Chapter 11 of NAFTA v. U.S. Democracy

Cara Mroczek

Western Michigan University, cmroczek@gmail.com

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"NAFTA vs. U.S. Democracy: The implications for domestic governance & judicial processes"

Dr. Ken Dahlberg, Political Science Department

Dr. Peter Renstrom, Political Science Department

Dr. Michelle Miller-Adams, Political Science Department
Chapter 11 of NAFTA v. U.S. Democracy

The Implications for Domestic Governance and Judicial Processes
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The roots of the democratic system in the United States are deeply embedded within the compelling language of the Declaration of Independence. This document is still held on high regard for the inspiration it has provided to the development of democratic institutions and ideals. The creation of United States democracy was founded on the principles outlined in this historic document “that certain truths are self-evident, that people are created equal, that they are endowed with inalienable rights, that governments derive their power from the consent of the governed and that the purpose of government is to protect these rights.” These principles are still a cause for much thought, as they are a sign of the new basis for U.S. Democracy, yet can still portray its faults simultaneously. Within the U.S. Constitution three branches of government were created: the executive, the legislative, and the judicial. The President was to act as chief executive in administering the law, while the Congress created the laws and ensured that local politicians represented U.S. citizens. The U.S. judicial system’s responsibility was to protect the integrity of the Constitution by making certain that laws and actions did not conflict with it and that justice would be served by fair and objective procedures.

The first Americans reveled in the belief that the purpose of the government was to secure and protect the liberty and property of its citizens, while not interfering with their daily lives. The advent of capitalism in the United States dramatically fashioned the political goals of the country towards more economic expansion. Conflict over property rights has shaped U.S. democracy from its beginnings. Early examples involved slavery and the taking of Indian lands by early European settlers. In conservative circles private
ownership has always been seen as one of the most important rights guaranteeing the individual freedom of Americans that were able to own property in the early days of American history. Yet, the concerns of many for social justice and the common good challenged the property over people argument, while generating devastating conflicts, like the Civil War.

Debate over property rights again came under increased public scrutiny in the beginning of the twentieth century, when corporate power was becoming more dominant in society. Even though social reformers generated much opposition to corporate influence, the Supreme Court continued to protect corporations by remaining true to the classic doctrines of laissez-faire economics, which seek to limit government involvement in economic matters. The case most often cited as enhancing the privileges of corporations by viewing them as having the same rights as individual citizens involved bakers’ hours in New York. The Supreme Court decision in *Lochner v. New York* 1905 ruled that a law requiring no more than a 10-hour workday for bakers as well as safer working conditions was unconstitutional and violated bakery owners’ right to property. For the next 30 years this precedent was used to nullify over 200 federal and state statutes, including minimum-wage laws, the progressive income tax, health and safety codes, and many other now common elements of United States government. Finally, in 1937 a new liberal majority was established in the Supreme Court during Franklin Roosevelt’s presidency. This court upheld the National Labor Relations Act, as well as many other economic regulations that led to a great expansion of government. Today another conservative court is shaping public policy through their decisions. The Rehnquist Court has many “pro-takings” members who feel that the government must
compensate an owner even if property or a business has been only partially affected by a government regulation rather than fully taken under eminent domain. The Court has yet to go so far as to overturn twentieth-century precedent and provide a radical new definition to property rights, something that would affect many other interests (Greider b) 2001). The governmental responsibility of protecting the greater interest of the public rather than shielding economic interests has been given attention, and yet the debate over the public good vs. economic interests still drives many discussions. Now that international markets are becoming more dominant through current trade policies, the government faces foreign companies wanting the same property rights and advantages as domestic ones.

The authority over foreign policy is mentioned in Article I Section 8 of the U.S. Constitution granting Congress the power to regulate commerce with foreign nations and the U.S. has developed an extensive interaction with the international community in terms of trade. In domestic affairs certain powers were distributed between the federal and state governments, by expressing powers meant for the federal, leaving the remainder to the states. The Constitution grants power that relates to the federal government but it is uncertain as to how that power is divided between the branches of the federal government. The powers of making war, treaties, commerce is given to the federal government explicitly, while other actions taken, such as conducting intelligence, negotiating international agreements other than treaties, and the deployment of forces in times with no war are not explained.

Congress can delegate power to the President to create foreign policies more efficiently. The executive branch of the federal government has takes a leadership
position drawing on these powers in negotiating, enacting, and implementing trade agreements as a crucial task of the executive branch with "advise and consent" of the Senate, especially in the responsibility of creating trade agreements. Foreign policy was drafted as somewhat vague and the framers intended to have the Presidents develop it pragmatically. The Executive Power Clause in Article II of the Constitution has been used as a source of the implicit power of the President to conduct foreign affairs, and the power of the President to act on these implicit powers has grown over the years (Makielski 1997). The President cannot take the lead in negotiating trade agreements unless Congress grants that authority. Over the last 50 years presidents took ahold of this power and enacted international agreements on their own, and only recently has Congress taken a proactive position in limiting presidential actions.

A means that the President can take to limit constraints on the ratification of trade agreements like the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) is by seeking fast-track authority from the Legislature when negotiating trade treaties. This authority has been granted to the President almost continuously from 1974 to 1994 but this negotiation procedure has received a lot of negative attention recently. The President must first consult congressional members at least 90 days before entering into the negotiation. With Fast track the President makes the political decisions and submits the agreement to Congress for action by a joint resolution without the option of amendments. This process makes it much easier to reduce trade barriers, and it also sets a time limit within which the agreement must be voted on. Without Fast track, Congress members may opportunely add their own amendments to a trade agreement making it almost impossible to negotiate with the
prospective trade partners. Presidents have used the Fast track procedure for decades to inhibit Congressional pork barrelling on trade agreements and it has been widely accepted until recent years. Congress does have the ability to set time limits on negotiation by the executive (Makielski 1997). This process has been criticized as undermining the checks and balances system set up in the Constitution to protect against autocracy. Regardless, the President has a great deal of authority when negotiating trade agreements especially with fast track authority.

The history of U.S. trade policy has evolved over the last several decades into a prominent governmental responsibility with a complex set of guidelines. Trade between the United States and a foreign nation is not a recent development. From this country’s beginnings trade has been used as a means to obtain goods not available here, while also exporting goods for profit. Prior to World War I the U.S. followed a more protectionist position when it came to most trade issues. The Congress set up policies that restricted other countries from selling products here, and before 1913 tariffs were the primary source of government revenue. The Hawley-Smoot Act passed in 1930 by the U.S. Congress brought U.S. tariffs to the highest protective level yet in the history of the United States. The act brought retaliatory tariff acts from foreign countries, U.S. foreign trade suffered a sharp decline and as a result the Great Depression intensified (Hawley-Smoot Act of 1930).

After World War II, the U.S. had a much broader trade policy perspective, and came into the international arena with much more enthusiasm. Four strategic objectives have been used to guide a proactive U.S. trade policy. Some of those strategies have received more attention then others as globalization and technology have begun to drive
the world economy. The creation of a level playing field with respect to public policies that impede global contestability of national markets, gradual elimination of tariff barriers to trade, domestic and international cooperation to strengthen labor and environmental issues, and deeper economic, political, and social ties with the three regions that border the U.S. the Americas, Pacific Basin, and North Atlantic are the strategies most focused on. The creation and ratification of GATT (General Agreement on Tariffs and Trade) in 1947 increased the amount of global trade, and the U.S. economy made full use of the opportunities made available to it through this treaty and dominated the world stage. By 1980 the trade balance in the U.S. was more than 1.8 billion-dollar surplus, which declined drastically in the last 20 years to more than a 133 billion-dollar deficit. GATT is responsible for much of the economic growth and expansion worldwide, and many companies have moved into international markets, causing globalization around the world. At the end of the Uruguay Round meetings of GATT members in 1994, documents to create the WTO were signed. Since coming into force in 1998, the WTO has become the operational arm of GATT. It has three main goals: To lower tariffs and decrease trade barriers, provide market security for traders and investors, and to help least developed countries by giving them loans and other privileges (Feketukuty 1998).

In order to increase international trade, the WTO helped to develop language and institutions to ensure corporate investment abroad, such as strict guidelines for governments, arbitration bodies, and side agreements involving issues like the environment. These developments in global economic cooperation encouraged the creation of free trade agreements around the world. The U.S. has focused on creating bilateral and multilateral agreements with those regions bordering the country to form a
strong trade bloc. The prospect of free trade agreements between the United States and other countries led to many discussions by politicians and corporations as a means to successfully increase foreign direct investment especially within the hemisphere.

