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NAFTA Chapter Eleven and the implications for the FTAA: the institutionalization of investor status in public international law

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Two issues have emerged from the innovation spurred by the investment chapter (Chapter 11) of NAFTA which provides for the settlement of investor-State disputes outside of the State's domestic courts. First, it represents the recognition that the legal standing of the natural and/or corporate legal person, when acting in the economic capacity of investor, is equal in international law to that of the State. Second, the inclusion of a private party-State alternative dispute resolution mechanism in an intergovernmental treaty is contradictory to the voluntary commitment by parties to such an agreement underlying this method, known as "privity of contract". These innovations have given rise to challenges in international public law, particularly given the strong influence that this NAFTA alternative dispute resolution mechanism has exerted on many intergovernmental bilateral investment treaties and free trade agreements. If the Free Trade Area of the Americas, which is modelled on these developments, is adopted, then this will complete the institutionalization of the investor-State alternative dispute resolution innovation. It is not too late to review and debate in an in-depth manner this possibility in order to secure consistency within international public law.

Key words: dispute resolution, subject of international law, NAFTA, FTAA, privity of contract.

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"There is a newly emerging tyranny attempting
to suppress democratic discourse about issues
of economic policy that are vital to prosperity…"
(Stiglitz , 2002, p.10)

1. Introduction

Joseph Stiglitz, former chairperson of President Clinton's Council of Economic Advisors and subsequently Chief Economist of the World Bank, bemoans the decade-long economic policies of the United States administration for laying "the groundwork for some of the problems we are now experiencing" (Stiglitz, 2002, p. 3). Stiglitz advises that the corporate scandals of the 1990s serve as a chief reminder that "… government has an important role. Every game has to have rules, and government sets the rules of the economic game. *If the rules promote special interests*, or the interests of corporate executives, then the outcomes are not likely to promote general interests, or the interests of small shareholders" (Stiglitz, 2002, p. 7, emphasis added).

This article draws attention to a set of rules that promotes the particular interests of investors.[1] These rules represent a development in international law that raises a myriad of new questions and challenges. The transformation of the General Agreement on Tariffs and Trade (GATT) into the World Trade Organisation (WTO) contributed an array of definitions concerning firms and private parties (reflected in the WTO agreements) and confirmed that firms and private actors were often considered "units of account"[2] in trade and investment activity. There is, therefore, a need to clarify the legal status of these actors. It is in this regard that the North America Free Trade Agreement (NAFTA) and not the WTO,[3] has played a

[1] The State inviting investment also has interests that are reflected in this set of rules. This article focuses on the rules that serve the interests of the investor and, to the extent that the interests diverge, does not discuss the issue from the State's perspective.

[2] The author is indebted to an anonymous referee for this formulation.

[3] In which private actors do not have standing.

pivotal role and exerted a strong influence. Since NAFTA, the increased usage of investor-State dispute resolution mechanisms within intergovernmental bilateral investment treaties (BITs) (Mann et al., 2004; Waelde, 2004a) and free trade agreements (FTAs) has been impressive. It allows the investor to seek settlement of investor-State disputes outside the State's domestic courts, or any domestic court for that matter, through alternative dispute resolution (ADR) mechanisms – specifically, but not exclusively, arbitration. Furthermore, NAFTA's influence on regional FTAs is unmistakable. The negotiations of the Free Trade Area of the Americas (FTAA)[4] (that may result in a future regional agreement[5]) reflect acceptance of the spirit of its NAFTA forerunner. Combined, NAFTA's influence on BITs and bilateral trade agreements, on the one hand, and on regional free trade negotiations, on the other hand, illustrates an institutionalization of these legal developments, suggesting that they have become common standards.

Two issues have emerged from the innovation spurred by Chapter 11 of NAFTA, which deals with the issue of investors. First, the State, which is the only subject of international law with a right of standing[6] in disputes arising from intergovernmental accords, has *de facto* recognized the natural and/or corporate legal person – when acting in the economic capacity of investor – as an equal subject of international law,

[4]Throughout, the article refers to the third draft FTAA.

[5] Although declared "dead" by many commentators, the recent endorsement of the NAFTA by the American National Association of Manufacturers (NAM) and Brazil's Federation of the Industries of the State of Sao Paulo, which just signed a memorandum of agreement reiterating support for the FTAA (NAM, 2005), and the 2004 reaffirmation by the heads of State of Canada and Brazil of their commitment to the FTAA (Government of Canada, 2005) tend to suggest otherwise. The FTAA may, however, take the shape of a *de facto* web of FTAs linking various States together in a "spaghetti bowl" mix of treaty provisions rather than one detailed and explicit regional treaty framework.

[6] The State is to be distinguished from other international actors, e.g. non-governmental organizations (NGOs). These enjoy a new legal status in international law as participants in the process of international law adjudication and making, however not as subjects of law equal in legal status to the State. See WTO (1998).

on par with governments. Second, the State adopted long ago ADR mechanisms to substitute for court litigation as a means to resolve its disputes. ADR mechanisms, however, are based on the principle of mutual consent, i.e. their application is dependent on the voluntary agreement signed between the parties to it that is referred to as "privity of contract".[7] In introducing the investor as party to the ADR mechanisms, with rights and duties as complainant or respondent, but not as party to the treaty or to an arbitration agreement, the drafters of international law have been moving away from a principle fundamental to the logic of a dispute resolution system that distinguishes itself from court litigation.

This article suggests that the time is opportune for thoroughly addressing and debating these issues because the negotiations of the FTAA have not yet been concluded, and its reconsideration is still possible. Also, due to its importance,[8] the ramifications of either adoption or revision of the investor-State concept in the FTAA will have considerable influence on the future evolution of public international law.

Section 2 discusses the history and purpose of international commercial ADR in order to contextualize the main argument, namely that the draft FTAA may represent the final stage of confirming and sealing the institutionalization of NAFTA's Chapter 11 in public international law. Section 3 explains the innovation introduced by Chapter 11's investor-state ADR mechanism and section 4 discusses its implications for international law. Section 5 investigates the implications emerging from the interpretation of international law by the Canadian courts;[9] section 6 describes the FTAA Investment Chapter (Chapter 17) ADR provisions; and section 7 concludes.

[7] This may differ from domestic law where arbitration has been legislated as a means to resolve disputes concerning the public good (e.g. in disputes between labour unions and employers) or where government guarantees, assurances or certification are involved (e.g. insurance, construction) and regarding administrative law at large.

[8] It would represent the world's largest free trade area.

[9] Which serves an example for the implications of Chapter 11 for domestic law.

