# THE ORIGINS, PURPOSES, AND NEGOTIATIONS OF THE NAFTA INVESTMENT AGREEMENTS: IMPLICATIONS FOR RENEGOTIATIONS AND INTEGRATION WITH CHINA

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## ABSTRACT

The NAFTA Investment Agreements are the NAFTA investment and financial services chapters, which function to facilitate and protect regional capital flow. This Article serves to identify the original purposes of the NAFTA Investment Agreements, which is an important reference point for negotiating objectives in NAFTA's modernization. I argue that the NAFTA investment agreements had two original goals: (1) to establish free market governance of capital in North America and in doing so "lock-in" Mexico's domestic investment reforms; and (2) to facilitate economies of scale and integrate regional production to enhance the competitiveness of U.S. firms in the emerging global economy. In the early

1990s, these two objectives were congruent, and Congress adopted the NAFTA on a bipartisan basis. There are two implications for the NAFTA renegotiations: (1) the NAFTA investor rights are no longer congruent with free market principles; and (2) since China has become the NAFTA's "fourth partner," integrated regional production is no longer a viable strategy for dynamic growth and jobs in North America.

## I. INTRODUCTION

Donald Trump taunted his opponent, Hillary Clinton, during a prime-time televised debate during the 2016 Presidential race, stating that "NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country."[1] Hillary Clinton's husband, former President Bill Clinton, signed the North American Free Trade Agreement ("NAFTA") into law in 1994.[2] Candidate Trump's claim was based on the subsequent multiplication of the U.S. trade deficit with Mexico, which, by Trump's calculation, was in large measure due to the offshoring of U.S. manufacturing to Mexico (i.e. U.S. manufacturing foreign direct investment ("FDI") to Mexico). However, scores of lawmakers and commentators have hotly contested the notion that U.S. manufacturing FDI to Mexico caused U.S. job losses, at least to the extent that Trump implied.

The NAFTA investment agreements are the NAFTA investment and financial services chapters. These chapters are the legal underpinning to regional FDI and capital flows. The investment chapter covers FDI and capital flows, while the financial services chapter covers trade and investment in financial services, which provide critical infrastructure to FDI.[3] In the context of the NAFTA renegotiations, this Article identifies the original purposes of the NAFTA investment agreements. The original purposes of the agreements serve as signposts for how officials intended the NAFTA to function. These purposes are an important reference point

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1. Patrick Gillespie, *Trump Hammers America's 'Worst Trade Deal'*, CNN BUS. (Sept. 27, 2016), *available at* https://money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate/ (last visited Mar. 8, 2019).

2. *See id.*

3. KRISTA N. SCHEFER, INTERNATIONAL TRADE IN FINANCIAL SERVICES: THE NAFTA PROVISIONS 271 (1999). Schefer explained,

> Closely connected to movement in investment is trade in financial services. The transfer of funds, necessary for setting up a business and engaging in international transactions, as well as repatriation of profits or income across national borders, requires the interaction of banks, non-bank financial institutions, insurance corporations, and security brokerages, on either side of the border, if not around the world.

*Id.*

for policymakers and commentators, as they debate new directions for the modernization of the NAFTA.

The NAFTA investment agreements had two original purposes. The first purpose was to establish free market governance of regional FDI, which intended to give permanence to Mexico's domestic investment reforms, therefore turning the page on nationalism and embracing regionalism. The second was a political project to facilitate U.S.-Mexico supply chains and, in doing so, support regional firms and jobs, particularly those in the electronics, textiles, and automobile sectors. U.S. trade officials justified the NAFTA investment chapter in 1992 by stating that "[i]ntegrated production in North America will make United States firms more competitive against European and Japanese producers."[4] However, this purpose became outdated by the emergence of China as a powerful partner and competitor with North America. The original NAFTA negotiations serve as a reminder that regionalism was an industrial strategy for the 1990s. Since China is now the NAFTA's "fourth partner," the NAFTA renegotiations cannot reinvigorate the NAFTA's original industrial strategy to use regional supply chains to stimulate growth and jobs.

The remainder of the Article is organized as follows: (1) the next section of Part I presents the areas that this Article will improve upon existing accounts of the origins and negotiations of the NAFTA investment agreements; (2) Part II documents the origins of the legal content of the NAFTA investment and financial services chapters; (3) Part III details the contexts and objectives of U.S. trade policy in the NAFTA investment and financial services chapters; (4) Part IV documents the negotiations of the agreements; and (5) Part V identifies the original purposes of the NAFTA investment agreements and implications for the NAFTA renegotiations and North American commercial integration with China.

### *A. Existing Documentations of the NAFTA Investment Agreements*

Two publications documenting the negotiations of the NAFTA investment chapter exist. The first, "The Making of NAFTA: How The Deal Was Done," is written by political scientists Maxwell Cameron and Brian Tomlins' which details the entire NAFTA negotiations.[5] Since Cameron and Tomlin focused on the NAFTA agreement in its entirety, they provide only a cursory examination of the NAFTA investment and financial services chapters. Therefore, Cameron and Tomlin did not provide the historical origins of the NAFTA investment agreements, and

4. *See* OFF. OF THE U.S. TRADE REP., INVESTMENT: THE NORTH AMERICAN FREE TRADE AGREEMENT 1 (1992).

5. *See generally* MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000).

their account lacks details regarding the stakes of the investment negotiations.

The second documentation, "Toward a History of NAFTA's Chapter Eleven," an article written by international law expert, Jennifer Heindl, details the negotiations of the NAFTA investment chapter.[6] Heindl used the official negotiating draft texts from the NAFTA investment chapter, which the United States Trade Representative ("USTR") made publicly available after Cameron and Tomlin published their book on the NAFTA. Heindl used the draft texts to piece together a historical narrative about the negotiations of the NAFTA investment chapter. However, Heindl did not include the negotiations of the financial services chapter and she did not situate the investment chapter negotiations within the historical context of U.S. investment policy and trade strategy.

This Article fills in the gaps in these historical accounts of the negotiations of the NAFTA investment agreements. Rather than focusing on the tactical history of the NAFTA negotiations, which has been well-documented elsewhere,[7] this Article has two initiatives: the first, to document origins, motivations, and negotiations of the NAFTA investment agreements; and the second, to identify the original purposes of the agreements. I assume a U.S.-centric approach because, in the NAFTA investment negotiations, the United States acted as the "policy-maker" whereas Mexico and Canada maintained the roles of "policy-takers."

## II. HISTORICAL ORIGINS OF THE NAFTA INVESTMENT AGREEMENTS

### *A. Historical Origins of the NAFTA Investment Chapter*

#### *1. The Calvo Doctrine vs. the Hull Doctrine*

The legal content of the NAFTA investment chapter took precedent in the Mexican revolution at the turn of the twentieth century. In 1938, the governments of the United States and Mexico were entangled in a conflict over the relationship between international investment law and state sovereignty. The focal point was the rights of foreign investors, specifically whether they were found under domestic or international law. In that year, Mexico nationalized the entire oil industry, which was previously dominated by U.S. and British oil companies.[8] During Mexico's

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6. *See generally* Jennifer A. Heindl, *Toward a History of NAFTA's Chapter Eleven*, 24 BERKELEY J. INT'L L. 672 (2006).

7. *See generally* CAMERON & TOMLIN, *supra* note 5.

8. O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL LAW & POLICY 2010-2011 649, 662 (Karl P. Sauvant ed. 2011).

1917 revolution, Mexico adopted a new Constitution which outlined "strategic areas" of economic activity "in an exclusive manner" to the Mexican State—focusing especially on the oil and energy sector.[9] Concurrent to the oil expropriations, the Mexican and U.S. governments were negotiating a settlement from Mexico's land takings of U.S. nationals during Mexico's sweeping land redistribution policy as a result of Mexico's 1917 revolution.

The 1917 Mexican Constitution adopted the Calvo Doctrine, which stipulates that foreigners must bring property disputes to domestic courts without recourse to their home governments.[10] In other words, in investment and capital disputes with foreign nationals, the Calvo Doctrine emphasizes state sovereignty and rejects international law. Carlos Calvo (1824-1906) was an Argentinian diplomat who wrote a treatise on international law in the context of European military interventions in Latin America in the mid-1800s. Latin America widely adopted the Calvo Doctrine, which asserted that intervention by foreign governments on behalf of foreign investors violated state sovereignty.

After Mexico nationalized the oil industry in 1938, the U.S. government pursued a "good neighbor" policy and decided against military intervention in Mexico. The U.S. and British oil companies brought their claims to the Mexican Federal Courts. The contentious cases were highly politicized, as the Mexican and U.S. governments were sharply divided over two issues: (1) the standard of compensation; and (2) that foreign nationals are entitled to a "minimum standard of treatment."[11]

In the correspondence between the Mexican Minister of Foreign Affairs and U.S. Secretary of State Cordell Hull, the Mexicans denied that there was any consensus on international law that would oblige compensation for expropriation.[12] Mexico acknowledged that compensation was necessary under Mexican Constitutional law, however, it maintained that "the doctrine which [Mexico] maintains of the subject . . . is that the time and manner of such payment must be determined by [Mexico's] own laws."[13] A few weeks later, U.S. Secretary of State Hull responded in what since became known as the "Hull Doctrine." He asserted "a self-evident fact" that international law exists and that "the applicable

9. *See* Constitución Política de los Estados Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, ultimas reformas DOF 15-09-2017 (Mex.).

10. *See id.*

11. Edwin Borchard, *Minimum Standard of the Treatment of Aliens*, 38 MICH. L. REV. 445, 445 (1940).

12. Johnson & Gimblett, *supra* note 8, at 664.

13. *Id.*

precedents and recognized authorities on international law [support the U.S. position]."[14] Indeed, there had been a range of international arbitral decisions in the 19th and early 20th century establishing such obligations as a rule of international law.[15]

In the Mexican Minister of Foreign Affairs note to Secretary Hull on September 2, 1938, the Mexican government contended that the Calvo Doctrine served to defend "weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position."[16] After provocative political exchanges and threats from the U.S. Congress, Mexico agreed to a lump sum payment for compensation for the land and oil expropriations. However, the underlying cause of the investment dispute—a fundamental opposition between claims to sovereignty and claims to international law—was far from resolved.

At that time, the Soviet Union and Romania joined Mexico in implementing far-reaching nationalizations. In the League of Nations in 1930, the United States attempted to codify international investment law to protect against expropriations and denials of justice to foreign nationals. The representative from China responded with a version of the Calvo Doctrine, arguing that a foreigner must be prepared for "all local conditions, political and physical, as he is the weather."[17] The conference fell apart as the 17 "weaker" nations located the rights of foreign investors in domestic law, while the 21 "greater powers" opposed that position as contrary to international law.[18]

*2. International Investment Law vs. Sovereignty and Development*

After World War II, the fundamental conflict between claims to sovereignty and the jurisdiction of international law evolved alongside growing commerce between the global north and global south. Simultaneously, the politics of FDI assumed a qualitatively new dimension because many developing countries gained national independence and their leaders sought to repurpose the world trade regime to reflect development objectives.[19] The U.S. Model Bilateral Investment Treaty ("BIT") program was qualitatively shaped by the political challenges from the global

14. *Id.*
15. *See generally* Borchard, *supra* note 11.
16. *Id.* at 450.
17. *Id.* at 450–51.
18. *See id.* at 450.
19. *See generally* VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD (2007); Nicolas Lamp, *The 'Development' Discourse in Multilateral Trade Lawmaking*, 16 WORLD TRADE REV. 475 (2017).

south for the inclusion of sovereignty and development discourse in the world trade regime.

Developing countries outlined their position on foreign capital and investment in the United Nations Charter of Economic Rights and Duties of States, adopted by the U.N. General Assembly in 1974.[20] Article Two addresses FDI, and provides that each State has the right: "to regulate and exercise authority over foreign investment within its national jurisdiction";[21] "to regulate and supervise the activities of transnational corporations within its national jurisdiction";[22] and "to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures."[23] In doing so, the 1974 Charter adopted the Calvo Doctrine. The Mexican delegation to the U.N. played a leading role in drafting the 1974 Charter.[24]

As countries in the global south gained their independence from colonial rule, the rate of expropriations increased markedly. From 1960-1969 there were 136 expropriations in developing countries, but from 1970-1979 there were 423, and during 1980-1992 there were 16.[25] Since the 19th century, the United States, British, and other European powers tended to respond to expropriations with "gunboat diplomacy," or military intervention in a foreign country to protect commercial interests in that country. The United States has a long history of gunboat diplomacy in Latin America and Asia. Specifically, at the turn of the 20th century, the United States had a particularly active military intervention policy on behalf of private commercial interests in Latin America and the Caribbean.[26] A State Department official commented in 1937:

> It was in large part the influence of pressure groups bent upon selfish gain and immediate material profit that led more than once to our interference in the internal affairs of our Central and South American sister republics, finally resulting in armed intervention and the sowing of fears and deep-seated resentment.[27]

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20. *See generally* G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974).

21. *Id.* art. 2(a).

22. *Id.* art. 2(b).

23. *Id.* art. 2(c).

24. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. – FOR. INV. L. J. 1, 2-3 (1986).

25. *See* Michael Minor, *The Demise of Expropriation as an Instrument of LDC Policy, 1980–1992*, 25 J. OF INT'L BUS. STUD. 177, 180 (1994).

26. *See generally* LESTER D. LANGLEY, THE BANANA WARS: UNITED STATES INTERVENTION IN THE CARIBBEAN, 1898-1934 (2001).

27. MERRILL RIPPY, OIL AND THE MEXICAN REVOLUTION 86 (1972).

Further, throughout the Cold War, the United States continued military and covert operations in the developing world in response to nationalizations and other commercial conflicts. Among the most famous instances of such intervention were the U.S. military ouster of President Jacobo Arbenz in Guatemala in 1954 at the behest of United Fruit Company,[28] and the CIA and International Telephone and Telegraph's successful efforts to overthrow President Salvador Allende in Chile in the early 1970s.[29]

Beyond notions of sovereignty, nationalist and socialist leaders in the global south were calling for the establishment of a New International Economic Order. In 1974, the UN General Assembly adopted the New International Economic Order, a document prepared by the "Third World," a geopolitical bloc that included most of the global south. The "Third World" argued from the perspective of dependency theory that the Cold War international economic order not only failed to develop post-colonial countries but facilitated their underdevelopment. In so doing, they were opposed to the U.S. and Soviet spheres of influence. The "Third World" challenged the United States and Europe to retool the world trade regime to meet wide-ranging development goals.[30] In those contexts, nationalist and socialist developing countries treated foreign firms and capital arbitrarily, and, in some instances, nationalized them. In addition, developing countries imposed "performance requirements" on multinational national corporations ("MNCs") to ensure that MNCs operated in accordance with the national policy objectives of the host state. Performance requirements include regulatory obligations of: (1) regional development; (2) training and employing local workers; (3) local research and development; (4) technology transfers; (5) mandatory exports quantities; and (6) mandatory local content inputs in which a certain percentage of the value of the final output is sourced locally.

