FOREWORD

THE RIPPLES OF NAFTA

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International rules relating to the treatment of foreign direct investment have generally been relegated to a backwater within public international law. For the greater part of the 20th century fundamental questions in the field—such as whether sovereign states are entitled to expropriate foreign investors' property without payment of compensation—were generally not resolved by national or international judges, whether within permanent courts or arbitral bodies. Issues like these were settled (if resolved at all) by political negotiations among states—as occurred after the Mexican and Russian revolutions early in the 20th century and a wave of expropriations in the wake of decolonization. They were also eventually the subject of considerable political machinations in the world's "town square," namely the U.N. General Assembly where the Group of 77 sought (unsuccessfully) to establish in the 1970s a "New International Economic Order" (NIEO). While on occasion, bilateral diplomatic efforts led to more legalistic modes for resolution—such as the Mexican-United States Claims Commission, sporadic *ad hoc* arbitrations (such as those arising from Libya's nationalization of oil concessions), and the Iran-United States Claims Tribunal—only rarely were transnational investment disputes the subject of judicial or arbitral consideration prior to the later half of the 1990s.

It was not only that foreign direct investment (FDI) rules were usually not the subject of adjudication. For much of the 20th century, foreign investment law was only sporadically the subject of treaties. While the United States Treaties of Friendship, Commerce and Navigation (FCNs), dating back to the 19th century, included some consideration of these issues within the context of bilateral trade relations, these FCN treaties were concluded largely between wealthy trading partners, such as the United States, Germany, and France, and not between these states and developing states whose practices and scholars were, at least by the 1960s and 1970s, casting doubt on the rules of the game. Further, the specificity of FCN treaties with respect to investment issues varied, with many of these agreements providing only ambiguous standards, such as national and most-favored-nation treatment, largely drawn from trade in goods.

The other established sources of FDI international legal obligation were scarcely better. Diplomatic settlements, including lump-sum settlements between

communist countries and the capitalist West, were a highly ambiguous form of "state practice" evincing dubious (if any) relevant *opinio juris*. As is suggested by innumerable scholarly debates on the subject, at least prior to the rise of bilateral investment treaties (BITs) custom could hardly be counted on to provide reliable answers. And divergences among national laws, including Latin American constitutions and national legislation faithful to the Calvo Doctrine, and laws and decrees authorizing nationalizations elsewhere, made recourse to comparative legal analysis, sometimes used to generate "general principles of law," equally unsatisfactory—at least from the perspective of the foreign investor seeking protection or reliable remedy for state action alleged to be in violation of international rules of state responsibility.

For all these reasons, the U.S. Supreme Court was not wrong when a majority of its Justices concluded, in 1964, that few issues of international law were as unsettled as the rules governing the expropriation of alien property.[1] At that time, lawyers looking to relevant international "caselaw" could only turn to a handful of precedents, most prominently the Permanent Court of Justice's decision in Chorzow Factory, along with a handful of arbitral decisions, such as those discussing "denial of justice" or the "international minimum standard" by the Mexican-U.S. Claims Commission.[2]

This brief account helps to explain why this book is both necessary and valuable. Without some familiarity with the historically still waters of international law addressing FDI, it is difficult to understand why the NAFTA's investment chapter's still meager arbitration practice—consisting of a handful of cases decided on the merits and less than 30 known claims now in the pipeline—casts such large normative ripples. The uninformed might wonder what there is to discuss, much less celebrate, on Chapter 11's tenth birthday. The few NAFTA investor-state arbitral decisions issued to date, at least on non-procedural matters, do not, after all, compare numerically with the relatively dense caselaw produced by WTO panels and its Appellate Body, resulting from some 200 inter-state challenges filed under the WTO's dispute settlement just from 1995 through 2000, much less with the many hundreds of claims filed under at least some of the over 50 international dispute mechanisms now in place around the world.[3] But, as is the case, for example, with respect to the relatively few number of decisions issued by the two *ad hoc* war crimes tribunals, in the case of the NAFTA, the paucity of decisions on the merits misleads. Both international criminal law (which was, at least prior to the establishment of the *ad hoc* tribunals in the mid

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[1] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, at 428 (1964).

[2] For a good summary of the history of investment rules in the 20th century, *see* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW, at 387–454 (2002).

[3] For a list of these dispute settlers, *see* the chart (regularly updated) *at* The Court of Justice for the European Community, at Luxembourg, and the European Court of Human Rights, at Strasbourg, to cite the most prominent examples, deal with hundreds of claims each year.

1990s, largely grounded in the few pronouncements of Nuremberg) and foreign investment law are now in the midst of intense development, if not a revolution, and this is in substantial part the result of developments within international dispute settlement.