2. The history and purpose of international commercial ADR

For over a century, ADR (notably arbitration[10]) has figured as a major tool of choice to resolve economic disputes, and arbitration has been seen as playing a significant role in economic and political affairs. International ADR has its roots in medieval commerce, but contemporary international commercial ADR began only in the late 19th and early 20th centuries with the use of mixed claims commissions[11] that attempted to resolve State-to-private-party (or State-owned companies) disputes. In the 1980s, the practice of by-stepping court litigation in favour of ADR expanded. ADR was considered an ingredient of a pre-emptive strategy designed to minimize investment risks particularly in developing countries. Foreign investors were increasingly assured protection through State contracts concluded between governments and the private sector (Bjorklund, 2001), as well as in inter-governmental BITs. The provisions for dispute resolution adopted in these accords represented mostly "soft law", and formed part of the re-vitalized doctrine of *lex mercatoria* (or merchant law) (Cutler, 2003).

Figuring as an important factor in the process of economic globalization, ADR has indeed carved out a private justice system within international trade law shadowing, and competing with, the court system. In United States terminology, it was coined as "offshore litigation" (Dezalay and Garth, 1996, p. 173), a new type of justice service engaging different classes and political positions. The argument in favour of international commercial[12] (i.e. involving a private party) ADR identifies numerous disadvantages associated with litigation via the court system at either the national or international level. Domestic litigation has been said to entail disadvantages such as time, cost (capital and personal), limitations regarding personal

[10] Among the various ADR tools are facilitation, consultation, negotiation, mediation and arbitration and various combinations thereof.

[11] For example, in cases of nationalization of private oil companies in the Middle East.

[12] "Commercial" denotes private-to-private and State-to-private business relationships, while "trade" infers State-to-State commerce.

jurisdiction, and subjection to a judicial process in foreign courts with differing legal systems. Furthermore, private sector concerns about the potential non-enforceability of foreign judgements resulted in unpredictability and uncertainty, thereby threatening commercial stability. All this was seen to cumulate into a "general chilling effect on international business transactions" (Naranjo, 1996, p. 118) resulting from court litigation and considered as a great disadvantage to the conduct of international business.

In addition to the private sector's dissatisfaction with the system of justice, trading States were looking for mechanisms to supplement or substitute for the weakness of the International Court of Justice (ICJ).[13] For a long time, governments relied on the GATT dispute settlement rules, which they later refined in the 1995 WTO Dispute Settlement Understanding (DSU) governing also intellectual property and service trade disputes. Along with the WTO Appellate Body, the DSU has represented a more viable and effective law enforcement option than the GATT and ICJ. Thus, in a consistent evolutionary process, ADR, and particularly arbitration, adapted from the international private sector,[14] has shifted the resolution of disputes arising under public international law out of the public arena of the courts and into the private arena of tribunals. In the process, many legal inconsistencies were created, which remain unresolved. These include the status of the investor in international law and the teleological foundations for ADR investor related provisions incorporated within public international trade law.

The discussion of international ADR involves the distinction between "hard law, soft law, and softer law or extra-legal standards" (Mistelis, 2001, p. 16) which represent different aspects of public international law, including commercial law.

[13] For example, in the settlement of intellectual property rights disputes (Hertz, 1997). Its weakness was related, among other things, to its lack of power to enforce judgments.

[14] And the domestic adjudicative sphere wherein it developed rapidly in the post-World War II era.

"Hard law" comprises international conventions, national statutory law and regional and international customary law reflecting the traditional axiom that international law is the system of law primarily regulating the relations between and among States and traditionally known as "public" international law (Parry, 1968, p. 1). "Soft law" comprises model laws, legal guides and scholarly "renditions" of international commercial law, all of which are not incorporated into national law, as well as private contractual terms that do not conflict with public policy. Soft law is legally binding and enforceable only upon consent of the parties. "Softer law" comprises extra-legal standards used for the purpose of assessment of legal questions (e.g. product quality measurement codes – Mistelis, 2001).

Lex mercatoria, a more recent category of rules permeating public international law, is also the most indeterminate source of public international law, still in the process of crystallization. While NAFTA is a binding treaty ratified through implementing legislation by each of its signatories, and BITs are similarly intergovernmental agreements, the dispute resolution provisions of *lex mercatoria* emerging in NAFTA,[15] BITs and possibly a future FTAA, have their origins somewhere in-between soft and softer law – a category yet to be determined. Indeed, as soft law became incorporated within hard law (e.g. the United Nations Commission on International Trade Law (UNCITRAL) *ad hoc* arbitration rules model law or the World Bank's International Centre for Settlement of Investment Disputes (ICSID) Additional Facility Rules), the question arose whether this practice sufficed to transform the nature of soft law and "codify" it into hard law when incorporated in treaties.

ADR has gained high regard within the legal profession, business and government – and to a certain extent (depending on sectors and interests) – also in the public eye. It has successfully mobilized the symbols of the public justice system

[15] Note that, even within NAFTA, ADR remains partly dependent on the judiciary (e.g. for the enforcement of arbitral awards or mediated settlement agreements, or where the impartiality of an arbitrator is at stake).

in legitimizing the out-of-court dispute resolution concept and its mechanisms. The overall outcome has seen judges acting sometimes as mediators, as senior partners to lawyers on both sides of the dispute or as counsellors to the parties, and employing skills that are not unique to judges alone. The ensuing economic opportunity for the legal and para-legal professions has nourished the emergence of over 120 arbitration centres and more general ADR service providers (Dezalay and Garth, 1996). Yet, from a theoretical legal perspective it has been observed that "... the recognition of a 'private enclave' within the official justice system ... clashes with law's universal ideology" (Dezalay and Garth,[16] 1996, p. 118) representing a dilemma that remains to be resolved. One way to illuminate this issue is to engage in a close examination of the incorporation of elements from *lex mercatoria* within public international law (Berger, 1996) which is "relatively permanent and independent of individual states, in that it is not subject to any ratification" (Mistelis, 2001, p. 23).

3. The innovation introduced in public international law by NAFTA's Chapter 11

Because of NAFTA's importance,[17] its Chapter 11 has become the spearhead of a reformative – perhaps revolutionary – front in intergovernmental trade agreements. This has been explicitly recognized by professionals sceptical of the Chapter's intent of, and ability to, protect investors (IISD and WWF, 2001, p. 6), and who maintained that "[u]ltimately, the chapter came to include stronger elements of investor protection and liberalization than found in the Canada-U.S. Free Trade Agreement, or in any existing BIT" (International Institute for Sustainable Development & World Wildlife Fund, 2001, p.8). Also, the Government of Canada has implicitly expressed reservation noting that:

[16] Bryan Garth is past President of the American Bar Association.

[17] While some investment agreements predate NAFTA, most of today's BITs and FTAs, which include investment provisions, were signed after, and were predisposed to follow in the path of NAFTA. This gives an additional reason to consider NAFTA's Chapter 11 as the banner for new international trade agreements.

> [t]he mere fact that Chapter 11 has generated so much widespread commentary – whether based on deep analysis or pure emotion – indicates that something is seriously wrong with the status quo and signals pressing unfinished business within the NAFTA framework (cited in Alexandroff, 2004, p. 463).