NAFTA is the most advanced and complex free trade agreement to date, and was ratified in 1994 with the primary goal to liberalize trade promote investment in North America. It grants corporations equal rights and protections between all three NAFTA parties, the United States, Mexico, and Canada. Many questions have arisen involving the agreement between these three parties that contrast in their wealth, power, and political institutions (Cameron 2000).

NAFTA’s benefits and repercussions are still being felt as this expansive trade agreement is continuously changing the face of international trade. At the heart of its groundbreaking language is Chapter 11, a provision that was intended to protect corporate investments from expropriation abroad, and has now been inventively interpreted in ways, which may seriously threaten democratic governance. Chapter 11 was also initially included in NAFTA as a safeguard against nationalization from Mexico, a practice that had been used widely in the unstable country. Its controversial investment components, giving corporations the opportunity to challenge governments in a secretive tribunal could lead to serious long-term ramifications for governmental authority. The investor-state arbitration process that allows a corporation to take on a government in an international tribunal is the first of its kind in any trade or investment agreement, and has caused much debate.

I decided to devote my research to this pressing issue because the majority of the concerns revolving around the expansion of NAFTA to 34 South American countries to
be known as the Free Trade Area of the Americas (FTAA) deals with the faults of Chapter 11. The problems with Chapter 11 are contemporary and are currently being debated in Congress and by other interest groups. The influence that the Chapter 11 debate will have on current policies and future trade agreements is momentous. Discussions of the implications of this provision of NAFTA should be dispersed thoroughly to everyone that could be affected by its components. So far it is still little known to the general public, something this paper aims to help correct. Chapter 11 has contradictory implications for the dual federalist form of democracy in the United States. This provision also impacts local policy-making as well as domestic court rulings through its investor-state arbitration process, which is available to corporations and is outside of, and superior to the domestic court system. Because of this arbitration process, the state and local representatives most accountable for the health and safety of their citizens may become unable to protect the people and land from health and environmental risks caused by corporate negligence. Chapter 11 could reshape the laws and regulatory powers of the national, state/provincial, and local governments of the three signatories through its broad use by corporations to challenge them

This thesis will outline the primary concerns surrounding Chapter 11 by first providing background information on the negotiation process that created NAFTA in Chapter II. Chapter II will then analyze the chronology of Chapter 11 and its components. Chapter IV will look at the secretive arbitration proceedings of Chapter 11. Chapter V will analyze selected Chapter 11 investment disputes that have been or are currently involved in the international arbitration process. Chapter VI of this work will explore the broader implications and challenges that Chapter 11 presents to the member
governments through its pre-emption of national, state, and local sovereignty. As well as whether or not there is an effective way of correcting the problem. The conclusion in Chapter VII will give my overall evaluation of Chapter 11, how it is being taken advantage of by transnational corporations, and whether or not there are revisions that would make Chapter 11 acceptable.
CHAPTER II: Background Information on the NAFTA Negotiation

On January 1, 1994, the North American Free Trade Agreement went into effect with mixed measures of support and opposition from various groups. The United States, Canada, and Mexico are the three parties involved in this extensive multilateral trade agreement that reaches far beyond any previous agreement. NAFTA has dramatically affected commerce between these parties, while offering opportunities to businesses and industries otherwise unseen in any previous trade agreement. The complexity of this trade treaty is found in over 1000 pages of text with almost 2000 pages of annexes and technical material (Paul 1993). Yet many unanswered questions have emerged which have impacted international trade negotiations and agreements in the last eight years.

In brief, NAFTA creates a free trade area within which to pursue its basic objectives. NAFTA was meant to prevail over other agreements, such as GATT, if a conflict were to arise. If the question in debate is unanswered by NAFTA any previous treaty shall continue to apply between NAFTA parties. The primary objectives of NAFTA are as follows:

- Elimination of barriers to trade in goods and services;
- Promotion of “conditions of fair competition” within the free trade area;
- Increasing investment opportunities within the FTA;
- Effective protection and enforcement of intellectual property rights;
- Creation of a framework for further cooperation to enhance the benefits of the Agreement (Paul 1993).
The framework of NAFTA was provided for in 20 detailed chapters, and various side agreements focusing on the environment, such as the North American Agreement on Environmental Cooperation (NAAEC), and also on labor in The Commission on Labor Cooperation.

NAFTA sought to increase economic interrelationships and interdependence between the three countries, while also becoming one of the most advanced agreements to date. NAFTA was based on the previous bilateral trade agreements that the U.S. had developed with Canada and Mexico. The majority of the agreement was based on the Canadian-United States Free Trade Agreement of 1988 (CUSFTRA) but also included a few sections that were much more limited in scope in a previous 1985 bilateral trade agreement between the U.S. and Mexico (McKinney 2000).

The different political institutions and levels of wealth and power of the parties contrasted drastically. The United States and Canada had well-established democratic political institutions, being presidential and parliamentary, while Mexico was in a transition to democracy from a semi-authoritarian system. The United States and Canada were much more developed than Mexico in terms of commerce and policy-making. A coordinated effort in trade and investment between these unlikely partners was a surprising initiative. NAFTA was also unique because it was the first free trade area developed between a developed country and a least developed country. The governmental attitudes towards the agreement differed because of sharp contrasts in leadership and strategies in each country. With the United States playing quite a large role in the globalized world the leaders in Mexico and Canada had uncertainties about joining NAFTA. Mexican President Carlos Salinas de Gortari and Canadian Prime
Minister Brian Mulroney depended on the United States as a primary trading partner, and neither wanted to give up that position, while the U.S. reveled in a win/win situation.

Canada's apprehension centered on the fact that the United States would benefit the most because its geographic location would offer an incentive to firms that desired access to the entire North American market to move there (McKinney 8). Foreign trade with the United States accounted for 80 percent of Canada's trade, and also came to be about 20 percent of Canada's gross domestic product (McKinney 5). The proportion of Canada's economy that was dependent on the United States market led to the cooperative efforts by Canada to include Mexico and also led to a swifter negotiation process.

The Mexican political leaders realized that trade barriers between Mexico and the United States were relatively low, but by incorporating Canada, NAFTA would help to alter the dependence of Mexico on the United States' trade policies while also strengthening foreign investment in Mexico. Mexico also feared the competition from Canadian products for the U.S. market, because 20 percent of Mexico's exports were closely in line with Canadian exports to the U.S. (McKinney 9). Mexico still enthusiastically joined the agreement in its search for foreign investment to reconstruct its economy stamped by debt, inflation, and recession (Cameron 2000).

Most United States government officials were pro-NAFTA, yet the negotiation process had its share of battles. Then President George Bush met many challenges in seeking approval of this controversial agreement. In order to negotiate NAFTA, and other possible trade agreements President Bush requested in May 1991 that Congress grant him fast track authority, a procedure developed by President Nixon in 1974. This authority allows the President to present a trade agreement to Congress with no chance to
debate its components or amend them since they must vote on it in its entirety with a yes or no vote within 90 days of submission. Fast track is meant to keep interest groups arguments out of the negotiation process so as to allow the trade partners more independence and less interference in their goal of enhancing freer trade (Riley 1999). Most of the negotiation process was secretive between the trade ministers in each county, yet security clearance was given to a number of interested corporations. When Bill Clinton was elected President, the secrecy behind the NAFTA negotiations was reduced as drafts and finally the full agreement became available in 1992. Many groups, particularly labor and environmental activists, insisted that supplementary agreements be enacted along with NAFTA. As was seen later, the enforcement measures for these side agreements, as well as provisions to make NAFTA trade practices more sustainable, were never fully realized. The fast track authority that was granted to the President to negotiate this trade deal was seen by critics as a barrier to recognizing the full consequences of each proposed chapter. Congress did not have the opportunity to debate or amend each chapter, so many important questions were never raised during negotiation of the agreement that would have come with a more thorough analysis. Proponents felt that NAFTA revisions and additions to deal with shortcomings of the agreement, plus controversies over the substance of the agreement that might emerge and need clarification, should be left to the discretion of the governments to resolve later. Even so, throughout the negotiations many political debates ensued about its components between non-governmental organizations something that slowed the agreement process.