Numbers of claims aside, it is not difficult to see why the investor—state dispute settlement mechanism within NAFTA's Chapter 11 draws the attention of scholars, experts in public policy, and members of the general public. The interest of business is easy to account for: few multinationals can afford to be uninterested in their rights within the largely inviting U.S., Canadian, and Mexican markets. As several of the authors here suggest, given the NAFTA's potential effects on existing national laws and practices, as well as its potential chilling effects on contemplated measures undertaken at the local, state, provincial or other levels, the intense interest (and some concern) evident among government officials at all levels within the NAFTA treaty parties is also not hard to understand. The same holds for those who watch over their actions, namely non-governmental organizations, especially those concerned with the effects of Chapter 11 on environmental regulation and labor rights. As Bryan Schwartz's chapter in this volume points out, others around the world, including foreign governments and other international organizations, pay attention to the NAFTA because of its potential impact on: general customary rules, the interpretation of current, or the negotiation of future, BITs, post-Doha Round possibilities within the WTO, and prospective regional arrangements such as the contemplated Free Trade Agreement for the Americas (FTAA).

FDI law is also emerging from the shadows in part because there are simply more people, in and out of business, likely to be impacted by the rules directed at foreign investors. The past two decades have seen a substantial rise in transnational investment flows as well as, and perhaps more importantly, an apparent shift in the attitudes of developing states toward such flows. As is well known, the wave of post-WW II nationalizations have not just stopped; in most cases, they have been replaced by privitizations, including privatization of economic sectors that once had been dominated by state enterprises and had never been held in private hands. Today, developing countries are most often engaged in competing among themselves for, not resisting, foreign investment. BITs, once considered an instrument for rich states to ensure that developing host states treated alien investors in their midst properly, have also become an instrument of public policy as between developing states. While some predict that developing countries' recently acquired fondness for free investment flows will, sooner or later, generate a public backlash against it (as it already has in some countries in Latin America), even critics of FDI acknowledge that existing investment treaties will make a return to the NIEO exceedingly difficult.[4] U.S. BITs, for example, pur-

[4] *See, e.g.*, Amy L. Chua, *The Privitization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995). For an argu-

port to last for a minimum of ten years upon ratification and guarantee that existing investors will retain their rights for an additional ten years even if the treaty were terminated in accordance with its terms.[5] Since foreign direct investment, unlike perhaps transactions involving trade in goods, is intended for the long haul, FDI rules of the game, whatever they are, cannot be quickly altered, even when governments change.

The NAFTA, the first multilateral agreement to replicate (and add to) the substantive guarantees accorded to foreign investors in bilateral treaties, also secures attention (if not always respect) merely because the world lacks a clear alternative. Unlike trade, there is no comparable institution charged with interpreting or developing foreign investment law. While the Organization of Economic Development (OECD) has generated a Code of Capital Movements, for example, that Code is limited in scope and lacks a mechanism for on-going binding interpretation of even inter-state disputes relating to its interpretation.[6] The OECD's efforts to negotiate a Multilateral Agreement on Investment (MAI) floundered, and despite forays into investment in the context of services and Trade-Related Investment Measures (TRIMs), many question whether the WTO is ready to serve as the forum for a comprehensive agreement on investment comparable to the MAI.[7] Further, while the ever-growing network of BITs—now numbering over 2000 around the world—can in theory generate an abundant number of *ad hoc* arbitral decisions, to date, BIT arbitrations (as under ICSID) have not been abundant, although the number of such arbitrations are increasing (perhaps spurred by developments surveyed in this book).[8] There have been, at least to date, relatively few alternative opportunities for documented case by case applications of international investment law to concrete fact.

Interpretations issued under the NAFTA—whether by arbitrators convened under its investor-state dispute settlement procedures or even by the NAFTA parties themselves pursuant to a Commission interpretation authorized under NAFTA Article 2001(2)(c)—naturally draw attention as well because of the state

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ment that developing states have been essentially coerced into accepting BITs, *see* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998). It is also true, of course, that the lending and other policies of the International Monetary Fund would make a return to the days of nationalization very painful economically for those states dependent on the Fund.

[5] *See, e.g.*, Investment Treaty with Egypt (June 27, 1992), art. XIII.

[6] *See, e.g.*, Code of Liberalisation of Capital Movements (2003) *available at* (OECD official website).

[7] *But see* Bryan Schwartz's foregoing chapter for cogent arguments in favor of such an attempt. For a contrary view, *see, e.g.*, Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77 (2003).

[8] As of September 15, 2003, there were 62 cases listed as pending, compared to 76 cases listed as concluded on ICSID's website. *See* http://www.worldbank.org/icsid/cases/cases.htm.

parties involved. The NAFTA deals with disputes among *particular* repeat players, namely two of the leading exporters as well as importers of foreign capital, including the world's remaining superpower and most influential member of the World Bank and the International Monetary Fund (institutions whose own impact on FDI law is not inconsequential). The NAFTA has also involved more than a dozen disputes to date that pit investors from one of those wealthy states against the government of Mexico, one of the key leaders of the old NIEO movement, a capital importing state that is still widely regarded as a leading advocate of the "Global South." The investment-related interpretations emerging from the NAFTA, therefore, represent the views (or at least practices) of extremely influential, and of course, "specially affected," states. While the NAFTA's investment rules remain the product of a "regional" arrangement that lacks the representative legitimacy of an institution with more universal membership, this is not just any regional arrangement. Both North and South, East and West have an interest in how Chapter 11 evolves and whether it succeeds. If the efficacy and justice of globalization amidst stark differences in the wealth of nations has a test case, the NAFTA may well be it.