Underscoring the novelty of Chapter 11 is the fact that, unlike the WTO DSU and many other previous international legal ADR provisions included in earlier FTAs and BITs,[18] it reformulates the investment relationship. These provisions, which stipulate a binding dispute settlement mechanism between the investor and the State, are of unprecedented nature[19] (IISD and WWF, 2001) and supplementary to terms addressing investment disputes between the contracting parties. Ever since NAFTA, Chapter 11 has been reflected (in varying measures) not only in many BITs (e.g. in all United States BITs) but also increasingly in FTAs (in a comparatively limited version in the European Energy Charter), the sub-regional Treaty on Free Trade between Columbia, Venezuela and Mexico, the bilateral free

[18] UNCTAD documents the existence of over 2,000 BITs by 2005, of which 1,800 were concluded concurrently with/or after NAFTA, many of them between developed-developing and developing-developing countries. Between 1994 and 2005, Canada alone has signed over two dozen (Alexandroff, 2004; Waelde, 2004b). To be sure, ICSID was established in 1966 precisely to regulate disputes between a State and a private party. These investments, however, were largely of a "concession" type contract designed to address investment risks in a Cold War climate (Waelde, 2004a). Moreover, "it is recognized that international law enforced by investment arbitration tribunals can not become a supranational legal system for the infinite number of government procurement and other contract disputes just because foreign operators are involved;" and the footnote to this statement adds that "[t]his theme is repeated in many recent arbitral awards …, but is rarely thought through: Formally, investment arbitral tribunals are never supranational appeals body [*sic*], but from a more material perspective, they provide – as appeals do – a recourse to judicial decision-making when the domestic option either appears non-appealing or in some cases when the domestic recourse has failed to satisfy the aggrieved investor" (Waelde, 2004a).

[19] In large measure due to the enlarged scope of the possibilities open to an investor seeking recourse, which have turned the legal protection of the investor into a double-edged sword – protective shield but also sword (IISD and WWF, 2001).

trade agreements between Bolivia-Mexico, Costa Rica-Mexico, Canada-Chile (SICE, 2003) and most recently in the United States-Chile Free Trade Agreement (USCFTA, 2004).[20] All these agreements provide for terms addressing investment disputes arising between a contracting party and an investor and permit the investor to bring a claim against a government in an arbitration procedure. This represents a salient novelty in intergovernmental agreements, for two reasons: investment provisions now draw into their realm the broader context of the trade (not just investment) agreement within which they are incorporated (prior to Chapter 11, similar provisions were related to specific issues and were limited in scope); and they allow for binding arbitration initiated by an investor.

The rationale for enhanced foreign investor protection agreements was based on the expectation that such protection, while encouraging investment in developing economies, would also provide opportunities for investment and encourage job creation in the home country of the investor (Mann, 2002, pp. 2-3). Recent studies show that BITs have not led to these effects (Mann *et al*., 2004), although NAFTA members more than doubled their foreign investment in their NAFTA partners between 1994 and 2000 (Government of the United States, 2003a). In addition, stakeholders and commentators have been vocal in criticizing Chapter 11's ADR provisions for causing harm to social interests (i.e. labour and the environment), for interference with national sovereignty and for undermining the democratic rules of the game at the national and sub-national levels of government. Furthermore, according to these critics, alongside the foreign investment gains, evidence has been mounting of unintended side effects in the form of foreign investors' recourse to the new ADR protection hindering government efforts to implement measures aimed at improving public welfare, through environmental legislation for example.[21]

[20] The USCFTA is the first comprehensive free trade agreement between the United States and a South American country.

[21] "Since the adoption of the high-profile NAFTA, many of these uses are now directed at blocking or seeking compensation from government measures designed to protect the environment or public welfare in other areas, but which impact upon an investor's interests" (Mann *et al.*, 2004, p. 1).

Subject of international law. The extensive focus on the adverse labour and environmental impacts of Chapter 11 has overshadowed its larger and deeper reaching implications on international law. What Chapter 11 has effected – without much public debate – is the addition of a new subject of international law to its already expanding list of new subjects.[22] Chapter 11 is innovative because it does away[23] with the more than century old international legal principle that the government of a State is the only subject that has (full) standing in international public law and is representing its citizens in its governmental capacity.[24] Intergovernmental trade and investment agreements (unlike commercial contracts[25]) are instruments of public, not private, international law. With this development, governments have now allowed (solicited) the investor to become a direct subject of international law since, under certain conditions stipulated in the investment dispute resolution mechanism, the investor is entitled in law to file directly – not via representation by government – a complaint against a foreign government. Concerned by the fact that international investment law is endowing its new subject – the investor – with rights and no corresponding responsibilities (by definition, a subject of international law carries both rights and duties), Howard Mann, like other critics, has protested against "the absence of a sense of basic justice in such a system of law" (Mann, 2002a, p. 2).

Privity of contract. The logic of ADR, which distinguishes it from adversarial court litigation, is premised on the mutual consent given by the parties that have concluded an

[22] This has been noted by experts on human rights; see the discussion by Alvarez (2004). More generally, on the expansion of the definition of subjects of international law, see Petersmann (2002) and Rights and Democracy and ICCLRCJP (2000).

[23] More than any other similar provision (e.g. Article 26 of the European Energy Charter, 1991).

[24] Even in matters of human rights (the most progressive development to date is the International Criminal Court), the party against which a natural or corporate legal person may submit a petition, is a natural person, not a State (IISD and WWF, 2001).

[25] See Waelde (2004a).

ADR agreement. The question which therefore arises from Chapter 11 is, whether an investor, who is not party to an international public trade or investment treaty, may be considered as having expressed consent to the procedure. Is actual recourse to the ADR provision sufficient proof of voluntary acceptance? Since, as private parties, investors cannot negotiate the ADR terms of a treaty, their only choice remains acceptance or rejection of the agreement "as is". Rejection, however, will not lead to a more attractive alternative.[26] Unlike the State, which has negotiated the ADR provisions adopted in the agreement, the investor is in a weaker bargaining position, or has none at all. But even if the very option of having recourse to ADR satisfies the test of free consent, the investor still will not be legally bound by the treaty. Or, is it now the case that, according to this scenario, proof of voluntary acceptance of the treaty's ADR terms renders an investor a party to the inter-governmental agreement? Arguably, while such a position is sustainable from a *lex mercatoria* contract law based perspective, it is significantly less persuasive when approached from a public international law angle.

Human rights and international trade law. "Through the transfer between contexts the meaning of norms becomes contested as differently socialized actors apply them. The analytical challenge is to provide a methodological link between these practices" (Wiener, 2003, p.1).[27] Expanding the definition of the subjects of international law requires overcoming the analytical challenge – a task that has characterized the discourse on human rights law, but only marginally the discussion of the re-definition of the subjects of public international law in an economic context. In the debate between Philip Alston and Ernst-Ulrich Petersmann, the latter maintains that his "proposals for empowering individuals" pursue the same human rights values as Alton's through decentralized and more complex "market

[26] After all, distrust of the local justice system in a host country formed one of the original reasons to incorporate ADR provisions in investment agreements.