*3. The Rise and Fall of the U.S. "Friendship, Commerce, and Navigation" Treaties*

In response to nationalist and socialist policies towards FDI in the global south, the United States and Europe codified international investment law (i.e. the Hull doctrine) in 1961 in the Organisation for Economic Co-operation and Development ("OECD") adoption of the binding Code of Liberalization of Capital Movements. The U.S. Treasury Secretary,

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28. *See generally* STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA (2005).

29. *See generally* LUBNA Z. QURESHI, NIXON, KISSINGER, & ALLENDE: U.S. INVOLVEMENT IN THE 1973 COUP IN CHILE (2009).

30. *See generally* PRASHAD, *supra* note 19.

Henry Fowler, explained in 1965 that the experience of U.S. MNCs abroad showed that "a vast area of potential conflict" could be minimized provided that host states applied "equal treatment under the law for foreign and domestic enterprises" and exorcised "the specter of state confiscation and state operation of competitive units."[31] This goal prompted the United States to initiate a series of bilateral Friendship, Commerce and Navigation ("FCN") treaties with investment provisions.

FCN treaties were a long-standing diplomatic instrument of the United States dating back to its founding, when an FCN was negotiated with France after the signing of the Declaration of Independence.[32] The content of the earliest FCNs related to commerce and navigation with few investment protections. By the 1920s and 1930s, the U.S. FCNs contained primitive investment protections.[33] After World War II, the United States attempted to establish a multilateral investment regime in the International Trade Organization ("ITO"), which was intended to be a Bretton Woods Institution.[34] However, the U.S. Senate refused to ratify the ITO because the U.S. business community disapproved, and it was replaced by the General Agreement on Tariffs and Trade ("GATT"), which had no mandate to cover investment issues.[35] Following the collapse of the ITO, the United Sates revised FCNs to prioritize investment protections. U.S. investment lawyer Kenneth Vandevelde, who helped to draft the first U.S. Model BIT, described the modern FCNs as the base of the BIT program, stating, "[t]he modern FCNs contained antecedents to three of the four BIT core provisions."[36]

The modern U.S. FCNs had two significant geopolitical shortcomings. First, the U.S. business community argued that the investment protections were vague and insufficient. Secondly, the United States had "difficulty" concluding them with developing countries, which were not only important growth markets, but investment protection was most

31. LEO PANITCH & SAM GINDON, THE MAKING OF GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF AMERICAN EMPIRE 116 (2012).

32. Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L. J. 201, 203 (1988).

33. *Id.* at 205.

34. Bretton Woods was the post-WWII agreement between the United States. and allied powers to establish multilateral institutions to promote and manage international economic affairs, including the General Agreement on Tariffs and Trade, the International Monetary Fund, and the World Bank.

35. Jürgen Kurtz, *A General Investment Agreement in the WTO—Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 719 (2002).

36. Vandevelde, *supra* note 32, at 207.

needed in the global south.[37] Concurrent to the United States' unsuccessful FCN program, European countries had successfully negotiated BITs with developing countries.

Unlike the U.S. FCNs, the European BITs only concerned investment protection. From 1962 to 1972, West Germany entered into 46 BITs while the United States negotiated only two FCNs.[38] Simultaneously, U.S. FDI to developing countries was growing, and from 1975 to 1985 increased from $19 billion to almost $75 billion.[39] Vandevelde observed, "[i]ncreasingly, the U.S. business community and Congress agitated for an investment protection treaty program comparable to that of the Europeans."[40] This motivated the State Department to develop the U.S. BIT program.

*4. Drafting the U.S. Model BIT*

The drafting of the U.S. Model BIT came on the heels of the failed GATT Tokyo Round of negotiations (1973-1979) in which the USTR attempted to include investment issues but was rebuked by developing countries.[41] Absent a multilateral framework for foreign investment regulations, the United States preferred bilateral action rather than unilateral action.[42] To that end, State Department officials set to work on drafting of the first U.S. Model BIT. The officials took the U.S. FCN and stripped it of all provisions unrelated to investment and then they drew upon successful European BITs.[43] The U.S. Model BIT had four core provisions: (1) treatment; (2) expropriation; (3) transfers; and (4) disputes (summarized in Table 1).

The U.S. BITs were the first U.S. treaties to provide for arbitration of investment disputes between investors and host states. The provisions are called investor-state dispute settlement (hereinafter "ISDS") and they oblige that investment and capital disputes between an investor and a host state be arbitrated at the World Bank,[44] not in the host country's domestic courts. The United States explained the historical justification for ISDS:

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37. *Id.*
38. *Id.* at 208.
39. *Id.* at 209, note72.
40. *Id.* at 208.
41. Kurtz, *supra* note 35, at 722.
42. Vandevelde, *supra* note 32, at 210.
43. *Id.*
44. The forum was the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank, which was established in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. *See generally* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 3, 1965, 575 U.N.T.S. 159.

> Military interventions in the early years of U.S. history – gunboat diplomacy – were often in defense of private American commercial interests. As recently as 1974, a United Nations report found that in the previous decade and a half there had been 875 takings of the private property of foreigners by governments in 62 countries for which there was no international legal remedy. Though diplomatic solutions were possible, they were often ineffective and political in character, rather than judicial. ISDS represented a better way.[45]

Developing the Model BIT was a protracted process as "significant interagency differences" immediately emerged "over the scope and content" and many of these conflicts were not resolved until 1981 after failed negotiations with Singapore.[46] The completed 1981 Model BIT was used in successful negotiations with Egypt and Panama, and these negotiations catalyzed further revisions to the text, resulting in the 1984 Model BIT. The 1984 Model BIT was slightly revised throughout the 1980s, but it served as the "gold standard" until the NAFTA Investment Chapter.

| Table 1: Core Provisions of the U.S. Model Bilateral Investment Treaty (BIT) | |
|---|---|
| Investment Definition | Broad definition, including: an enterprise, equity and debt securities, loans, interest, real estate and property, profits and returns from enterprise |
| National Treatment | Investments and investors of another Party must be treated "no less favorably" than nationals |
| Most-Favored-Nation | Investments and investors of another Party must be treated "no less favorably" than investments and investors of another Party or non-Party |
| Minimum Standard of Treatment | Investments and investors must be treated with "full protection and security" and "non-discriminatory treatment" |
| Performance Requirements | No Party shall impose or enforce requirements upon an investment or investor of another Party, with an expansive list detailing prohibited performance requirements |
| Transfers | Each Party permits all transfers relating to an investment of an investor of another Party "to be made freely and without delay" |

45. *ISDS: Important Questions and Answers*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Mar. 2015), *available at* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited Mar. 4, 2019).

46. Vandevelde, *supra* note 32, at 210.

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|---|---|
| Expropriation | No Party may nationalize or expropriate an investment of an investor of another Party, except for public purpose and on a non-discriminatory basis, in which case compensation be "fair market value" |
| Investor-State Dispute Settlement (ISDS) | Foreign investors may bring claims of violations of investor rights against a host state to the World Bank, arbitrators can make monetary awards but not change laws in the state. |

*5. The Purpose of the U.S. BIT Program: Free Market Governance and Not Promotion of FDI*

The original purpose of the U.S. Model BIT was to establish free market governance of international capital, not to promote capital flows. International investment law regulates the boundaries between state and market, specifically the relationship between multinational investors and host states. According to Vandevelde, the U.S. BIT imposes a relationship between the state and market according to three free market principles: (1) states must intervene to protect property rights and contracts; (2) the market should allocate resources and the state should not "chose winners or losers"; and (3) the state may intervene to correct market failures, such as suppling public goods or protecting against anticompetitive behavior (i.e. monopoly).[47] The United States justified free market governance of cross-border capital as a prerequisite to market efficiency and thereby productivity and growth. Jose Alvarez, a U.S. BIT negotiator in the late 1980s, affirmed that the United States' objective was to prevent developing countries from intervening in FDI and to "resist the forces of change often demanded by the political and economic life of host countries."[48]

The United States championed free market governance because U.S. economists demonstrated that it was mutually beneficial (i.e. "a rising tide lifts all boats"). President Reagan explained while announcing the U.S. BIT program in 1983:

> A world with strong foreign investment flows is the opposite of a zero-sum game. We believe there are only winners, no losers and all participants gain from it [ . . . ] foreign investment flows which respond to

47. Jose Alvarez, *The Evolving BIT*, *in* 3 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 5 (Ian Laird & Todd Weiler eds., 2010).

48. *Id.* at 4.

> private market forces will lead to more efficient international production and thereby benefit both home and host countries.[49]

The ten developing countries that signed U.S. BITs in the 1980s did so to attract U.S. FDI and capital, although circumstances differed by country.[50] However, U.S. BIT negotiators frankly admitted to their counterparties that there was no correlation between BITs and FDI and capital flows.[51] Similarly, President Clinton wrote in two different letters to the Senate for the ratification of BITs with Ecuador and Mozambique: "[i]t is the U.S. policy [ . . . ] to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increase in private U.S. investment flows."[52] The State Department maintains three "basic aims" of the BIT program: "[p]rotect investment abroad; [e]ncourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and [s]upport the development of international law standards consistent with these objectives."[53]

That is, promoting U.S. FDI is not one of the official "basic aims" of the U.S. BIT program. The purpose of the U.S. BIT Program was to protect existing capital stocks in developing countries and establish a free market regulatory regime. The United States never intended nor pretended that U.S. BITs promote U.S. FDI flows. The U.S. Model BIT became the NAFTA Investment Chapter. Therefore, the NAFTA Investment Chapter shares the same purpose as the U.S. Model BIT—to establish free market governance for cross-border capital flows.

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49. *Statement on International Investment Policy, September 9, 1983*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM, *available at* https://www.reaganlibrary.gov/research/speeches/90983b (last visited Mar. 4, 2019).

50. Valerie H. Ruttenberg, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 U. PA. J. INT'L L. 121, 135-37 (1987).

51. *See* Vandevelde, *supra* note 32, at 212.

52. William J. Clinton, *Letter of Submittal from U.S. President Clinton to U.S. Senate Regarding Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment*, U.S. DEP'T. OF ST. (May 1, 2000), *available at* https://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/exp_002667.asp (last visited Mar. 4, 2019).

53. *Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T. OF ST., *available at* https://www.state.gov/e/eb/ifd/bit/ (last visited Mar. 4, 2019).

### *B. Historical Origins of the NAFTA Financial Services Chapter*

#### *1. Corporate Lobbies Motivate the U.S. Trade in Services Campaign in the GATT Tokyo Round*

The foundational text of the NAFTA Financial Services Chapter is the same chapter of the U.S.-Canada Free Trade Agreement ("FTA") (1988), and services were specifically negotiated in the U.S.-Canada FTA to prepare the USTR for multilateral services negotiations in the GATT Uruguay Round (1986-1994). This section identifies the United States' motivations for its financial services proposals in the GATT, which motivated the drafting of the financial services agreements in the U.S.-Canada FTA.[54] The U.S. financial services initiative was a central component of the United States' larger trade in services agenda.

There is a large body of literature documenting and explaining the internationalization of service industries as a function of technological advance and reorganizations to the geography of production beginning in the late 1960s.[55] Emerging information technology in the 1970s and 80s not only led to the creation of entirely new services industries, but it enabled fundamental changes to the geography of production. In these contexts, U.S. MNCs needed a permissive international regulatory regime so that they could expand operations into new services markets, and this was the source of corporate activism in bringing trade in trade in services to the U.S. trade policy agenda.

U.S. corporate sector lobbying, led by financial services firms,[56] motivated the USTR to include services in the GATT Tokyo Round (1973-1979).[57] The USTR's proposals at the Tokyo Round were rebuked by the vast majority of developing countries, who insisted that the United States address its concerns about development before trade in services. Following the Tokyo Round, U.S. services lobbies institutionalized, multiplied, built strategic alliances, and became advisors to U.S. trade policymakers. The principle corporate services lobby was the U.S. Coalition of Service Industries ("CSI"), which was formed in 1982 with the overall goal of

54. The history of the U.S. trade in services campaign is well-documented. *See generally*, GEZA FEKETEKUTY, INTERNATIONAL TRADE IN SERVICES: AN OVERVIEW AND BLUEPRINT FOR NEGOTIATIONS (1988); JANE KELSEY, SERVING WHOSE INTERESTS? THE POLITICAL ECONOMY OF TRADE IN SERVICES AGREEMENTS (2008).

55. *See generally* MANUEL CASTELLS, THE RISE OF NETWORK SOCIETY (2000); MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1986).

56. The lobbying campaign was led by AIG and AMEX. *See* KELSEY, *supra* note 54, at 78.

57. FEKETEKUTY, *supra* note 54, at 300.

ensuring that services would be central to U.S. trade policy, and financial services firms assumed the pivotal leadership roles.[58]

According to Geza Feketekuty, who was Assistant USTR and responsible for services, the services lobbies had two commercial interests in bringing trade in services to the GATT. First, as new technologies revolutionized the cross-border movement of information, data, and capital, U.S. MNCs sought deregulations of any new markets based on information technology,[59] particularly within developing countries. Second, services lobbies sought to secure a multilateral agreement on investment that included major developing countries. According to USTR William Brock, the U.S. had several political interests in supporting the corporate services lobbies. The first was to "[develop] a stable institutional environment for trade in services, [and provide] 'predictability' in governmental actions and an orderly way for dealing with problems that arise."[60] The second objective was to address state regulations that discriminate between domestic and foreign suppliers or services.[61] Each of these U.S. objectives for establishing a multilateral agreement on trade in services broadly applied to financial services.

The most influential financial services lobby was the Financial Services Group ("FSG") formed as part of the CSI, and it consisted of banks, insurance companies, securities firms, and other financial service providers. Throughout the 1980s, the FSG was "the most powerful group in U.S. policy making" as the group conducted regular meetings with the USTR, Treasury, and regulatory agencies.[62] Feketuky worked closely with the FSG to prepare the USTR for multilateral negotiations in financial services at the GATT. Feketuky observed, "[m]ost national governments consider the regulation of banking a legitimate and essential function—for the achievement of fiduciary objectives (protection of

58. Those firms included Merrill Lynch, AIG, AMEX, and Citicorp. *See id.* at 78.

59. Feketekuty recalled that telecommunications and financial services were the industries most motivated to bring services to the GATT:

> The key people from the industry came to me and said: 'look, what we really want out of this, bottom line, is to stop any pressure within governments to establish restrictive regulations . . . on the 'new services,' from consulting to data processing to information services' . . . We want you to come up with a regime that stops governments from just willy-nilly coming in and regulating things and building up new restrictions in what is potentially a tremendous growth area.'

*See id.* at 158.

60. William E. Brock, *A Simple Plan for Negotiating on Trade in Services,* 5 THE WORLD ECON. 229, 235 (1982).

61. *Id.*

62. Vinod K. Aggarwal, *The Political Economy of Service Sector Negotiations in the Uruguay Round*, 1 THE FLETCHER F. OF WORLD AFF. 35, 41 (1992).

depositors), for the achievement of monetary control objectives, and in some cases, for the allocation of credit."[63] However, U.S. financial firms found a range of regulations to "hamper" their operations in other countries. The FSG wanted to secure deregulations in: (1) new markets based on transfers of information, data, and capital, which depended upon emerging information technology; and (2) on the free movement of capital to provide cash management services for MNCs and money managers.[64]

Feketuky's task was to reconcile the regulatory concerns of developing countries with the FSG's goals of market access and deregulations.[65] Feketuky proposed a negotiating agenda in financial services based on the "free trade" principle of national treatment, in which governments are obliged to treat foreign producers on the same basis as domestic producers, specifically with respect to entry and equivalent treatment after entry.[66] The FSG advised the USTR, "[a]ny agreement that does not include the more advanced developing countries and the newly industrializing countries will not be of great interest."[67] The financial services negotiating agenda was integrated into the USTR's broader proposal for multilateral services negotiations in the GATT Uruguay Round.