The reasons why FDI lawyers are naturally drawn to the investor-state procedures of the NAFTA are also clear. Neither substantive FDI protections nor the procedural or evidentiary rules that govern arbitrations are self-explanatory. While the 1990s saw the proliferation of BITs, as well as the negotiation of the NAFTA, there are considerable uncertainties with respect to how the fundamental protections accorded under such treaties (not to mention under customary law) will be interpreted. While the relative standards contained in investment treaties, namely national and MFN treatment (sometimes for entry but always upon establishment), have a pedigree that predates BITs and the NAFTA, it is not yet clear, as a number of the chapters in this volume indicate, whether the meaning of such guarantees will (or should) parallel those given by WTO dispute settlers or national courts in the context of trade in goods. And the more absolute investor rights contained in the NAFTA—"fair and equitable treatment" and "full protection and security" (whether or not in addition to or as a more particularized application of older rights recognized in customary international law), the obligation to pay compensation upon expropriation, the guarantee of free transfers of profits, the prohibition on certain performance requirements, and the restrictions on national discrimination with respect to appointment of senior management and boards of directors—are either unique to foreign investment or depart in some respects from comparable WTO guarantees. The substantive guarantees of the NAFTA's investment chapter are not simply WTO norms applied to (generally) less movable objects. Equally open to creative gap-filling by advocates and arbitrators are the many procedural matters addressed by contributors here, including whether by pursuing a claim in local court, an investor has "waived" its right to international arbitration, the consequences of choosing a arbitration venue, complex questions on the handling of discovery, as well as the documentary and oral evidence ultimately produced, the conduct of oral proceedings, and the determination of damages. The lacunae within the relevant arbitration rules with respect

to such matters are surprisingly deep and wide. Lawyers invariably pay heed to a process likely to generate so much new law.

In addition, as a number of the authors in this volume point out, despite similarities between the dispute settlement provisions of the WTO and those governing investment in the NAFTA, the differences between these dispute settlement mechanisms are striking as well and likely to lead to divergent outcomes, especially with respect to procedural issues and remedies. Despite the behind-the-scenes involvement of private business interests in WTO dispute settlement, that mechanism remains, fundamentally, in the hands of the state contracting parties. If a contracting state within the trade regime injured by another state's action does not have a diplomatic interest in bringing a claim, it has the discretion not to bring the matter up to a WTO panel. The GATT contracting parties can, and often do, resist business pressure to bring certain claims that may prompt concerns among important domestic constituencies, including NGOs or powerful political lobbies. Despite concerns among European businesses troubled by the threat of U.S. unilateral sanctions on trade with Cuba, for example, European complaints directed at challenging the U.S. Helms-Burton Act have not been maintained before the WTO. In addition, the number of WTO claims resolved by WTO panels is vastly eclipsed by the numbers of inter-state claims settled quietly by the state parties to the WTO, with no assurance that (and considerable doubts about whether) such settlements are in compliance with the rights contained in the relevant agreements.[9] The WTO's dispute settlement scheme, to this extent, tempers the rights that it ostensibly accords traders of goods. For these reasons, it is not entirely inaccurate to see the WTO covered agreements as extending rights to *states*, rather than to private parties.[10] States, rather than their traders, have the right to trade—or at least to enforce this right.[11]

By contrast, the NAFTA's negotiators turned to the market with respect to investment disputes. They privatized what were, at least prior to BITs, inter-governmental disputes, permitting those alleging injury to themselves decide whether to bring an international claim and rendering the enforcement of any resulting awards less subject to diplomatic whims or the existence of trade leverage. They

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[9] According to a detailed study of GATT/WTO disputes initiated from 1948–1999, three-fifths of all disputes end prior to a panel finding, and of these, most occur without even the request of a panel. Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000). It is very difficult to evaluate just how many of these settlements reflect political, as opposed to legal, judgments and are therefore not faithful to the law.

[10] This is especially true to the extent that most WTO members have refused to make the commitments made under the trade regime "self-executing" within their national courts, thereby permitting private rights of action. *See* IMPLEMENTING THE URUGUAY ROUND (John H. Jackson & Alan Sykes, Jr., eds., 1997).

[11] Indeed, states' rights to enforce under the WTO relate not only to their discretion on whether to bring claims to the WTO's dispute settlement body. Even when they do so, states' retain the right to enforce since the ultimate WTO remedy is sanctioned trade retaliation.

treated investment guarantees more like treaty rights accorded to individuals under regional human rights treaties such as the European Convention of Human Rights or the American Convention of Human Rights or the diverse rights accorded individuals and companies under European Community law. Jurisdictionally, NAFTA dispute settlement is less like the WTO's, than it is like the European Court of Justice at Luxembourg or the European Court of Human Rights at Strasbourg, each of which is also open to individual claims directed at alleged state violations of particular treaty commitments and each of which produces binding adjudicative judgments that are routinely enforced. Unlike the WTO which retains aspects of inter-state dispute resolution comparable to those of the International Court of Justice, Chapter 11 of the NAFTA provides what Keohane and others have labeled as a new form of dispute resolution, namely "transnational" dispute settlement.[12]

