative outcomes of national political debates on the desirable regulatory regime to secure the health and safety of the citizenry.

In the face of Canada's constitution, which had been amended in 1982 to incorporate a Charter of Rights and Freedoms that deliberately excluded property rights (on the grounds that they would excessively enhance corporate power), NAFTA's Chapter 11 created a property right for foreign corporations that neither the government nor the public at first understood.⁵ Still more obviously quasi-constitutional, this right is not available to domestic corporations in Canada. It can only be exploited there by American and Mexican companies. A local entrepreneur, whose sales have been adversely affected by a new municipal by-law, will have to take her lumps, whereas an American competitor can launch a suit for damages because its investment has been expropriated.⁶ The potential effects of this provision are enhanced by the wide latitude given the concepts of investor and investment in Chapter 11. An American or Mexican investor has the right to challenge a government regulation merely when seeking to be an investor and before it

3 Howard Mann, *Assessing the Impact of NAFTA on Environmental Law and Management Processes*, Working Paper, *First North American Symposium on Understanding the Linkages between Trade and Environment* (Fall, 2000), 29.

4 North American Free Trade Agreement, Article 1110. For the importance of the "and" see Todd Weiler, "NAFTA Investment Arbitration and the Growth of International Economic Law," *supra* this issue, at ____.

5 David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada," *University of Toronto Law Journal* 46 (1996), 536.

6 Of course, Canadian firms operating in the US and Mexico would also benefit from this right to attack American or Mexican regulations that "expropriated" their property.

has actually made an investment.⁷

4. Norms

The norms generated by Chapter 11 disputes can be seen as quasi-constitutional, because they control government behaviour in a way the government itself cannot change. The norms have not been translated into specific legislative changes but remain as prescriptions which NAFTA partners may invoke if they feel that Canada is not fulfilling its obligations.

Since constitutions establish the institutional and normative framework for governing systems, the values generated by Chapter 11 dispute settlement can reverberate through the policy system. An indirect effect of investor-state disputes is the regulatory chill that has gripped policy-making in the environmental field.

The Canadian government has in fact already backed off legislation because of Chapter 11's provisions. An illustrative case is Ottawa's debacle over cigarette packaging. In the mid-1990s the federal government decided to ban differentiated cigarette packaging as a natural extension of its prohibition on cigarette advertising⁸. Although the tobacco industry claimed that branding served no purpose other than to promote competition among brands for existing smokers, the government maintained that branding was targeted at lifestyle marketing and thus promoted increased sales and smoking⁹. Misunderstanding the treaty it had negotiated, the government thought that NAFTA merely required it to respect the principle of national treatment. In other words, as long as American and Mexican tobacco companies were treated the same way as Canadian companies, the proposal was NAFTA-proof.¹⁰ After lobbying efforts threatened to invoke Chapter 11's corporate rights against expropriation,¹¹ Ottawa officials became convinced they would lose a challenge and gave way. The movement to liberalize foreign investment rules had become a means to disempower government from regulating business.¹¹

A second example illustrative of Chapter 11's anti-regulatory impact was the federal government's abandonment of its attempt to eliminate the use of the gasoline additive MMT. Ethyl Corporation of Virginia, the producer of this octane enhancing

7 NAFTA Article 1138.

8 Susan Goodeve, "Canada Commits to Trade Liberalization," Section 2194 in Peter Haydan and Jeffrey Burns, eds., *Foreign Investment in Canada* (Scarborough: Carswell, 1996).

9 Susan Goodeve, "Canada Commits to Trade Liberalization," .

10 Schneiderman, "NAFTA's Takings Rule," 499-537.

11 Julie A. Soloway, "NAFTA's Chapter 11: Issues and Perspectives," forthcoming *Canadian Yearbook of International Law*. [I'll have to ask Julie S]

chemical, had been unable to persuade Washington to request a dispute panel be struck under Chapter 20, NAFTA's regular process for government-to-government conflict resolution. Since the US Environmental Protection Agency had banned MMT since 1977 because it was considered a dangerous neurotoxin suspected of accelerating the onset of Alzheimer's Disease, Washington was unwilling to expend political capital on contesting Canada's right to ban trade in the same substance. Using Chapter 11's investor-state dispute provision, Ethyl was able to bypass its government's reluctance to fight on its behalf. The Virginian company put forward a claim that Ottawa's legislated ban on the fuel additive had cost it US\$250 million in lost business and future profits.¹²

If governments are afraid to make policy that could potentially step on the toes of corporations thanks to Chapter 11's new judicial process, it shows how the political system has ingested the new normative system. The Canadian government's reversal of its cigarette packaging policy and of environmental regulations conflicting with corporate interests suggest that, under the supraconstitutional aegis of Chapter 11, the issue is no longer which level of government -- federal or provincial -- should initiate a regulation. It becomes whether either level of government *can* initiate such legislation at all.¹³ Beyond questions surrounding this stunning and unappreciated change in Canada's constitutional sovereignty and regulatory autonomy, these examples raise the spectre of a serious democratic deficit.