*2. The USTR Fights to Bring Services to the GATT Uruguay Round*

The USTR took its services proposals to the 1982 GATT ministerial meetings, which were to determine the scope of the GATT Uruguay Round (1986-1994), which produced the WTO. At the 1982 GATT ministerial meetings, developing countries refused the U.S.' services proposals and conflicts quickly escalated.[68] The meetings ended in adversarial impasse between the United States as the leader of developed countries and India and Brazil as the leaders of developing countries. However, both camps agreed to conduct surveys on issues in trade in services for the next ministerial meeting. The position of developing countries on the agenda for multilateral services negotiations is summarized

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63. FEKETEKUTY, *supra* note 54, at 283.
64. KELSEY, *supra* note 54, at 158.
65. FEKETEKUTY, *supra* note 54, at 286.
66. *Id.*
67. Aggarwal, *supra* note 62, at 42.
68. In one instance, India refused to permit services on the negotiating agenda without the implementation of the development objectives set out in the Tokyo Round. USTR William Brock claimed to respond, "Hell would be dappled with little icebergs before India got anything out of the U.S. if they continued to act that way," and talks resumed the next day. KELSEY, *supra* note 54, at 65.

in a report published by the United Nations Conference on Trade and Development (UNCTAD) titled "Services and the Development Process."[69]

The report was an interdisciplinary study concerning the role of services in national development. The report argued that services had large non-economic components and that they were central for "the attainment of a variety of cultural, strategic and social goals."[70] For this reason, the study argued that attempts to apply the theory of comparative advantage to trade in services had been "statistically meaningless" and that comparative advantage does not apply to trade in services.[71] In terms of financial services, banking regulations were considered necessary because of the close links between banking and a country's monetary policy. Therefore, the report argued that financial services liberalization "raises questions about dependency and hence national sovereignty."[72] In doing so, the report put banking at the heart of national identity and categorically refused the application of "free trade" principles to banking.

Developing countries argued that the U.S. services proposal was also an investment containing deregulations of services FDI. In a range of services industries, FDI is necessary for a firm to provide a service abroad, such as the opening of a subsidiary. The UNCTAD report argued, "[t]o [MNCs] the issues of trade and investment ("access" and "establishment") are elements of their global strategy. To governments, trade and investment are two distinct issues."[73] The core of the distinction was the "policy space" needed to implement regulations on FDI to meet development goals.[74] Moreover, the report stipulated that the U.S. services proposal paid no attention to development.[75] The report argued that any agreement in services "will have to also include, among others, specific goals in the areas of training and research, external financing, the

69. *See generally* U.N. Conf. on Trade and Development Secretariat, *Services and the Development Process*, U.N. Doc. TD/B/1008/Rev.1 (1984) [hereinafter *Services and the Development Process*].

70. *Id.* at 22.

71. *Id.* at 35.

72. *Id.* at 22.

73. *Id.* at 80.

74. India's finance minister rejected the U.S. services proposal, stating:

> When I say so I express the will of 700 million people of my country who constitute one of the largest potential markets in the world economy. They rightfully ask that after their long struggle against colonial rule towards freedom, after having built bit-by-bit a strong and sound economy on the strength of their own toil and talent, whether their national aspirations are now to be condemned as 'obstacles' to trade?

The U.S. denounced the statement as a "door-slammer" and threatened to leave negotiations. KELSEY, *supra* note 54, at 71.

75. *Services and the Development Process*, *supra* note 69.

transfer of adequate technology, technical assistance . . . ."[76] The 1984 GATT ministerial meeting was concluded as developing countries framed their opposition to the U.S. services proposal on technical grounds that the GATT mandate was only limited to goods.

The debate on trade in services entered the larger policy debates in the GATT ministerial meetings with Trade Ministers pointing to the unfolding international debt crisis across the developing world. Arthur Dunkel, GATT Director-General, proposed in the 1982 meeting, "[the] basic objective of the [GATT Uruguay Round] should be to promote worldwide the structural adjustment needed for growth."[77] The USTR insisted that the services and investment proposals would facilitate the necessary "structural adjustment" in developed countries, "which would foster more efficient economic development."[78] Essentially, the United States and Europe argued that "[a]s the geography of production shifted to the global south, the global north needed robust services economies to increase demand for goods from the global south." Creating these services, economies would facilitate growth in the debt-burdened developing countries.

The delegate from the European Economic Community maintained, "there was increasingly a need to turn to the services sector to create jobs that had been lost in more traditional industries."[79] To this end, the U.S. services lobbies aggressively advocated the U.S. services proposals as the basis for the services economy in the United States. Joan Spero, Executive Vice President of American Express, advised the USTR that the "U.S. financial service sector is one of our most competitive internationally . . . that sector will have to be included in the final [GATT] agreement."[80] By the mid-1980s, solidarity among developing countries was beginning to wane as the ongoing debt crisis in developing countries and concomitant International Monetary Fund ("IMF") structural adjustment loan conditions left developing countries in dire need of foreign capital.[81] Eventually, domestic and international pressure on the Brazilian and Indian delegations forced them into isolation and eventual capitulation to include services, investment, and intellectual property rights in the GATT Uruguay Round.

76. *Id.*

77. Prepatory Comm., *Record of Discussions: Discussions of 17-20 March*, GATT Doc. PREP.COM (86), ¶ 156, SR/3, (Apr. 11, 1986).

78. *Id.* at ¶ 126.

79. *Id.* at ¶ 135.

80. Aggarwal, *supra* note 62, at 41.

81. *See generally* PRASHAD, *supra* note 19.

*3. Drafting the NAFTA Financial Services Chapter*

While the USTR was negotiating the GATT Uruguay Round to establish the WTO (1986-1994), the USTR also negotiated the U.S.-Canada FTA (1988) and the NAFTA (1991-1992). The United States included services in the U.S.-Canada FTA and the NAFTA, not only to support U.S. MNCs in North America, but also to set legal precedents for the services negotiations in the WTO.[82] Olin Wethington, the principle U.S. negotiator of the NAFTA financial services chapter, explained that the U.S. financial services negotiators were "extremely cognizant of the precedential effect" of the agreement.[83] To that end, the financial services chapters of the U.S.-Canada FTA and the NAFTA were the first international agreements to merge "free trade" theory with banking law, although the NAFTA chapter was far more substantive than the U.S.-Canada FTA.

The U.S. negotiators opted for this "principled" approach to the NAFTA financial services chapter because it could easily serve as a negotiating template for future agreements. According to Wethington, the U.S. financial services negotiators entered negotiations "having formulated certain core, substantive negotiating objectives."[84] The right to pre-establishment[85] and national treatment were essential and there would be "no NAFTA" without these provisions in financial services. The right of pre-establishment was necessary to give U.S. companies "unimpeded access" to the Mexican and Canadian markets. National treatment was the guiding "free trade" principle of U.S. services proposals because it guaranteed U.S. firms non-discriminatory treatment. In drafting the NAFTA financial services agreement, U.S. negotiators added "equal competitive opportunity" to the national treatment article, which was to address situations in which law may read in neutral fashion but in practice it leaves U.S. firms at "competitive disadvantage."[86] U.S. negotiators also explicitly added the article allowing for the entry of new financial services,

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82. FEKETEKUTY, *supra* note 54, at 175.

83. OLIN L. WETHINGTON, FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK (NAFTA SERIES) 10 (1994).

84. *Id.* at 11.

85. Right to pre-establishment is a clause in the national treatment provision that extends the national treatment provision to the pre-investment stage (ex-ante) not simply the investment stage (ex-post). The pre-investment phase refers to the entry of investments and investors of a Party such that they have the right to establish an investment in the host state on terms no less favorable than those that apply to domestic investors in the host state (national treatment). The post-investment phase refers to the operations of the investment.

86. WETHINGTON, *supra* note 83, at 11.

products, and data processing.[87] This provision reflected the fundamental objective of U.S. financial services industries to secure deregulations on new financial products based on the use of information technology.

As in the beginning of the GATT Uruguay Round, investment and financial services were negotiated by the U.S. Treasury Department while the other areas were negotiated by the USTR. At the GATT Uruguay Round, the Treasury insisted that financial services be negotiated apart from other services.[88] The Treasury argued that regulations on financial institutions were "substantially different from those governing other services because, among other things, special controls were necessary to prevent bank failures."[89] To that end, the U.S.-Canada FTA had a separate chapter for financial services and the NAFTA would significantly build upon that foundation.

However, U.S. financial services negotiators placed little emphasis on regulation. Wethington published the U.S.' financial services negotiating objectives, and none addressed regulation except a singular reference to specific exceptions to national treatment in accordance with "internationally recognized [regulatory] principles."[90] In other words, the U.S. financial services negotiators addressed regulation up to the standards of "internationally recognized" regulations, which were codified by the IMF and followed free market orthodoxy.[91] International investment law expert Krista Schefer observed that,

> [a]s most of the negotiators came from a trade or free-market economic background, the main [financial services] provisions demonstrate a firm commitment to the principles of free trade (market access, non-discriminatory treatment, arbitration-based dispute settlement procedures) and a lesser consideration of the interests of financial service regulators and practitioners.[92]

In financial services FDI, the Treasury only sought to apply the "transfers" and "expropriation" articles from the investment chapter to financial services.[93] That is, investors in financial services would not have the same investor protections as investors in any other industry—financial services would *not* have access to the investor protections on national treatment, most-favored-nation, minimum standard of treatment,

87. North American Free Trade Agreement art. 1407, Can.-Mex.-U.S., Dec. 8, 1993, 32 I.L.M. 605.

88. *See* DAVID P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1994) 2365 (Terence P. Stewart ed., 1999).

89. *Id.*

90. WETHINGTON, *supra* note 83, at 11.

91. North American Free Trade Agreement, *supra* note 87, art. 2104.

92. SCHEFER, *supra* note 3, at 120.

93. North American Free Trade Agreement, *supra* note 87, art. 1401.

or performance requirements. The Treasury made this decision based upon reflection of a consensus among regulators at the Treasury, Federal Reserve, and the Securities and Exchange Commission who had sought to shield themselves from ISDS challenges to emergency financial measures during crises.[94]

| Table Two: Core Provisions of the NAFTA Financial Services Chapter | |
|---|---|
| Scope and Coverage | Applies to financial institutions of another Party, financial services FDI, cross-border trade in financial services |
| Establishment | Investors have the right to establish and operate on basis of non-discrimination |
| Cross-border Trade | No Party may adopt any measure restricting cross-border trade in financial services, including purchase of services in another Party |
| National Treatment | Guarantees non-discrimination and requires that Parties provide "equal competitive" opportunities (rather than outcomes) |
| Most-Favored-Nation | Guarantees treatment equal to other countries, emphasis is placed on ensuring that prudential measures are non-discriminatory |
| New Financial Services and Data Processing | Parties shall permit a financial institution of another Party to provide "any new financial service" and shall permit the free transfer of data across borders |
| "Balance of Payments" Exceptions | Parties may violate obligations in the event of a balance of payments crisis, although under highly specific conditions and supervised by the IMF |
| Dispute Settlement | Disputes are done on a state-to-state basis; the financial services chapter incorporated the "transfers" and "expropriation" provisions from the investment chapter and subjected each to ISDS |

94. *U.S. Faces Opposition in TPP On Demands for Broad Investor-State Clause*, INSIDE US TRADE (Oct. 4, 2013), *available at* https://insidetrade.com/inside-us-trade/us-faces-opposition-tpp-demands-broad-investor-state-clause (last visited Mar. 11, 2019).

## III. MOTIVATIONS OF THE NAFTA INVESTMENT AGREEMENTS

### *A. International Context*

*1. Emerging "Regionalism" in a World Economy*

The United States negotiated the NAFTA to: (1) catalyze the stalled Uruguay Round of GATT negotiations which eventually produced the WTO; and (2) set precedent for future U.S. FTAs that would follow the NAFTA. During NAFTA negotiations, the United States would extend, expand, and modify these objectives. Between Mexico's formal request (1990) for an FTA with the U.S. Congress' ratification of the NAFTA (1993), Congress and the USTR repeatedly justified the agreement as an exigent response to the emergence of regionalism and regional trading blocs as the Cold War closed.

Parallel to the NAFTA talks, U.S. competitors were expanding their markets in Europe and Asia while barriers to U.S. exports were becoming increasingly problematic. The European Community was pursuing political and economic integration that culminated with the founding of the European Union in 1992. In 1993, USTR Michael Kantor argued that European integration policies created new barriers to U.S. exports and investment.[95] Simultaneously, Japan, then the second-largest economy in the world, was leading an inward-looking integration in East Asia. USTR Kantor warned, "allowing other nations to promote and protect their industries, building profits from secure home markets, while targeting our open market, is a formula for competitive suicide."[96] The USTR and a chorus of congressmen called for an "American regionalism." An early NAFTA proponent, Rep. Bill Richardson, pleaded to Congress: "If we are to avoid being 'frozen out' of the world market it is imperative that we look to the future with the same [regional] strategy."[97]

To that end, in 1990 President George H.W. Bush announced the goal of a FTA for the Western Hemisphere called the Free Trade Area of the Americas ("FTAA"). The proposed U.S.-Mexico FTA was to be the stepping-stone to the FTAA, a plan that was subsequently adopted by President. Canada joined the U.S.-Mexico negotiations and the U.S.-

95. *See generally U.S. Trade Policy and NAFTA: Hearing Before the Comm. on Finance*, 103rd Cong. (1993) (statement of Mickey Kantor, U.S. Trade Rep.) [hereinafter *U.S. Trade Policy and NAFTA*].

96. *Id.* at 10.

97. *See United States—Mexico Economic Relations: Hearing on H.R. Before the Subcomm. On Trade of the Comm. On Ways and Means*, 101st Cong. 30 (1990) (statement of Bill Richardson, Representative) [hereinafter *United States—Mexico Economic Relations*].

Mexico FTA became the NAFTA. The proposed NAFTA would create an integrated North American market which would boost the global competitiveness of the region. In so doing, North American economic integration would increase the region's geopolitical influence to keep markets open in other parts of the world, which became particularly significant as conflicts escalated in the GATT Uruguay Round negotiations.[98]

*2. U.S. Trade Strategy in the GATT Uruguay Round*

The NAFTA emerged on North America's trade relations agenda during the GATT Uruguay Round, which were the contentious and prolonged multilateral negotiations that established the WTO. Since the inception of the NAFTA, the overriding goal of both the United States and Mexico's trade strategy was to conclude the Uruguay Round.[99] However, by 1991 the Uruguay Round collapsed over seemingly irreconcilable differences in agricultural disputes between the United States and the European Community. During this stalemate, the United States turned its attention to the NAFTA. The proposed NAFTA assumed new significance in U.S. trade policy debates, aptly summarized in Senator Clark Reynold's address to Senate, "[t]he breakdown in the GATT Uruguay Round negotiations makes it all the more important to rely on regional agreements as a 'second best' approach in the direction of ultimate global liberalization."[100]

According to U.S. trade policy advisors Fred Bergsten and Jeffrey Schott, the NAFTA "reminded" the European Community "that the United States could pursue alternative trade strategies."[101] Indeed, the European Community released a study on potential effects of the NAFTA and concluded that the NAFTA is not a threat to the European Community, but that "an expanded NAFTA would not necessarily be in the Community's best interest."[102] Considering the United States' ambitions for hemispheric trade and investment integration in the Americas, the

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98. *Id.*

99. *Id.* at 19 (statement of Carla Hills, U.S. Trade Rep.).