Various organizations and other interested parties responded negatively to the free trade policies defined in NAFTA. The issue of NAFTA diminishing the national
identities of the member parties was raised and the likelihood of the loss of national as well as state and local sovereignty was discussed. The three governments were viewed as yielding to special interests, like those of the transnational corporations, without considering the larger interest of the citizens of each nation (Frederico Reyes Heroles 1996). The NAFTA signatories were seen as largely giving up their authority to make important political and economic policy by agreeing to the NAFTA requirements for international trade. This was the basis of the reservations felt by environmental interests: that national, state, and local laws involving hazardous waste, emissions, endangered species, and food labeling could all be considered "trade barriers" and discarded to the benefit of corporations. Environmental groups were also concerned that environmental regulations would either effectively become less strict or companies would move to Mexico where regulations were already more lenient. They also feared a greater dependence on fossil fuels due to increased transportation would lead to increased pollution levels and also contribute to global climate change (Greens Leaflet 1). The downward harmonization of protective standards was a major topic in most of the opponents' arguments. An example of this occurrence is Mexico's challenge to the dolphin safe tuna import restrictions, in which a GATT panel condemned U.S. legislation banning imports of "non-dolphin friendly tuna," while undermining the Marine Mammal Protection Act.

Labor organizations and worker's rights groups also had severe misgivings about NAFTA. American workers worried that jobs would move south where wages were lower and products could be made more inexpensively due to fewer regulations. Human rights' activists felt that NAFTA could encourage the use of child or prison labor and that
nations would be unable to use sanctions or ban certain imports made unethically. By using their lower prices and might, agribusiness was predicted to prevail over small family farms in NAFTA countries. The Greens Party of the United States stated that the agreement passed due to corporate pressure to reduce tariffs and that corporations, not the concerns of the public, influenced the Republican and Democratic parties (Greens leaflet 1).

While the NAFTA debate saw its share of opponents, supporters continued to pronounce that the benefits of the free trade area would far outweigh any negative side effects. Many felt that the denial of fast-track authority would harm the United States' position in the global economy. Economists defended NAFTA by stating that transnational corporations are unlikely to assume the sovereignty role in any of the countries, even if their investments seemed more powerful. Corporations were not looking to gain political power and would rather leave the policy-making to the NAFTA governments involved. Economic expansion due to international free trade was meant to enhance the markets of the United States, Canada, and Mexico, and was seen as entirely separate from political sovereignty. Defenders of NAFTA claimed that the integration of the economies of North America would strengthen national unity rather than eliminate it, and also strengthen political control for each government (Doran 1996). Another foreign policy consideration driving the NAFTA debate was the promotion of trade liberalization in Mexico. The Mexican economic system had a long history of nationalization of foreign and privately owned property and NAFTA aimed to prevent this from happening in the future by locking the country into a enforceable trade agreement.
Economists also argued that the movement of firms into foreign nations would not only increase global markets, but also establish benefits in host countries like increasing jobs and sharing in technological innovations. Economic liberalization would lead to building stronger international ties, and allow for an intensified competition in the North American market (Blank and Harr 1998). By providing national treatment to foreign firms, the promotion of foreign direct investment in the three countries would be a significant benefit of the agreement. As a political compromise, in the areas of the environment and labor issues, side-agreements were included in NAFTA to protect and possibly raise standards in the countries. The Commission on Labor Cooperation was created to monitor labor conditions and also encourage fair labor practices, such as a minimum wage and the right to collectively bargain. The North American Agreement of Environmental Cooperation (NAAEC) endorsed the notion that the United States, Mexico, and Canada should harmonize environmental standards positively rather than moving to the “least common denominator” (Riley 1999).

Inevitably NAFTA was approved by each member country making it the most impressive multilateral trade endeavor to date due to its never before seen provisions and it being negotiated between drastically different trading partners. With the possible expansion of NAFTA to 34 Central and South American Countries being proposed as the Free Trade Area of the Americas (FTAA), the current results of NAFTA are being thoroughly debated. Most of the statistics and basic facts surrounding the NAFTA debate including jobs, investment, standards etc. are disputed, and a major problem with analyzing NAFTA is that the facts are indeterminate in showing the true results. The Office of the United States Trade Representative (USTR), the leading office responsible
for NAFTA administration in the U.S., has released statements finding that trade has grown between member parties by 96%, and the United States' investment in Mexican and Canadian economies has also increased significantly, reaching more than $189 billion. The USTR also argues that North America is a growth center for the entire global economy, and that that job growth has occurred in each country, and in the United States it has increased over 7 percent (12.8 million jobs) (United States Trade Representative 2000). However, a leading research based think-tank, the Economic Strategy Institute, argues that NAFTA provisions are still being phased in and that it is not likely these changes occurred because of it. Trade and investment between these countries is likely to improve in efficiency and improve economic performances, and the United States was timely to introduce NAFTA in a period of domestic expansion. The Institute did recognize that NAFTA efforts in the environment, labor, and agriculture have been difficult to implement since the side agreements have not been strongly enforced (Mutti 2001).

The condition of different aspects of the economy in the U.S. has not been as positive as indicated by the USTR. Another study done by the Economic Policy Institute, a nonprofit, nonpartisan think tank that "seeks to broaden the public debate about strategies to achieve a prosperous and fair economy", found that steadily growing trade deficits in the United States have been accumulating at a much faster rate since NAFTA took effect in 1994 and the WTO (World Trade Organization) was created in 1995. They did find that U.S. exports rose 61.5% between 1994 and 2000, but in return imports increased by 80.5%. Job losses increased by six times more between 1994 and 2000 more than they did between 1989 and 1994. Significant job loss was found by this
organization as indicated in Table 1, while there was little trade-related job creation from NAFTA from 1993 to 1999 (Scott 2001).

<table>
<thead>
<tr>
<th>Mexico</th>
<th>1993</th>
<th>1998</th>
<th>Change since 1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic exports</td>
<td>$36,390</td>
<td>$59,911</td>
<td>92.1%</td>
</tr>
<tr>
<td>Imports for consumption</td>
<td>35,015</td>
<td>55,951</td>
<td>58.8%</td>
</tr>
<tr>
<td>Net exports</td>
<td>475</td>
<td>-18,039</td>
<td>-92.1%</td>
</tr>
<tr>
<td>Canada</td>
<td>1993</td>
<td>1998</td>
<td>Change since 1993</td>
</tr>
<tr>
<td>Domestic exports</td>
<td>$84,055</td>
<td>$131,875</td>
<td>58.5%</td>
</tr>
<tr>
<td>Imports for consumption</td>
<td>102,715</td>
<td>163,114</td>
<td>58.8%</td>
</tr>
<tr>
<td>Net exports</td>
<td>-18,660</td>
<td>-51,239</td>
<td>-70.8%</td>
</tr>
<tr>
<td>Mexico and Canada</td>
<td>1993</td>
<td>1998</td>
<td>Change since 1993</td>
</tr>
<tr>
<td>Domestic exports</td>
<td>$120,445</td>
<td>$201,787</td>
<td>67.5%</td>
</tr>
<tr>
<td>Imports for consumption</td>
<td>138,630</td>
<td>249,065</td>
<td>78.7%</td>
</tr>
<tr>
<td>Net exports</td>
<td>-18,185</td>
<td>-47,278</td>
<td>-64.4%</td>
</tr>
</tbody>
</table>

Public Citizen, a non-profit organization dedicated to informing and protecting consumers, has expounded upon the “broken promises” of NAFTA. A trade adjustment assistance (TAA) program was set up for workers who lost their jobs due to a firm leaving the country because of NAFTA. Less than five percent of NAFTA TAA qualified workers are receiving any compensation because distribution of information about the program in unemployment offices is not mandatory. The number of workers getting benefits is 203,374, and $75 million has been spent since May of 1998 on dislocated workers. The average amount per worker, is a small $418 total, not sufficient enough to help with financial problems caused by job loss (Public Citizen e). Those concerned for worker’s rights were promised that TAA would help citizens who suffered job loss due to transferring of operations to Mexico. The implementation of this program has not been thoroughly carried out, and many jobless Americans are unaware of its existence.
Public Citizen also argues that environmental standards are not being protected and the side agreements are not effectively being followed. Governments argue that by not promoting the deregulation of environmental standards, the NAFTA parties are attempting to harmonize standards upwards most beneficially. While the governments may not be encouraging deregulation, it is still occurring through the lowering or lack of enforcement of environmental standards designed to attract investment does still occur. The "lack of encouragement" clause in the environmental side agreement is not a strict enough criterion to stop deregulation of standards since competitive deregulation is effectively drawing corporations into all three NAFTA countries. These pollution havens attract industries that must pay a high cost in many countries to comply with stricter standards and with NAFTA, Mexico had much more lenient standards and drew many firms to relocate while also forcing Canada and the United States to reconsider stronger regulations. An effective movement by NAFTA parties towards healthy environmental regulations that serve to protect citizens and the environment--rather than corporations--is necessary for sustainability. Finally, Public Citizen described the investment procedures of Chapter 11 of NAFTA that allow foreign corporations to sue a country's government for monetary damages if their investment in that country was damaged by a regulation or policy including those of state and local entities (Public Citizen b).