5. Political Will

NAFTA's constitutional structure is most vulnerable in its fragile legitimacy, which is sorely tried by perceptions of Chapter 11's investor-state injustice. Brought into effect over the objections of a majority of Canadian voter opinion (57 percent of the electorate voted in 1988 for parties opposed to CUFTA), bilaterally negotiated economic integration has been controversial from its inception. Although NAFTA has been less politically polarizing, its acceptance has been grudging, and conditioned by a circumstance of dubious authenticity. The great success attributed by trade promoters to NAFTA, citing major increases in crossborder transactions, appears to be more attributable to a drastic devaluation of the Canadian dollar than to the new rules for economic integration.

Under the dispute mechanism established by Chapter 11, cases initiated against a municipal, provincial or federal government under the investor-state provisions of Chapter 11 are not heard before a Canadian court using Canadian jurisprudence. These investor-state@ disputes are arbitrated before an international panel. Since each of these forums operates according to the norms of *private* international commercial law, Chapter 11

12 Elizabeth May, "Fighting the MAI," in Andrew Jackson and Matthew Sanger, eds., *Dismantling Democracy: The Multilateral Agreement on Investment and Its Impact* (Toronto: Lorimer, 1998), 32-47.

13 Schneiderman, *supra* n.5, at 535.

disputes actually transfer the adjudication of disputes over government policies from the realm of public law to corporate law and from the federal sphere to the global orbit, with several serious implications.

Several basic values held dear in the common law tradition are violated by this process.

Transparency is the first victim in this secret world of commercial arbitration. Proceedings are held in camera. The briefs that document the parties' pleadings and even the existence of a case may be kept secret, if the parties so wish. The public may never learn what has happened or why, even though its government may have been forced to change its legally adopted regulations as a result of this process. In response to this problem, the NAFTA Free Trade Commission declared on July 31, 2001 its members' intention to make available all documents submitted to or issued by a Chapter 11 tribunal, subject to some restrictions.

Arbitrariness is another quality of this new corporatized justice. After Ottawa abandoned its MMT legislation, a second piece of federal environmental legislation was invalidated in another Chapter 11 arbitration that had even more devastating implications. When Ottawa banned the export of PCB waste, it was conforming with one of the three international environmental treaties which have precedence over NAFTA. Nevertheless, S.D. Myers, an American waste disposal company with all its facilities in the US, triggered an arbitration. In a flight of apparently stupefying legal arbitrariness, the arbitrators deemed the Canadian ban to have violated Article 1102 on national treatment (on the seemingly aberrant grounds that it discriminated against a facility in the United States). Notwithstanding the multilateral Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, the bilateral Canada-US agreement Concerning the Transboundary Movement of Hazardous Wastes, and the trilateral NAFTA whose Article 104 acknowledges the primacy of these international environmental treaties, the Myers tribunal added to its exercise in judicial high handedness by ruling that Canada was not authorized to institute a ban on the export of hazardous waste. Confidence in this process can hardly grow when arbitrators are described by an appellate judge as misreading the documents before them and when the judge himself is then declared ignorant by a NAFTA practitioner¹⁴. Nor is it helpful to judicial stability when the precedential weight of these decisions is unclear.

Under Chapter 11, there are only limited rights of appeal. These are to be filed in the jurisdiction where the arbitrators declared their formal address, which may not be that of the defending government.¹⁵ When the US waste disposal company Metalclad used

14 Todd Weiler, "Metalclad v. Mexico: A Play in Three Parts," [CBLJ], 14.

15 Although the tribunal in the Metalclad case held its hearings in Washington, it selected Vancouver as its formal location. This meant that Mexico's appeal of its ruling was held under

Chapter 11 to attack the environmental order made by a Mexican village that had shut down its landfill site, the arbitrators, who met in Washington, ruled in the company's favour. Because the tribunal had named Vancouver as its nominal address, the Mexican government's appeal had to invoke the jurisprudence of British Columbia, adding yet another twist of legal exotica to Chapter 11's constitutionalizing effects. If, for instance, a tribunal dealing with an American company's complaint against a provincial policy selected Guadalajara as its formal address, the appeal would trigger the jurisprudence of the state of Jalisco, and would involve a civil law tribunal being asked to adjudicate a common law based dispute.