100. *United States—Mexico Free Trade Agreement: Hearings Before Comm. On Finance,* 102nd Cong. 413 (1991) (statement of Clark Reynolds, Senator) [hereinafter *United States—Mexico Free Trade Agreement*].

101. *See* Fred Bergsten & Jeffrey Schott, *A Preliminary Evaluation of NAFTA*, PETERSON INST. FOR INT'L ECON., (Sept. 11, 1997), *available at* https://piie.com/commentary/testimonies/preliminary-evaluation-nafta (last visited Mar. 3, 2019).

102. *Report of the European Parliament Committee on External Economic Relations on the Free Trade Agreement Between the United States of America, Canada, and Mexico*, A3-0378/92 (Nov. 18, 1992) [hereinafter *EC Parliament Report*].

European Community report "strongly" urged the conclusion of the Uruguay Round and suggested that free trade areas "can be useful building blocks of the world trade regime."[103] Subsequently, the European Community found a new resolve to conclude the faltering GATT Uruguay Round. In so doing, the politics of the NAFTA became inseparable from the founding of the WTO.

### *B. Domestic Context*

#### *1. Renewing "Fast-Track" Authority*

Beginning in the 1970s, Congress and the Executive branch agreed that to make politically expedient deals with trading partners the Executive branch would need the power to negotiate an agreement without interference from Congress. Therefore, the 1974 Trade Act established fast-track negotiating authority (hereinafter "fast-track") which required Congress to suspend its ordinary legislative procedures and vote a trade agreement up or down with limited debate and no amendments.[104] In addition, fast-track legislation contained Congress' negotiating objectives for the President, among other checks on the Executive including consultations with relevant Congressional committees. In a 1990 Congressional testimony, USTR Carla Hills explained the political importance of fast-track: "Although the Congress cannot preclude negotiations as a legal matter, without the procedural advantages of fast-track authority, the practical impediments to negotiating an agreement would be all but insurmountable."[105] Therefore, as the Bush administration pursued the U.S.-Mexico FTA, it immediately had to consult with Congress over negotiating objectives and general approval of the deal.

President Bush entered office with fast-track negotiating authority provided by the Omnibus Trade and Competitiveness Act of 1988 ("1988 Omnibus Act"), designed for the GATT Uruguay Round but legally applied to all trade and investment agreements under negotiation. However, when the legislation was drafted, Congress expected the Uruguay Round to be completed by 1991. As such, Congress set fast-track to expire in June 1991 with an automatic two-year extension that could be vetoed by a simple majority vote in either the House or the Senate. By early 1991, the Uruguay Round was on the verge of collapse and the Bush administration would need the two-year extension on fast-track, including for negotiating the NAFTA. On March 1, 1991, President Bush formally

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103. *Id.*
104. *See* Trade Act of 1974, Public Law 93-618, 3rd Cong. 37-40 (2018).
105. *United States—Mexico Free Trade Agreement*, *supra* note 100, at 135.

requested the two-year extension, and five days later both houses introduced disapproval resolutions.[106]

*2. Congressional Resistance*

The March-May 1991 political battle for the renewal of fast-track is well documented.[107] However, at issue in this Article is the extent to which the fast-track renewal process either contested or amended the Bush administration's negotiating objectives in the NAFTA. The 1988 Omnibus Act enjoyed broad bipartisan support and it passed the Senate by a vote of 85 to 11 and the House by a vote of 376 to 45. However, the Bush administration's plan to extend this fast-track legislation to the Mexico FTA inspired unprecedented domestic resistance. During the March-May debates in Congress over the renewal of fast-track, the time debating the U.S-Mexico FTA exceeded Uruguay Round debates by almost ten to one, even though the Uruguay Round was of far greater significance.[108]

The Bush administration engaged in a major outreach effort to win Congressional votes as Bush personally contacted "scores" of lawmakers.[109] Major U.S. business groups organized a massive lobbying campaign to defeat the fast-track disapproval bills. "It's a pan-business effort, I've never seen a larger grouping from the private sector," remarked a top lobbyist from the Emergency Committee for American Trade.[110] On May 1, 1991, the Bush administration made political concessions to Democrats that included a trade-displaced worker adjustment program, future cooperation with Mexico on health and safety issues, a joint border environmental plan, and appointment of environmental experts to the USTR's trade advisory committees.[111] These new labor and environmental commitments were legally non-binding and they did not affect any of the USTR's negotiating objectives. On May 9, House Majority Leader Gephardt introduced a resolution to tie fast-track to these new

106. H.R. 101, 102$^{nd}$ Cong. (1991); S.R. 102$^{nd}$ Cong. (1991).

107. FREDERICK MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 98 (1998); *see also* CAMERON & TOMLIN, *supra* note 5.

108. Lenore Sek, Cong. Research Serv., RL97-885, *Fast-Track Legislative Procedures for Trade Agreements: The Great Debate of 1991* (1999).

109. Gary Lee, *"Fast Track" Sprint: Frenzied Lobbying on a Treaty Not Yet Written*, WASH. POST (May 23, 1991), *available at* https://www.washingtonpost.com/archive/politics/1991/05/23/fast-track-sprint-frenzied-lobbying-on-a-treaty-not-yet-written/507ec79a-4ea4-41df-9bbc-5c9e50dc2065/?noredirect=on&utm_term=.7891581aa3f1 (last visited Mar. 11, 2019).

110. CHARAN DEVEREAUX, ROBERT Z. LAWRENCE, & MICHAEL D. WATKINS, CASE STUDIES IN US TRADE NEGOTIATION, VOLUME 1: MAKING THE RULES 196 (2006).

111. Sek, *supra* note 108, at 2.

commitments.[112] At the end of May 1991, the House and Senate voted down the fast-track disapproval resolutions (House: 192 to 231; Senate: 36 to 59) and fast-track was renewed.[113] The Bush administration was forced to make relatively small (non-binding) concessions to environmental critics to win fast-track. The negotiating objectives from the 1988 Omnibus Act remain unchanged.

### *C. U.S. Objectives in NAFTA*

The official U.S. negotiating objectives in both the Uruguay Round and the NAFTA were detailed by Congress in the 1988 Omnibus Act. The bill was designed to "enhance the competitiveness of American industry," signifying that for U.S. policymakers, trade policy was an industrial strategy.[114] However, the NAFTA also represented the Bush administration's trade strategy in the Uruguay Round and broader foreign policy goals. Therefore, the U.S. objectives in the NAFTA had evolved as a careful combination of industrial strategy, trade strategy, and foreign policy.

| Table Three: Synthesis of U.S. Objectives in the NAFTA | | |
|---|---|---|
| Industrial Strategy | Trade Strategy | Foreign Policy |
| Establish WTO-plus standards in North America<br>Competitive liberalization: leverage negotiations in the Uruguay Round; encourage other developing countries to negotiate U.S. FTAs | Reposition key U.S. industries by integrating production with Mexico<br>NAFTA was the cornerstone of the Free Trade Area of the Americas (FTAA)<br>"Asymmetrical trade liberalization" to reduce the trade deficit | Support democracy in Mexico and promote reforms in Latin America and the Caribbean<br>Support and compliment bilateral initiatives on border safety and security (narcotics trafficking, undocumented migration, environmental issues) |

#### *1. The NAFTA as U.S. Industrial Strategy*

The 1988 Omnibus Act directed three overall negotiating objectives to the USTR to obtain: (1) open markets; (2) reductions to barriers to trade; and (3) a more effective system of international trading disciplines

112. H.R. 146, 102nd Cong. (1991).
113. Sek, *supra* note 108, at 6.
114. The Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 100th Cong. (1988) [hereinafter Omnibus Trade and Competitiveness Act].

and procedures.[115] At the Uruguay Round, the United States faced fierce resistance from developing countries in negotiations over the USTR's proposals in the "new issues" of investment, services, and intellectual property.[116] The purpose of the U.S. proposals on "new issues" was to establish and protect U.S. comparative advantages in advanced manufacturing, advanced services, and high intellectual property content commodities.[117] By extension, the U.S. proposals on the "new issues" would support U.S. exports, and therefore U.S. jobs. In fact, the USTR found that jobs supported by exports paid higher wages in both manufacturing and services.[118] However, due to geopolitical resistance at the Uruguay Round, the USTR was unable to negotiate "high standard" agreements in investment, services, and intellectual property ("high standard" trade agreements are referred to as "WTO-plus" because they go beyond WTO commitments). The NAFTA was an opportunity for the United States to reach a WTO-plus agreement with Mexico, a geopolitically important developing country, thereby setting precedent for future trade agreements with developing countries.

The NAFTA marked the beginning of the U.S. trade strategy of "competitive liberalization," which employs bilateral or regional FTAs with "ready and willing" countries to overcome resistance to U.S. trade policy elsewhere. This trade strategy had its roots in the U.S.-Canada FTA (1988). James Baker, then U.S. Treasury Secretary, described the geopolitical significance of the FTA as "a lever to achieve more open trade."[119] Baker explained, "[o]ther nations are forced to recognize that the U.S. will devise ways to expand trade—with or without them. If they chose not to open markets, they will not reap the benefits."[120] The NAFTA would develop that strategy, and President Clinton announced, "[bilateral and regional] agreements, once concluded, can act as a magnet including other countries to drop barriers and to open their trading systems. The [NAFTA] is a good example."[121] That is, the NAFTA would

115. *Id.*

116. *See generally* STEWART, *supra* note 88.

117. *Id.*

118. *North American Free Trade Agreement*, *Comm. On Ways and Means, Subcomm. on Trade,* 102nd Cong. (1992) (statement of Carla Hills, U.S. Trade Rep.) [hereinafter *North American Free Trade Agreement*].

119. James A. Baker, *The Geopolitical Implications of the U.S.-Canada Trade Pact*, 2 INT'L ECON. 34, 41 (1988).

120. *Id.*

121. *Remarks by the President at American University Centennial Celebration*, CLINTON WHITE HOUSE ARCHIVES (Feb. 26, 1993), *available at* https://clintonwhitehouse6.archives.gov/1993/02/1993-02-26-corrected-remarks-by-the-

make Mexico and Canada a "magnet" for international capital which would apply competitive pressure on other countries seeking to attract international capital, thereby encouraging them to negotiate FTAs with the United States. The competitive liberalization strategy is a part of U.S. industrial strategy since it facilitates the opening of new markets to U.S. FDI and exports.

*2. The NAFTA as U.S. Trade Strategy*

a. Vertically Integrated Production with Mexico

The NAFTA was a bipartisan political project to cultivate "regionalism" in North America, which was an important goal to U.S. lawmakers to facilitate the United States' ability to be a global economic leader. The emergence of Asian manufacturing exporters in the 1970s turned some U.S. producers into importers, especially for goods such as shoes, luggage, toys, games, sporting goods, and bicycles.[122] However, other industries shifted assembly operations to Mexico to preserve the market shares and competitiveness of U.S. suppliers, notably in autos, textiles, and electronics. Essentially, the trade strategy was to increase the U.S. content in imports from Mexico to maintain production in the United States. By the time the NAFTA came into force, North American supply chains had already emerged in autos, textiles, and electronics.[123]

By vertically integrating production with Mexico, the United States could sustain and grow manufacturing industries. Those industries, in addition to U.S. financial services and agricultural exporters, were the main business lobbies promoting the NAFTA.[124] By the early 1990s, even politically liberal politicians embraced this realist perspective. New York Senator Bill Bradley argued in favor of the NAFTA in 1993, stating that "*[e]conomic competition in the year 2020* won't consist of *scattered countries nibbling* at each other, but major regions operating as economic units on the global playing field" (emphasis added).[125]

b. "Asymmetric Trade Liberalization"

The Bush administration's vision for the FTAAs was not simply about expanding U.S. market shares in Latin America and the Caribbean;

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president-at-american-university.html (last visited Mar. 3, 2019) [hereinafter *Remarks by the President*].

122. Ralph Watkins, *Meeting the China Challenge to Manufacturing in Mexico*, *in* CHINA AND THE NEW TRIANGULAR RELATIONSHIPS IN THE AMERICAS 37, 43 (Enrique Peters et al. eds., 2013).

123. *See id.*

124. *Id.*

125. Sen. Bill Bradley, *NAFTA Opens More Than a Trade Door*, WALL ST. J., Sept. 16, 1993, at A20.

another central motivation in the FTAA was to gain leverage over European and Asian negotiators. Joan Spero, an executive at American Express and a leading corporate lobbyist, reasoned to Congress that:

> U.S. exporters and investors must have access to rapidly growing and increasingly sophisticated Asian markets in order to meet and beat our competitors. Our positive decision on the NAFTA will confirm to the world that the U.S. is ready to lead and compete in a changing global economy.[126]

The 1988 Omnibus Act was a response to the unprecedented yet structural expansion of the U.S. trade deficit in the 1980s with Japan and, to a lesser extent, Europe. Moreover, U.S. exporters were increasingly frustrated by protectionism in Europe and Japan. USTR Michael Kantor summed up the dilemma: "We will not stand by and pretend that other nations share our commitment to expanded trade and open markets if the real-world evidence suggests that they do not."[127] The NAFTA and the Bush administration's plans for the FTAA would leverage negotiations with Europe, Japan, and the rest of East Asia. To that end, in the 1988 Omnibus Act Congress laid out specific negotiating objectives for developing countries[128] and for countries with persistent trade surpluses.[129]

Since the United States was the country most open to trade, negotiating partners had relatively higher barriers to trade, especially developing countries. In the Uruguay Round, the USTR sought to lower barriers to trade in areas where the United States already maintained low barriers, and policymakers described this dilemma as achieving "reciprocity" in the exchange of trade obligations, or "asymmetrical trade liberalization." Therefore, in the 1988 Omnibus Act, the principal negotiating objectives of the United States towards developing countries were two-fold: (1) to "ensure" that developing countries commit to "reciprocal" trade obligations; and (2) to reduce the "nonreciprocal trade benefits" for the more advanced developing countries.[130] In the Uruguay Round, solidarity among developing countries prevented the USTR from realizing "asymmetrical trade liberalization."[131] However, in the NAFTA negotiations

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126. *Asia Pacific Economic Cooperation (APEC) and U.S. Policy Toward Asia: Hearing Before the H. Comm. on Foreign Affairs*, 103rd Cong. 5 (1993) (testimony of Joan E. Spero, Vice President American Express).

127. *U.S. Trade Policy and NAFTA*, *supra* note 95, at 51 (statement of Mickey Kantor, U.S. Trade Rep.).