As a number of scholars have suggested, transnational dispute settlement like that provided in the NAFTA's Chapter 11 is at least in principle more likely to generate litigation than is traditional inter-state dispute settlement. The leading empirical example for this proposition is, of course, the European Court of Justice, whose abundant, far-reaching (and creative) caselaw has led, in the views of most commentators, to the "transformation" or "constitutionalization" of Europe."[13] While NAFTA's investor-state method for settling disputes lacks some of the prominent features that have made the European Court of Justice such an effective instrument for legal development (such as the power for national courts to direct inquiries to that Court, thereby drawing national courts into the international integrative process), it shares with that Court the feature which some believe is the principal reason for that Court's success, namely private party access. Thus, Alec Stone Sweet argues, for example, that when private non-state litigators are given access to institutionalized dispute settlement, "triadic rule-making" tends to emerge, given that third-party dispute settlers, forced to fill legal gaps in the course of applying principle to fact in an ever-growing number of cases, need to justify their result normatively.[14] Sweet argues that under specified conditions, judicial law-making becomes in such cases self-perpetuating and for its judges, self-aggrandizing, as additional rules feed ever more litigation, which generates ever more disputes, and an ever greater reliance on judicial structures. For Sweet, as for international lawyers who seek to displace the political resolution of disputes with their legalization, the result is a "virtuous circle" that can lead, as in Europe, to the "judicialization of politics."[15]

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[12] *See* Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000).

[13] *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

[14] Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 147, at 152–57 (1999).

[15] Sweet, *supra* note 14, at 163–64.

As Atik, among others, in this collection point out, this is not how critics of the NAFTA would describe what is now happening pursuant to investment arbitration. For groups like Public Citizen, the process that Sweet describes and extols is the very reason why, in their view, the NAFTA "bankrupts democracy."[16] Judicial (or arbitral) law-making scares some people, particularly those in the United States for whom "delegating" prominent public policy issues to international fora is largely alien or vaguely extra-constitutional.[17] Whether or not such fears are warranted, the NAFTA investment chapter has some built-in checks on arbitral law-making. The NAFTA provides Canada, Mexico, and the United States with a mechanism for issuing joint "interpretations" of their agreement. As a number of the authors in this volume address, the NAFTA parties have already taken advantage of this provision twice, in apparent reaction to arbitral rulings. The continuing opportunity to issue such interpretations, whether in reaction to or in anticipation of particular claims, is only one reason why NAFTA investment arbitration may never fully emerge as the mechanism for "constitutional" development that the Court of Justice has become.

The NAFTA is obviously a far more limited tool of economic integration than is the European Union. The NAFTA lacks comparable legislative and rule-making institutions—from the European Commission to the European Parliament. It also lacks the expansive substantive guarantees contained in the relevant European agreements. The NAFTA anticipates free flows of capital and goods (and perhaps some, very limited, number of high-level managers engaged in investment) but not, for example, the free flow of persons. More importantly, the state parties of NAFTA lack the integrative goals of all (or most) Europeans. Absent colossal and unanticipated political changes within the polities of the three NAFTA parties, these states would never tolerate, for example, NAFTA arbitral decisions comparable to the key seminal decisions issued by the European Court of Justice in its early days that, through innovative judicial interpretation, rendered international rules issued by Community institutions "directly applicable" in national law.[18] Moreover, unlike the European Union, or for that matter even the

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16 *See* Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* (September 2001), *available at* http://www.citizen.org/publications.

17 As is well known, the United States has been largely adverse, except in the context of the NAFTA and the WTO, to binding forms of multilateral dispute settlement. Indeed, as a result of the ICJ's upholding of jurisdiction in the Nicaragua Case, the United States renounced the compulsory jurisdiction of that Court and has refused to ratify, for example, the optional protocol of the International Covenant for Civil and Political Rights (ICCPR) (providing for an individual complaints mechanism). The United States is also not a party to the American Convention of Human Rights and thus is not subject to the jurisdiction of the Inter-American Court of Human Rights. *See generally*, LORI DAMROSCH, ET AL., INTERNATIONAL LAW (4th ed. 2001). Despite the United States' reticence to participate in such regimes, some U.S. constitutional scholars are quite threatened by the possibility of supranational "delegations" of power. *See, e.g.*, Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003).

18 *See* Van Gend en Loos v. Nederlandse Administratie Der Belastinger, Case 26/62, [1963]

WTO, the NAFTA lacks a permanent adjudicative body amenable to repeat iterations among its membership or charged with serving as a *de facto* court of appeal to reconcile inconsistent rulings on the law. Although, as a number of commentators in this book point out, NAFTA investor-state arbitrations may nonetheless generate a body of harmonious interpretations of the relevant law, that result is not preordained. Indeed, as the discussions of even the few NAFTA decisions issued to date contained in this book suggest, there is some indication the individual arbitrators chosen to hear certain claims will not always accord deference to the prior rulings issued by their *ad hoc* brethren and there is no clear requirement in the NAFTA itself that they must do so.[19]