[27] Boehmler (2004) provides an interesting philosophical contribution to the analysis of the issue.

governance mechanisms which treat citizens as legal subjects rather than mere objects" (Petersmann, 2002, p. 8). In contrast to mainstream discourse, the political is distinguished from the economic, social and cultural spheres of human rights. Petersmann emphasizes the "mutual synergies between economic integration law, human rights and social welfare" because "[e]conomic welfare depends on constitutional guarantees for the division of labour, savings, investments and trade among individuals and on the protection of human rights" (Petersmann, 2002, p. 6).

A "social market economy" hinges on reconciling liberal and social values through legislative protection, where international economic law includes procedural rights in addition to substantive rights. This would require one to "suggest [interpret] national and international guarantees of freedom, non-discrimination, rule of law and social justice (e.g., in the Bretton Woods and WTO agreements) in a mutually coherent manner as empowering citizens, obliging governments and reinforcing individual rights (e.g., to 'negative' as well as 'positive freedoms', non-discrimination and individual access to courts)" (Petersmann, 2002, p. 3). In other words, against the backdrop of Petersmann's argument, the innovation of Chapter 11 might be viewed as a first step towards the enfranchisement in international law of the individual legal person in their capacity as an investor and beyond – encompassing all economic matters. If and when the human rights debate extends beyond the intellectual backroom and is positioned in the political forefront, the extension of the definition of the subjects of international law embarked upon in Chapter 11 may well prove not just innovative but revolutionary indeed.

Chapter 11 developments ten years later. Recurrent calls for increased public access to the process of negotiation and implementation of NAFTA effected a minor drift in this direction when almost ten years after its entry into force, governments have begun paying attention. Both Canada and the United States are now committed to having their hearings in public (provided the arbitrating investor agrees). The NAFTA

Free Trade Commission took the unprecedented initiative of issuing a joint interpretive statement designed to clarify key aspects of its dispute resolution mechanism for the purpose of future arbitrations. The October 2003 statement promised that the parties would take greater steps to share documents filed in connection with Chapter 11 proceedings with members of the public and other levels of government, in the hope of alleviating fears and concerns created by the procedure (Tollefson, 2002, p. 186). The Commission's decisions have led to the establishment of a procedure for *amicus* briefs submissions,[28] and have also paid attention to the separate concerns of the private sector (private party-to-private party) by accepting the recommendation of the NAFTA Advisory Committee on Private Commercial Disputes and calling for a harmonized legal framework for the resolution of private commercial disputes (Government of the United States, 2003a). All of this, however, still leaves the core element of the NAFTA investor-State dispute resolution formula (i.e. privileged extension of the definition of the subjects of international law and privity of contract) intact.

4. The implications of Chapter 11 for international law

The reach of Chapter 11's innovations extends beyond international trade, commerce and investment, or labour interests and environmental concerns. It further amplifies earlier changes (in human rights law) that have been modifying the architecture of international law, and in particular the distinction in international law between public and private disputes. Comparing trade and investment liberalization in NAFTA with that under the agreements of the WTO or the European Union (EU) illustrates the magnitude of this evolution. WTO members have not reached agreement about negotiations on investment and the DSU governs only State-State disputes.

[28] Representing a reinforcement of the WTO Shrimp decision. The NAFTA's three trade ministers agreed "on measures to further improve the transparency and efficiency of Chapter 11 (Investment) dispute settlement process, including guidelines for submissions from non-disputing parties and a standardized Notice of Intent Form" (Government of Canada, 2003b, p. 1).

However, the European Court of Justice (ECJ) has carved out an approach for the EU that reconciles features of both international and national law. It chose to follow the classical theory of representative democracy and to apply it as a standard measure to secure adherence by EU institutions to democratic principles.[29] Most ECJ cases reflect jurisprudential attention to questions of institutional balance within the EU, and provide lessons to be learnt with regard to the "osmosis" (Ninatti, 2003) permeating the EU's regional and national levels. It is widely accepted that the ECJ's deliberations have affected the conceptualization of the EU as a regional integration area, a proposition that is foreign to NAFTA's adjudicative process simply because NAFTA lacks the relevant institutions. Consequently, although it has served as a model for providing investment-related ADR mechanisms, the course that international trade and investment law has taken in the 1990s, and which has been influenced by the innovations introduced in NAFTA's Chapter 11, reflects an only partly conceptualized approach. The investment aspect of *lex mercatoria* has not yet been integrated within the theory of international law.

It has been inferred in defence of Chapter 11 that – similar to *lex mercatoria* at large – it represents the evolutionary process of law (Berger, 1996; Cutler, 2003). Moreover,

> the investment law now emerging is that the process of norm development is no longer an exclusively inter-governmental project. Rather, it deploys the legal procedures developed in the largely privatised systems of commercial arbitration and itself mediates between the traditional inter-governmental character, and the new privatised character, of investment arbitration, with 'legal entrepreneurs' providing impetus and dynamics (Waelde, 2004b, p. 478).

Some advance this argument as grounds to embracing the change: "we are not straying into the unknown, but rather are

[29] Accordance with democratic principles is also a guiding tenet of NAFTA.

correcting the aberration manifested in the nationalization of international economic and business law during the 19th century … we are merely returning to our roots …" (Jan Dalhuisen cited in Waelde, 2004b, p. 478). However, one must question whether in the context of a globalized 21st century environment, such an approach remains applicable to an increasingly complex socio-political post-modern order. Arbitration, which is the hallmark of the Chapter 11 investor-State provisions, is, according to Michael Reisman (1992, p. 1) in fact, "a delegated and restricted power to make certain types of decisions in certain prescribed ways. Any restricted delegation of power must have some system of control. … Controls are necessary not only for efficient operation. Effective controls are the only assurance of limited government. In this sense controls are a *sine qua non* of liberty". How does this assertion apply to trade liberalization that empowers the investor? Is the limitation on government as emerging from Chapter 11 contributing to control?

In Chapter 11, the issue of control relates to the designation of arbitration as a mode of dispute settlement involving two different types of subject of international law – the State and the investor. To fulfil its purpose, control must address the core characteristics of the subject of control. As mentioned above, in the EU, European institutions (specifically the European Parliament) are the beneficiaries of the ECJ's judgments, and the context for the Court's interpretation is designed to assure a democratic balance within the regional institutional system. In NAFTA, where delegated representation remains at the level of the national parliaments of the members and there is no regional NAFTA body to counter-balance the executive, control will remain elusive. Chapter 11 provisions that have expanded the definition of the subjects of international law to include only certain (not all) actors in the market place (i.e. the investor), are insufficient to secure against unlimited control by the economically powerful. It rewards the powerful corporate investor, but leaves other actors outside the scope of protection (Gal-Or, 1998a, 1998b, 2002). This has been recognized in the debate regarding public goods – of which the State has

traditionally been the guardian. According to Michael Hart and William Dymond quoted in Alan Alexandroff (2004, p. 469): [30]

> States face a choice. One option is to retreat from obligations governing the treatment of foreign investors and investments. … A better choice would be to extend rights of private access beyond investment issues to encompass the full range of international economic exchanges and to expand access to those rights to their own citizens, corporate or otherwise.