128. *See* Omnibus Trade and Competitiveness Act *supra* note 114, § 1107.

129. *See id.*

130. *Id.* § 1121.

131. *See generally* STEWART, *supra* note 88.

the United States was able to implement these objectives with an important developing country—Mexico.[132]

Achieving "asymmetrical trade liberalization" was a means to the next negotiating objective, "restoring current account equilibrium" (i.e. balancing total imports and exports).[133] In outlining the premise of the 1988 Omnibus Act, Congress found that, "[t]he United States is confronted with a fundamental disequilibrium in its trade and current account balances and a rapid increase in its net external debt."[134] Therefore, Congress mandated a principle negotiating objective to address "persistent" trade imbalances and countries with structural trade surpluses "by imposing greater responsibility on such countries to undertake policy changes . . . including expedited implementation of trade agreements where feasible and appropriate."[135] In so doing, Congress sought to reduce the trade deficit not with protectionism on imports but with an aggressive trade policy on exports.

### 3. *The NAFTA as U.S. Foreign Policy*

#### a. Support Democracy in Mexico and Promote Reforms in Latin America and the Caribbean

In 1991, USTR Carla Hills explained to Congress the origins of the proposed FTA with Mexico stating, "[c]onsideration of the FTA initiative is possible because of a reorientation in Mexico away from statist, interventionist policies toward a market-oriented system."[136] The "statist, interventionist policies" that Hills referenced were parts of Mexico's restrictive trade and investment regime during the Cold War. These policies reflected the articles enumerated in the 1974 United Nations Charter of Economic Rights and Duties of States (discussed in Part I). Mexico imposed high tariffs and far-reaching investment restrictions, championed the Calvo Doctrine, pursued import substitution industrialization, and maintained a high degree of state ownership and operation of business.

Mexico's sovereign debt crisis in 1982 triggered the "sea change" in Mexican domestic politics, shifting from inward-looking to outward-looking economic policies. Following a banking crisis and facing sovereign default in 1982, Mexico began to gradually respond to low-growth

132. *See* Bergsten & Schott, *supra* note 101.

133. Omnibus Trade and Competitiveness Act, *supra* note 114, § 1122.

134. *Id.* at § 1120.

135. *Id.*

136. *Proposed Negotiation of a Free Trade Agreement with Mexico: Hearings before the Subcomm. On Trade of the H. Comm. On Ways and Means*, 102nd Cong. 21 (1991) (statement of Carla Hills, U.S. Trade Rep.).

and high-debt with unilateral, bilateral, and multilateral trade and investment liberalizations, notably with Mexico's accession to the GATT in 1986. In the context of expanding foreign debt—which increased tenfold between 1984 and 1988 (up to USD $200 billion)—Mexico's President de la Madrid insisted that Mexico accede to the GATT to attract FDI and grow foreign currency reserves.[137] In so doing, de la Madrid began Mexico's liberalization process by overriding domestic political pressure against joining the GATT. The Salinas Administration took office in 1988 and pursued unprecedented unilateral liberalizations to make Mexico one of the most open developing countries, often going beyond its formal GATT obligations.[138]

While Mexico's domestic political reforms were the "impetus" for the NAFTA, according to USTR Carla Hills the United States "encouraged and supported Mexico in its process of reform."[139] In 1989, Mexico became the first country to reach a new debt accord under the Brady Plan, named after then U.S. Treasury Secretary Brady, designed to rearrange the terms of debt service for developing countries. The debt agreement exchanged substantial debt service relief for Mexico with greater assurance of future collectability and further market-oriented reforms. In the GATT Uruguay Round (1986-1994), together USTR Carla Hills and her Mexican counterpart Minister Jaime Serra became a dynamic lever in the conflicts at the bargaining table between developed and developing countries.[140] The emerging political partnership between the United States and Mexico at the end of the Cold War became the origins of the NAFTA.

The U.S.-Mexico political partnership became a symbol of the 21st century as U.S. politicians elevated Mexico to a signpost for the rest of Latin America's "fragile democracies."[141] The U.S.-Mexico partnership quickly became necessary to the U.S. foreign policy goal to promote democracy and free market reforms in Latin America and the Caribbean.

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137. *See* CAMERON & TOMLIN, *supra* note 5, at 58.

138. Notably, the Salinas administration slashed tariffs and licensing restrictions, reduced the role of government as an owner/operator of businesses, and implemented major unilateral reforms in the "new issues" of investment and intellectual property, near and dear to the heart of U.S. trade policy. *See id.* at 60.

139. *United States—Mexico Economic Relations*, *supra* note 97, at 50 (statement of Carla Hills, U.S. Trade Rep.). As Mexico was acceding to the GATT they concurrently established with the U.S. a consultative mechanism to discuss trade issues and bilateral sectoral negotiations in agriculture, investment, intellectual property, services, and tariffs. *See* CAMERON & TOMLIN, *supra* note 5, at 60.

140. *United States—Mexico Free Trade Agreement*, *supra* note 100, at 14 (statement of Carla Hills, U.S. Trade Rep.).

141. *US—Mexico Economic Relations*, *supra* note 97, at 38 (statement of Jim Kolbe, Senator).

Concurrent to the NAFTA, other regional trade agreements in Latin America were emerging, notably the Southern Common Market, and President Bush had made a political commitment to Chile for an FTA after completion of the NAFTA. In addition, many Latin American countries began to undertake their own unilateral market-oriented economic and political reforms, often as part of IMF structural adjustment programs. The Bush administration and Congress sought to "lock-in" these reforms in Latin America and prevent any policy reversion that harkened back to Latin American nationalism and socialism during the Cold War. In Congress, lawmakers argued that Latin American leaders needed Mexico to be "an example of success with a market-oriented economy."[142] In 1993, President Salinas met with leaders from 12 Latin American nations in Chile and described the regional importance of the NAFTA:

> [NAFTA is] . . . a fundamental test of American relations not only with Mexico but also throughout the hemisphere. 'When negotiations for the treaty began, many people thought Mexico was turning its back on Latin America, and events have shown the opposite to be true. For Latin America, the free trade agreement has come to mean a different policy of the U.S. toward the region.'[143]

b. Strengthen U.S.-Mexico Border Initiatives

As outlined by President Clinton in a foreign policy speech in 1993, "it is time for us to make trade a priority element of American security," signifying that the Clinton administration developed a "comprehensive trade policy" that also reflected foreign policy objectives.[144] U.S. lawmakers intended for the NAFTA to advance border security. In early congressional debates on U.S. trade policy in the NAFTA, various congressmen from border states argued in favor of the deal because it would ameliorate social and political problems along the U.S.-Mexico border, which extends more than 2000 miles over four states. In 1990, Congressman Bill Richardson of New Mexico catalogued these border problems to Congress citing, "high unemployment, substandard living and health conditions, drug trafficking, and a continued influx of illegal immigration."[145] Other members of Congress touted the NAFTA because a strong commercial relationship with Mexico would be the basis of a political partnership that would be necessary to address common bilateral

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142. *Id.*

143. Tim Golden, *Salinas Call NAFTA a Test of U.S. Relations With All Latin America*, N.Y. TIMES (Oct. 19, 1993), *available at* https://www.nytimes.com/1993/10/19/world/salinas-calls-nafta-a-test-of-us-relations-with-all-latin-america.html (last visited Mar. 4, 2019).

144. *Remarks by the President*, *supra* note 121.

145. *U.S. —Mexico Economic Relations*, *supra* note 97, at 30.

problems along the border, including migration, narcotics trafficking, and environmental issues. The NAFTA proponents in Congress repeatedly cited reports that the agreement would bring prosperity to Mexico, which they argued would reduce instances of undocumented immigration and narcotics trafficking.

## IV. NEGOTIATIONS OF THE NAFTA INVESTMENT AGREEMENTS

### *A. The NAFTA Opening Rounds (June to September 1991)*

As NAFTA negotiations began, trade ministers from the United States, Mexico, and Canada divided the negotiations into 19 working groups within six broad areas: (1) market access for goods; (2) services; (3) investment; (4) intellectual property; (5) dispute settlement; and (6) trade rules on subsidies, dumping, and rules of origin.[146] Carla Hills, from the Office of the USTR, appointed officials from the U.S. Treasury to head the investment and financial services working groups, consistent with the negotiating format from the Uruguay Round.

Table Four: The NAFTA Opening Rounds (June to September, 1991)

| Negotiating issues in investment and financial services | U.S. Lawmakers and Stakeholders | | | Mexico | Canada |
|---|---|---|---|---|---|
| | Congress | Corporate lobbies, private sector advisors | Labor and environmental groups | | |
| Investor rights and investor-state dispute settlement (ISDS) | Majority support NAFTA objectives; minority wary of offshoring and Mexico as "pollution haven" | U.S. BIT; labor and environment concerns do not belong in the NAFTA | NAFTA will not boost exports but will depress labor and environmental conditions in all three countries | Rejects expropriation and ISDS | Unsuccessfully counters U.S. Model BIT with U.S.-Canada FTA |

146. CAMERON & TOMLIN, *supra* note 5, at 82.

| | | | | | |
|---|---|---|---|---|---|
| Market access for FDI | | Demands high value deal | | Energy sector not open to negotiations | Demands right to screen FDI |
| Investor rights and FDI in financial services | Apply free trade principles to banking | U.S. banks "framed parameters of domestic political acceptability" | - | No national treatment, cap on foreign market share, long transition period | U.S. wants branching, Canada wants changes to U.S. banking law |

### *1. USTR Tables the Model BIT*

According to political scientists Maxwell Cameron and Brian Tomlin, at the beginning of the investment negotiations the USTR tabled the U.S. Model BIT while Canada proposed to use the U.S.-Canada FTA as the point of departure, while both the United States and Canada attempted to persuade Mexico to join their side.[147] There were two fundamental differences between the U.S. BIT and the U.S.-Canada FTA. First, the U.S. Model BIT assumes a "negative list" approach to sectoral liberalization while the U.S.-Canada FTA had a "positive list" like the WTO. A "negative list" agreement assumes complete liberalization of all economic sectors and with sectoral exceptions that are negotiated, whereas the "positive list" only liberalizes certain negotiated sectors. The second difference between the U.S. BIT and the U.S.-Canada FTA was the dispute settlement provisions. The U.S. Model BIT obliged ISDS, a set of procedures for investors to bring claims against states to the International Centre for Settlement of Investment Dispute at the World Bank. Conversely, the U.S.-Canada FTA directed investment disputes to a state-to-state dispute settlement mechanism or the GATT. However, concurrent to the NAFTA, Canada was negotiating a BIT with Argentina that utilized ISDS procedures.[148] Moreover, in all of the official draft texts of the NAFTA investment chapter, Canada had never bracketed the dispute

147. *Id.* at 100-01

148. Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment, May 11, 1991, 2467 U.N.T.S. 243.

settlement clauses. Therefore, since the beginning of negotiations, Canada was not opposed to ISDS.[149]

Despite Canada's movement towards the United States on the negative list approach and ISDS, there were fundamental differences between the two sides. Canada sought to narrow the definition of "investment" in the U.S. BIT, thereby narrowing the scope of the entire chapter. In addition, Canada insisted on maintaining the right to screen foreign investments which the U.S.-Canada FTA had allowed, and the United States sought to eliminate this carve-out. The FTA permitted a Canadian law which sanctioned government review of direct acquisitions valued over $150 million CAD, and Canada resisted the United States until the end of negotiations.

The U.S. BIT provisions posed three significant problems for Mexico. First, the U.S. BIT expropriation clause provides that compensation must be "prompt, adequate, and effective." This language was unacceptable to Mexico, as it was the language used by the United States when Mexico expropriated U.S. oil companies, banks, and agricultural investments in 1938. Second, Mexico did not accept ISDS due to Calvo Clause in the Mexican constitution. The Calvo Clause was adopted from the Calvo Doctrine, which directed capital disputes with foreigners to domestic courts in Mexico with no recourse to the foreigner's home state. Lastly, from the beginning of negotiations, Mexico drew a red line around the energy sector as off-limits to FDI. Consistent with Mexico's Constitution, Mexico insisted that the energy sector was vital to national security and it was operated by Mexico's large state-owned enterprises.

### 2. *Investment-Related Labor and Environmental Concerns*

The most well-known "nationalist" politician was Ross Perot, who ran a relatively successful third-party campaign in the 1992 Presidential elections. During a Presidential debate, Perot famously derided the NAFTA stating:

> We have got to stop sending jobs overseas . . . [it's] pretty simple: If you're paying $12, $13, $14 an hour for factory workers and you can move your factory South of the border, pay a dollar an hour for labor . . .

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149. Contrary to Cameron and Tomlin's account, it appears that only Mexico was opposed to dispute settlement from the beginning of negotiations. In Cameron and Tomlin's account of the negotiations, both Mexico and Canada initially rejected the U.S. BIT dispute settlement provisions. However, Cameron and Tomlin make no indication that Canada eventually accepting dispute settlement. Further, in all of the official draft texts of the NAFTA investment chapter (published after Cameron and Tomlin's research), Canada had never bracketed the dispute settlement clauses while Mexico did. Therefore, there is no indication that Canada was opposed to dispute settlement. *See generally* CAMERON & TOMLIN, *supra* note 5.

–that's the most expensive single element in making a car–have no environmental controls, no pollution controls and no retirement, and you don't care about anything but making money, there will be a giant sucking sound going south.[150]

Perot's argument was that NAFTA would enable Mexico to "suck" manufacturing investment away from the United States, thereby putting downward pressure on employment and wages in the United States. Perot's sentiments were shared by some U.S. labor unions who did not support the NAFTA along nationalistic lines and preferred protectionist policies. In contrast, other labor unions advocated for institutional mechanisms to improve labor standards in all three countries.[151] U.S. labor union representatives testified to Congress that an FTA with Mexico would not boost U.S. exports because Mexico lacked consumption power to buy U.S. goods. The labor union representatives argued, rather, that the NAFTA would worsen labor conditions in all countries. This argument had currency with a growing number of House Democrats who were wary of offshoring to Mexico, some citing a general lack of enforcement of labor and environmental standards in Mexico as an "unfair trade subsidy" that would distort investment towards Mexico.[152] They warned that offshoring to Mexico would put downward pressure on wages, working conditions, and employment. Former U.S. Treasury Secretary James Baker testified to the Senate, "[t]he argument that Mexican wage levels will be kept artificially low to attract U.S. investment and thus depress wage levels, U.S. wage levels, is not valid."[153]

Environmental groups argued that Mexico would become a "pollution haven" for dirty industry because plants would relocate to Mexico in search of fewer environmental regulations and costs, causing environmental deterioration. During the early rounds of negotiations, the coalition of labor, environmental, and other citizen's groups protested their exclusion from negotiations and began to "shadow the negotiators wherever they went."[154] Environmental groups filed a law suit against the USTR on the grounds that the NAFTA and the GATT Uruguay Round required environmental impact assessments.

150. *The 1992 Campaign: Transcript of the Second TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES (Oct. 16, 1992), *available at* https://www.nytimes.com/1992/10/16/us/the-1992-campaign-transcript-of-2d-tv-debate-between-bush-clinton-and-perot.html (last visited Mar. 4, 2019).

