# Blowback: Investor–State Dispute Mechanisms in International Trade Agreements

ANN CAPLING* and KIM RICHARD NOSSAL**

*The North American Free Trade Agreement (NAFTA) gave unprecedented rights to private investors. These provisions quickly became entrenched in policy and practice, appearing in most multilateral and bilateral trade agreements in the 1990s as American investors began to bring Canada and Mexico to arbitration. However, the Australia–U.S. Free Trade Agreement (AUSFTA) of 2004 contained no such provisions. The purpose of this article is to explain why enthusiasm for NAFTA-style protections waned so dramatically after a decade of entrenched practice. We argue that the reason lies in the "blowback," the unintended and negative consequences created by NAFTA's Chapter 11, and conclude that the abandonment of NAFTA-style protections in the AUSFTA sets important precedents for the future of international free trade agreements.*

## Introduction

The North American Free Trade Agreement (NAFTA) that came into force on January 1, 1994, gave unprecedented rights to private investors. Under Chapter 11 of NAFTA,[1] the American, Canadian, and Mexican governments assumed a wide-ranging set of obligations to investors from the other NAFTA countries. Investors were granted national treatment, and were protected from direct or indirect expropriation of their investments. Importantly, when investors from one NAFTA country believed they had been treated unfairly by one of the other two signatory governments, they were not limited to seeking redress in the courts of that country. Rather, they were given the right to bring a claim for compensation against that government in an international tribunal (Alvarez 1997; Dawson 2004; Gaines 2002; Gantz 1999; NAFTA Secretariat 2003; Soloway 2002; Tollefson 2002; Weiler 2000, 2001a).

While provisions for investor–state arbitration were a common feature of bilateral investment treaties (BITs), NAFTA's Chapter 11 represented a radical change in existing practices in at least two major respects. First, NAFTA was the first international investment and trade agreement to

*University of Melbourne
**Queen's University, Canada

*Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 19, No. 2, April 2006 (pp. 151–172).
 ISSN 0952-1895

provide for investor–state arbitration between developed countries. Second, unlike BITs, which allowed only *governments* to seek arbitral relief on behalf of their nationals, NAFTA granted private investors the right to take a complaint against a government *directly* to binding international arbitration. These new provisions generated considerable controversy, raising community fears and anger about the consequences of these new forms of corporate rights. In addition, critics argued that Chapter 11 was poorly drafted, thus leading to unintended interpretations and rulings; that the arbitration processes lacked transparency and accountability; and that it would lead to "regulatory chill" where governments would be reluctant to legislate in areas such as environmental protection for fear of future litigation.

Nonetheless, the use of NAFTA-style investor-rights provisions were quickly entrenched in U.S. trade policy, appearing in Chapter 15 of the Singapore–U.S. Free Trade Agreement of May 2003, Chapter 10 of the Chile–U.S. Free Trade Agreement of June 2003, Chapter 10 of the U.S.–Morocco Free Trade Agreement of June 2004, and Chapter 10 of the Dominican Republic–Central America–U.S. Free Trade Agreement of August 2004.[2] Moreover, this departure was found not only in U.S. bilateral trade agreements: investor–state provisions comparable to those found in NAFTA were also proposed for the aborted Multilateral Agreement on Investment (MAI), negotiated under the auspices of the Organisation for Economic Co-operation and Development (OECD) in 1997–1998 (Smythe 1998), and are to be found in Chapter 17 of the draft agreement for the Free Trade Area of the Americas (FTAA).[3]

Thus, when the United States and Australia began to negotiate a bilateral trade agreement in 2002, it was widely assumed that one of the items on the negotiating table would be an American demand to include investor–state provisions comparable to those found in the NAFTA agreement (Australian Fair Trade and Investment Network 2003; Liberty Victoria 2003). Certainly the official negotiating objectives articulated by Robert Zoellick (2002), the U.S. Trade Representative (USTR), to the U.S. Congress included liberalizing the Australian investment regime.[4]

However, to the surprise of many, the Australia–U.S. Free Trade Agreement (AUSFTA) of May 2004 did not include any provisions for investor–state dispute settlement of the kind that had been included in NAFTA.[5] Instead, in the investment chapter of AUSFTA—also Chapter 11—Australian and American negotiators had agreed to abandon NAFTA-style Chapter 11 disciplines, replacing them with an approach that left in place the same obligations as NAFTA's Chapter 11, but left investors from one country who believed that the other country had violated their obligations to seek redress through the other country's courts rather than through international arbitration.

The purpose of this article is to explain this radical departure from the trend over the 1990s to entrench stiff investor–state disciplines in bilateral and multilateral trade treaties. We suggest that the abandonment of

NAFTA-style Chapter 11 disciplines in the AUSFTA is best explained by a phenomenon usually associated with American security and intelligence policy—"blowback." Originally used to describe the backward escape of unburned gunpowder when a pistol is fired, blowback was the colloquial metaphor used by Central Intelligence Agency operatives in the 1950s to describe the phenomenon of U.S. clandestine operations abroad rebounding in unintended and negative ways for American interests. The term has since been applied more widely in the analysis of American foreign policy, most recently by Chalmers Johnson, who argued that the contemporary global policies of the U. S. government was likely to rebound on Americans. In a remarkably prescient passage, Johnson (2000, 223) wrote: "'Blowback' is shorthand for saying that a nation reaps what it sows, even if it does not fully know or understand what it has sown. Given its wealth and power, the United States will be a prime recipient in the foreseeable future of all the more expectable forms of blowback, particularly terrorist attacks against Americans . . . anywhere on earth, including within the United States." Since the terrorist attacks of September 11, 2001, the word has become an exceedingly popular metaphor in the analysis of contemporary American foreign policy, not just to describe the dynamics of the origins of 9/11 (e.g., Johnson 2001), but more widely, as any search of the term will reveal.

While the blowback metaphor has its origins in American security policy, the dynamic it identifies is equally apposite in other spheres of policy and governance (e.g., DeVotta 2004). We suggest that it is a useful metaphor to understand the policy dynamics of NAFTA-style Chapter 11 investor–state dispute mechanisms: the United States pressed hard for a mechanism that came rebounding back, creating negative reactions not only abroad but also in domestic American politics. We show that by 2003, NAFTA's Chapter 11 had created such blowback in Australian politics that the government in Canberra simply refused to consider the inclusion of such an investor–state dispute mechanism in the free trade agreement (FTA). Likewise, we show that on the U.S. side, the operation of NAFTA's Chapter 11 had produced sufficient opposition that the administration of George W. Bush was willing to abandon its original negotiating objective of reproducing NAFTA's Chapter 11 in the trade agreement with Australia. Moreover, we conclude that because the abandonment of NAFTA-style Chapter 11 mechanisms in the Australian agreement will effectively preclude the inclusion of such provisions in future trade agreements between developed countries, the blowback we observe in the Australian case has wider and longer-term implications.