NAFTA dispute settlement may not become the engine for vigorous (or harmonious) adjudicative law-making that the Luxembourg Court now is for yet another reason. As Noah Rubins points out in his contribution to this volume, there is a very different relationship between national and international adjudicative bodies under the NAFTA. NAFTA arbitrators are not formally given review powers over NAFTA parties' national courts—although as *dicta* in the decision issued in the *Loewen* case suggests, this is not inconceivable in certain circumstances—but it is clear that national courts charged with the review and enforcement of NAFTA arbitral awards have the power to review such awards at least to some extent and have already done so. As several commentators discuss in their respective contributions, at least one domestic court in Canada has treated a NAFTA arbitral decision with considerably less deference than is usually seen in connection with international arbitration awards.[20] As Leonel Pereznieto and Sergio Puig argue in their chapter, to this extent the NAFTA's investment chapter leaves local judges in the seat of arbitration ultimately in charge of the destiny of the treaty.[21] For these reasons and others as well, the analogy to European

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E.C.R. 1; Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL), Case 6/64, [1964] E. C. R. 585. This is a distinct quextion from whether, *under the national laws of any of the three NAFTA parties and not as a result of international judicial law making*, provisions of a treaty are rendered self-executing under national law. As Bjorklund notes in her chapter in this book, Mexican law apparently provides for such effect, thereby requiring a distinct reservation under Annex 1121.1(a) of the NAFTA.

19 For a general critique of the NAFTA investment dispute settlement process to date along these grounds, *see, e.g.*, Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VANDERBILT J. TRANSNAT'L L. 37 (2003). Indeed, Brower recommends as a remedy, among other things, establishment of a standing Appellate Body.

20 *But see* J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433 (2002)(defending the Supreme Court of British Columbia's review of the *Metalclad* decision).

21 Perhaps this is the NAFTA's answer to the doctrines of "subsidarity" and "margin of appreciation" deployed by the Luxembourg and Strasbourg courts to respond to local sensitivities. For discussion of these interpretative principles in the context of Europe, *see, e.g.*, Herbert Petzhold, *The Convention and the Principle of Subsidiarity*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, 41, 59–61 (Ronald St. J. Macdonald, et al. eds. 1993); Ronald St. J. Macdonald, *The Margin of Appreciation*, *id.* at 83. But note that the local court reviewing a NAFTA arbitral award may not be a court within the NAFTA party most directly affected

Community law—where some acts taken by Community institutions are subject to direct effect and where the judgments of the Court of Justice are rarely second-guessed by national courts—can only be pressed so far.

Comparison between NAFTA's Chapter 11 and systems for human rights protections raise even more complex issues. As Ian Laird's and David Gantz's chapters in this collection suggest, certain provisions of the NAFTA, notably Article 1105 (fair and equitable treatment in accord with international law) and Article 1115 (anticipating "due process before an impartial tribunal") are reminiscent of long-standing human rights standards, under relevant treaties and customary international law. The NAFTA, along with the relevant provisions of ICSID's Additional Facility or UNCITRAL's *ad hoc* arbitration rules, like certain provisions in human rights treaties, anticipates that investors, like human beings generally, are entitled to a process for the resolution of their disputes which respects the basic elements of procedural fairness, including the recognition of the rights of all parties to be heard, to have due deliberation by a duly constituted tribunal, and to have a reasoned judgment free from fraud and corruption.[22] Certainly it is possible for a claim brought by an investor on its own behalf for losses suffered as a result of state action,[23] such as a violation of an investment right stemming from denial of equal access to local remedies, to constitute both a violation of the NAFTA and a violation of a human right under relevant treaties or customary international law. Moreover, even other investment guarantees provided in the NAFTA, such as the right not to be discriminated on the basis of nationality and the right to compensation when personal property is seized by the state, have human rights antecedents. All relevant human rights instruments, at the regional and international levels, bar discriminatory treatment on the basis of nationality with respect to the rights accorded therein and most of them recognize, in addition, a right (variously defined) not to be arbitrarily deprived of one's property.[24] For this reason, those pursuing takings claims under the NAFTA,

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by the award. The Canadian court in *Metalclad*, which set part of the arbitral award, was not necessarily responding to Mexican national sensitivities, much less to concerns felt in the Mexican municipality most directly affected by the foreign investment.

22 This is suggested by, among others, Gustavo Carvaja Isunza and Fernando Gonzalez Rojas's contribution in this book. *See* International Covenant on Civil and Political Rights, Article 14; European Convention of Human Rights, Article 6. *See also* V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 25 (1980) (arguing that these rights stem from two fundamental principles, namely the right of each party to be heard and the equality of the parties). While the NAFTA's dispute settlement provisions as well as the arbitration rules upon which it relies clearly anticipate that certain minimal due process standards need to be satisfied at the international level, its Article 1105 (through the incorporation of the minimum standard of treatment for aliens under customary international law) appears to anticipate that this entitlement extends to national courts as well.

23 *See* art. 1116, NAFTA.

24 *See, e.g.*, Universal Declaration of Human Rights, art. 2 (bar on nationality discrimination for purposes of the rights recognized in the Declaration), art. 17 (bar on arbitrary depriva-

including claims arising from regulatory expropriations, need to be aware of the growing human rights procedural and substantive caselaw relevant to such claims.[25] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, 213 UNTS 262, opened for signature, Mar. 20, 1952. The European Court of Human Rights decided its first case dealing with Article 1 in 1976. *See* David Anderson, *Compensation for Interference with Property*, 6 EUR. HUM. RTS. L. REV. 543, 545 (1999) (referring to *Handyside v. United Kingdom*).