Neutrality is another legal value that falls by the wayside. The plaintiff investor has the right to appoint one of the three arbitrators, so the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values. The sociology of the panellists' selection makes it more likely that they will respond to the legal arguments presented to them by privileging the norms of international private law.

Judicial sovereignty is still another victim of this extraordinary addition to the Canadian legal order. Investor-state arbitration creates a further source of quasi-constitutional norm-making because a privatized process, whose rulings have direct effect in the member states' policies and institutions, will bypass the regular courts¹⁶. As the investor and the state each have the right to appoint one arbiter and since the panel's chair is chosen by consensus, it is likely that there will be just one Canadian on tribunals that are adjudicating suits launched against Canadian governments. This suggests that, when a norm of international investment and commercial law comes into conflict with a Canadian legal standard, the latter is likely to be overridden.

Since American investment and commercial law tends to prevail in international private law cases, conflicts between American corporations and the Canadian state will inexorably cause US legal definitions to infiltrate Canadian legal standards and force Canadian governments to operate as if American law on Aregulatory takings@ applied to them. While some expected that the notion of Aexpropriation@ would be interpreted differently by Canadian, American and Mexican jurisprudence,¹⁷ it is generally acknowledged that the United States's rules would supersede the views of the other two signatories when it came down to arbitral panel findings.¹⁸ The American program of signing a series of bilateral investment treaties, begun in 1981, has lent credence to the

the laws of British Columbia, which, needless to say, are far removed from Mexico's.

16 In the *Metalclad* case, the tribunal ruled that the local municipality had exceeded its constitutional authority, a judgment that hitherto only the judges of the Supreme Court of Mexico had been able to make. Mann, *Assessing the Impact of NAFTA*, 31. (full reference in note 3)

17 Richard Dearden, "Arbitration of Expropriation Disputes Between an Investor and the State Under the North American Free Trade Agreement," *Journal of World Trade*, 29:1 (February, 1995), 127.

idea that expropriation occurs whenever a state regulates arbitrarily or discriminates against the financial interest of a foreign investor.

The new system was skewed because corporations were given new rights and opportunities that citizens of the three countries did not enjoy. Even though firms have been given greater freedom to locate where they wish (and so leave unemployed workers left behind when branch operations are closed), no balancing obligations have been imposed on them by continental-level institutions with the clout to regulate their behaviour, redistribute some of their winnings through taxing the winners, or to monitor the newly created continental market that has begun to emerge.¹⁹ Nor were Chapter 11's new corporate rights balanced by a requirement to promote the public interest by protecting the environment or public health. NAFTA was unlikely to enjoy high legitimacy among the public so long as it empowered the continental market less by creating a new institutional structure than by reducing member states' capacities and by making it possible for capital to discipline governments that stood in its way.

Exclusion of citizens from privatized continental justice system is a further delegitimizing feature. Access to dispute settlement under NAFTA varies according to subject and chapter. The restriction of standing to corporate and governmental players further skews the course of continental justice. In the MMT affair, Ethyl Corp. claimed that the federal government could not provide "convincing evidence that MMT puts toxic levels of manganese into the air."²⁰ Had qualified NGOs been allowed to provide the missing scientific information, the final outcome might have been quite different.

The democratic deficit accompanying NAFTA's legal deficit also involves the organized role of citizens. Unless they are corporations, third parties are generally excluded from continental environmental disputes. Given that citizens and their non-governmental organizations (NGO) can neither launch a complaint, nor be involved until the matter reaches the panel stage, the public is effectively shut out of the various dispute settlement processes of continental governance.

IV CONCLUSION

18 "The term 'expropriation' includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project." United States Foreign Assistance Act of 1969, Section 238, cited in Richard C. Levin and Susan Erickson Marin, "NAFTA Chapter 11: Investment and Investment Disputes," *NAFTA: Law and Business Review of the Americas* 83:2 (1996), 97.

19 Stephen Blank and Stephen Krajewski, "U.S. Firms in North America: Redefining Structure and Strategy," *North American Outlook* 5:2 (February 1995).

20 Editorial, "Mad Ministers Thwarted," *Financial Post*, July 21, 1998, www.sice.oas.org

Finding the right cure depends on achieving the correct diagnosis. But in this case doctors can be found offering advice across a broad menu of remedies.

Diagnosis 1. There is no problem because the patient is normal.