## NAFTA's Chapter 11

Chapter 11 of NAFTA had as its primary purpose the encouragement of cross-border investment, and it was designed to deal with the particularities of the politics of foreign investment in North America. However, the

American, Canadian, and Mexican governments were not equally committed to an investor-friendly regime. Canada was the least enthusiastic, a consequence of the historical Canadian ambivalence toward foreign direct investment from the United States; Ottawa's preference was for the investment regime in the Canada–U.S. Free Trade Agreement that had come into force on January 1, 1989. By contrast, the Mexican government of Carlos Salinas de Gortari was keen to create a regime that would attract foreign investors and, for that reason, was willing to embrace the tough disciplines in Chapter 11. The Salinas government believed that an investment regime with harsh disciplines would attract greater investment from the United States, which in turn would entrench the neoliberal reforms that Salinas had introduced as a means of maintaining civil peace (Cameron and Tomlin 2000, 100–102, 112–114).

For its part, the administration of George H. W. Bush shared the Salinas government's vision of increasing Mexican wealth as a means of building stability and prosperity—and dealing with a mounting migration problem on the southern border. But, while supporting Mexico's aim to attract U.S. investment, Washington was committed to ensuring that NAFTA's Chapter 11 contained very tough measures to protect American investors in Mexico against discriminatory expropriation. These measures were shaped by the experience of frequent disputes over the treatment of American investors by Mexico, most clearly exemplified by the nationalization of American oil companies in 1938 by the government of Lázaro Cárdenas del Río. Moreover, the Mexican constitution contains a so-called Calvo clause, which stipulates that local courts have final jurisdiction in disputes involving foreigners. For these reasons, American negotiators wanted to establish an investment regime that afforded American investors in Mexico greater protection than the standard BIT.

The investment regime negotiated by the three governments in 1991–1992 reflected these differing interests.[6] Chapter 11 of NAFTA entrenches a set of obligations that each of the three governments agreed to give "investors" (firms, individuals, nonprofits, and government-owned enterprises) of the other two parties. Virtually all forms of "investments"—debt, equity, real estate, capital—of American, Canadian, and Mexican "investors" were granted a number of rights. Article 1110 gives foreign investors the right to compensation if a government expropriates their property, or, importantly, if any government adopts a "measure tantamount to nationalization or expropriation."[7] Under Article 1102, investors are guaranteed "national treatment"—that is, foreign investors from NAFTA signatory countries are to be treated no less favorably than domestic investors. Article 1103 provides most-favored-nation treatment, requiring that foreign investors from the other parties are to be given no less favorable treatment than that given to investors from any other nation. Article 1105 assures investors of "minimum standard of treatment," which requires that investors must be treated "in accordance with international law, including 'fair and equitable treatment and full protection and security.' " Under Article 1106, "performance requirements" are not permitted: measures designed to regulate investors by requiring certain types of conduct or outcomes.

If a foreign investor believes that a host government has breached any of these obligations, the investor could seek remedy through the courts of the host country. However, those who negotiated the NAFTA wanted to provide an additional measure of protection for investors. The NAFTA thus incorporates a practice commonly found in BITs between developed and developing countries. In the standard BITs signed by the United States,[8] for example, American investors are protected against the possibility that local courts may not be willing or able to adjudicate disputes between Americans and the host government fairly or independently by being given the right to bypass the host country's court system and ask that the dispute be taken to an international tribunal for arbitration. BITs normally provide for the investor to indicate a desire to submit the dispute to arbitration; the process of initiating the submission to arbitration falls to one of the signatories to the agreement (normally the government of the aggrieved investor).[9]

NAFTA's Chapter 11 incorporated the essence of the BIT language. It allows a foreign investor from one of the other two signatories which believes that a host government has breached its obligations under Chapter 11 to submit its dispute to one of three international arbitral mechanisms: the International Center for the Settlement of Investment Disputes (ICSID); ICSID's Additional Facility Rules; or have the dispute arbitrated under the rules of the United Nations Commission for International Trade Law. Chapter 11 also provided that the awards of these international arbitration tribunals were enforceable in domestic courts.

But the drafters of Chapter 11 took an important further step. Unlike most BITs, which required that a government submit a dispute to arbitration on behalf of an investor, Chapter 11 permits all investors to launch claims unilaterally. As Michael J. Trebilcock and Robert Howse note (1999, 355), NAFTA was "the first comprehensive international trade treaty to provide private parties direct access to dispute settlement as of right."

Thus, while NAFTA's Chapter 11 dispute settlement mechanism, mirroring as it did the mechanism of most BITs, was not unusual, the way in which aggrieved investors could move to arbitration represented a radical change. No longer did claims for redress have to be filed in the courts of the country where the alleged harm occurred; no longer did an aggrieved corporation have to depend on the willingness of a national state to sign on to a grievance, as under a standard BIT. Instead, corporations could simply move directly to demand arbitration.

It did not take corporate lawyers long to spot the huge opportunity afforded by this change. The first claim was initiated on December 30, 1996, when the Metalclad Corporation, a U.S. waste disposal company, announced to the United Mexican States that it was planning to lodge a claim that the refusal by a Mexican town to grant it a license to operate a hazardous-waste treatment facility constituted a breach of Mexico's obligations under Chapter 11.[10] This was followed in April by a claim by Ethyl Corporation, an American firm, against Canadian legislation that banned imports of methylcyclopentadienyl manganese tricarbonyl, a gasoline additive.[11] In October 1998, S.D. Myers, Inc., an American firm that disposes of polychlorinated biphenyl (PCB) waste, claimed that a 1995 Canadian ban on PCB waste exports to the United States served "to effectively deprive the Investor of the benefits of its Canadian investment."[12] In November 1998, Sun Belt Water Inc. of California notified the Canadian government that it was planning to submit a claim to arbitration because the British Columbia government had deprived it of the benefits of its investments in the water export business.[13] Even though Sun Belt is frequently cited as one of the largest claims under Chapter 11 (e.g., Barlow 1999; NAFTA and Inter-American Trade Monitor 1999; Public Citizen 2001, 23), it should be noted that the company never followed through and submitted a valid claim; there is in fact no Chapter 11 arbitration currently under way.

These early exercises of the investor-rights provisions of NAFTA generated considerable opposition from those who feared that granting such rights to corporations would produce negative reactions. Some complaints about Chapter 11 focused on the ways in which it was interpreted,[14] and the demonstration effect of these interpretations, which in essence woke up investors to the full gamut of investment treaties available for them to press their claims (International Institute for Sustainable Development 2003, 14). Another concern relates to "regulatory chill"; that is, because investors can lodge claims against any level of government, all governments—at the national, state/provincial, and local levels—might be reluctant to legislate in areas such as environmental protection and public health, for fear of future litigation.