Historically, the environment and welfare of workers and consumers has not been considered as extensively in any previous trade agreement as it is in NAFTA. Unfortunately it has been well documented that the NAAEC has not been able to enforce environmental and labor laws thoroughly and effectively. The provision in this side agreement that warns NAFTA countries not to deregulate so as to entice companies to
invest there contains no official requirements or penalties, leaving it ineffective and merely hortatory (Magraw 1994). NAFTA may deserve recognition for its positive impact on the United States economy, but it is still needs further development in the more public areas of concern, such as the environment and social welfare.

These varying perspectives regarding the results of NAFTA after seven years demonstrate that this agreement is controversial in many areas, such as economic markets, environmental standards, and labor changes. NAFTA may have been a positive step towards a more global economy, but the outcome in the United States has included many unintended side effects that are curtailing the progression into a stable international, political, and economic system. In discussions of the FTAA agreement, public interest groups that would like to voice their opinions in the shaping of this possible future trade agreement are highlighting many of the divisive components of NAFTA. The negotiation of international trade agreements is carried out by the federal government, and has been done for the most part in secrecy, while allowing some corporate access. Other interested parties would like to have equal opportunity to be informed about and participate in these proceedings. The government argues that trade negotiations need to be secretive in order to accomplish the necessary goals, yet many would argue that these international trade initiatives affect all U.S. citizens, and that in a representative democracy the public should have more of a voice. The new corporate protections and investment rights in NAFTA exhibit an unprecedented scale of corporate power not previously seen in international trade dealings. They well may be carried over into the FTAA to the dismay of critics (Bottari 2001).
Chapter 11 of NAFTA focuses on investment provisions that were seen as negative by opponents as pointed out earlier. Chapter 11 has initiated many debates due to its controversial investment components, such as the ability of corporations to sue for acts “tantamount to expropriation” in a secretive tribunal with no public information available. When a party does not offer the protections guaranteed through NAFTA, the policy, whether it be national, state, or local, is subject to dispute in an international body (Cameron 2000). The opponents warned that the decisions of secretive arbitration tribunals could supersede a country’s policies and pre-empt national laws, especially in the area of the environment. NAFTA’s Chapter 19 details a dispute settlement procedure to quickly resolve disputes dealing with NAFTA provisions. Most disputes surround Chapter 11, which has been dramatically reinterpreted since its first appearance in CUFTRA. Exactly what Chapter 11 was intended for and its evolution into a corporate tool will be discussed next.
CHAPTER III: Description and Procedures of Chapter 11

Investment protections have always been seen as a necessary component in any trade agreement. The parties involved in negotiations generally seek to increase their foreign investment, while enticing corporations to invest within their borders. Creating a set of strict regulations that parties to a trade agreement must follow reassures corporations that their investments are protected from encroachment from the government of the country they invest in. Originally meant for protection from expropriation, which is the sovereign action of a state in taking or modifying the property rights of an individual, the investment rights of NAFTA’s Chapter 11 have increasingly been interpreted very broadly to the benefit of the corporations.

Many contestable side effects of NAFTA are based upon the open investment provisions and the disputes that have arisen under Chapter 11. The provisions outlined in this Chapter have been referred to as a “corporate bill of rights,” since it seems to many that NAFTA has allowed corporations more authority than each nation’s government. (Hossien-Zadeh 1997). These restrictions on a member country’s ability to govern foreign investment were meant to allow freer global commerce for corporations and to ensure protection from governments. The U.S. did not fear outright seizure of capital by the treaty partners, especially Mexico, as much as it was apprehensive about “creeping expropriation.” The U.S. foresaw the problem of heavily invested capital in foreign countries being controlled by stiff regulatory measures and eventually taken over by the member country (Greider (b) 2001). The U.S. also saw Mexico’s restrictions on
investment at a threat and, in addition, felt that a corrupt justice system in Mexico would not be fair to foreign companies. The expansive investment rights in NAFTA went almost unnoticed by Congress and the media because of the fast track procedure it was approved under. Administrator’s arguments that NAFTA’s Chapter 11 was an insurance policy to protect the United States from Mexico and its corrupt courts gave reason enough to Congressional members to support it. The use of fast track likely prevented meaningful analysis of Chapter 11, which left many members of Congress in the dark about the importance of this Chapter (Public Citizen Friends of the Earth (b) 2001).

Chapter 11 is divided into two sections. Section A describes the obligations of a host country to a foreign investor, while Section B explains the formal dispute resolution system that private foreign investors from one of the parties can initiate against the host country if any of the obligations have been denied. Known as “investor-state arbitration,” it is the first process of its kind in any multilateral trade or investment agreement (Mann and Moltke 2001). In joining NAFTA, the member parties agreed to stringent investment obligations in order to establish open and equal opportunities for capital ventures in each country. The principles of Section A instituted in the agreement include:

- National Treatment, which means that foreign investors must be treated no less favorably than local companies. No formal or even substantive rules can be enacted that give preferential treatment to local companies.

- Most Favored Nation Treatment, requires that NAFTA country investors must be given as favorable treatment as non-NAFTA country investors.
• Minimum International Standards of Treatment, states that NAFTA governments must provide treatment in accordance with international law, and provide equitable treatment to investments with full protection.

• Non-Discriminatory Treatment provides that NAFTA countries give treatment "equal to the better of National Treatment and Most-Favored Nation Treatment."

• Limits on Performance Requirements, does not allow parties to impose rules that interfere with business operations, such as local hiring, requiring the purchase of local materials, management, and achievement of specified levels of import and export.

NAFTA allows for "Full Compensation on Expropriation," which has been interpreted to mean that if a government denies some benefit of the property to an individual, compensation can be paid to the investor, even if the act is not a complete seizure of property. (Appleton, Rights: d) (Paul et al. 1993). Expropriations do not have to be a taking, but have been interpreted and accepted as an unreasonable interference. A delay in the sale of property or requiring a permit are examples of interference where a corporation becomes eligible to make a NAFTA claim (Appleton, Examples: e). Many of the expropriations that have been challenged under Chapter 11 are not like the usual government seizure of property that this chapter was meant to protect against.

Regulatory takings, where a regulation imposed by a government takes away the majority or entire value of the property, are activating many investment disputes between corporations and governments. While these suits have faced extreme impediments in
U.S. courts, the “regulatory takings” arguments are finding their way quickly into special NAFTA tribunals (Bottari 2001).