The connections between the investment rights contained in the NAFTA and human rights are historical as well as textual. Accounts of the rise of international human rights norms stress that these treaty and customary norms are, like the investment rights in the NAFTA and BITs, grounded on black letter rules, state practice, and scholarship relating to state responsibility for the treatment of aliens. Human rights advocates and dispute settlers have long relied on the same cases, involving alleged denials of justice or the violation of the international minimum standard, that are now surfacing in connection with the interpretation of the NAFTA (especially in connection with interpreting relevant customary law). Indeed, the entire post-war international human rights movement might be regarded as a belated recognition that a state's own nationals ought to be accorded, under international law, the same respect that 19th century rules once accorded

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tion of property); International Covenant on Civil and Political Rights, art. 2 (bar on nationality discrimination); European Convention of Human Rights, art. 14 (bar on nationality discrimination), Protocol One, art. 1 (bar on arbitrary deprivation of property); African Charter on Human and Peoples' Rights, art. 14 (right to property); American Convention on Human Rights, art. 21 (right to use and enjoyment of property).

[25] For a survey of this caselaw in the context of the European Court of Human Rights, *see* Helen Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 N.Y.U. ENVTL. L.J. 136 (2002). This is not to imply that NAFTA's provisions governing expropriation are necessarily comparable to those protective of property rights under the European Convention of Human Rights, Protocol 1. On its face, Article 1, Protocol 1 is a great deal more solicitous to states than to owners of property, as compared to the NAFTA. Article 1 provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject o the conditions provided by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, 213 U.N.T.S. 262, opened for signature, Mar. 20, 1952. The European Court of Human Rights decided its first case dealing with Article 1 in 1976. *See* David Anderson, *Compensation for Interference with Property*, 6 EUR. HUM. RTS. L. REV. 543, 545 (1999) (referring to *Handyside v. United Kingdom*).

only to aliens (including alien investors) within one's territory. Not surprisingly, given these common antecedents, at least some human rights casebooks include sections on the protection of "freedom of enterprise" alongside more traditional civil and political rights.[26]

The connections between investor rights and human rights also help to explain some of the wider normative ripples addressed in this book. As all public international lawyers know, the rise of international human rights has prompted revolutionary developments in a field that was, heretofore, largely grounded in rules by and for states alone. Human rights advocates, such as Louis Henkin, have loudly proclaimed the demise or even the end of sovereignty in the age of human rights.[27] It should not surprise therefore if the investor-state dispute settlement provisions of the NAFTA are also seen as fundamentally threatening to notions of sovereignty.

But if the NAFTA's investment chapter is a human rights treaty, it is one with unique features. No other human rights treaty permits those accused of violations, namely its state parties, to undercut the possibility of remedying such violations merely by issuing a joint interpretation to the contrary.[28] This is one "human rights treaty" which, through its provision for periodic Commission interpretations, puts the foxes in charge of guarding the henhouse. From a different perspective, as Jeffrey Atik suggests in his chapter, the analogy to human rights is patently offensive, if not ironic: if the NAFTA's Chapter 11 is a human rights treaty, it is one for a very limited (and relatively privileged) class of human being. And, despite efforts such as the OECD's Guidelines for Multinational Enterprises (discussed by Bryan Schwartz in his chapter), it is not as if those injured by foreign investors have a multitude of equally effective international fora in which to bring their own claims. Indeed, there are very few possible international venues in which individuals harmed by corporate malfeasance (including by foreign investors) can bring claims against the responsible multinational corporation and secure an enforceable award.[29] For these reasons, not all human rights advocates are likely to see the NAFTA's investment chapter or its remedies as an ally to their cause.[30]

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[26] *See, e.g.*, LOUIS HENKIN, HUMAN RIGHTS, at 1133–49 (surveying both international and national constitutional bases for this right). Given these developments, it is not far-fetched to examine even the second type of claims that might be brought under the NAFTA's investment chapter, Article 1117 (on behalf of an enterprise) in terms of human rights precedents.

[27] *See* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31 (1995); Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y INT'L L. NEWSL., Mar. 1993, at 1.

[28] *Compare* Leonel Pereznieto and Sergio Puig's chapter which criticizes this feature of the NAFTA.

[29] *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

[30] But some public international lawyers adhere to a neo-Kantian vision in which free mar-

But the normative implications of the NAFTA's investor-state mechanism are wider still. It has been suggested that the "enormous expansion and transformation of the international judiciary" at the end of the 20th century will be regarded by future international lawyers as "the single most important development of the post-Cold War age."[31] Putting such hyberbolic assessments to one side, it is nonetheless true that an increasing number of inter-state disputes are now being resolved by international mechanisms of various kinds. The NAFTA alone provides no less than five. Apart from the investor-state provisions which are the subject of this book, the NAFTA provides for general dispute settlement procedures that resemble (but are not identical to) those of the WTO for trade issues, a specialized mechanism that replaces judicial review of national decisions regarding antidumping and counter-veiling duties, a Commission for Environmental Cooperation that can adopt non-binding recommendations and can establish arbitral panels to handle complaints that a party has failed to enforce its own environmental laws, and a tri-national Labor Commission and Ministerial Council capable of undertaking consultations and establishing arbitral panels to resolve complaints that a party is failing to enforce its labor laws.[32] While the NAFTA's investor-state mechanism has generated the most number of claims to date and the largest share of scholarly and media attention, over time it will be interesting to compare the results of these various dispute mechanisms. As Bryan Schwartz's contribution here suggests, examination of the results of the NAFTA's investor-state mechanism, as opposed to its mechanisms for dealing with labor and environmental issues, will provide opportunities to compare the efficacy of a "hard" adversarial system producing binding judgments to softer, managerial approaches to dispute resolution and issue linkage.[33]