A third complaint has been that NAFTA's Chapter 11 suffers from a democratic deficit (Atik 2004; International Institute for Sustainable Development 2001; Public Citizen 2001). Opportunities for public input were limited, especially in Canada and Mexico, which did not have well-developed institutional mechanisms for community consultations in trade negotiations. The Chapter 11 dispute process is initiated by an investor and is conducted by a three-person tribunal. NAFTA parties have no joint control over the composition of the tribunals. Instead, in each dispute, the investor and the state each nominate their own arbitrator, with the third meant to be neutral. Concerns were expressed about the lack of accountability in the selection of tribunal members, and the lack of safeguards that are associated with domestic court systems, including public access to hearings and appeals mechanisms (Soloway 2003). In the 1990s, tribunal hearings were held in camera and third parties were not able to participate in any way. Moreover, there was considerable resistance to bringing greater transparency to these arbitral processes for fear that they would become "politicized" (Canada Department of Foreign Affairs and International Trade 2003).[15]

Finally, a persistent criticism has been that NAFTA's Chapter 11 lacks legitimacy. As Charles Brouwer has argued, unless international legal regimes operate with predictability and coherence, conform to some historical practice, and incorporate shared values of the community, they are likely to founder. In Brouwer's estimation, Chapter 11 fails on all three counts. Its lack of clarity is complicated by its institutional design: "to resolve problems of textual indeterminacy, Chapter 11 supplies an arbitral process that generates incoherent rulings on a key provision, lacks an accepted pedigree . . . and evidently fails to incorporate the fundamental values of the governed community" (Brouwer 2003, 59).

In short, by the end of the 1990s, Chapter 11 was one of the most criticized aspects of NAFTA. Moreover, the fact that similar provisions were showing up in other international efforts to liberalize investment, such as the MAI, and the FTAA, tended to galvanize and strengthen public opposition. To be sure, there was evidence of growing concern among NAFTA parties themselves about Chapter 11; in 2001, after all three governments lost cases taken against them under Article 1105, they sought to limit its scope by jointly issuing an "interpretation" to clarify its meaning and intent.[16] Significantly, however, NAFTA parties stopped short of formally amending Chapter 11; on the contrary, all indications were that the three North American governments remained inertially attached to NAFTA as it had been originally negotiated in the early 1990s. For while the American, Canadian, and Mexican governments might have had second thoughts about Chapter 11, there was clearly an unwillingness to reopen negotiations on Chapter 11—for fear that it would open the door to demands for the renegotiation of other chapters, especially those about which the United States was having second thoughts.

## AUSFTA's Chapter 11

When Australia and the United States announced in November 2002 that they had agreed to initiate bilateral trade negotiations, the United States made it clear that it would be seeking strong investor protections in the agreement. In addition to seeking the abolition of Australia's Foreign Investment Review Board, Zoellick (2002) announced that Washington would seek investor rights "comparable to those that would be available under U.S. legal principles and practice," as well as national treatment and dispute settlement procedures. The USTR's position received strong backing from a number of U.S. industry groups, most notably the National Association of Manufacturers (NAM), a strident advocate for the inclusion of investor–state dispute provisions in all U.S. trade and investment agreements. From Canberra's perspective, however, the prospect that an AUSFTA would have to include NAFTA-style Chapter 11 protections for investors was distinctly unappealing for at least two reasons. First, the cases that had been initiated by companies seeking redress under Chapter 11 of NAFTA suggested that if investor–state provisions were included in AUSFTA, the Australian government could anticipate a comparable future of litigiousness by American investors.

Second, and more importantly, the Chapter 11 cases under NAFTA had generated considerable public opposition to investor–state provisions. As the number of cases of corporations making claims over the course of the 1990s mounted, a growing body of literature, particularly from nongovernmental organizations (NGOs), focused on the impact of investor-rights provisions on economic development, public services, government procurement policies, cultural identity, and even human rights (e.g., Council of Canadians 2003; International Institute for Sustainable Development 2001, esp. chap. 7; Public Citizen 2001). These concerns of North American NGOs were echoed in Australia, emerging most vociferously during the negotiation by the OECD of the MAI in 1997–1998 and the antiglobalization debates before and after the WTO ministerial meeting in Seattle in 1999. In Australia, as elsewhere, the MAI generated high levels of public concern and hostility, and there was a strong community campaign against the MAI that included church groups, trade unions, development agencies, indigenous organizations, green groups, human rights organizations, legal advocacy groups, and some business groups (Capling and Nossal 2001; Goodman and Ranald 2000). Many of these same groups expressed their opposition to the inclusion of Chapter 11 provisions in any trade agreement between Australia and the United States.

Australian state governments also made representations to the federal government in Canberra, expressing their opposition to the inclusion of investor rights and an investor–state dispute settlement mechanism in an Australia–U.S. trade agreement (Parliament of Australia 2004). The government of the state of Victoria in particular believed that NAFTA's investment provisions had been used to "undermine local and state sovereignty and control" and "give foreign investors better treatment than local businesses."[17]

As a result, Australia's negotiating objectives on investment were decidedly more modest than those put forward by the USTR. Australia made no specific demands for investor-rights provisions, national treatment, or investor–state dispute settlement. Rather, Canberra limited its goals to seeking "an enhanced framework to govern investment flows between Australia and the United States." Significantly, the government indicated its intention to ensure that the negotiations took account of "the need for appropriate policies to encourage foreign investment, while addressing community concerns" (Vaile 2003). At the same time, however, the government consistently refused to rule out the inclusion of Chapter 11-type provisions in an agreement. When formal negotiations commenced on March 17, 2003, Canberra's position remained opaque: the official refrain was that "everything is on the table." Indeed, as late as June 2003, the Australian Department of Foreign Affairs and Trade

(DFAT) acknowledged that it was still seeking business views as to whether investor–state mechanisms should be included in the agreement (Parliament of Australia 2003b).

Community concerns in Australia were not assuaged when an investor–state dispute settlement mechanism appeared in the Singapore–Australia Free Trade Agreement (SAFTA). Chapter 8 outlines a number of investor rights, including provisions to protect investors against expropriation and to provide compensation for losses. In addition, SAFTA imposes some national treatment obligations, and specifies measures for investor–state dispute settlement. But SAFTA's Chapter 8 differed from NAFTA's Chapter 11 in several important respects: for instance, its substantive provisions make a clear distinction between direct and indirect expropriation, and both governments made a number of reservations to national treatment obligations (Parliament of Australia 2003a). The Australian government was also at pains to point out that the investor–state dispute mechanism in SAFTA was "not a duplicate of Chapter 11 of NAFTA" (Parliament of Australia 2003b, 254). Rather, SAFTA's provisions for investor–state disputes are identical to those found in Australia's bilateral investment treaties with many developing countries.

Such assurances did little to stem mounting fears that NAFTA-style state–investor dispute provisions would find their way into the Australia–U.S. trade agreement. As a result, this issue was subsequently taken up with some vigor by the parliamentary opposition parties. In particular, Peter Cook, an Australian Labour Party (ALP) senator, worried that the inclusion of an investor–state dispute mechanism in a trade agreement with a developed country such as Singapore was a clear signal of Australia's willingness to include similar provisions in its trade agreement with the United States (Parliament of Australia 2003b).