If a member country fails to uphold a NAFTA provision, the companies have the option of claiming compensation for a “lost market opportunity.” These investor-state claims can be settled in a local court, or in a NAFTA tribunal set up to hear investor-state disputes and make decisions more timely. The court is a three member, special international arbitration tribunal of either the World Bank’s International Center for the Settlement of Investment Disputes (ICSID) and its additional facility rules or the United Nations Commission on International Trade Law (UNCITRAL) (Weiler 2001). Their binding decisions are litigated secretly in the international bodies and are closed to public participation and feedback. Many see the secrecy and protections granted through these investment rights as an advancement of corporate power over national governments. If the NAFTA investor’s claim is upheld that a local, state/provincial, or national government’s action causes them to lose a chance to do business in that country, the national government must repay the investor for its claimed losses. Investment losses, lost profits (past, present, and future), lost property, and lost goodwill are all acceptable violations by governments that the NAFTA investor can seek to be paid damages for (Appleton, Damages: b). The broad scope of investment rights for corporations and legal liability of countries encourages broad interpretations of what actually is a loss. According to Barry Appleton, international trade lawyer, “The potential for lawsuits under this process is far-reaching since it could be used by more than 350 million individuals and corporations throughout NAFTA countries” (Appleton, Signa: c).
The doctrine of sovereign immunity, a legal concept that has existed for centuries, states that governments cannot be sued unless law expressly allows the lawsuit. The United States federal government, as well as many states, has the ability to waive sovereign immunity by statute, or on a case-by-case basis. NAFTA parties effectively waived this doctrine when they signed the agreement. A NAFTA investor that is unhappy with a rejection of their claim in a local, state, or federal court on the grounds of sovereign immunity can file a claim with a NAFTA tribunal. A claim could be made that the international treaty rights granted through NAFTA trump sovereign immunity protections. Critics of NAFTA fear that if the tribunal rules in the corporation’s favor, then it would have the ability to reverse a U.S. court’s decision which is something that would grant foreign corporations privileges that U.S. corporation do not have domestically (Public Citizen and Friends of the Earth (b) 2001). If this age-old common law principle can be overturned by a three party international tribunal it could have devastating effects on United States governance, as well as Canada and Mexico, at all levels. Looking back after the effects of Chapter 11 have become clearer, some proponents claim that they did not realize the extent to which this provision would affect international law. Yet some lawyers involved in writing the language of Chapter 11 claim that the USTR knew of the broad implications of the provisions in this chapter. Many saw Chapter 11 as having great potential for bringing corporate claims against regulatory actions of governments for compensation. For example, Carla Hills, the U.S. Trade Representative who oversaw the NAFTA negotiations under Bush, now has her own trade-consulting firm, and represents R.J. Reynolds and Philip Morris. She first used the threat of an investor-state case against Ottawa, Canada in 1994, when Parliament was
considering proposing a law to require plain packaging for cigarettes. Many new
Canadian initiatives have been targeted by corporate law firms in New York and
Washington D.C. under Chapter 11 (Greider (b) 2001). NAFTA has expanded the areas
of jurisdiction for the international tribunals in resolving disputes between corporate
foreign investors and governments by creating such extensive protections.

The volume of trade between countries has grown immensely and this led to a
call from foreign investors for stronger protections and efficient means to solve problems
that are more conducive to the business state of mind. NAFTA included the tribunal
methods of the World Bank and the United Nations and it has greatly increased the
docket for each arbitral method, while also reassuring companies. NAFTA’s Chapter 11
has significantly expanded the previous role of these dispute resolution mechanisms to
include a half-private system by offering corporations access to the procedures as equals
to any government body. As globalization continues to occur in the world, corporations,
by means of protections and measures granted in agreements like NAFTA and the WTO,
will continue to gain more authority and power in influential disputes. Corporate rights
could eventually dominate the international arena through their inclusion in new trade
agreements. If approved, the world will likely see a huge increase in investment disputes
over multilateral agreements around the world that put the corporations claims as more
important than a country’s protective policies because the country does not want to
violate the investment rights for fear of firm penalties.

These recent developments in dispute resolution methods used in international
treaties are seen as threatening to the U.S. legal system because they essentially establish
a private adjudication system over a public treaty. The procedure is private because it is
unlike the transparent court system in the U.S. and information is not readily accessible by outside interests. The members of the dispute choose the three-member panel of arbitrators selected through the World Bank or the United Nations bodies and they have the power to make decisions that affect the public of the state or locality in question. All sessions are closed and no public party or media group is able to view or record these proceedings or look at their records. National governments (i.e. taxpayers) must foot the bill to cover the damages (Bottari 2001). Out of fifteen investor-state cases litigated to date, a total of 13 billion dollars has already been awarded to corporations in NAFTA countries, and 1.8 billion dollars has been paid to Canadian and Mexican firms by United States taxpayers (Brown 2001).

While free trade essentially eliminates tariffs, the NAFTA design of Chapter 11 is meant to eliminate “non-tariff barriers” to both trade and investment. As defined by GATT and the WTO, a non-tariff barrier is any, local, state, or national control of wages, health and safety, or environmental standards that could harm trade. Some say this has come include any legislation or regulations aimed at social justice issues, equality, and “values other than profit.” This arrangement makes NAFTA a plan to deregulate and promote global business without interference and has been seen as “an agent for corporate sovereignty” (Hossien-Zadeh 1997). The corporations argue that lost market opportunities should be compensated for because it is unfair to investors to bear the cost of a social policy (Greider (b) 2001).

During trade negotiations, the parties tend to harmonize rules and standards in order to promote smoother trading. A fear during the NAFTA negotiation was that harmonization would move downward, and that federal, state, and local governments
would have no authority to set stricter standards and that the international lowest common denominator would prevail (Magraw 1994). Another concern from environmentalists was that governments would lower their standards in order to entice corporations. These pollution havens attract business by offering higher pollution allowances or lower environmental standards, they produce a regulatory race to the bottom (Neumayer 2001). While it is argued that movement of U.S. corporations to Mexico may have significant economic benefits for U.S. companies due to lenient environmental standards, the potential benefits are displaced by the fact that U.S. investments have shifted south and caused a loss of jobs for American workers. Article 1114.2 of NAFTA was supposedly written to discourage movement of corporations due to weaker environmental standards in other member nations. According to a Sierra Club analysis, the term "should not" was used instead of "shall" which made this effort to address that concern meaningless from a legal standpoint. This section only calls for consultation from other NAFTA parties and does not allow access to the arbitration system (Seligman 1993).

Some argue that NAFTA’s Chapter 11 has been transformed into a business tool to undermine democratic regulations. Corporate investors have the option of using their investment rights to file a dispute against a national or local law, a decision by a body of government, or even a governmental condition of services that they see as a barrier to the free trade provisions outlined in the agreement (Bottari 2001). By raising competitiveness among NAFTA parties and causing corporations to invest and move production to a country with lax regulations, it could impact public protections in other areas. A regulation that may have been created to safeguard public health could be a
violation of NAFTA's Chapter 11 and the cause for a corporation to make a claim. The momentum from Chapter 11 cases that have forced governments to rethink regulations meant to protect the public has increased this uneasiness. The concerns and interests of corporations and the maximization of international trade may have overshadowed the right of a country, state, or locality to protect its citizens. Corporations are capable of causing a large-scale movement hindering a government’s ability to govern and provide public services. The secrecy of these measures goes against the “long-established principle of judicial systems operating under complete public scrutiny” (Canadian Union of Public Employees 2001). It is nearly impossible to hold either governments or arbitrators accountable because the dispute resolution process is undertaken secretly, and the federal government cannot allow domestic laws to trump international treaties. Corporations continue to be compensated for procedures that state and local governments see as normal regulatory activity. Trade negotiators have dismissed concerns that Chapter 11 case outcomes will lead to a chilling effect for future public interest laws, even though Canada has already lost a dispute against Ethyl Corporation, a U.S. company. Canada banned MMT (methylcyclopentadienyl maganese tricarbonyl), and must now note publicly that this known neurotoxin, used as a gasoline additive, is completely safe even though that statement contradicts the view of its environmental protection agency (Public Citizen a). This investor-state case will be discussed in depth in Chapter 5 of this thesis.

The fear of governments possibly having to pay large penalties could cause governments to back away from imposing regulations aimed at protecting their citizens. The potential effects of Chapter 11 are significant, especially in considering whether or not the dispute resolution process ensures fair and open treatment of all participants, or if
it will become an avenue for attacking important legislation and government services (Gracer and Mansell 2000). The separate court system gives corporations an advantage when dealing with the three governments involved in NAFTA. By filing a claim with an international arbitration body, the corporation can escape their obligations to host countries while keeping the proceedings secret, so as not to receive unfavorable press and public responses. The methods corporations are using to resort to arbitration with their host countries are very broad and increasing in use. In order to discover how this arbitration takes place, the next chapter will look at the history of arbitral tribunals in NAFTA, the procedure in making a claim, the economic defense for secrecy in trade agreements, and the differences between arbitration and democratic domestic courts.
CHAPTER IV: Dispute Resolution Process

NAFTA is a mix of ideas from other treaties combined with groundbreaking measures never before seen in a trade agreement. Free trade can accelerate global borderlessness in terms of unified regulations, enforcement mechanisms, and authoritative bodies in control of procedures. The roots of the concern in the U.S. in signing this trade agreement centered on the fear of expropriation from Mexico. Section 1110(1) of NAFTA explains “no NAFTA party may directly or indirectly nationalize or expropriate an investment of an investor of another Party...or take a measure tantamount to nationalization or expropriation of such investment without paying compensation to the affected investor.” This is even true when the governmental action is taken on a non-discriminatory basis for a public purpose in accordance with all applicable legal requirements (Kass 2000). This coincidence of different measures meant to preserve the protection and equal treatment of firms in all NAFTA countries is based around the investor-state dispute resolution method. These cases litigated in the seemingly neutral, international arbitration bodies of the World Bank and the United Nations have been the focal point of critics of NAFTA for their secretive nature.