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kets, human rights, and the rule of law are all part of a virtuous, self-perpetuating circle. *See, e.g.*, Ernst-Ulrich Petersmann, *Constitutionalism and WTO Law: From a state-centered approach towards a human rights approach in international economic law*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 32 (Daniel L.M. Kennedy & James D. Southwick eds. 2002). *See also* Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*, 57 INT'L ORG. 587 (2003) (presenting empirical evidence that democratic regimes attract higher FDI flows and are regarded as more hospitable to foreign investors). There are hints of this vision in some of the chapters in this volume. *See, e.g.*, Bryan Schwartz's chapter.

[31] Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, at 709 (1999).

[32] For descriptions of some of these, *see, e.g.*, Patricia Isela Hansen, *Judicialization and Gloablization in the North American Free Trade Agreement*, 38 TEX. INT'L L.J. 489 (2003).

[33] Many of the Chapters form part of a broader literature debating such questions. *See, e.g.*, ABRAM & ANTONIA CHAYES, THE NEW SOVEREIGNTY (1995) (endorsing less adversarial "managerial approaches"); George W. Downs, et al., *The Ransformative Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465 (2000) (expressing skepticism about such approaches); Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT'L L. 655 (1999) (re-evaluating the need for hard law in the WTO context).

As this suggests, this book should be of interest to a wider audience than investment lawyers because it illuminates more generally the rapidly changing features of international dispute settlement. The foregoing chapters form part of a relatively new discipline within public international law—the study of international adjudication in binding and non-binding fora and its interaction with more politicized actors, such as foreign ministries and NGOs. That discipline addresses a topic that emerges frequently in the pages that follow in connection with investor-state dispute settlement, namely the possibility of new kinds of forum shopping given the overlapping jurisdictions of a number of international dispute settlers, as well as complex questions arising from the possibility of parallel and successive proceedings (as among national courts and international dispute settlers).[34] For public international lawyers anxious to get their hands on the basic component of the common law, namely the development of "caselaw" (whether or not formally subject to *stare decisis*),[35] the proliferation of international dispute settlers promises an embarrassment of riches. NAFTA's investor-state claims are yet one more sign that public international lawyers no longer need to be content with parsing the relative sparse (and arcane) decisions of the World Court. Those who see the Uruguay Round as signaling the victory of the rule of law are likely to see the NAFTA's investor-state procedures in the same light: as another area where those injured by state action need not rely on the idiosyncracies of their foreign office to secure a remedy; as another aspect of foreign policy that is giving way to reliance on a distinctive form of neutral reasoning that is less power-laden, more predictable, and more stable because it is embedded in legal precedents; as another instance where parties to an international contract decide to delegate to unelected experts completion of their deal as questions arise.[36]

While there are abundant indications in the contributions here of this celebratory stance, other authors here remind us that many critics, in and out of government, take a much grimmer view of these developments (and of the globalization it represents). Those inclined to view with suspicion rule-making by an unaccountable judiciary (national or international) or who regard international institutions like the WTO as tools of blinkered or predatory economic globalization harmful to social or other values, are less likely to celebrate NAFTA's invest-

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[34] For a general overview of these issues, which includes some discussion of the NAFTA, *see* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003).

[35] NAFTA, Article 1136(1), which provides arbitration awards under Chapter 11 "shall have no binding force except between the disputing parties and in respect of the particular case," is no more likely to eliminate the consideration of prior arbitral awards by NAFTA arbitrators than the identically worded provision (in Article 59 of the Statute of the Court) has eliminated the *de facto* use of precedent in the International Court of Justice.

[36] *See* generally, JOHN H. JACKSON, THE WORLD TRADING SYSTEM 85–88 (1989) (comparing "power-oriented" diplomacy to "rule-oriented" diplomacy); Joel Tractman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999) (examining the role of WTO dispute settlement in terms of completing post-hoc the state parties' inter-state contract).

ment chapter and its powerful tools for legal gap-filling and enforcement.[37] Adverse reactions to rulings issued under the NAFTA need to be factored into our assessments of the merits of investor-state arbitration and our descriptions of how it operates. As the discussions of the emerging NAFTA decisions in the succeeding chapters suggest, there are some signs that some NAFTA arbitrators are only too aware that what they say or fail to say in their decisions can create powerful political ripples, some of which may ultimately engulf the NAFTA itself. While this book includes a section on "political" developments in the NAFTA which includes such sovereignty-laden topics as the treatment of taxation issues, matters dealing with public health, and the participation rights of interested third parties, this does not mean that politics is absent from the rest of its chapters. As is recognized by many of the authors to chapters in other portions of the book, including those dealing with substantive "primary" obligations, NAFTA arbitral decisions or the opinions of individual arbitrators evince political and not purely legal concerns irrespective of matter addressed. Decisions issued by NAFTA arbitrators on virtually any topic may demonstrate the operation of the "passive" virtues of judicial restraint that many see as a necessary element of sustaining the credibility and legitimacy of judicial review, even for established judicial bodies like the U.S. Supreme Court or the International Court of Justice.[38] Some arbitrators may reserve their most innovative suggestions to *dicta*, for fear of the consequences. Others may, on occasion, fail to do full justice to the parties actually before them, whether in terms of findings of fact or law or in terms of the award of damages, for the same reasons.