Indeed, during the third round of negotiations in October/November 2003, the United States put these issues squarely on the negotiating table. The ALP's shadow trade minister, Stephen Conroy, pressed Australia's chief negotiator, Stephen Deady, about the rights that would accrue to U.S. investors under the trade agreement.[18] Deady's suggestion that Australia could "craft the language in a way that reflects Australia's interests" was greeted with skepticism by Conroy: "Lawyers," he responded, "are paid to change the legal definition. They are paid to argue that black is white and to mount that case. They frequently argue successfully that black is white" (Parliament of Australia 2003c, 135).

In November 2003, the Senate Foreign Affairs, Defence and Trade References Committee tabled its report on the proposed trade agreement with the United States. It identified a broad range of community concerns about investor–state provisions in trade agreements. These included lack of transparency and accountability in investor–state dispute tribunals, concerns about the appropriateness of a commercial arbitral model in cases where public interests were involved, and the potential for conflict between Australia's domestic legal system and international tribunals. The committee argued that an FTA modeled on NAFTA "would grant U.S. corporations inappropriate powers to challenge government regulation at local, State and Commonwealth [i.e., federal] levels." The report accepted the assertion of Pat Ranald, of the Australian Fair Trade and Investment Network, that the United States regarded the U.S.–Singapore and U.S.–Chile FTAs as "a template and a beachhead in investor–state complaint mechanisms" and worried openly that the U.S. side would introduce these provisions "even at a very late stage in proceedings." The report recommended against the inclusion of investor–state provisions in the Australia–U.S. trade agreement (Parliament of Australia 2003d, chap. 6:133).

In the final round of negotiations in Washington in January 2004, the United States continued to press hard for the inclusion of investor–state dispute provisions. Australia expressed its equally strong opposition on the grounds that their inclusion would be "unacceptable" (confidential interview with government official 2004). Ultimately, however, the United States backed down and agreed to the Australian proposal that the legal systems in both countries were "robust" enough to ensure that investors should find sufficient protection through domestic courts. The result was that a NAFTA-style Chapter 11 was abandoned. Instead, the Chapter 11 in AUSFTA, while imposing certain obligations on both governments, did not give investors the right to arbitrate disputes with governments directly.

As Madelaine Chiam (2004) has noted, it is not technically correct to assert, as the DFAT did in its "national interest analysis" of the agreement, that AUSFTA contains "no provision for investors to use international arbitration to pursue concerns about government actions."[19] This is because AUSFTA's Chapter 11 does provide for the *possibility* of arbitration for investors whose investments have been affected by government action. However, it specifies a much more indirect mechanism for the resolution of investor disputes. Article 11.16(1) states:

> If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. Upon such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

As will be evident, this article marks several important departures from NAFTA. First, it ensures that investors are not the drivers of investment disputes. Instead, an aggrieved investor who has exhausted redress in the domestic courts of the other country must convince its own government to take up the cudgels on its behalf to proceed further, for only a "party"—one of the governments—has the capacity to request a move to arbitration.

Second, arbitration can only occur when one of the governments considers that there has been "a change in circumstances affecting the settlement of disputes." There is no elaboration in the text of the agreement on what such a "change in circumstances" might be, although a reading of the USTR press release on February 8 (United States 2004, 4) suggests what the "circumstances" both sides had in mind:

> In recognition of the unique circumstances of this Agreement—including, for example, the long-standing economic ties between the United States and Australia, their shared legal traditions, and the confidence of their investors in operating in each others' markets—the two countries agreed not to adopt procedures in this FTA that would allow investors to arbitrate disputes with governments. This issue will be revisited if circumstances change.

Given that these "circumstances" were highly unlikely to change, this wording dramatically limits the scope and range of the conditions under which it is likely that one of the governments will seek arbitration.

## Analysis

How can we explain the willingness of the United States to abandon NAFTA-style investor–state dispute mechanisms in AUSFTA? We argue that there are two related explanations, both examples of blowback: one proximate and related to Australian politics, the other related to shifts in American politics.

The first explanation focuses on the blowback in Australian politics from the MAI and the widespread view in Australia that a NAFTA-style Chapter 11 was not in Australian interests. The Australian government was thus adamant that American insistence on NAFTA-style investor–state mechanisms would be a deal breaker. The American side knew that this was not simply a rhetorical negotiating position: the opposition parties held a majority of the seats in the Australian Senate, and could vote AUSFTA down, thus preventing it from ever coming into force.

The second explanation focuses on the U.S. side, and the domestic blowback that was occurring in American politics as a consequence of the application of NAFTA's Chapter 11 to the United States itself. In the first four years of NAFTA, Chapter 11 was used exclusively by American firms against Canada and Mexico. But in July 1998, a Canadian firm in the death-care industry, the Loewen Group, filed a claim alleging that the decision of a Mississippi court that required Loewen to post an appellate bond of US$625 million to appeal a US$500 million lawsuit against it was an illegal "taking" under NAFTA (Ahdieh 2004).[20]

The Loewen claim was followed by a number of other claims against the United States. In June 1999, Methanex Corporation, which distributed methanol, an ingredient in the gasoline additive methyl tertiary butyl ether (MTBE), claimed that the United States was in breach of its Chapter 11 obligations as a result of the ban by the state of California on the use or sale in California of MTBE on health grounds. In September 1999, Mondev International, a Canadian real-estate development firm, alleged that a decision of the Supreme Judicial Court of Massachusetts against one of its partners, which had sued the city of Boston, had led to losses that were tantamount to expropriation under Chapter 11. In July 2000, ADF Group Inc., a Canadian steel corporation, claimed that its Florida subsidiary had suffered losses as a result of the United States Surface Transportation Assistance Act of 1982, which requires that all federally funded state highway projects use only domestically produced steel. In July 2002, Canfor Corporation, a Canadian forest products company, alleged that levies imposed by the United States on softwood lumber products violated U.S. obligations under Chapter 11. In August 2002, Kenex Ltd., a Canadian company that deals in hemp, alleged that the implementation of a ban on hemp by the United States Drug Enforcement Agency and the Office of National Drug Control Policy breached Kenex's rights.[21]

The use of Chapter 11 against the United States widened the range of opponents to these investor–state measures. In addition to the more traditional sources of opposition—the antiglobalization movement, the environmental movement, church groups, and labor unions[22]—there was a growing variety of other voices expressing opposition to the kind of investor–state provisions in NAFTA's Chapter 11.