The rationale of free trade proponents for the selection of this method is that it provides parties involved with an approach to solve disputes with the aid of an impartial tribunal in order to ensure equal treatment to investors. The selection of this tribunal method to solve disputes arising under this agreement has been influenced by other global agreements and built upon existing trade rules, such as GATT and the WTO. The
difference between NAFTA and other trade agreements is that corporations are free to litigate on their own without having to ask national governments to act on their behalf in the international arbitration forums. The direct recourse to arbitration by investors to protect themselves from a violation of NAFTA is established in Chapter 11. Direct recourse has been praised for its benefit of protecting investors in a non-public forum, thereby promoting foreign direct investment. NAFTA did not require a standard procedure in arbitration, which gives investors more freedom to solve disputes. The trend of increasing freedom in dispute resolution methods so as to advance foreign direct investment has been seen in hundreds of bilateral investments as well as in multilateral treaties such as MERCOSUR, the Cartagena Free Trade Agreement, the Energy Charter Treaty, and NAFTA (Emmanuel Gaillard 2001). Direct recourse compensates for the lack of a contractual relationship between investors and the host state, and the host state must oblige because it has essentially consented in signing and adopting the agreement. The Chapter 11 investment and arbitration measures aid in the promotion of foreign direct investment by providing a tactic to protect an investment from discriminatory and regulatory measures by the host country. The tribunals have the ability to render decisions that impact the actions and policies set by the host state that violate NAFTA rights guaranteed to investors.

Another important element of the dispute resolution process for proponents is that the decisions are enforceable in domestic courts and final awards stated by the international body must be upheld. As previously mentioned, investors have the option of The World Bank's International Center of the Settlement of Investment Disputes (ICSID); the ICSID's Additional Facility Rules; or the rules of the United Nations
Commission for International Trade Law (UNCITRAL) rules. The investor may also choose to use the court system available in the host country. (NAFTA Secretariat 2001). Mexico and Canada are not members of the ICSID convention so any Investor-state case that involves both of these parties must be brought under UNCITRAL rules. The United States is a member of the ICSID and any case that involves the United States and another party from either Canada or Mexico, can be brought under the ICSID’s Additional Facility Rules. These rules allow proceedings when the investor’s home country or the country that a case is brought against does not belong to the ICSID Convention. At least one of the parties in an ICSID case must be a member of the convention (Public Citizen and Friends of the Earth (b) 2001).

Each NAFTA member has passed legislation to facilitate and encourage the use of the international arbitration bodies. As mentioned previously, Mexico adopted the UNCITRAL Model law by amending its Commercial Code and its Federal Code of Civil Procedure in 1993. Canada also adopted the UNCITRAL model in the early nineties. All of the provinces have adopted localized versions of this model of international law. The United States, although not formally adopting the UNCITRAL model, has enacted the Federal Arbitration Act to promote international measures for litigating cases of international law. Some states have adopted the UNCITRAL rules on their own.

The UNCITRAL is the foundation for legal issues within the structure of the field of international trade law for the United Nations. It was put into place by the General Assembly to facilitate the harmonization and unification of international trade by furthering cooperation amongst nations. The organization follows key mission
statements. Those statements most directly related to Chapter 11 of NAFTA investor-state cases in the UNCITRAL arbitration tribunals are:

- "Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws."

- "Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field."

- "Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade."

- "Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade. (UNCITRAL 2001)."

The UNCITRAL process is more closed and publicly unaccountable that that of the ICSID. UNCITRAL arbitration rules of 1976 can be used by any nation and are very similar to the ICSID rules. However UNCITRAL does not have a web page for NAFTA cases nor does it provide professional staff for administrative oversight of the arbitration proceedings. UNCITRAL does not collect and make public final decisions about the cases. It does not even make public basic information about cases. Since there is no staff overseeing cases, the UNCITRAL system has no provision for review of tribunal decisions even when significant facts about a dispute emerge that may change the
decision. The ICSID is slightly more open than the UNCITRAL because it provides minimal information to the public through its website, where it posts only basic information on the parties, dates of complaints, and arbitrators, while not posting any documents as the tribunal proceeds. There is no provision for amicus participation in either venue, and there is no appeals process as in domestic courts (Public Citizen and Friends of the Earth (b) 2001).

The ICSID has authority to handle NAFTA claims mainly through its Additional Facility Rules. The Center has a small Washington office in the World Bank headquarters and has seven lawyers and four staff members currently overseeing eight NAFTA cases through the Additional Facility Rules. The center’s docket also contains 29 other disputes that have arisen from over 1,400 bilateral treaties that involve more than 130 nations that agreed to abide by the World Bank’s investment rules. The Center was created in 1966 and in its first 20 years it established panels for no more than one case a year. Now, largely due to Chapter 11, it files almost one case every month. The responsibility of the ICSID is to appoint arbitrators to the tribunals and ensure that the Additional Facility Rules are followed. The arbitrators are selected from a list of “internationally recognized experts who are paid $1,500 a day for work” (DePalma 2001).

Proceedings can be made public if both the investor and the government consent, but that has yet to happen. Reasons behind this may involve proprietary matters or, more often, highly sensitive and political subject matter corporations do not want to affect their public image with publicity about a matter that is seen to be detrimental to the public interest. Many argue that arbitration really is private justice and that the conflict between
investor rights and public policy will continue to grow since people are now realizing that
long entrusted principles of law such as transparency, precedent, and an appeals process
are now being lost in international arbitration proceedings protected by the secrecy by of
the agencies that assist in the dispute.

The procedures in making a claim are administered by the NAFTA Secretariat. The Secretariat, established by the Free Trade Commission, includes the Canadian, Mexican, and United States locations, and all offices are identical to each other. Each national section holds a “court-like registry” that has information on the members of the panel and the tribunal proceedings. The dispute resolution rules are found in Chapters 11, 14, 19, and 20 of NAFTA (NAFTA General Information). Before filing a NAFTA arbitration the parties are required to wait six months, which is meant to encourage settling a claim through mediations. These informal negotiations can involve third-party members, such as trade ministers or councils from the NAFTA party not involved in the dispute. If this effort fails, the next step is to the NAFTA Free Trade Commission and the Secretariat who may attempt to settle the dispute through means of alternative dispute resolution. The final attempt at solving a dispute is the investor-state arbitration process (Dalton 1994). Many cases are settled before the arbitration process is implemented, because governments fear the possibility of having to compensate a corporation with a large damage award. While this may prevent a law from being declared a violation, and thus being rescinded, it also could provide an incentive for other corporations to bring a case against the same regulation, knowing that the government will settle.

The Investor-state process offers a rapid solution for the settlement of investment disputes between NAFTA countries. An investor first must provide a Notice of Intent of
Claim to the NAFTA government that they consider has violated a NAFTA obligation. The notice must give a detailed account of the reasons for the claim and the damages being sought. The next step is a Consultation Period that lasts for a minimum of ninety days between the delivery of the Notice of Intent and the time that the investor takes other actions. The government and investor can discuss the issues involved in the claim during this time. A claim can finally be brought after the 90 days of the Notice of Intent of Claim, then six months must have elapsed as a period of mediation before following through with the NAFTA tribunal. The action being challenged by the corporation cannot have occurred more than three years prior to the time a claim was submitted.