Chapter 11 fails to satisfy the control requirement for yet another reason: it overlooks the central role played by privity of contract in the very mechanism of arbitration. It transposes "arbitration rules [that] were created to remove investment disputes from the heated political arena of state-to-state controversy to the cooler … tribunal" (Laird, 2001, p. 225) and places them within the arena of investor/private party-to-State disputes, but with an unclear legal or political grounding. The conversion of a private contract law based principle into a treaty law context has not been thought through adequately. From a political perspective, State-private party relations involve a set of implications different from those arising in a State-to-State relationship. Consequently, from a legal point of view, Chapter 11 contributes to self-contradictory norm development (regarding investor-State disputes) – which applies not only at the point of initiation of the arbitration procedure but also at the stage of judicial review of an arbitral award.[31] For instance, clearly the argument that investor-State arbitration under NAFTA is invalid becomes irrelevant in the context of Chapter 11 because "none of the bases for invalidity common in the commercial arbitration context, such as coercion, fraud, lack of identity of the parties, and so forth, can apply where arbitration is 'without privity' …" (Jan Paulsson, cited in Rubins, 2004, p. 363).

[30] See also Rubins (2004) and IISD and WWF (2001, pp. 19-20).

[31] Under UNCITRAL, which is referred to by NAFTA (Rubins, 2004).

The insights gained in the EU may provide guidance for NAFTA signatories as well as the drafters of the FTAA,[32] particularly due to the role played by the adjudication process in the transformation of norms. As observed in the EU, it is significant that "often, jurisprudential affirmations appear to prefigure those normative reforms to which the treaties have conformed throughout the history of European integration" (Ninatti, 2003, p. 5). The ECJ has become "a privileged interlocutor, a concrete starting point for understanding the affirmation of democratic principle in European integration" (Ninatti, 2003, p. 5), even a "privileged 'political' agent" (Ninatti, 2003, p. 5). To be sure, it is reasonable to expect that the adjudication process within NAFTA may yield a similar influence. This is all the more important when considering the role that the national courts of NAFTA signatories may play in recognizing foreign arbitral awards.

5. The national court as an agent in mediating the impact of Chapter 11: Canadian examples

Which institution plays the role of "privileged political agent" with regard to the NAFTA area? Arguably, by analogy, the international-national law "osmosis" proposition may also be valid with regard to NAFTA. In such a case, the osmosis will be effected through a combination of NAFTA arbitration panels of the one hand, and United States, Canadian and Mexican national courts on the other, which, through judicial review, would be performing a role similar to that of the ECJ. The Canadian example serves to illustrate this proposition.[33] Not surprisingly, and in contradistinction to the ECJ, the Canadian court has adopted a deferential attitude to international adjudication. The literature on the role of judges in the domestic internalization of international law, and the jurisprudence

[32] Although NAFTA and (a possible future) FTAA are both free trade agreements and do not establish a common market.

[33] This article discusses only a limited number of examples to show the reach of arbitral decisions under the "evolving law" of Chapter 11 as they reverberate within international law and affect domestic law.

regarding the implementation of international law by Canadian administrative tribunals, is relevant here.[34]

For instance, the part of the decision in *Baker* (Baker v. Canada, 1999) discussing the Court's method of interpretation to determine whether to incorporate international legal norms in domestic law is illustrative of a relatively new trend in Canadian courts. The question raised in *Baker* was whether to substitute the teleological interpretation of laws, which was based on legislative intent and historical origins, with a more engulfing contextual ("non-originalist") and persuasive approach. Shifting to the latter, the Court endorsed a broad construction, undertaking to consider all national indicators that could suggest approval of international conventional law (Houle, 2003, p. 4). According to this approach, interpretation depends not only on the literal text of the international norm, but equally incorporates both axiological and empirical contexts of the norm (Houle, 2003, p. 7). [35] The implications are significant. Since *Baker*, a judge may no longer be required to examine the conformity of national and international law, for a simple ascertainment of compatibility will suffice; and in the absence of conflict between international and national laws, the judge will remain free to give effect to the former in the latter's laws (Houle, 2003, p. 7).

Another example of the deferential approach to international law is the *Metalclad* decision[36] (Government of

[34] Although only one example addresses trade and international commerce directly, the insights from the literature and jurisprudence are suggestive of an overall trend relevant also to international trade and commerce law.

[35] It should be noted that *Baker* applies to the incorporation of international law through an administrative agency based on the latter's discretion and pro-active orientation. Nevertheless, it is argued here that this signals a general pattern regarding the incorporation of international law within national law, particularly in the absence of unequivocal decisions to the contrary in non-administrative issues.

[36] A NAFTA Chapter 11 appeal heard by the Supreme Court of British Columbia, Canada. See also Rubins (2004, pp. 375-380).

Canada, 2001). Mexico, supported by the Intervener Attorney General of Canada, urged the Court to review the traditional judicial deferential approach to private commercial arbitral awards. The grounds advanced by Mexico were based on the principle of privity of contract, i.e. the argument that Chapter 11 represented a departure from that principle since the investor was not party to the treaty within which the dispute originated. In this example, the Court deferred to the NAFTA tribunal without clear explanation (Rubins, 2004, p. 376).

Considering the Court's positions in both cases – regarding the arguments challenging the transposition of international within national law (*Baker*), or those concerning the interference of private, within public, international law (*Metalclad*) – suggests that, in practice, the Court prefers to follow, rather than "struggle" to resolve complex issues arising in international law. Consequently, it could be inferred that Canadian judicial deference to international law might be signalling a tendency to go beyond simple judicial reluctance to interfere with international law on a legal plane. The Court is seen to be considering political reasons as justifying the presumption of conformity of international and domestic law even in the absence of clear legislative intent (Houle, 2003, p. 9; Rubins, 2004, p. 379).