Throughout 2002, an increasing number of state and local governments in the United States formally expressed concern that investor–state provisions like NAFTA's Chapter 11 inappropriately infringed on the prerogatives of noncentral governments. In addition to a resolution by the National Conference of State Legislators on March 1, 2002, state legislatures expressing concern included California (April 25), Minnesota (May 7), Oklahoma (May 9), and Oregon (May 17). At the local level, concerns about the impact of investor–state provisions were expressed by the National League of Cities (March 13), National Association of Towns and Townships (April 4), National Association of Counties (May 4), League of California Cities (May 20), and the U.S. Conference of Mayors (June 18). Adding their voices to these protests were the National Association of Attorneys General (March 22) and a number of individual attorneys general on behalf of their states, the International Municipal Lawyers Association (March 12), and the Conference of Chief Justices (May 15).[23] A common refrain was that, as Sheila Kuehl, chair of the California Select Committee on International Trade Policy and State Legislation, put it, "state and local governments should be carved out from the scope of future investment agreements" (Kuehl 2002).

This opposition to NAFTA's Chapter 11 was reflected in the U.S. Congress during the consideration on the legislation to give the president trade promotion authority in 2002. For example, Senator John Kerry (Democrat, Massachusetts) proposed an amendment that was aimed at preventing the inclusion of Chapter 11 provisions in future U.S. trade agreements. Under Amendment 3430, investors would be required to demonstrate that measures enacted by public authorities were implemented with the primary intention of discriminating against foreign investors or investments. Based on U.S. Supreme Court rulings on expropriation, the amendment would restrict investment protection actions to only those cases where it could be demonstrated that government action had caused a physical invasion of property or the denial of all economic or productive use of that property. Such a provision would radically alter (and limit) the scope of claims that could be made by foreign investors. While the Kerry amendment was eventually defeated,[24] the measure drew considerable support from a broad range of groups representing state and municipal governments across the United States.[25]

Indicative of the division within the American trade policy elite was an opinion piece in the *New York Times* by Joseph Stiglitz (2004), chief economist at the World Bank in the late 1990s and winner of the 2001 Nobel Prize in economics, which openly criticized NAFTA for the special rights it granted to the corporate sector. "Conservatives have long sought to receive compensation for regulations that hurt them," Stiglitz argued, "and American courts and Congress have usually rejected these attempts. Now business may have accomplished indirectly, through treaty, what they could not get more openly through the democratic political process." However, NAFTA denied similar protections to "those harmed by the actions of the foreign firms, for instance by what they do to the environment." Indeed, Stiglitz went so far as to assert that these corporate rights "potentially weakened democracy throughout North America."

Moreover, the heightened publicity being given to the cases brought against the United States also threatened to have political/electoral effects. As William Greider of *The Nation* put it (Public Broadcasting System 2002), it was likely that Americans

> will be shocked and quite confused, if any of a number of cases, whether it's Methanex or Loewen, or some of the others, manage to win damages against the United States. People at first are gonna say, "Huh? What is that about?" And then, as it's explained to them, they're gonna say, "We didn't sign on for that. That's not what we think about as a global trade agreement." And then the education process is quickly gonna turn into anger, I believe.

While Zoellick himself was clearly not prepared to admit openly that NAFTA's Chapter 11 was flawed, there is strong evidence of a growing appreciation in the USTR and the Washington policy elite, however belated, that the negotiators in 1991 and 1992 simply had not anticipated that lawyers would use Chapter 11 in this way. As Charles ("Chip") Roh, who had served as the U.S. deputy chief negotiator for NAFTA, admitted in a frank television interview (Public Broadcasting System 2002):

> I don't find it altogether surprising that there have been creative uses of the [Chapter 11] mechanism because, I mean, I'm a lawyer and our profession is

> creative. People use worse words for us, but they are at least creative. And that can result in, you know, attempting to make a use of a provision that perhaps was not in the contemplation of the drafters.

However, Roh left in little doubt that he believed that a mistake in drafting had been made:

> If you took that wording literally and said, okay, let's make it clear or let's add a rule that says, by the way, expropriation means anything that diminishes the value of your investment, then it seems to me that that's probably—I, who am a huge supporter still of these agreements, would say that's a—that's a big mistake because you get—if you try to push it to there, the people are not going to go with you, because that's just too greedy.

Given the increasing expression of concerns from across the United States, it is perhaps not surprising that many agencies in the U.S. administration, including the Environmental Protection Agency, the Interior Department, and the Justice Department, were having second thoughts[26] and no longer as keen as the USTR about investor–state provisions of NAFTA's Chapter 11 (Atik 2004; Kurtz 2002).

Indeed, by 2003, even the USTR itself was reconsidering its strong attachment to NAFTA-style mechanisms. One evident measure of this reconsideration was the USTR's decision to agree to limit the definition of an "indirect expropriation" in the U.S.–Singapore Free Trade Agreement. In an exchange of side letters on expropriation in May 2003 that forms part of the agreement, both governments agreed that even if "an action or series of actions by a Party has an adverse effect on the economic value of an investment," that economic effect, "standing alone, does not establish that an indirect expropriation has occurred."[27] Similarly, the U.S.–Chile Free Trade Agreement included measures to enable the two governments to issue interpretations of the investment provisions that would be binding on arbitration panels, in order to ensure that panels interpreted the agreement in accordance with its intent.[28]

In short, by the time that AUSFTA negotiations actually began in 2003, there were few voices in the United States openly advocating the reproduction of NAFTA's Chapter 11 in other FTAs.[29] To be sure, there was some domestic opposition to the exclusion of a NAFTA-style Chapter 11 in AUSFTA. For instance, the NAM argued that this omission would set a bad precedent for future U.S. trade agreements, especially with developing countries.[30] Indeed, this precedential argument was instrumental in driving the USTR's strong position on investor-dispute settlement provisions in AUSFTA (confidential interview with government official 2005). However, these concerns were overwhelmed by the wave of domestic criticism directed against investor–state provisions. There were simply too many national and local actors who were on record opposing NAFTA-style investor–state provisions, particularly because the opposition of states and cities inevitably found echoes in Congress (Ahdieh 2004, 211). Moreover, the opposition was coalescing on the eve of an election year and on an issue that could not easily be sold to the public.

## Conclusion

The abandonment of investor–state provisions in Chapter 11 of AUSFTA of 2004 was unexpected because it was widely assumed that such provisions were entrenched in free-trade practice: the appearance of NAFTA-style investor–state dispute mechanisms in U.S. FTAs and the FTAA drafts, and the public commitment of Robert Zoellick to achieving investor protections confirmed the correctness of such assumptions.

However, we have argued that the willingness to abandon NAFTA's Chapter 11 in favor of the kind of regime found in AUSFTA's Chapter 11 stemmed from blowback, both in Australia and in the United States. NAFTA government officials will freely admit in private that those who negotiated Chapter 11 in the early 1990s simply did not anticipate that lawyers would be able to use the provisions of Chapter 11 to launch the kind of legal actions that generated such opposition in the late 1990s. The unintended consequences of NAFTA's Chapter 11 triggered opposition that spilled out beyond the border of NAFTA parties and into other jurisdictions. This opposition was clearly manifested in Australian politics, leading to the insistence by the Australian government that NAFTA-style measures not be reproduced in the investment chapter of AUSFTA.