The arbitration follows the accepted claim through the third party international tribunal. The tribunal will have three panelists, one chosen by each party, while the investor and the government jointly appoint the third panelist. If an agreement cannot be reached on the third panelist between the investor and government, either the ICISD or UNCITRAL administrators will appoint a judge as they see fit (Appleton, NAFTA: a). The arbitration panels are appointed on a case-by-case basis, and there is no requirement that the arbitrators must have served in a similar capacity. For these reasons, precedent in NAFTA cases is difficult to identify. When a decision is carried out it could influence another tribunal if they are aware of the previous case presented. The most feared consequence is a chilling effect on regulatory policies by lawmakers that do not want incite a case against them. In most cases the tribunal encourages settlements between the parties rather than following through with the entire process and awarding or denying damages to the litigant. The timeline for a Chapter 11 case is supposed to be no more
than 315 days but the time often gets extended, still most are solved within two or three years.

In order to bring about a suit against a government, NAFTA requires that some international element be involved. A corporation need only be comprised of a certain percentage of foreign shareholders in order to receive the benefits and rights provided in Chapter 11. For example a corporation chartered in the United States cannot the U.S. under NAFTA unless the private party that owns the company is a citizen of another NAFTA country. Domestic corporations are treated unfairly because foreign corporations from Mexico or Canada have the ability to challenge laws in the more business friendly dispute resolution process, whereas domestic companies have a much more difficult time with the same type of challenges because they must use the U.S. court system. The same is true for domestic corporations in Mexico and Canada as compared to foreign corporations. This unequal treatment caused by the availability of a court system to foreign investors with less formal procedures, almost no precedents, and tribunal judges that have experience only with trade and investment has been criticized by domestic companies and policy makers as inhibiting those corporations’ ability to compete with international corporations. The playing field is not level between domestic and foreign investors and that could have very broad impacts like the movement of domestic corporations outside of the country in order to take advantage of rights granted in NAFTA.

In an international dispute, the panel cannot order a government to strike down laws that violate a NAFTA protection, yet they can award monetary damages large enough to persuade governments to change regulations. Their decisions on awards are
legally binding in domestic courts (Appleton, Damages: b). Successful claims by foreign investors have led to compensation and the revision and/or revocation of laws. If a country involved in the arbitration refuses to obey the decision of the international tribunal then the consequence is a suspension of trade benefits until the conflict is reconciled (Dalton 1994). Chapter 11 has offered corporations a valuable shield against governmental laws and rules that could negatively affect their investments, something far from its original intent as a defensive measure against unfair governments. Rather, it has become to be used as a principal offensive tool to further corporate expansion in a global arena (Mann and Moltke 2001).

Investor-state dispute resolution has been praised by the private business community as an effective approach to settling disputes with governments fairly. International arbitration has been used for hundreds of years, yet for the first time with NAFTA, it allows private companies in all three countries make a claim against a NAFTA government that has impaired their investment. Investors are involved in all stages of Chapter 11’s arbitration proceedings as equal to governments, and cooperate in selecting judges (Weiler 2001). This procedure is seen as an effective way to solve a dispute quickly and reasonably, because the system allows for representation from the corporation, and bypasses corrupt courts. Fair and unbiased treatment, especially in developing countries like Mexico, is necessary to encourage foreign corporations to invest in the area. The confidentiality allows sensitive issues to be heard outside of the media spotlight and does not cause public and political unrest against trade dealings and corporate authority.
National treatment in member NAFTA countries is seen as essential to the transnational corporation because without it the governments could propose incentives that encourage supporting domestic companies, and would hinder the growth in foreign investments. Providing a level playing field for all private corporations is a right that should be guaranteed according to corporate interests because governments may show favoritism to domestic companies’ concerns. The “BUY American Campaign” to enhance interests in the U.S. steel industry has been criticized due to Chapter 11, and there is a challenge being brought against it by a Canadian contractor seeking 90 million dollars in damages. The law is incorporated into federal highway projects and mandates that U.S. steel be used for federal matters (Brown 2001). Many people criticize the growth of “supranational corporations” and their influence on all global markets, while also pointing out that there are corporate rights, but no corporate responsibilities.

Proponents claim that countries can grow by attracting foreign investment in various beneficial ways. Increased globalization and competition provides countries with more options and substantial social paybacks. Restraints on competition do not allow for freedom of investment in foreign soil and the opportunity to better the situation in the host country. Corporations need measures to protect themselves from unfair government actions that prevent them from ideal operations in ventures abroad. Closed markets or state-owned monopolies do not provide the countries or individual consumers with expanded choices, while allowing domestic companies to take advantage of citizens without difficulty (Green 2001).

Foreign investment opens the door to more opportunity and consistent with corporate rights there must be a protection against a host country’s governmental
dominance. Corporations feel unfairly treated and are granted this protection that infringes on a government’s ability to make decisions and basically do its job well. NAFTA’s dispute panels are permitted to raise questions about whether or not a domestic action is contradictory to a NAFTA provision. A corporation’s compliance with international standards is required by other agreements focusing on issues like the environment. In NAFTA those agreements have some protection only so long as those standards are “least trade restrictive.” For example, NAFTA specifies three international environmental agreements that take precedence over NAFTA, while other agreements are subject to the discretion of NAFTA administrators. Corporations argue that global standard setting will lead to higher interest in securing a sustainable environment and future, and that there should be no worry of moving to the least common denominator (Seligman 1993). They also argue that the extra income generated from trade liberalization will likely do more for environmental protection and remediation is a promise from free trade endorsers, rather than causing environmental laws to weaken due to investor-state cases based on regulatory takings. The secretive investor-state tribunals available to corporations through NAFTA protect economic interests, especially when it involves a large democratic, internationally linked nation such as the United States, where issues may be high profile and politically sensitive (Gaillard 2001). While these investor-state cases are kept secret from the public, corporations are more secure because governments must be transparent in dealing with the tribunals. Canada’s Evidence Act allowed the government to prevent the reproduction of any document that they wish to remain undisclosed by issuing a s.39 certificate. These were found as an unfair advantage by a NAFTA tribunal. The NAFTA panels deem it necessary to receive as
much evidence and information as possible in order to deliver a fair and objective
decision and the government can only withhold documents that need to be kept
confidential, such as military defense secrets (Appleton 2000)

The secretive nature of the Chapter 11 investor-state cases has been criticized as
a threat to democracy. Democracy is based on values of openness with the public trust
in the government’s decision-making, and the ability to contest unpopular actions. When
a corporation challenges the regulations or actions of a state government under NAFTA,
the governor, attorney general, and citizens of the state are shut out of the proceedings.
The state must rely on the Office of the USTR to defend its interests in the closed tribunal
(Bottari 2001). The state cannot even obtain all documents later to evaluate the defense
and the USTR. The funding for Chapter 11 cases that the United States loses or settles
comes from the taxpayers in the entire country. The issue of national responsibility in
these cases could change the politics of Congress, because a large sum taken from the
national budget may take needed funds away from other matters of governance. There is
also a fear that state governments will be threatened by the federal government to either
remove a policy that could instigate an investor-state case or that the damage award will
be deducted from federal money normally sent to the state.

The lack of transparency to the public, of a traditional appeals process and of
legally binding precedent in these international arbitration procedures causes concern
because it undermines many long-standing legal principles of the United States judicial
system. The dispute resolution procedure does not allow for public participation nor does
it allow for *amicus curiae* submissions (Stephen Kass 2000). During the Methanex case
that will be analyzed later, the Tribunal considered allowing *amicus* briefs on January
15th, 2001, however, Mexico still opposes this decision, so it is unlikely to change significantly. This would be a big step for the investor-state cases in becoming a bit more public and less suspicious. If citizens and interest groups had access to the arbitration, the distrust of the investor state process might be reduced. If an investor makes a claim directed at legislation passed by publicly elected officials, the public should have a right to the information revolving around the issue. Currently some information about NAFTA cases is being collected through the United States Freedom of Information Act, as well as Canadian public access information law. Mexico, however, does not have a public information law. Only periodic filings are reproduced on behalf of the governments in these countries, and the information is not released daily. And only when the government is named as a defendant in a case can information be released on its documents. Therefore entire access and information surrounding a case is not available. Interest groups from the United States and Canada are posting this limited information on websites in both countries.

In a NAFTA case that was decided in 1998, Loewen v. United States of America, the NAFTA Tribunal had the authority to review a domestic court's previous decision in a claim stating that the Mississippi Court treated the foreign company unfairly. This case will be analyzed in Chapter V of this paper. The capacity for an international third party tribunal to decide whether the United States' judicial institutions, jury verdicts, punitive damages, and appeals bonds can violate a standard guaranteed by NAFTA is a scrutiny level far beyond anything considered as an appropriate remedy (Gaillard 2001). Since the panels are secretive, and UNCITRAL does not have to release final decisions, it is difficult to build any legal precedents. The judges do not need any previous experience
as tribunal members and different people are selected for each case. Precedent is an important guiding feature in U.S. domestic courts; yet this method of accountability rarely exists in the decision-making of these international bodies.