Arbitrators in and out of the NAFTA have repeatedly shown themselves to be political as well as legal actors. In this respect, NAFTA's arbitrators are no different than, for instance, national judges, WTO panelists, arbitrators in the Iran-U.S. Claims Tribunal, or the members of the ICJ, all of whom have sometimes ducked the handling of issues seen (rightly or wrongly) as "too hot to handle." Even the strongest proponents of the "rule of law" acknowledge that legal discourse arising in the course of adjudication is only *relatively* neutral, *relatively* less power-laden. Indeed, this is probably not only inevitable but, within bounds, desirable—at least if the NAFTA investment system is to survive the vicissitudes of changing political tides within the three NAFTA parties.

Perhaps the most evident fact that emerges from the chapters here is that no one will ever credibly claim, as some attempted to do in the early days of the GATT with respect to trade, that the NAFTA's investment chapter is a "self-

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[37] *See generally*, Ugo Mattei, *Globalization and Empire: A Theory of Imperial law: A Study of U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEG. STUD. 383 (2003).

[38] *See generally*, Antonio F. Perez, *The Passive Virtues and the World Court pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997) (canvassing doctrines of judicial abstention); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 754–61 (1999) (suggesting that WTO panelists deploy abstention doctrines comparable to the political question doctrine, ripeness and standing).

contained" regime. Virtually every chapter in this volume draws connections to rules or principles outside "investment" law narrowly construed. As is suggested by Todd Weiler's attempts, in his chapters on international economic law, non-discrimination, and sanitary and phyto-sanitary measures (SPS) to seek guidance from WTO caselaw, and in his chapter on causation and damages to reach for principles of domestic tort law, those arguing and deciding claims under Chapter 11 will need to master many legal specialities. And others engaged in tasks far removed from foreign investment, such as public international lawyers engaged in litigating claims in national courts or other international fora, will in turn need to look to arbitral developments under the NAFTA. Even NAFTA's sparse caselaw already addresses how and why customary law evolves; the primacy and efficacy of exhaustion of local remedies; the propriety of "teleological" treaty interpretation over resort to the original intention of the treaty parties; the meaning of "state practice," "plain meaning," or "good faith" under customary rules for treaty interpretation; the continued viability of the *Lotus* principle preserving sovereign discretion unless expressly renounced; the interpretation of successive treaties dealing with the same subject matter; the extent to which states have a right not to produce requested government documents; the extent to which transparency is a general principle of law or is otherwise embraced by customary rules respecting due process; the scope of the *compétence de la compétence* enjoyed by international adjudicators; the proper inferences that can be drawn from the failure to produce evidence; the kind of restitution appropriate when the injured business was never a "going concern;" and the prospect of residual remedial powers enjoyed by arbitrators under general principles of state responsibility—to mention only some of the cross-cutting issues canvassed by various contributors here. While NAFTA arbitrators are not likely to have the last word with respect to any of these matters, lawyers who ignore what they say might well be accused of malpractice.

The NAFTA's investment chapter and its remedies draw both ire and praise across the political spectrum. Reactions do not necessarily fall along predictable national lines. While Mexican government officials, who have to date faced the largest number of NAFTA claims and may continue to face the greatest hurdles with respect to satisfying NAFTA's expectations given the required changes to national law, might be expected to be the most leery participants in investor-state dispute settlement, their concerns are mitigated by the grim satisfaction that the wealthy nations of the North are—at long last—facing the pressures they have long inflicted on others.[39] For some Mexican officials there is also a sense that however harsh the results of investor-state dispute settlement prove to be, these are probably an improvement over the gun-boat diplomacy once deployed by the United States and the unilateral pressures which they would otherwise face even today.

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[39] As is suggested by Leonel Pereznieto and Sergio Puig's chapter.

The essays that follow remind us that the NAFTA is a Rorschach test on which many project their worst fears or earnest hopes. Is Chapter 11 and investor-state dispute settlement merely a strengthened BIT; a process that, like 20th century changes in sovereign immunity, gets governments out of the time-consuming business of espousing many of their nationals' claims; part of a conspiracy to undermine national environmental laws, to effectuate the colonization of the South by the West, or to undermine democratic governance; an important part of the "peace by pieces" that will eventually bring about Kant's vision of perpetual peace; a device to harmonize common law and civil law methods of adjudication; a catalyst for the development of universally applicable investment protections under customary law; a tool for sustainable economic development; or a testament to the power of law over power laden diplomacy? There are hints of all of these competing or overlapping visions throughout the chapters of this book.

The contributors here depict the many ripples—legal and political—of the still nascent NAFTA.