But it was the domestic blowback—the vigorous opposition to NAFTA's Chapter 11 that spread across the United States in the early 2000s—that led the USTR to abandon its insistence on the inclusion of NAFTA-style investor–state mechanisms in the Australia–U.S. agreement. In the 1990s, much of the opposition to NAFTA had been centered in those who were skeptical about the neoliberal project and globalized capitalism—environmental groups, unions, churches, antiglobalization groups. But in the early 2000s, more "mainstream" groups added their voices to that opposition: state legislatures, cities, and mayors, all of whom had deep linkages to congressional delegations, and thus with more pronounced electoral implications.

In the event, the U.S. side was willing to accede to an Australian demand to remove investor–state provisions from the AUSFTA draft. Such a "concession" served two purposes: not only did it remove a potential irritant that might have posed an obstacle to the passage of AUSFTA in the Australian Senate, where the opposition parties were in the majority, but it also removed a potential irritant in American politics, a not inconsiderable factor in an election year.

It is likely that the abandonment of NAFTA-style Chapter 11 in the Australian case will have implications for other bilateral, regional, and multilateral FTAs. Certainly, AUSFTA's unambiguous expression of confidence in national systems of law to protect the rights of investors sets such a high standard that it will be very difficult to justify including NAFTA-style investor–state dispute settlement measures in future FTAs between developed countries. While some developing countries may still agree to NAFTA-style provisions in trade agreements with the United States if they believe this will increase U.S. investment in their economies, the AUSFTA precedent will make it more difficult for the United States to insist on the inclusion of such mechanisms in future trade agreements with those developing countries that object to NAFTA-style protections, because such insistence could be viewed as a slight against their legal systems.

The AUSFTA example has certainly strengthened the hand of opponents of NAFTA-style protections. It will provide a powerful precedential argument for those who have pressed for the amendment of NAFTA's Chapter 11, and for those who have objected to the investment provisions in the FTAA (2003) agreement. Indeed, the FTAA negotiations have stalled, with the Summits of the Americas focusing on other issues, such as jobs and democratic governance.[31] Likewise, the Dominican Republic–Central America–U.S. Free Trade Agreement, which was signed in May 2004, has not been submitted to Congress, in large measure because of opposition to many of its provisions, including its NAFTA-style investment chapter.[32] In other words, the unintended consequences of NAFTA's Chapter 11 will continue to be manifested for some time to come.

## Acknowledgments

This article was first presented at the Oceanic Conference of International Studies, Canberra, Australia, in July 2004. We would especially like to thank the three *Governance* reviewers for their extensive and very helpful criticisms and suggestions.

## Notes

1. The text of NAFTA's Chapter 11 is available online at http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp?#chap11.
2. The texts of these agreements are available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html; http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html; http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/; http://Final_Text/Section_Index.html; and http://ww.ustr.gov/Trade_Agreements/.Bilateral/CAFTA-DR/CAFTA-DR_Final_Texts/Section_Index.html.
3. Chapter 17 appears in the third and latest draft agreement of the Free Trade Area of the Americas, Draft Agreement: FTAA.TNC/w/133/Rev.3, November 21, 2003: http://www.ftaa-alca.org/alca_e.asp.
4. In addition, Zoellick himself was on record in April 2001 as saying that there was nothing in the arbitrations under NAFTA that would lead him to conclude that the investor–state provisions needed to be significantly

altered or the regulatory rights given to corporations to bring claims against governments needed to be curbed. "Zoellick Cool to Restrictions on Investor State Disputes," *Inside U.S. Trade* April 20, 2001.

5. The final text is available online at http://www.ustr.gov/Trade_Agreements/Bilateral/.Australia_FTA/Final_Text/Section_Index.html.
6. The release by NAFTA parties of the draft negotiating texts in July 2004 illustrates these differences quite clearly. Available online at http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp and http://www.ustr.gov/Trade_Agreements/.Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/Section_Index.html.
7. In international law, direct expropriation by a state—or a "taking"—is permitted under certain circumstances: if it does not discriminate against the investor, if it is done for a public purpose, and if it is accompanied by full compensation that is "prompt, adequate, and effective." Indirect expropriation, by contrast, does not involve the deprivation of title to the investment; rather, indirect expropriations are measures designed to affect the profitability of an investment, and thus are the functional equivalent of a "taking." Such measures can come in numerous forms, such as legislation, regulations, or zoning.
8. For details about the U.S. BIT program, see http://www.state.gov/e/eb/rls/fs/22422.htm. The United States signed its first BIT with Panama in October 1982; as of 2004, the United States has signed BITs with 46 states.
9. See, for example, Article VII of the Treaty between the United States and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, Washington, March 12, 1986: http://www.tcc. mac.doc.gov/cgi-bin/doit.cgi?204:64:65369350:14.
10. The fullest and, in our view, the most objective telling of the complex Metalclad story is Weiler (2001a). Original documents are available online at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/.Metalclad/Metalclad.htm. In August 2000, the tribunal found in favor of Metalclad; Mexico sought to have the award reviewed by the Supreme Court of British Columbia, which eventually set part of the award aside.
11. The Ethyl case is muddied because three Canadian provinces also objected to the federal measures. The dispute was adjudicated by a panel under the federal–provincial Agreement on Internal Trade. When this panel found against the federal government, it immediately moved to settle the case with Ethyl, paying US$13 million in compensation: original documents available online at http://www.dfait-maeci.gc.ca/tna-nac/disp/ethyl_archive-en.asp.
12. See Article 48 of the Statement of Claim: http://www.dfait-maeci.gc.ca/tna-nac/documents/myers3.pdf. In November 2000, Canada was found to have violated two of its four obligations; it appealed to the Federal Court of Canada to have the decision reviewed; in January 2004 the appeal was dismissed.
13. This notice of intent is found at http://www.dfait-maeci.gc.ca/tna-nac/documents/Sunbelt.pdf.
14. Some foreign investors have used Chapter 11 not simply to defend their interests against "expropriation" in its broadest sense, but as an aggressive measure to improve their position in a particular market. For example, the United Parcel Service (UPS) brought a claim against Canada, arguing that Canada Post, the national postal service, was disadvantaging private courier companies by offering publicly subsidized services that private courier companies were unable to offer (e.g., by allowing customers to drop courier

packages in regular post boxes). The details of this ongoing case are at http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp.