151. *See generally* Tamara Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 AM. J. OF SOC. 715 (2005).

152. *United States—Mexico Free Trade Agreement*, *supra* note 100, at 7.

153. *Id.* at 48.

154. MAYER, *supra* note 107, at 126.

### *3. Investor Rights and FDI in Financial Services*

Each country had a consultation process with representatives of financial services industries. After negotiations, Olin Wethington reflected that the U.S. consultation process with U.S. banks "framed, early in the process, the parameters of domestic political acceptability and became a two-way education process on specific issues, with both government and the private sector learning and exploring the limits of negotiating feasibility."[155] To this end, from the beginning of the negotiations there was a "high degree of convergence" on core principles between the USTR and the private sector, particularly in establishment, national treatment, and Mexico's transition period.[156] In negotiations, the majority of sticking points concerned how much liberalization and how soon. Wethington observed:

> Much of the NAFTA negotiations in the financial services sector concerned the elements of the transition period - its length, the speed of the liberalization during the transition, the extent of market share for the U.S. and Canadian firms . . . and certain special rules that would apply only to the transition period.[157]

Negotiations were slow to begin as Mexico initially did not agree to negotiate financial services on the grounds that they had just reprivatized their banks and they feared U.S. competition. The United States responded that without a financial services agreement there would be "no NAFTA."[158] Mexico conceded and then called for a permanent five percent cap on foreign ownership of financial institutions, and when the Mexicans did not accept the core issue of national treatment, the United States responded that this was "not serious."[159] The United States and Mexico were "nowhere" near an agreement.[160] Both the United States and Canada wanted to build upon the FTA and establish the right to open retail and commercial bank branches. However, the United States claimed it was unable to permit branching due to interstate banking laws and the Glass-Steagall Act. In turn, Canada would not give anything up on the issue.

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155. WETHINGTON, *supra* note 83, at 21.
156. *Id.*
157. *Id.* at 55.
158. CAMERON & TOMLIN, *supra* note 5, at 84.
159. *Id.* at 98-99.
160. *Negotiators Remain Far Apart in NAFTA Talks on Financial Services*, 10 INSIDE U.S. TRADE 1, 19-20 (Jan. 31, 1992).

### *B. Drafting the Investment Agreements (October 1991 to January 1992)*

<table>
<tr><th colspan="6">Table Five: Drafting the Investment Agreements (October 1991 to January 1992)</th></tr>
<tr><th rowspan="2">Negotiating issues in investment and financial services</th><th colspan="3">U.S. Lawmakers and Stakeholders</th><th rowspan="2">Mexico</th><th rowspan="2">Canada</th></tr>
<tr><th>Congress</th><th>Corporate lobbies, private sector advisors</th><th>Labor, environmental groups</th></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td rowspan="2">Majority favor U.S. BIT but offshoring concerns leads some Congress members to oppose it</td><td rowspan="2">Maintains that NAFTA is not forum for labor and environmental concerns; all BIT provisions necessary</td><td rowspan="2">Successfully motivate USTR to address investment-related environmental concerns, although unclear to what extent</td><td rowspan="2">Concedes to U.S. BIT provisions; unsuccessfully tables performance requirements</td><td>Continues to push for narrower definition of investment</td></tr>
<tr><td>Market access for FDI</td><td>Maintains right to screen FDI</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>Treasury drafts balance of payments safeguard provision</td><td>Mexico has political motivations for maintaining control of banking system</td><td>-</td><td>Accepts establishment; rejects national treatment; demands caps to market share</td><td>Pushes for repeal of Glass-Steagall</td></tr>
</table>

*1. Investor Rights and Investor-State Dispute Settlement (ISDS)*

By the meetings of January 7-10, 1992, each side had "cut and pasted" its wish list into a draft text.[161] Mexico continued to reject the U.S. BIT's articles of expropriation and ISDS through the initial January 16, 1992 draft.[162] Mexico was stubborn to give up its commitment to the Calvo Doctrine. Mexico had not proposed an expropriation text, although it had agreed that the subject should be covered in "a manner consistent with its Constitution, which does not preclude fair market value."[163] The United States continued to push for a broad definition of investment and "national treatment," over the objections of Canada and Mexico.[164]

During the investment negotiations of the Uruguay Round, developing countries, led principally by India, argued that U.S. investment proposals would compromise national sovereignty.[165] India made a particularly strong case against performance requirements, arguing that they have development dimensions that "far outweigh their trade effects in the case of developing countries."[166] In 1989, Mexico was among the countries who concurred with India. The United States responded that "capital should flow according to market forces with a minimum of government intervention."[167] During NAFTA negotiations in January 1992, Mexico had proposed voluntary performance requirements in which "a company could voluntarily agree to meet a certain content requirement in exchange for a subsidy payment."[168] The United States and Canada rejected this proposal, and in official statements the USTR maintained the same talking points that investment should respond to "private market forces."

*2. Investment-Related Labor and Environmental Concerns*

A GATT dispute panel ruled that a U.S. environmental law that protected wild dolphins was in violation of GATT obligations because it prohibited imports of Mexican tuna. Public Citizen spokeswoman Lori

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161. *NAFTA Working Group on Investment Still in Early Stages of Negotiations*, 10 INSIDE U.S. TRADE 1, 10-11 (Jan. 31, 1992).

162. *See generally NAFTA Investment Chapter 11 Draft*, OFF. OF U.S. TRADE REP. (Jan. 16, 1992), *available at* https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file57_5923.pdf (last visited Mar. 4, 2019).

163. *Id.* at 16.

164. *NAFTA Working Group on Investment Still in Early Stages of Negotiations*, *supra* note 161, at 10-11.

165. STEWART, *supra* note 88, at 2100.

166. *Id.*

167. *Id.* at 2107.

168. *Id.*

Wallach explained, "[t]his case is the smoking gun, we have seen GATT actually declaring that a U.S. environmental law must go."[169] In Congress, 63 members joined environmentalists in protesting the ruling with concerns of the implications of the ruling for other U.S. environmental laws.[170] The lawmakers had easily made connections to the NAFTA negotiations and denounced Mexico as a partner in protecting the environment. Environmental groups and Democrats in Congress continued to advance the "pollution haven" argument, in which Mexico would attract FDI due to its lax environmental standards and enforcement. Mexican President Salinas responded to the concerns of U.S. Congress that Mexico would not seek to enforce the GATT ruling and Mexico would implement a new law to prevent the killing of dolphins.[171] In response, U.S. negotiators inserted into the investment chapter draft, "[l]anguage on the environment may be provided for this chapter and/or generically."[172]

### 3. *Investor Rights and FDI in Financial Services*

In January 1992, the Mexican financial services negotiators prepared a document for their counterparts in the U.S. Treasury. In the document, the Mexicans were in broad agreement with U.S. liberalization objectives stating that "[b]ehind the program for opening the domestic financial system under NAFTA is the assumption that allowing foreign intermediaries to operate in Mexico could contribute to economic efficiency and facilitate the globalization of the financial sector."[173] However, the Mexican financial services negotiators retained the objective of minimizing risks of instability that might result from "too sudden and too significant infusion of foreign competition."[174] Therefore, by January of 1992 Mexico agreed to the right of establishment of foreign firms but was demanding a transition period until roughly 2010, with permanent limitations on foreign ownership and foreign market share afterwards.

Many U.S. negotiators believed that politics were the Mexican government's core motivation for insisting on permanent caps to foreign ownership and market share, and not financial instability. Olin Wethington reflected that "the political element stemmed from a strongly held view in certain Mexican political circles that the financial system must be

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169. MAYER, *supra* note 107, at 128.

170. *Id.*

171. *See* Juanita Darling, *Tuna Turnabout: Mexico Announces a Dolphin Protection Plan*, L.A. TIMES (Sept. 25, 1991), *available at* http://articles.latimes.com/1991-09-25/business/fi-2764_1_dolphin-protection (last visited Mar. 12, 2019).

172. *NAFTA Investment Chapter 11 Draft*, *supra* note 162, at 4.

173. WETHINGTON, *supra* note 83, at 13.

174. *Id.*

maintained under the control of Mexican nationals."[175] Wethington believed that these were the reasons for the Mexican negotiating documents characterizing the Mexican banking system as a "national asset" and "essential to the country's economic security."[176] The Mexican negotiating documents asserted the necessity of permanent ceilings on foreign ownership of banks: "a ceiling is needed to assure adequate domestic control of the banking system so vital to the national economy."[177] However, the United States rejected any permanent limitations on the principle of national treatment.[178]

As negotiators prepared the first draft of the financial services agreement, they remained "far apart" in seven areas: (1) national treatment; (2) coverage of agreement; (3) administration of trade laws and regulations; (4) commercial presence; (5) which services to include and exclude; (6) transparency of rules and regulations; and (7) the extraterritorial application of U.S. laws.[179] Mexico was unwilling to accept the principle of "national treatment," which the United States and Canada outlined as an "essential condition" to the agreement.[180] Mexico introduced a "sweeping proposal" that would ban financial service providers from many programs that included government involvement, such as student loans, pension funds, and export/import financing, and the United States rejected these exclusions.

Canada insisted upon the removal of Glass-Steagall restrictions on foreign banks and securities affiliates in U.S. markets.[181] Moreover, Canada sought to enlarge the ability of its securities firms to provide cross-border securities services into the United States. Canada was generally in line with U.S. objectives towards Mexico, but the Canadians did not make demands of Mexico. Simultaneously, the U.S. Treasury indicated that it would provide an emergency "safeguard" provision for balance of payment crises, although the language was not yet drafted.[182]

### *C. "The Dallas Jamboree" and Aftermath (February to April 1992)*

There was a conclusion of the main draft text at the Uruguay Round in early 1992, although the United States and European Union were still

175. *Id.*
176. *Id.*
177. *Id.* at 13-14.
178. *Negotiators Remain Far Apart in NAFTA Talks on Financial Services*, *supra* note 160.
179. *Id.*
180. *Id.*
181. WETHINGTON, *supra* note 83, at 16.
182. *NAFTA Investment Chapter 11 Draft*, *supra* note 162, at 8.

engaged in a standoff over agriculture. The negotiations in Dallas on February 17, 1992 assumed greater significance because concluding the NAFTA would demonstrate to the European Union that the United States had an attractive non-agreement alternative to the Uruguay Round. Presidents Bush and Salinas ratcheted up the pressure on their negotiators to complete the NAFTA as soon as possible. The Dallas meeting was dubbed the "jamboree" (or large gathering), where all the working groups met with chief negotiators for outstanding issues to be decided at a higher political level.

Table Six: "The Dallas Jamboree" and Aftermath (February to April 1992)

| Negotiating issues in investment and financial services | U.S. Lawmakers and Stakeholders | | | Mexico | Canada |
|---|---|---|---|---|---|
| | Congress | Corporate lobbies, private sector advisors | Labor, environmental groups | | |
| Investor rights and investor-state dispute settlement (ISDS) | NAFTA is embraced as alternative to Uruguay Round; debate over labor and environmental concerns | NAFTA should not address labor and environment; | Leaked copy of negotiating text confirms labor and environmental concerns | Expropriation language had to avoid Calvo doctrine | Concedes to U.S. investment definition |
| Market access for FDI | | | | Energy sector not open to negotiations | U.S. concedes to Canada's FDI screen |
| Investor rights and FDI in financial services | | Scope needs to be financial services and not just firms; pressures Mex. | | Unsuccessfully defends "national treatment" exception | Sides with U.S. vis-à-vis Mex.; still pushes for reforms to Glass-Steagall |

### 1. *Investor Rights and ISDS*

The Dallas Jamboree lead to Mexico finally conceding to "expropriation" and ISDS due to the pressure it faced to conclude the NAFTA. In drafting the "expropriation" provision, negotiators had to figure out how to word the obligation without violating the Mexican constitution, which permitted expropriation on the grounds of national interest.[183] When explaining the tradeoff, an anonymous negotiator said: "[w]e had to craft the expropriation language not using the words 'prompt, adequate, and effective.' There are three paragraphs, and if you read them, you find that what they say is exactly those three words, but in substitute language."[184] The United States argued that it was essential for Mexico to accept the U.S. definition of expropriation and ISDS in order for Mexico to attract U.S. FDI and capital.[185] In market access talks, the United States conceded to Canada's demand to maintain its foreign investment screen, but the USTR sought to reduce its scope.

A leaked copy of the draft text from the Dallas Jamboree was published in March by the Washington DC journal *Inside U.S. Trade*, and it confirmed all the fears of NAFTA critics. A spokesperson from an environmental group called the Sierra Club addressed the NAFTA draft text: "[i]t's pure and simple, the document does not pay attention to anything but expanding trade . . . The best you get is meaningless language or no mention of the environment."[186] This draft text was the final evidence to labor and environmental groups that they would be marginalized from determining the NAFTA's core content.

### 2. *Investor Rights and FDI in Financial Services*

Similar to the investment negotiations, the Mexican financial services negotiating team closely followed its directive to finish negotiations as soon as possible. At Dallas, the Mexicans accepted the principle of national treatment in financial services.[187] In addition, while they maintained demands for a permanent cap on foreign market share, they abandoned their fight for permanent caps on foreign ownership in banking. However, the Mexican negotiators immediately regretted this concession because they made it without receiving anything in return from the United States or Canada, to the delight of those parties. As a result, U.S. negotiators became "hungry for more."[188] An anonymous negotiator recalled,

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183. CAMERON & TOMLIN, *supra* note 5, at 112.
184. *Id.*
185. *Id.* at 100-01.
186. MAYER, *supra* note 107, at 133.
187. CAMERON & TOMLIN, *supra* note 5, at 114.
188. *Id.*

"[t]hey were giving things away; so I am going to keep asking until they stop giving."[189] As the United States continued to push for the agreement to cover financial services rather than financial firms, its negotiators upped the ante, insisting there would be "no NAFTA" unless every financial intermediary who wanted access to the Mexican market got it.[190]

Mexican financial markets had come to expect a NAFTA agreement, and the success of the NAFTA negotiations were already "factored into the market."[191] Therefore, any indication of failure to reach an agreement would make Mexican markets highly volatile. So, the U.S. negotiating strategy was to "keep demanding, and be patient."[192] The U.S. negotiators knew that Mexico was anxious for a deal as the country was in dire need of foreign capital. Therefore, U.S. negotiators were patient, and when the Mexican markets became impatient, the United States would push Mexican negotiators for concessions in financial services. The Mexican negotiators felt pressure from their superiors to conclude the agreement as soon as possible, which resulted in tremendous concessions from the Mexican negotiators in several working groups, especially investment and financial services.

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189. *Id.*
190. *Id.*
191. WETHINGTON, *supra* note 83, at 19.
192. CAMERON & TOMLIN, *supra* note 5, at 114.