For some, the patient is growing healthily. Any reported discomfort is but an indication of growing pains. Investor-state dispute settlement applied to Canada is simply the extension of an international trend visible in hundreds of other bilateral investment treaties. From this perspective, any intervention would be a mistake likely to cause more harm than it prevents.²¹

Diagnosis 2. There is difficulty in one limb.

Among the many who believe that there is indeed a problem, specifically located in Chapter 11's investor-state dispute system, there are three main schools of thought.

Prescription A. Only a local infection: the immune system needs stimulating.

The patient can heal itself; the problem can be corrected through the workings of NAFTA's own institutions.

NAFTA was created with a minimal institutional structure in the interests of maintaining maximal autonomy for what remained of each member state's sovereignty. The North American Free Trade Commission is mandated to supervise NAFTA's mechanisms, resolve disputes that have arisen over the meaning of its text, and to take whatever steps may be necessary for its future development. So far the Commission has shown few signs of life beyond the yearly powwows of the three countries' trade ministers. In addition to these executive and managerial functions, the Commission also has a legislative role. It can provide interpretations of NAFTA's clauses and annexes which are binding on arbitral tribunals set up under Chapters 11.

Because of the uproar over the Ethyl, S.D. Myers, and Metalclad cases among Canadian environmentalists, the Canadian government has lobbied its NAFTA counterparts since 1998 to amend the investor-state dispute feature of Chapter 11. Mexico was opposed to the change on the grounds that Mexico's attractiveness to foreign capital lay in offering iron clad guarantees of investor rights - so Canada could not obtain a trilateral consensus to make this change.

Finally, on July 31, 2001, the three trade ministers were able to agree on the meaning of international law in Article 1105 (it means international customary law) for use by Chapter 11 arbitrators. The clarification is unlikely to have much effect.²²

Prescription B. Deformity: requires corrective surgery.

Chapter 11's dispute process violates accepted legal norms with serious de-

²¹ Weiler, "Metalclad v. Mexico." [full reference in fn 13]

²² Todd Weiler, "NAFTA Investment Arbitration." - This is the article that Todd sent around before the panel: Jacob, do you have the full reference? -

legitimizing effects on the whole trade liberalization project because it puts complex and serious societal issues into the hands of narrow, text-based specialists. In this optic, the NAFTA Trade Commission's July 31 interpretation on Chapter 11 arbitrations is a temporary analgesic which will do nothing to cure the disease. NAFTA needs amendments more substantial than can be achieved by the Commission's interpretations in order to safeguard environmental, health, and safety regulations from challenge on the grounds of expropriation.²³

Prescription C. Gangrene: requires amputation.

The whole principle of endowing foreign corporations with rights to sue national governments in an international commercial legal order is equivalent to gangrene. The problem can only be resolved by surgically removing the investor-state dispute process from Chapter 11.

Diagnosis 3. The problem is not incidental ; it's systemic

For many diagnosticians outside the legal profession, the malady is the general one of a democratic deficit. For them NAFTA endowed the continental marketplace with greater powers without creating any corresponding supranational regulatory institutions responsive to civil society. Those expressing this analysis are NGOs and concerned citizens who feel that, in the negotiations that created trade liberalization, a fast one was pulled over them by negotiators who were either extremists committed to a narrow ideational system based on libertarian economics or were less militant but badly informed about the implications of what they had signed.

If the disease is cancer not gangrene, the treatment must be more radical. Beyond mere surgery there must be chemotherapy and radiation to rid the body of the cells that develop corporate tumours and devastate democratic tissue.

* * *

Institutional change results less from intellectual analysis than from the exertion of power. The power of those who chant Afix it or nix it@ outside the venues of international financial institutions' annual meetings is at best indirect. But what is cure for anti-neoconservatives is poison for transnational capital.

However inadequate the norms and institutions of North American governance may appear to be to the outside observer, they are unlikely to be either fixed or nixed since they serve the interests of those continental TNCs who lobbied for their negotiation in the first place. Indeed, as long as transnational capital and the international community of trade lawyers which serves it remain so hooked on libertarian views that they cannot tolerate any democratic constraint on their NAFTA-based judicial empowerment, then, with Leonard Cohen, we will have to concede that Athere ain't no cure for@ loving Chapter

²³ Julie Soloway, "Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11" (2000) 33 CBLJ 11.

24 As Cohen puts it in his second stanza of *There Ain't No Cure For Love*, "I'm aching for you baby / I can't pretend I'm not / I need to see you naked / In your body and your thought. / I've got you like a habit / And I'll never get enough / There ain't no cure, / There ain't no cure, / There ain't no cure for love ."