15. In two cases—*UPS v. Canada*, and *Methanex v. the U.S.*, discussed below—tribunals indicated their willingness to accept submissions from amici curiae (friends of the court) relating to the dispute, moves that mirrored the increasing transparency of the World Trade Organization (WTO)'s dispute mechanism. However, Mexico, along with some business interests, was particularly opposed to amicus briefs in Chapter 11 cases.
16. See Weiler (2001b) for a discussion of the effect of this clarification. See also Free Trade Commission Clarifications Related to NAFTA Chapter 11, July 31, 2001. Available online at http://www.state.gov/documents/organization/38790.pdf.
17. Letter, Terry Moran, Head of Premier's department in Victoria, to Ashton Calvert, Secretary Department of Foreign Affairs and Trade, quoted in Parliament of Australia (2003a, 43).
18. Citing concerns about the UPS case, Conroy asked whether FedEx would be able to challenge Australia Post's courier service, on the grounds that it was being cross-subsidized. Deady suggested that FedEx could theoretically do that through the Australian court system and that investor–state articles simply provide the right for recourse to independent arbitration beyond the domestic courts.
19. In the FAQs on its AUSFTA website, DFAT is clearer, acknowledging that "The dispute settlement mechanism established under the agreement only allows the Parties, that is, the two governments, to initiate dispute settlement procedures. . . . Unlike many FTAs . . . AUSFTA does not include provision for Investor–State Dispute Settlement." See http://www.dfat.gov.au/trade/negotiations/us_fta/faqs.html.
20. Documents relating to the Loewen case are available online at http://www.state.gov/s/l/c3755.htm. In June 2003, all claims against the United States were dismissed.
21. Details of these cases are available online at http://www.state.gov/s/l/c3741.htm. The Mondev claim was dismissed in October 2002; the ADF claim was dismissed in January 2003; as of June 2004, all others were sub judice. Since 2002, four other cases have been filed against the United States: in December 2003, Glamis Gold Ltd. submitted a claim regarding a proposed gold mine in California; two other Canadian forest products companies laid claim: Tembec Incorporated in December 2003, and Terminal Forest Products Ltd. in March 2004. In March 2004, the Grand River Enterprises Six Nations Ltd., a manufacturer of cigarettes, claimed that the 1998 "master settlement agreement" between 46 American states and the major tobacco companies was being implemented in such a way as to put the United States in breach of Articles 1102, 1103, 1104, 1105, and 1110 of Chapter 11.
22. See, for example, the joint letter from the AFL–CIO, Action Aid USA, Alliance for Democracy, American Lands Alliance, Center for International Environmental Law, Center for Policy Analysis on Trade and Health, U.S. Gender and Trade Network, Church World Service, Citizens' Network on Essential Services, Citizens Trade Campaign, Defenders of Wildlife, Friends of the Earth, Global Exchange, Greenpeace USA, Institute for Agriculture and Trade Policy, International Brotherhood of Teamsters, International Jesuit Network for Development, Maryknoll Office for Global Concerns, Minnesota Fair Trade Coalition, National Environmental Trust, National Catholic Social Justice Lobby, Oxfam America, Public Citizen's Global Trade Watch, Resource Center of the Americas, Rural Coalition, Sierra Club, Union of Needletrade, Industrial and Textile Employees, United Auto Workers, United for a Fair Economy, United Church of Christ, United Steelworkers

of America, Western Organization of Resource Councils to Zoellick, August 1, 2003, criticizing the USTR for pushing Chapter 11 investment protection mechanisms: http://www.ciel.org/Tae/Zoellick_7Aug03.html.

23. Many of these resolutions are available online at http://government.cce.cornell.edu/doc/reports/freetrade/resolutions.htm.
24. On May 12, 2002, several Democrats joined the Republicans to table (i.e., kill) the amendment 55-41: United States, 107th Congress, 2nd session, Senate, Roll Call 121, May 21, 2002; "Trade: Motion to Table Kerry Amendment to Repair Failed NAFTA Investment Provisions," available online at http://www.mentata.com/ds/retrieve/congress/vote/VC107S7.
25. Including the U.S. Conference of Mayors, the National Conference of State Legislatures, the National Association of Counties, the National Association of Towns and Townships, and the National League of Cities. "Defeat of Kerry Amendment Thwarts Trade Bill's Prospects in House," May 21, 2002, available online at http://www.citizen.org/pressroom/release.cfm?ID=1115.
26. Indeed, to try to capture this process of rethinking more accurately, Atik (2004) uses the French word *repenser*, which is rethinking tinged with regret.
27. The side letters on expropriation, May 6, 2003, are available online at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file58_4058.pdf.
28. Statement by the House Ways and Means Committee on the U.S.–Chile Free Trade Agreement—Impact on State and Local Governments, available online at http://waysandmeans.house.gov/media/pdf/chile/hr2738Chilestateandlocalreportrev.pdf.
29. The Western Organization of Resource Councils, a network of community organizations in seven western states representing some 9,000 farmers and ranchers, e-mailed Zoellick in late 2003 urging him to ensure that there were no investor–state provisions in AUSFTA. E-mail, Skip Waters, Western Organization of Resource Councils Agriculture and Food Issue Team Chair, to Zoellick, undated [2003], Billings, Montana: available online at http://www.worc.org/pdfs/zoe.pdf.
30. The NAM also lobbied vigorously against proposed changes to the U.S. "model" BIT that would have prevented investors from bringing claims directly against a government through third-party arbitration. See NAM Joint Industry Group Letter on BITs to Jesse Helms, Chairman, Committee on Foreign Relations, July 24, 2000, and to Donald Evans, Secretary of Commerce, and Robert Zoellick, USTR, March 19, 2004: http://www.nam.org.
31. See http://www.ftaa-alca.org/alca_e.asp.
32. See, for instance, the letter to the USTR from 18 House Democrats on December 5, 2003, available online at http://www.citizen.org/documents/housedemstoUSTR_CAFTA_inv.pdf.

## References

Ahdieh, Robert B. 2004. "Between Dialogue and Decree: International Review of National Courts." *New York University Law Review* 79. ⟨http://ssrn.com/abstract=623262⟩. (April 12, 2005).

Alvarez, José E. 1997. "Critical Theory and the North American Free Trade Agreement's Chapter Eleven." *University of Miami Inter-American Law Review* 28: 303–312.