### *D. Reaching an Agreement (May to August 1992)*

<table>
<tr><th colspan="6">Table Seven: Reaching an Agreement (May to August 1992)</th></tr>
<tr><th rowspan="2">Negotiating issues in investment and financial services</th><th colspan="3">U.S. Lawmakers and Stakeholders</th><th rowspan="2">Mexico</th><th rowspan="2">Canada</th></tr>
<tr><th>Congress</th><th>Corporate lobbies, private sector advisors</th><th>Labor, environmental groups</th></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td rowspan="2">Official study shows investment will be boon to all NAFTA; Congress warns environmental concerns must be addressed</td><td>Concerns over Canada and Mexico's FDI screens</td><td rowspan="3">Unsuccessfully argued that the NAFTA would increase offshoring and decrease employment; unsuccessfully lobbied for labor and environmental provisions; presented studies contesting official studies</td><td colspan="2">By May brackets were removed around investor rights and ISDS, indicating Mexico and Canada were unsuccessful in reforming U.S. BIT provisions</td></tr>
<tr><td>Market access for FDI</td><td>Limit sectoral exceptions to investment obligations</td><td colspan="2">Talks are contentious; U.S. bargains for high threshold for Canada's FDI screen while Mexico demands FDI screen also</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>USTR and Treasury hold meetings with financial services lobby and must placate the lobby's demands</td><td>Financial services lobby threatens to erode Congressional support for NAFTA without Mexican concessions</td><td>No permanent caps acceptable to U.S. industry; Mexico joins Canada insisting reforms to U.S. banking laws</td><td>Reforms to Glass-Steagall not possible under NAFTA framework</td></tr>
</table>

### *1. Investor Rights and ISDS*

By the end of May, Mexico and Canada conceded to all U.S. BIT provisions and talks had progressed to negotiating which sectors would be exempt from the obligations. Mexico secured the most exceptions (89)—although many were transitional and to be phased out over time—followed by the United States (50) and lastly Canada (48). Notably, all three parties exempted government provided social services, telecommunications services, and maritime and transportation sectors. Canada fought to protect its culture industries from FDI, while Mexico barred FDI in energy. In addition, Canada was persistent in maintaining investment screening of takeovers valued above $150 million CAD, and Mexico responded by also calling for an equivalent mechanism. The United States rejected both, except for national security reasons, as in U.S. legislation. However, by August the United States conceded to both Canada and Mexico on permitting investment screening to conclude the NAFTA, and the right to review investment acquisitions was carved out of ISDS.[193]

### *2. Investment-Related Labor and Environmental Concerns*

The leaked draft text from the Dallas Jamboree was fuel to fire for opposition to the NAFTA. A coalition of environmental groups, which included some fast-track supporters, presented the USTR with a list of demands. USTR Carla Hills "appeared uninterested" until many Congressmen testified that the NAFTA would not make it past Congress unless environmental concerns were met.[194] Hills responded to Congress in September 1992:

> Mexico will not become a pollution haven because it costs more for our companies to move to Mexico than it does to comply with our U.S. environmental standards. We did not negotiate this agreement to permit Mexico to enforce our environmental laws or any of our other laws any more than we are going to enforce theirs.[195]

The USTR concluded that the NAFTA would not turn Mexico into a "pollution haven" because "environmental compliance costs play a minimal role in relocation decisions because they represent a small share of total costs for most industries."[196] The USTR even claimed the

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193. *NAFTA Chapter 11 Trilateral Negotiating Draft Texts*, OFF. OF U.S. TRADE REP. (Aug. 11, 1992), *available at* https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file865_5907.pdf (last visited Mar. 1, 2019).

194. MAYER, *supra* note 107, at 134.

195. *North American Free Trade Agreement*, *supra* note 118.

196. *See generally* OFF. OF THE U.S. TRADE REP., MYTHS & REALITIES: THE NORTH AMERICAN FREE TRADE AGREEMENT (1992).

contrary: "[the] NAFTA encourages environmentally sound investments" and "will enhance environmental protection."[197] To placate Democrats in Congress, the USTR would "green the text,"[198] but the investment chapters' environmental provisions were framed as moral obligations and not legally enforceable provisions.[199]

Similarly, the USTR concluded that neither Mexico's low wages nor poor labor conditions would attract U.S. FDI because "[t]he total cost of production is what matters in relocation decisions, not wages alone."[200] On the contrary, the USTR sold the investment provisions to Congress as a "win-win" agreement for all parties because "U.S investments generate increased U.S. exports."[201] In August 1992, the USTR Press Release on the investment chapter explained, "[i]ntegrated production in North America will make U.S. firms more competitive against European and Japanese producers," and the elimination of performance requirements in Mexico "will increase the demand for inputs sourced from the United States."[202] Therefore, the USTR argued, the investment provisions will encourage job growth.

In May 1992, at the request of the USTR, the U.S. International Trade Commission surveyed and evaluated the various economic analyses of NAFTA. The subsequent report found that:

> [T]here is a surprising degree of unanimity in the results regarding the aggregate effects of NAFTA. All three countries are expected to gain from a NAFTA. These independent studies found that NAFTA would increase U.S. growth, jobs, and wages. They found that NAFTA would increase U.S. real GDP by up to 0.5 percent per year once it is fully implemented. They projected aggregate U.S. employment increases ranging from under 0.1 percent to 2.5 percent. The studies further project aggregate increases in U.S. real wages of between 0.1 percent to 0.3 percent.[203]

The President and the USTR announced these findings to Congress and the public. In doing so, the USTR rejected the concerns of labor and environmental countries. Simultaneously, the USTR's negotiation of the

197. *See generally* OFF. OF THE U.S. TRADE REP., *supra* note 4.

198. *See generally* Rhonda Evans & Tamara Kay, *How Environmentalists 'Greened' Trade Policy: Strategic Action and the Architecture of Field Overlap*, 73 AM. SOC. REV. 970 (2008).

199. North American Free Trade Agreement, *supra* note 87, art. 1114.

200. OFF. OF THE U.S. TRADE REP., *supra* note 4.

201. *Id.*

202. *Id.*

203. *White House Fact Sheet: The North American Free Trade Agreement*, *in* 2 PUBLIC PAPERS OF THE PRESIDENTS: BUSH, GEORGE H.W. 1342-45 (1993), *available at* https://www.govinfo.gov/content/pkg/PPP-1992-book2/pdf/PPP-1992-book2-doc-pg1342.pdf (last visited Mar. 6, 2019).

investment chapter was "strongly endorsed" by the Investment Policy Advisory Committee for Trade, the advisory committee that interfaces the USTR with private sector perspectives.[204]

*3. Investor Rights and FDI in Financial Services*

In May, there was a deadlock in the financial services working group. At the Dallas Jamboree, Mexico abandoned its fight for permanent caps on foreign ownership but insisted on permanent caps for foreign market shares in financial services and they refused to give more market access. Representatives from U.S. banks were "furious."[205] The U.S. financial services industry feared that such an agreement would set "dangerous precedent" for future negotiations. The major financial services lobbies wrote to USTR, stating that,

> [t]he extent of liberalization in financial services will determine our ability to support the final NAFTA agreement . . . Financial industry commitment to the Mexican market will be undermined by any form of permanent cap even if used for 'safeguard purposes.' These proposed restrictions are unacceptable in terms of U.S. liberalization goals.[206]

The Treasury responded to Mexico that the U.S. financial services industry rejected the Mexican proposal as "inadequate" and countered with a proposal that featured no permanent caps within "some reasonable transition period."[207] The standoff continued through June as Mexico was seeking tradeoff concessions with the United States and Canada. Mexico argued that the United States cannot truly offer national treatment due to interstate banking laws. Mexico joined Canada in demanding changes to Glass Steagall. However, Mexico indicated that it was willing to modify its demand of a permanent 12 percent cap on foreign share of the financial services market, for safeguards blocking further expansion.[208]

USTR Carla Hills and Treasury Secretary Nick Brady met with the financial services lobby, where the coalition of U.S. banks threatened to sink the NAFTA in Congress.[209] Hills and Brady returned to the Mexican negotiators with the ultimatum and the Mexicans understood that they

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204. *See generally* OFF. OF THE U.S. TRADE REP., NORTH AMERICAN FREE TRADE AGREEMENT: REPORT OF THE INVESTMENT POLICY ADVISORY COMMITTEE (INPAC) (1992).

205. MAYER, *supra* note 107, at 136.

206. *U.S., Mexico Still Unable to Resolve NAFTA Financial Services Dispute*, 10 INSIDE U.S. TRADE 17, 17 (May 22, 1992).

207. *Id.*

208. *NAFTA Talks Stall in Financial Services Market Access Working Group*, 10 INSIDE U.S. TRADE 10, 10-11 (June 5, 1992).

209. MAYER, *supra* note 107, at 136.

could not get the NAFTA without the five largest U.S. banks.[210] Mexico issued a new proposal with no permanent caps, but with a lengthy transition period and safeguards that would prevent rapid increases of foreign ownership.[211] This new proposal was the basis of the final agreement, and in July the United States and Mexico had reached a deal. The USTR presented the agreement to the public and Congress as unprecedented support to U.S. comparative advantages in financial services.[212]

Canada continued its demand for changes to U.S. interstate banking laws and Glass-Steagall.[213] The United States responded that repealing Glass-Steagall would require permission from the Federal Reserve and it would not consider the demand, but foreign firms will be afforded same rights as domestic firms. By the conclusion of negotiations, the following issues between United States and Canada remained unresolved: (1) U.S. restrictions on interstate banking; and (2) Glass-Steagall restrictions on affiliations between banks and securities firms.[214]

*4. Financial Regulation and the "Balance of Payments" Exception*

The final agreement ventured into uncharted legal territory by seeking a tradeoff between the free movement of capital and financial stability. To this end, the liberalization of financial services could only become viable by relying on exceptions to free trade principles. The U.S. Treasury inserted an emergency provision in the case of balance of payments crises.[215] The balance of payments exception can be broadly characterized as language on capital controls, which allow exceptions to the free movement of capital under the transfers article.[216] However, for a country to implement the balance of payments exception, capital controls can only take specific forms under specific conditions and they must be implemented under the supervision of the IMF.[217] Moreover, any capital controls must be temporary, non-discriminatory, and meet an ambiguous standard "to not be more burdensome than necessary."[218] The USTR's private sector advisory committee strongly endorsed the provision

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210. *Id.*

211. *Id.*

212. *See generally* OFF. OF THE U.S. TRADE REP., SERVICES: THE NORTH AMERICAN FREE TRADE AGREEMENT (1992).

213. *U.S. Mexico Reach Deal in NAFTA Financial Services, Canada Balks*, 10 INSIDE U.S. TRADE 1, 11-12 (July 3, 1992).

214. WETHINGTON, *supra* note 83, at 22.

215. North American Free Trade Agreement art. 2104, Dec. 17, 1992, 32 I.L.M. 289.

216. *Id.* art. 1109.

217. *Id.* art. 2104.

218. *Id.*

saying, "The provisions on transfers substantially meet the ACTPN's [Advisory Committee for Trade Policy and Negotiations] objective to allow such transfers to be completely without restriction. The qualification provided to address any possible balance of payments problem is reasonable, and the conditions under which it may be invoked are clearly defined and limited."[219]

That the balance of payments exception is ambiguous, vague, and highly conditional, indicating that the NAFTA safeguards to financial stability are weak. Simultaneously, by applying free trade principles to financial services, the agreement was intended to increase the mobility of capital, which, according to free market principles, would increase economic growth.

## V. THE ORIGINAL PURPOSES OF THE NAFTA INVESTMENT AGREEMENTS

### *A. The NAFTA Investment Agreements are U.S.' Documents*

#### *1. The U.S.' Negotiating Success in the NAFTA Investment Chapter*

The U.S.' proposal for the NAFTA investment chapter was a direct import of the U.S. Model BIT. Domestically, the USTR faced resistance on the content of the NAFTA investor rights from labor unions, environmental groups, and "economic nationalist" politicians like Ross Perot. The USTR simply marginalized these opposing stakeholders; however, the USTR could not ignore resistance in Congress concerning the NAFTA's environmental impacts. This forced the USTR to insert language on the environment in the investment chapter, although it is a non-binding commitment.[220]

In international negotiations, Mexico rejected expropriation and ISDS because of the Calvo Clause in the Mexican Constitution, which referenced the Calvo Doctrine by directing investment disputes with foreigners to Mexican courts. However, the USTR and the U.S. MNCs insisted that ISDS was necessary for Mexico to attract U.S. capital. Eventually, the Mexican negotiators conceded to ISDS, signifying Mexico's historic break from the Calvo Doctrine. The United States and Canada were broadly aligned on negotiating objectives, apart from Canada's suspicion of the United States' broad definition of investment and Canada's refusal to grant the U.S. market access in culture industries.[221]

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219. OFF. OF THE U.S. TRADE REP., *supra* note 204, at 51.
220. North American Free Trade Agreement, *supra* note 215, at art. 1114.
221. *See* Part IV, *supra*, for an extended discussion of this topic.

Despite the domestic and international resistance, U.S. negotiators successfully maintained all core investor rights from the U.S. Model BIT in the NAFTA investment chapter and achieved widespread market access in Mexico in Canada, with limited sectoral exceptions. The USTR's Investment Policy Advisory Committee offered a strong endorsement:

> The [NAFTA investment chapter] will encourage and promote free flows of investment among the three countries by ending many current restrictions in Mexican law on foreign investment and by going beyond the terms of the recent United States-Canada Free Trade Agreement (CFTA) in liberalizing investment requirements.[222]

The USTR's Investment Policy Advisory Committee justified strong investor rights because they would "encourage and promote" regional FDI while ISDS would remove Mexico's Calvo Doctrine, "a major impediment to investment."[223] In so doing, the USTR used the NAFTA investment chapter to reregulate Mexico's FDI policies. To that end, the Committee's report also asserted that ISDS would promote FDI to Mexico,

> [p]ermitting an investor to choose impartial international arbitration and thus bypass national courts is a significant change from long-standing Mexican views under the Calvo Doctrine. [The Investment Policy Advisory Committee] believes the dispute resolution section removes a major impediment to investment and that it meets all . . . objectives. [The Investment Policy Advisory Committee] strongly endorses it.[224]

### 2. *The U.S.' Negotiating Success in the NAFTA Financial Services Chapter*

The impetus for the NAFTA financial services chapter came from the U.S.' initiatives in the late 1970s to establish to establish a trade in services regime in the GATT. U.S. lawmakers came to an overwhelming consensus that the GATT had to include services, investment, and intellectual property to ensure the global competitiveness of U.S. industries. The Omnibus Trade and Competitiveness Act of 1988, in which Congress mandated specific negotiating objectives for the USTR in the GATT Uruguay Round, passed the Senate by 85 to 11 votes and the House by 376 to 45 votes. In financial services, negotiations were led by the U.S. Treasury, which insisted that trade and investment in financial services must be separated from other service sectors due to the unique regulatory concerns in financial services.[225]

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222. OFF. OF THE U.S. TRADE REP., *supra* note 204, at 3.
223. *Id.* at 11.
224. *Id.*
225. STEWART, *supra* note 88.