Scholars have also drawn attention to the role of the Court in transforming domestic law as a by-product of the Court's interpretation of international law, particularly as result of its deference to international commercial arbitration and the reverberations on domestic arbitration (Watson Hamilton, 2003). Party autonomy, which is corollary to the legal principle of privity of contract, represents a legal principle designed to "level the playing field" formally among disputing parties with different socio-political traits. The parties are supposed to be of "relatively equal bargaining strength" and "want to be free of national procedural and substantive law" (Watson Hamilton, 2003, p. 1). This intent, however, is lost in the context of a globalized world economy in which new and powerful non-State actors (NSAs) participate in the process of intergovernmental

rule making (i.e. treaty negotiations)[37] and have been advocating a body of rules "free from the idiosyncratic differences that arise between national legal systems" (Watson Hamilton, 2003, p. 3). Promoters of such "liberation" (mainly from the business sector) have advanced contractual theory as a means to secure the independence of the arbitrator's authority in conducting international commercial arbitration as well as choosing the law governing the contract. In practice, however, the irreconcilability of the legal principle of party autonomy with the principle of judicial scrutiny (court procedure) may entail situations in which party autonomy (of economically unequal parties) will conflict with the imperative of fairness.[38]

Jurisdictional theory, which challenges contractual theory, represents the opposite extreme on the spectrum of argumentation. It recognizes the State's primacy as the actor governing the arbitral procedure incorporated in treaties. "The real authority of arbitration derives not from the contract between the parties, but from the recognition accorded by the state" upon which the enforcement of arbitration awards depends (Watson Hamilton, 2003, p. 5).[39] The enforcement itself, or the extent of enforcement, is subject to the state's interest in the fairness and uniformity of law and order (Watson Hamilton, 2003). Sensitive to this dissonance, promoters of international ADR have been increasingly equating an arbitrator's to a judge's status, amongst others, by considering for settlement via arbitration issues previously considered as not being subject to arbitration (Watson Hamilton, 2003).

The compromise struck by the Uniform Law Conference of Canada of 1990 in the Uniform Arbitration Act represents a

[37] On this issue, see for example, Angela Banks (2003): "Not only are non-state actors instrumental in generating soft law, but they can also be influential in accelerating the political process to motivate states to create hard law, … through lobbying efforts, informational campaigns, and coordinating action among various organizations and segments of society" (Banks, 2003, p. 295).

[38] See also Gal-Or (2004, 2005).

[39] Jurisdictional theory is concerned more with the status of the subject of international law and less, if at all, with privity of contract.

mix of contractual and jurisdictional theories,[40] suggesting a degree of (belated) alignment of Canadian courts' with United States' courts' deferential attitude towards arbitration (Watson Hamilton, 2003). Interestingly, statutory reform in New Zealand and the United Kingdom have circumscribed the reach of contractual theory where a contract was dictated by a more powerful party (Watson Hamilton, 2003, p. 55).[41] These precedents may create reverberations throughout the international trade and commercial legal regime, both with regard to State-to-State disputes involving states of unequal economic power, as well as Chapter 11 type State-to-private party disagreements.

In conclusion, the NAFTA Free Trade Commission and the legal profession have been sensitive to the need for further fine-tuning. The Commission has felt uneasiness with regard to the absence of privity of contract and the fact that, as investors were not party to the treaty, the parties' federal governments were torn between irreconcilable commitments at the international versus national levels. Other issues of concern have emerged from the definitional shortcomings of Chapter 11, for instance, when shareholders were considered as being investors; fault with an arbitral tribunal's scope of jurisdiction where arbitrators applied excessively generous interpretations of the substantive rights provided under NAFTA; problems with the reconciliation of arbitral law with international law, particularly in cases in which, according to NAFTA, a party to a dispute that had unsuccessfully applied a treaty remedy was blocked from having recourse to domestic remedies "even though the full exhaustion of remedies (without order of priority) is a

[40] The three relevant conflicting principles are: fairness or equality of treatment (reflecting jurisdictional theory); and control by the parties and efficiency (both reflecting contractual theory) (Watson Hamilton, 2003, p. 8).

41 The fact that investors can avail themselves of Chapter 11 only by accepting it "as is" is an example of a contract dictated by a powerful party (the State). Critics would probably argue that the State negotiated and drafted the agreement under the influence of investors (transnational corporations) and therefore is not more powerful than the investor.

principle of international law (Cowpler, 2002).[42] Finally, governments have come to realize the high financial costs of arbitrating Chapter 11 disputes (particularly when appealing the tribunal award in a party's domestic court) and consequently undertook to reduce the number of claims. This is, however, a double-edged sword because it may either encourage improvements to Chapter 11 ADR mechanisms or, alternatively, lead to a reluctance to challenge NAFTA arbitral awards.

6. The institutionalization of the NAFTA investor-state ADR mechanism through the FTAA

The previous section discussed the impact of the NAFTA investor-State ADR mechanism on public international law. It pointed out the two innovations in investment law ADR – the expansion of the definition of subjects of international law, and the problem of reconciling the ADR requirement of privity of contract with a treaty framework that enfranchises non-parties. It showed that NAFTA provisions have been a major force in popularizing these innovations, its model being embraced in many BITs as well as bilateral (and even some regional) FTAs. The article now turns to a discussion of the incorporation of the NAFTA investor-State ADR mechanism in the draft FTAA. It is argued that if this treaty is signed and ratified, it will represent the completion of an institutionalization process of new norms in international law, a process reflected in NAFTA, that in turn became a catalyst for its further development.

At the occasion of NAFTA's 10th anniversary celebration, the three member countries' trade ministers declared: "The FTAA will build on the existing free trade agreements and on expanding the links that the NAFTA countries have elsewhere in the hemisphere, allowing them to take full advantage of

[42] Geoff Cowpler acted as counsel for the Metalclad Corporation in *Metalclad*. Note that the ADR mechanism writ large provides for a succession of what has lately been referred to as "amicable dispute resolution" (excluding arbitration, ADR Rules 4 (ICC, 2001)) whereby consultation and negotiations are in most cases prerequisites to arbitration. Some BITs require the prior exhaustion of recourse to local courts (SICE, 2001, p. 18).

emerging hemispheric markets" (Government of the United States, 2003a, p. 6). Indeed, a cursory review suffices to show that the FTAA dispute resolution provisions have been drafted based upon both the WTO and NAFTA models. Some criticisms of NAFTA's Chapter 11 have been addressed by the FTAA drafters, who have refined several relevant terms. These concerns were raised, among others, in the Canadian multistakeholder consultations, where participants expressed doubts concerning selected NAFTA Chapter 11 provisions. For instance, participants were troubled by the fact that Chapter 11 includes everything unless excluded, and favours a bottom-up approach; that no investor obligations are attached to the already granted rights; and the fact that individuals who do not fall within the investor definition, are, in this agreement, legally inferior to investors. The discussion on the dispute settlement mechanism weighed the right of direct corporate access to arbitration against access administered through government representation (i.e. contract theory vs. jurisdictional theory) and considered the issues of transparency and voice through *amicus* briefs. The composition of tribunals and the choice of panellists were also discussed (Government of Canada, 2003a). The analysis begins with a review of the provisions of the draft FTAA Investment Chapter that incorporate these (and other) criticisms, and then juxtaposes them with those provisions that remain unchanged.[43]

Chapter 17 Section C Procedures and Institutions is an overall statement (re-iterated throughout the Chapter) designed to secure business interests and simultaneously reassure civil society. For instance, several articles address civil society's relentless demand for transparency. Section C.1. Article 21. Transparency provides:

[43] The FTAA refinement of investor-State ADR provisions coincides with recent steps undertaken in the United States to reconcile social justice issues with trade and investment relations. For instance, the United States-Jordan FTA represents the first FTA to which the United States is a Party that incorporates labour and environmental provisions within its main text and, in addition, provides a single dispute resolution mechanism for both commercial and social issues (Hornbeck, 2003).