Atik, Jeffery. 2004. "*Repenser* NAFTA Chapter 11: A Catalogue of Legitimacy Critiques." *Asper Review of International Business and Trade Law* 3: 1102–1148.
Australian Fair Trade and Investment Network 2003. Submission to Parliament. ⟨http://www.aftinet.org.au/campaigns/GATSusftasubmission1c.html#24⟩. (April 28, 2004).
Barlow, Maude. 1999. "Global Rule Could Paralyze U.S." *Toronto National Post*, August 31. ⟨http://www.cb3rob.net/~merijn89/nieuws/99-8-31.html⟩. (May 24, 2004).
Brouwer, Charles H., II. 2003. "Structure, Legitimacy, and NAFTA's Investment Chapter." *Vanderbilt Journal of Transnational Law* 36 (37): 51–94.
Cameron, Maxwell A., and Brian W. Tomlin. 2000. *The Making of NAFTA: How the Deal Was Done*. Ithaca, NY: Cornell University Press.
Canada Department of Foreign Affairs and International Trade. 2003. *Report on NAFTA Chapter 11 Multi-Stakeholder Consultations*. Ottawa: DFAIT. ⟨http://www.dfait-maeci.gc.ca/tna-nac/other/multistake-nafta-en.asp⟩. (May 24, 2004).
Capling, Ann, and Kim Richard Nossal. 2001. "Death of Distance or Tyranny of Distance? The Internet, Deterritorialization and the Anti-Globalization Movement in Australia." *The Pacific Review* 14: 443–465.
Chiam, Madelaine. 2004. "Submission 34, Centre for International and Public Law, Australian National University, to Joint Committee on Treaties." Canberra, April 5.
Confidential interview with government official. 2004. Canberra, Australia, June.
———. 2005. Honolulu, United States, February.
Council of Canadians. 2003. *NAFTA's Big Brother: The Free Trade Area of the Americas and the Threat of NAFTA-Style "Investor State" Rules*. Ottawa: Council of Canadians. ⟨http://www.canadians.org/⟩. (May 24, 2004).
Dawson, Laura Ritchie, ed. 2004. *Whose Rights? The NAFTA Chapter 11 Debate*. Ottawa: Centre for Trade Policy and Law, Carleton University.
Devotta, Neil. 2004. *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka*. Stanford, CA: Stanford University Press.
Free Trade Area of the Americas (FTAA). 2003. Chapter 17 appears in the third and latest draft agreement of the Free Trade Area of the Americas. Draft Agreement: FTAA.TNC/w/133/Rev.3, November 21, 2003. ⟨http://www.ftaa-alca.org/alca_e.asp⟩. (October 15, 2004).
Gaines, Sanford E. 2002. "The Masked Ball of NAFTA Chapter 11: Foreign Investors, Local Environmentalists, Government Officials, and Disguised Motives." In *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges*, ed. John Kirton and Virginia Maclaren. Aldershot, UK: Ashgate.
Gantz, David. 1999. "Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties." *American University International Law Review* 14: 1025–1106.
Goodman, James, and Patricia Ranald, eds. 2000. *Stopping the Juggernaut: Public Interest versus the Multilateral Agreement on Investment*. Annandale, NSW, Australia: Pluto Press.
International Institute for Sustainable Development. 2001. *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*. Winnipeg, Manitoba, Canada: IISD. ⟨http://www.iisd.org⟩. (February 6, 2002).
———. 2003. "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration." Research paper prepared for the Swiss Department of Foreign Affairs. Winnipeg, Manitoba, Canada: IISD.
Johnson, Chalmers. 2000. *Blowback: The Costs and Consequences of American Empire*. New York: Metropolitan Books.
———. 2001. "Blowback." *The Nation*, October 15. ⟨http://www.thenation.com/doc.mhtml?I=20011015&s=Johnson⟩. (May 9, 2004).

Kuehl, Sheila. 2002. Letter to Robert Zoellick, September 20. http://www.organicconsumers.org/corp/KuehlLettertoZoellick.cfm (May 9, 2004).

Kurtz, Jürgen. 2002. *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*. Jean Monnet Working Paper 6/02. New York: New York University School of Law.

Liberty Victoria. 2003. *"The Big Chill"? Concerns about the Investor/State Provisions in the Proposed Australia-U.S. Free Trade Agreement*. Melbourne Australia: Victorian Council for Civil Liberties and the Catholic Commission for Justice, Development and Peace. ⟨http://www.melbourne.catholic.org.au/ccjdp/⟩. (April 28, 2004).

NAFTA and Inter-American Trade Monitor. 1999. Canada Water Protection December. http://www.newsbulletin.org./getcurrentbulletin.cfm?bulletin_id=8&sid=.

NAFTA Secretariat. 2003. *Overview*. http://www.nafta-sec-alena.org (October 15, 2004).

Parliament of Australia, Joint Standing Committee on Treaties. 2003a. *Report on Singapore-Australia Free Trade Agreement*. Report 42, Canberra, March.

Parliament of Australia, Senate Foreign Affairs, Defence and Trade Legislation Committee. 2003b. *Estimates*. Canberra, June 3. Testimony by Stephen Deady.

———. 2003c. *Estimates*. Canberra, November 6.

———. 2003d. *Voting on Trade: The General Agreement on Trade in Services and an Australia-U.S. Free Trade Agreement*. Canberra, November. http://www.aph.gov.au/senate/committee/fadt_ctte/gats/report/c06final.pdf (May 9, 2004).

———. 2004. *National Interest Analysis of Australia-U.S. FTA*. Canberra, March 30.

Public Broadcasting System. 2002. *Now—With Bill Moyers. Trading Democracy: A Bill Moyers Special, 2–1-02*. Transcript available online at http://www.pbs.org/now/transcript/transcript_tdfull.html.

Public Citizen. 2001. *NAFTA Chapter 11 Investor-to-State Cases. Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas*. Washington, DC: Public Citizen. ⟨http://www.citizen.org/trade/NAFTA/CH_11/⟩. (February 6, 2002).

Smythe, Elizabeth. 1998. "The Multilateral Agreement on Investment: A Charter of Rights for Global Investors or Just Another Agreement?" In *Canada among Nations, 1998: Leadership and Dialogue*, ed. Fen Osler Hampson and Maureen Appel Molot. Toronto: Oxford University Press.

Soloway, Julie. 2002. "Expropriation under NAFTA Chapter 11: The Phantom Menace." In *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges*, ed. John Kirton and Virginia Maclaren. Aldershot, UK: Ashgate.

———. 2003. "NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest." *Choices: Canada's Options in North America* 9. ⟨http://www.irpp.org/choices/index.htm⟩. (May 23, 2004).

Stiglitz, Joseph E. 2004. "The Broken Promise of NAFTA." *The New York Times*, January 6.

Tollefson, Chris. 2002. "Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime." *Yale Journal of International Law* 27: 141–152.

Trebilcock, Michael J., and Robert Howse. 1999. *The Regulation of International Trade*. 2nd ed. London: Routledge.

United States. 2004. United States Trade Representative. Free Trade "Down Under": Summary of the US-Australia Free Trade Agreement. Trade Facts, Washington: 8 February.

Vaile, Mark. 2003. "Vaile Announces Objectives for Australia-U.S. FTA." *Media Release*, March 3.

Weiler, Todd. 2000. "Arbitral and Judicial Decision: The Ethyl Arbitration—First of Its Kind and a Harbinger of Things to Come." *American Review of International Arbitration* 11: 187–204.
———. 2001a. "*Metalclad v. Mexico*: A Play in Three Parts." *Journal of World Investment* 2: 685–712.
———. 2001b. "Trade Ministers Say the Darnedest Things." Unpublished paper. http://www.naftalaw.org (October 15, 2004).
Zoellick, Robert B. 2002. "Letter to J. Dennis Hastert, Speaker of the House of Representatives." Washington, DC, November 13. ⟨http://www.ustr.gov/releases/2002/11/2002-11-13-australia-hastert.PDF⟩. (October 17, 2004).