U.S. firms prioritized trade agreements with developing countries, which not only had the most restrictive regulatory environments for foreign firms but also had the largest growth potential. During multilateral negotiations in the 1970s and 80s, U.S. firms refused any U.S. negotiating objective that did not advance market access in developing countries. Conversely, developing countries argued for the right to retain the necessary policy space to regulate FDI in financial services to meet development objectives, which the United States categorized as protectionist "non-tariff barriers" to trade in services. A U.N. report rebuked the U.S. financial services proposals, arguing that "[b]anking, because of its close links with a country's monetary policy, raises questions of dependency and hence national sovereignty."[226] Since the U.S.' proposals for services and financial services agreements were politically impossible in the GATT Uruguay Round, the United States used the Canada-FTA and the NAFTA to establish legal precedents for future agreements. As the United States was the policymaker in the NAFTA negotiations, the NAFTA financial services chapter did not include any of the development discourse from the GATT Uruguay Round negotiations.[227]

Mexico originally refused to negotiate a NAFTA financial services agreement, to which the United States responded that there would be no NAFTA without financial services. Given the U.S.' goals to establish a services regime in the GATT that would address the discriminatory treatment of foreign firms, the principle of non-discrimination was the intellectual lynchpin of the U.S.' financial services proposals for the NAFTA. Mexico was slow to move from its original stances in refusing U.S. financial firms' national treatment and broad market access, citing regulatory concerns over liberalization. Eventually, U.S. banks threatened to torpedo the NAFTA in Congress without national treatment and complete liberalization of Mexico's financial markets. Mexico's concessions on financial services essentially became the price that it paid for the entire NAFTA. Canada was broadly aligned with the U.S. position vis-à-vis Mexico, but sought greater market access in the United States, which was left for future negotiations. In so doing, the United States was highly successful in achieving its goals in the NAFTA financial services chapter.[228]

The NAFTA financial services chapter reflects distinct U.S. objectives for three reasons: (1) the principled approach to trade in financial services; (2) deregulations on information technology; and (3) little

226. *Services and the Development Process*, *supra* note 69, at 22.
227. *See generally* Part IV, *supra*.
228. *See* Part IV, *supra*.

concern for macroeconomic risk. First, using free trade principles of national treatment and non-discrimination, the United States sought a principled approach to the NAFTA financial services chapter, which would be the first international agreement to merge free trade law with banking law. Second, U.S. financial firms sought to secure deregulations on new markets based on information technology and data processing, and to secure the absolute free movement of capital to provide cash management services. Third, since the U.S.' primary objective was to establish a free trade model of governance of trade in financial services, U.S. negotiators placed little emphasis on regulation. The NAFTA's most significant regulatory provision is an obscure exception to treaty obligations to maintain macroeconomic stability, the balance of payments exception, which has never been implemented. Ironically, financial services could not be liberalized without this exception to liberalization commitments.[229]

### *B. The Original Purposes of the NAFTA Investment and Financial Services Chapters*

#### *1. Purpose One: Establish "Free Market Governance" in North America*

In negotiating the NAFTA investment agreements, the United States was guided by two overarching political and economic objectives: (1) establish and support free market governance in North America; and (2) facilitate economies of scale for U.S. MNCs (i.e., integrated production in North America). The NAFTA investment chapter originated from the U.S. Model BIT. The U.S. BIT program was designed to reregulate developing countries with histories of nationalism and socialism and functioned to establish free market governance of international capital. To that end, the NAFTA investment chapter institutionalized free-market governance of capital in North America.[230] According to Olin Wethington, a lead U.S. negotiator for the NAFTA investment agreements,

> [i]n the view of the U.S. negotiators, the NAFTA was an opportunity to lock in and to enlarge economic reform in Mexico. The NAFTA would give permanence to the market-based orientation of Mexican economic policy at the turn of the decade and would prevent a retreat to more statist forms of economic policy.[231]

The NAFTA investment chapter marked Mexico's historic break with the Calvo Doctrine and embrace of customary international investment law. The NAFTA investment chapter established a regulatory

229. *See* Parts III & IV, *supra*.
230. *See* Part IV, *supra*.
231. WETHINGTON, *supra* note 83, at 8.

freeze on Mexico's domestic investment reforms from the late 1980s, especially in dismantling Mexico's import-substitution industrialization programs, restrictions on FDI, and a long history of nationalizations and expropriations.[232] The NAFTA's core investor protections reflected free market principles in that they forbid state intervention in capital flows and FDI, unless under specific circumstances. This "non-interference" was enforced by ISDS, which extricated the U.S. government from private investment disputes between U.S. investors and host states, which U.S. officials claimed would "de-politicize" investment disputes.

The other NAFTA investment agreement, the financial services chapter, was an investment agreement specifically for the financial services sector. The NAFTA financial services chapter reflected the historical convergence of the U.S. financial services lobbies and the U.S. Treasury's aim to establish a multilateral trade and investment agreement in financial services.[233] Financial services provide critical infrastructure to capital flows and FDI. Therefore, U.S. officials argued that the liberalization of financial services would reduce the transaction costs and enlarge the gains from international trade and investment.[234] To that end, one function of the NAFTA financial services chapter was to facilitate regional manufacturing supply chains.

*2. Purpose Two: Facilitate "Integrated Regional Production"*

The 1988 Omnibus Act, which was applied to the NAFTA in the 1991 Fast Track bill, mandated that the USTR negotiate trade and investment agreements to reduce the trade deficit with an aggressive export strategy.[235] Since manufacturing imports from Mexico contained greater U.S. content than imports from Asia, manufacturing industries were competitively restructuring into Mexico as a low-wage export platform—notably, the auto, textiles, and information technology industries. By integrating production with Mexico, U.S. producers not only maintained market position in North America, but they co-produced with Mexico for export to the world.

According to the USTR's private sector advisors, the NAFTA investment chapter would encourage the U.S.' outward FDI in manufacturing and services and in so doing facilitate firm-level economies of scale

232. *See* Luis J. Jr. Creel, *Mexicanization: A Case of Creeping Expropriation*, 22 SMU L. J. 281, 282 (1968); *see generally* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35 (2003).

233. *See* KELSEY, *supra* note 54.

234. SCHEFER, *supra* note 3, at 271.

235. Omnibus Trade and Competitiveness Act, *supra* note 114, §1101(b)(5).

to compete more effectively in world markets.[236] Despite unprecedented resistance from labor and environmental groups, the NAFTA enjoyed bipartisan political support in Congress. The Bush administration sold the plan to the public as an engine of job growth because more globally competitive industries implied more exports and jobs: "U.S investments generate increased U.S. exports."[237] The Bush administration proudly displayed the 1992 International Trade Commission report surveying all relevant studies, and predicted that the NAFTA would increase GDP, employment, and wages in all three countries.[238]

### 3. *Congruence of "Free Market Governance" and "Integrated Regional Production"*

The texts of the NAFTA investment and financial services chapters were not only intended for the NAFTA, but for other trade and investment agreements. Therefore, their original purposes were to establish a rules-based approach to international trade, and specifically, to establish a "free market governance" of international capital. However, the NAFTA had a political project to integrate regional production, which was distinct from other U.S. trade and investment agreements. Therefore, the two U.S. objectives in the NAFTA investment agreements of "free market governance" and "integrated regional production" were mutually exclusive.

In the early 1990s, the two goals were entirely congruent. This was explained by the USTR's main private sector advisory committee in 1992:

> [w]ith a NAFTA that allows companies to plan long term investments based on economic efficiencies rather than government imposed barriers, costs can be reduced and economies of scale achieved, allowing North American products to compete more effectively in world markets.[239]

That is, U.S. policymakers argued that free market governance in North America would facilitate economies of scale for U.S. firms, particularly the use of Mexico as a low-cost manufacturing export platform. A central purpose of the NAFTA financial services chapter was to lower the costs of regional commerce, thereby encouraging regional supply chains.[240] Indeed, a main reason Canada joined the NAFTA was to

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236. *See generally* OFF. OF THE U.S. TRADE REP., *supra* note 4.
237. *Id.*
238. *White House Fact Sheet: The North American Free Trade Agreement*, *supra* note 203.
239. OFF. OF THE U.S. TRADE REP., *supra* note 204.
240. SCHEFER, *supra* note 3, at 271.

prevent investment diversion away from Canada and to the United States and Mexico.[241]

Similarly, several East Asian countries declared the NAFTA as "sneaky protectionism" because they argued that the NAFTA would lower regional transaction costs and divert FDI away from East Asia and to North America.[242]

### *C. Implications for the Twenty-First Century*

The new Trump administration requested Mexico and Canada to renegotiate the NAFTA in April 2017. Currently, no trilateral institutions exist that evaluate the NAFTA's performance, not to mention the NAFTA's performance in relation to its original purposes. This study identified the original purposes of the NAFTA investment agreements, which can be used as reference points in discussions on the modernization of the agreements.

The NAFTA investment agreements had two original purposes: (1) establish free market governance of capital in North America; and (2) facilitate economies of scale and integrate regional production to enhance the competitiveness of U.S. firms in the emerging global economy.[243] In the early 1990s, these two objectives were consistent; however, literature on these topics shows that these two goals have been lost. Legal scholars demonstrated that the NAFTA's investor protections provide greater substantive rights for multinational investors than domestic ones, which is inconsistent with the free trade principles of equal treatment and equal competitive opportunity. Simultaneously, economists have shown that there been trends towards disintegration of regional production due to "the rise of China."[244] If NAFTA renegotiations do not address these issues, then the original purposes of the NAFTA investment agreements will continue to be outdated and forgotten.

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241. *Id.*

242. *Id.*

243. *See* Parts III & IV, *supra.*

244. *See* LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA ¿INTEGRACION O DESINTEGRACION REGIONAL? (Enrique Dussel Peters et al., 2016) [hereinafter LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA]; Enrique Dussel Peters & Kevin P. Gallagher, *NAFTA's Uninvited Guest: China and the Disintegration of North American Trade*, 110 CEPAL REV. 83, 86 (2013); Michele Rioux, Mathieu Ares, & Ping Huang, *Beyond NAFTA with Three Countries: The Impact of Global Value Chains on an Outdated Trade Agreement*, 5 OPEN J. OF POL. SCI. 264, 264-65 (2015).

*1. Implications for the NAFTA Renegotiations*

In the original NAFTA negotiations, the U.S. investment negotiators were generally unconcerned that the United States would be a defendant in ISDS cases, which accounts for the NAFTA's vaguely worded minimum standard of treatment[245] and indirect expropriation[246] articles. By 2001, all three NAFTA countries faced ISDS claims citing these articles. In response, the three governments issued an official Interpretative Note in 2001 that tied the legal meaning of two articles to customary international law, norms that have been "crystallized" in international law through repeated decisions over centuries. In so doing, the Interpretative Note had curtailed the absolute strength of the NAFTA's minimum standard of treatment and indirect expropriations by limiting their interpretation to customary international law.

However, there is little consensus on the scope of minimum standard of treatment and indirect expropriation in customary international law. For this, ISDS tribunals have made judgements on these articles based on the precedents set by other ISDS tribunals, creating "evolving" standards of investor protection.[247] Indeed, ISDS tribunals have made both narrow and broad interpretations of minimum standard of treatment and indirect expropriation.[248] In this context, the NAFTA investor protections confer greater substantive rights to multinational firms than domestic firms, such as the potential for regulatory chill.[249] Free trade principles depend on equal competitive opportunity (i.e. the notion of a "level playing field" and that the state should not pick "winners and losers"). To the extent that the NAFTA's investor protections confer regulatory advantages to multinational firms, the NAFTA investment agreements are inconsistent with the NAFTA's original goal of free market governance. The implication for renegotiations is that if the new NAFTA does not include language constraining the rights of multinational investors to the same substantive rights as domestic investors, then the NAFTA's original purpose of free market governance will continue to be lost.

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245. North American Free Trade Agreement, *supra* note 114, art. 1105.

246. *Id.* art. 1110.

247. Matthew Porterfield, *An International Common Law of Investor Rights*, 27 U. PA. J. INT'L ECON. L. 79, 103-05 (2006).

248. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1581 (2005).

249. *See generally* Gus Van Harten & Scott Dayna Nadine, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 12 OSGOODE HALL L. SCH. 1 (2016).

### 2. *Implications for North American Regionalism and Integration with China*

The NAFTA investment agreements functioned to "lock-in" Mexico's domestic reforms that reoriented Mexico's investment policies away from nationalism and towards regionalism. For this, NAFTA negotiators argued that the NAFTA investment chapter would remove impediments to FDI and grow regional supply chains.[250] The strategy was successful in the 1990s as supply chains flourished and manufacturing GDP, employment, and wages grew in all three countries.[251] U.S. trade officials justified the NAFTA investment chapter in 1992, stating that "[i]ntegrated production in North America will make U.S. firms more competitive against European and Japanese producers."[252]

However, the document did not refer to China. No policymaker or commentator in North America foresaw that China would join the WTO in 2001 and then become the NAFTA's "fourth partner," as trade flows between North America and China are the largest in the world. In 2015, China became the United States' largest trade partner, dislodging Canada and Mexico. Since China joined the WTO in 2001, China's exports to North America have steadily increased in value added content and have displaced intra-NAFTA trade in key manufacturing sectors, notably electronics, textiles, and potentially soon autos.[253] Since commerce between North America and China is governed by WTO rules, the NAFTA renegotiations will not prevent continued North American integration with China. Beyond trade integration and industrial competition, China quickly emerged as the developing world's leading recipient of FDI. In this context, China has become one of the principle destinations for U.S. FDI, some of which diverted away from Mexico, such as in the electronics sector after the "dot-com" bubble burst.[254] U.S. companies are not simply investing in China as a lower-cost export platform, but to access China's internal markets—which are the most dynamic in the world—and for China's robust infrastructure, educated workers, and human

250. *See* Part IV, *supra.*

251. *See* LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA, *supra* note 244; Peters & Gallagher, *supra* note 244; Rioux, Ares, & Huang, *supra* note 244.

252. OFF. OF THE U.S. TRADE REP., *supra* note 4.

253. *See* LA NUEVA RELACION COMERCIAL DE AMERICA LATINE Y EL CARIBE CON CHINA, *supra* note 244; Peters & Gallagher, *supra* note 244; Rioux, Ares, & Huang, *supra* note 244.

254. KEVIN P. GALLAGHER & LUBYA ZARSKY, THE ENCLAVE ECONOMY: FOREIGN INVESTMENT AND SUSTAINABLE DEVELOPMENT IN MEXICO'S SILICON VALLEY 10 (2007).

capital. For these reasons and others, there are thousands of companies investing and operating in the U.S.-Mexico-China triangle. As the United States and China negotiate a BIT and China continues to liberalize inward FDI policies, U.S.-China investment will only deepen, particularly since China has become the world's second largest source of FDI (the United States is first).

Increasing North America-China integration means that the NAFTA's original purpose of integrated regional production is increasingly obsolete. The North American regionalism of the 1990s will be impossible to achieve in the twenty-first century. The NAFTA renegotiations can influence the pace of North American integration with China. Notably, "rules of origin" (regional content requirements) can be raised to protect against Chinese imports, particularly in the auto sector. However, there is no consensus on the effects of rules of origin on investment. The U.S. Model BIT was not intended to promote U.S. FDI but to establish free market governance of FDI, which insisted that investment decisions are private matters and are best left to the market. Therefore, the original NAFTA investment agreements reflected this same free market approach to FDI, and for this reason many footloose U.S. MNCs abandoned production in Mexico for China, such as in electronics, textiles, and autos. The original NAFTA negotiations serve as a reminder that regionalism peaked in the 1990s. The NAFTA renegotiations grapple with a multipolar world in which regionalism is no longer a strategy for economic growth.