> … 21.1. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that affect or pertain to covered investments or investors are *promptly published or otherwise made publicly available*. Where a Party establishes policies that affect or pertain to covered investments or investors, which are not expressed in laws or regulations or by other means listed in this paragraph, that Party shall promptly publish them or otherwise make them publicly available[44] (FTAA, 2003, p. 29, emphasis added).

Non-bracketed Section C.2.b. Dispute Settlement between a Party and an Investor of Another Party Article 30 Transparency of Arbitral Proceedings states that:

> 30.2. The tribunal shall conduct hearings *open* to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. *However*, any disputing party that intends to use information designated as *protected information* in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
> 30.3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article XX (Essential Security) or Article XX (Disclosure of Information) of Chapter XX (Exceptions) (FTAA, 2003, pp. 53-54, emphasis added**).**

Transparency in arbitration hearings is addressed in Subsection C.2b. Article 50. Public Access to Hearings and Documents, which reads: "50.1. Hearings held under this Section shall be open to the public" (FTAA, 2003, p. 48). Some degree of standing for the affected non-Party is provided in Article 51 Non-Party Participation stipulating that:

[44] Brackets represent pending negotiations regarding both content and language and may also reflect complete rejection of the text by one or more negotiating parties.

> 51.1. A Tribunal may grant *leave to a non-Party* petitioner *to file a written submission*. In making this decision, the Tribunal shall consider, *inter alia*, whether:
> a) there is a *public interest* in the arbitration;
> b) the petitioner has a substantial interest in the arbitration …; and
> c) the *non-Party's submission would assist the Tribunal* in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties (FTAA, 2003, p. 48, emphasis added).

Progress has been made with regard to the issues of public goods, sovereignty and sub-level government jurisdiction. Subsection C.2. Dispute Settlement Article 22. Dispute Settlement reads:

> 22.2. Disputes that arise as a result of direct or indirect *governmental administrative decisions of a regulatory or enforcement nature shall not be subject to the dispute settlement provisions of this Agreement*, provided that such decisions are consistent with the legislation of the respective Party and with Articles 4 (National Treatment) and 5 (Most-Favored-Nation Treatment) (FTAA, 2003, p. 29, emphasis added).

Securing the competence, impartiality, and independence of arbitrators are issues addressed in Subsection C.2.b. Article 32. Arbitrators requiring that:

> 32.2. Arbitrators shall:
> a) have expertise or experience in law, international trade, other matters covered by this Section, or the resolution of disputes arising under international trade agreements;
> b) be independent of, and not be affiliated with or take instructions from, any Party or disputing party; and
> c) comply with the Code of Conduct for Dispute Settlement procedures (Annex XX of Chapter XX (Dispute Settlement))"[45] (FTAA, 2003, p. 38).

[45] Details on Annex XX were not available at the time of writing of this article.

Based on the above, promoters of a social-justice and public-good[46] oriented FTAA may see the outcome so far as giving reason for optimism. The shift effected by way of "amending the NAFTA in the FTAA" may suggest that consultations (and civil society's public protest) have born positive results. Also, while this may signal willingness on behalf of the drafters to respond to trade-and-investment *related* concerns, the modifications remain incomplete. The core problem identified above in the development of international trade and investment law and related dispute settlement – namely the expansion of the definition of subject of international law and arbitration without privity – have yet to be acknowledged. The NAFTA "*status quo*" is overshadowing the corrective FTAA drafting accomplishments as several major concerns have not yet been addressed. They include, for instance, the direct access of an investor to the dispute resolution process to the exclusion of any other private or public (sub-government level) party. Section A General Aspects Article1 Definitions states that: "disputing investor means an investor who makes a claim under [Subsection C.2.b. (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter]:] (FTAA Draft 3 p. 8) and "[disputing party means [either the claimant or the respondent] [the disputing investor and the disputing Party] (FTAA, 2003, p. 8).

Having adopted the NAFTA innovation of extending the definition of the subjects of international law, Chapter 17 of the FTAA does not move towards a further (equalization) expansion

[46] Including equality: concerns regarding the development gap between rich and poor member States, and the development constraints experienced by the smaller (poorer) economies, have been accommodated in Section C.2. Dispute Settlement Article 22.3. "Smaller economies shall be allowed access to technical assistance and an extended time period, where necessary, for dealing with state-to-state and investor-state disputes" (FTAA, 2003, p. 29). Subsection C.2.b. Dispute Settlement between a Party and an Investor of Another Party 24. 2. Investor-state Disputes provides that "… [w]here an *investor of a large or developed economy* is involved in a dispute with a *smaller economy State* and the matter is submitted to arbitration, at least half of the legal costs incurred by the State should be borne out of a Regional Integration Fund (FTAA, 2003, p. 30, emphasis added).

of the definition to include other private (or public) actors in addition to the investor.[47] In fact, the drafters distinguish between trade and commerce, i.e. the public and private economic spheres as they draw attention (in another dispute resolution chapter) to the settlement of private-to-private disputes, which are considered no less important to the promotion of free trade than settlement of investor-State and State-to-State disputes.[48] They recommend assisting private parties in settling their disputes through mechanisms similar to those governing State-to-State disputes. Article 47 Alternative Dispute Resolution between Private Parties in Chapter 23 encourages the parties as follows:

> 47.1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes *between private parties.*
> 47.2. To this end, *each Party shall provide for appropriate procedures to ensure observance of [international arbitration conventions]* [agreements to arbitrate] [that have been ratified] and the recognition and enforcement of arbitral awards granted in those disputes. [A Party shall be deemed to be in compliance with this paragraph if it is party to [and is in compliance with] [the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards] [or the 1975 Inter-American Convention on International Commercial Arbitration].]
> 47.3. The Parties *may establish an Advisory Committee on Private Commercial Disputes*, comprising persons with expertise or experience in the resolution of international private commercial disputes. The Committee shall present reports and recommendations of a general nature respecting the availability, use and effectiveness of arbitration and other procedures for the

[47] See Gal-Or (1998a, 1998b, 2002, 2004) and de Mestral (2005) regarding amendments to NAFTA's Chapter 11 investor-state provisions.

[48] See Dispute Settlement Chapter 23, which deals only with State-to-State disputes.

resolution of these disputes in the FTAA. (FTAA, 2003, Chapter 23, emphasis added).

The emphasis on commercial (not trade) relations was reiterated at the January 2004 Monterrey Special Summit of the Americas, when the leaders of the Americas addressed the disparity between large corporations versus small and medium-sized enterprises (SMEs). They endorsed the granting of financial assistance to SMEs (Government of the United States, 2004b) and the development of various regulations in support of SMEs. For instance, in a move towards promoting a business friendly environment, the United States suggested to strengthen and enforce individual property rights at the national level.[49] It called on the American States to establish effective property rights systems and proposed to facilitate remittances to Latin America by streamlining transactions costs (Official Agenda, 2004, p. 4). Also, in a bid to encourage job creation in Latin America, the United States suggested to remove roadblocks to starting new business, including impediments to good governance, by declaring anti-corruption as a top target because "*[o]nly* 25 percent to Latinbarometro's 2002 survey] expressed confidence in their government or judiciary, the lowest level in six years" (Government of the United States, 2004a, p. 5, emphasis added). The United States proposal did not include suggestions for the setting up of institutional means to overcoming barriers to justice. It is also regrettable that the leaders at Monterrey did not address the possibility of developing additional (less expensive) ADR mechanisms designed to facilitate access by SMEs.

The NAFTA *status quo* is reflected in the FTAA also regarding the issue of "privity of contract". The formula of "arbitration without privity" reminds of the small letters section within standard contracts, a practice that has been source of discontent in debates on the common law of contracts. Similar to the NAFTA provisions, the investor is invited to accept or reject the FTAA ADR formula. However, rejection of the only

[49] See Petersmann (2001) regarding international individual property rights, in the section on innovations introduced in Chapter 11.

available procedure shuts the door on any truly negotiated option.[50] The sole alternative to "arbitration without privity" is recourse to the parties' national courts, the distrust of which has led to the adoption of ADR in the first place. Loyal to the NAFTA *status quo*, FTAA Chapter 17 (Subsection C.2.b Dispute Settlement between a Party and an Investor of Another Party, Article 30. Conditions Precedent to Submission of a Claim* [*sic*] to Arbitration) stipulates:

> 30.1. A disputing investor may submit a claim [on its own behalf] to arbitration [under this Section] [under Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) only if:
> a) the *investor consents* to arbitration *in accordance with the procedures* set out in [this Section] [this Agreement] (FTAA, 2003, p. 35, emphasis added).
> The article continues:
> b) … Accordingly, once the investor or the enterprise has submitted its claim to an arbitration procedure under this Section, *the choice of such a procedure shall be final, precluding the possibility of submitting the claim to the competent national court* of the disputing Party or to other dispute settlement procedures, without prejudice to the exceptions set out above with respect to preventive measures and administrative remedies.… (FTAA, 2003, p. 35, emphasis added).
> and Article 30.2 repeats:
> 30.2. A disputing investor may submit a claim [, on behalf of an enterprise] [under this Section,] [under Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)] to arbitration *only* if *both the investor and the enterprise*:
> a) *consent* to arbitration in accordance with the procedures set out [in this Section] [in this Agreement; and
> b) *waive their right* to initiate[or continue] any proceedings [before a competent national court under the

[50] The legal ramifications (consistency in the law) of applying ADR in a manner contradictory to ADR's own teleology was discussed in the previous section.

> law of the disputing Party, or other dispute settlement procedures with respect to the measure of the disputing Party that is alleged to be a breach of the provisions of Article 26.1 and 26.2 …Accordingly, once the investor or the enterprise has submitted its claim to an arbitration procedure under this Section, *the choice* of such a procedure shall be final, precluding the possibility of submitting the claim to the competent national court of the disputing Party or to other dispute settlement procedures, without prejudice to the exceptions set out above with respect to preventive measures and administrative remedies.]) (FTAA, 2003, p. 35, emphasis added).

Arbitration without privity is reinforced in Subsection C.2.b. Dispute Settlement between a Party and an Investor of Another Party Article 31. Consent to Arbitration where the stipulation reads: "31.1. Each Party consents to the submission of a claim … to arbitration in accordance with the procedures [and requirements] set out [in this Chapter] [in this Agreement] [in this Section]" (FTAA, 2003, p. 36).

7. Conclusion

This article has highlighted two developments in international public law that are flowing from the blurring of the boundaries between private international commercial law and public international trade law. Resulting in the adoption of private law ADR mechanisms within public international law, two legal principles have been affected. One principle provides that only the State is a subject of international law with right of standing in disputes arising under intergovernmental accords. The other reflects the rationale underlying ADR, namely that to be fair ADR must apply exclusively where the terms of the dispute resolution mechanism are adopted by mutual and free consent. NAFTA Chapter 11 challenges both these principles; many BITs have adopted the NAFTA model; and it is possible that the FTAA could follow suit. Consequently, NAFTA Chapter 11 would emerge as a path-breaking development with revolutionary implications. This is a matter of great concern

because these changes to the above mentioned doctrines and traditions are being institutionalized without paying attention to the ensuing inconsistencies created within international law.

While the incorporation of ADR within international trade law is salutary, such a development must be conditioned on a thorough, consistent and teleological assessment of the implications for international law. This calls for (a) a head-on debate of the re-definition of the subjects of international law, and (b) an examination of the rationale underlying the extended (private-public) version of the ADR option in international law. While NAFTA critics have contributed to a comparatively "kinder" draft FTAA, the core issues raised by NAFTA in these respects have not yet been addressed. In these debates, it is advisable to be mindful of the economic, political, social, and cultural characteristics of the North American as well as Latin American regions. Although comparisons of NAFTA with the EU abound,[51] trade and investment are still perceived differently on both sides of the Atlantic. The creation of such institutions as the European Court of First Instance or the ECJ[52] may be inappropriate for NAFTA or the FTAA, but this should not

[51] Former United States Trade Representative Robert Zoellick recognized that "[t]he extent of the New World's new influence will depend on the pace and scope of the economic synthesis, *similar* to the way Europe's Union worked to combine visions with realities over time" (Government of the United States, 2003b, emphasis added).

[52] To be sure, the FTAA consultations have evidenced increasing caution regarding concern over a possible democratic deficit and attention to the EU's influence. In addressing the Americas' (both hemispheres) commitment to the Inter-American Democratic Charter and its relation to the FTAA, it was noted that: "[a]greements between countries in the Americas and the European Union (EU) and its Member States offer other examples of the application of 'democracy clauses' to trade and democratic agreements. … Since then EU practice has evolved, and clauses establishing respect for human rights and democratic principles as an 'essential' element of the treaty relationship are standard in EU trade and economic agreements. Such a clause is found in the EU's agreements with Mexico, Chile and MERCOSUR, and in the Cotonou Agreement to which many Caribbean countries are party …. There will be many challenges in developing an appropriate way to give effect to the relationship between the FTAA and the Charter …." (Government of Canada, 2003c, pp. 3-4).

overshadow other possibilities for improving access to justice. For instance, FTAA drafters might consider setting up FTAA administrative tribunals and small claims courts open to any citizen of the contracting parties (Gal-Or, 2002e). As the issue of justice becomes increasingly regulated within the framework of both NAFTA and the FTAA, an overhauling of the ADR mechanisms to bridge the divide between trade and commerce, i.e. between public and private international law, is imperative. The evolution of trade and investment law must go beyond the resurrection and revision of *lex mercatoria* traditions and respond to 21st century socio-economic realities and needs with imagination.■

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