In NAFTA it was decided that side agreements should be complied with, as well as set national standards concerning issues like health and the environment, as long as they were the “least trade restrictive.” The side agreements are non-enforceable and have been ineffective, and corporations cannot be challenged for non-compliance through the tribunal process or any other, because the investment protections are meant for investors and not governments or interest groups. Those measures that do not meet this standard are subordinated to free trade. Therefore the corporations could have provided ample reasons for not abiding by standards and international agreements. This could have a chilling effect on the United States in the entering of future socially and environmentally beneficial agreements (Seligman 1993). The side agreements were meant as protective policies that would ensure fair trade, but corporations also have a responsibility towards following fair business practices for their employees, while also having excellent environmental stewardship. While harmonization of standards is meant to prevent a chilling effect from occurring, as was mentioned earlier the harmonization of policies can move downward rather than upward. Typically, preserving capital and investments by allowing corporations these protective rights is seen as more beneficial than safeguarding the public and the environment (Neumayer 2001). Corporations can decide that it is more advantageous to keep standards at the lowest possible level so that their business will be more cost-efficient.
Not only does NAFTA cause a chilling effect on foreign policy in social and environmental arenas, but it also will increasingly affect national, state, and local policy-making as well. The extensive range of possible lines of attack on regulations that these investment rules provide through the investor-state cases to challenge policies leaves many people and government officials nervous (DePalma 2001). Municipal governments have voiced their concerns through the National League of Cities in a letter to U.S. Senators. They are also specifically concerned with future trade negotiations, that could include Chapter 11, a provision that has “expanded the definition of a regulatory taking (Borut 2002).” The duty of politicians to protect citizens of the United States with public policy is not keeping up or defending against the fast-paced rate of investment disputes. The NAFTA panels cannot strike down laws, yet they can award substantial damages that can chill efforts to protect the public. Governments must consider how their legislation, regulations, and practices conform to NAFTA or risk having a large claim brought against them as a violation of NAFTA’s Chapter 11.
CHAPTER V: Sample Chapter 11 Cases

The vulnerability of domestic environmental laws and protective measures to NAFTA’s Chapter 11 investor-to-state process is now fully being realized as each country has had significant claims made against them. Even though NAFTA was negotiated to contain language to prevent such threats, the Chapter 11 loophole has weakened these provisions and state and local governments are unable to defend laws that are challenged as trade barriers. The area of litigation where corporations and landowners claim that their investment or property has been expropriated or “taken” by “excessive” environmental regulations is not new in the United States. The United States Supreme Court was faced with regulatory takings claims in four high profile decisions involving historic buildings (Penn Central v. City of New York 1978), coastal protection (Lucas v. South Carolina Coastal Council 1993) and municipal land-use controls (Nollan v. California Coastal Commission 1987 and Dolan v. City of Tigard 1994). The Court decided that while some environmental regulations can be excessive and amount to a taking that should be compensated for under federal law, any non-discriminatory legislation that is “reasonably related to a legitimate public purpose and is carried out in good faith without depriving an owner of all economically viable use of the regulated property is not considered a compensable taking” (Kass 2000). The dispute resolution mechanism in NAFTA is a completely new venue for foreign corporations to get around this U.S. precedent, and it is cause for concern for the potential implications it may have on environmental protection around the world. Chapter 11 allows for an investor to be
compensated even when the government action is a non-discriminatory measure taken for a public purpose in accordance with all legal requirements. Since corporations in all three NAFTA countries have used the investment rules and protections provided in the agreement to challenge national and local laws, concerns that these decisions threaten democratic procedures, federalism, and environmental protection have been raised. Damages sought from taxpayers in NAFTA investor-state cases have already exceeded $1.8 billion (Public Citizen and Friends of the Earth (a) 1999).

The Ethyl Corporation of the United States sued for $250 million, and was awarded a $13 million settlement from Canada in the first Chapter 11 investor-state case. This case is being discussed in the thesis because it was the first NAFTA investor-state case related to Chapter 11, and it also involved a potentially dangerous environmental health threat to Canadians. This case demonstrates the influence a corporate threat of a large compensatory sum can have on public policy and then public opinion. It is a prime example of the corporate arm-twisting that occurs to enhance the public image of a corporation producing a widely known dangerous chemical.

The Ethyl Corporation produces a toxic gasoline additive called MMT in its facility in Virginia and then ships the additive to Canada where it is mixed in a plant in Ontario and sold to Canadian gasoline refiners. On top of this trade, Ethyl imports 4 million kgs of toxic waste back into the United States to be buried in Ohio. This company was also the first to put lead into leaded gasoline and is the largest cross-border trader of pollution in North America (Kass 2000).

Canada enacted a ban on the import and inter-provincial transport of MMT in 1997 with the aim of protecting public health because MMT contains manganese, a
known human neurotoxin. California has banned MMT, the EPA has banned its use in reformulated gasoline due to its dangers, and Environment Canada considered it a health hazard. During the parliamentary debate over Canada's imposition of a ban the Ethyl Corporation filed a notice threatening the Canadian government that it would sue using the NAFTA investor-state process if restrictions were placed on MMT. The Parliament still passed the ban because of the health hazards to Canadians and Ethyl filed a $250 million claim five days later in a NAFTA Tribunal. Ethyl argued that the law expropriated its assets and violated Article 1106, the performance requirements of NAFTA, since no Canadian company made MMT, and that it would force Ethyl to build a factory in every Canadian province to continue to do business. Before the arbitration took place four Canadian provinces also challenged the MMT ban under Canadian law on the grounds that it had no scientific basis, and a domestic court agreed (Kass 2000). Due to these findings by the provinces and the lack of clear and conclusive evidence surrounding the damages caused by MMT, the Canadian government was helpless. Only one year later, the Canadian government settled with Ethyl and reversed its ban on MMT, while paying $13 million in legal fees and damages to Ethyl. Not only did Canada make this settlement, they were also mandated to issue a statement that said that MMT was a safe chemical and that they lacked the evidence of MMT's toxicity, so that Ethyl could use this in their advertising.

This case threatened Canadian lawmakers with large monetary damages before the law was even passed. The Parliament did not fall to this pressure and still passed the law, only to reverse it less than a year later. The Ethyl Corporation successfully used the investment protections provided in Chapter 11 of NAFTA to force a government to
rescind its regulations on a dangerous chemical, while also receiving a payment for compensation of lost profits. The implication of "paying the polluter" imposed by Chapter 11 could have a considerable effect on future decisions by lawmakers, while also encouraging other corporations to use NAFTA's investment rules to challenge government policies (Public Citizen and Friends of the Earth (a) 1999). While the NAFTA Tribunal never reached a final decision, the evidence supporting Ethyl's claim outweighed the government's public interest assertion according to advisement from international lawyers on the investment rules in the treaty. The fear of such a large compensatory payment was reason enough for Canada to back away from its protective health regulation banning MMT.

NAFTA tribunals have been notoriously unwilling to recognize any health risks that are not proven beyond the shadow of a doubt. They are consistently supportive of trade promotion. In order to make an overwhelmingly complete case proving a chemical as harmful requires a great deal of time, money, and research. The precautionary principle to environmental and health regulations suggests that it is easier to prevent the damage than to repair it later and that the burden of proof should be shifted away from those advocating protection and towards those proposing that the action is not harmful. Policy-makers and scientists should not have to prove beyond a reasonable doubt that a product is harmful; rather the producer should have to prove that it is safe. The precautionary principle is not included and thus not recognized by NAFTA as a reason to exclude from the tribunal process legislation that conflict with the advancement of trade and the rights of corporate investors. Since international law tribunals and governments can act much quicker than scientific studies can be carried out, the potential for these
types of "regulatory takings" cases is immense (Linda MacQuaig 2001). Forcing the government to publicly admit without proper evidence that the toxic substance will not cause harm is an advantageous power that the corporation can use in its advertising, while the substance could still be unsafe. Chapter 11 investor-state cases have the capacity to render governments powerless at the corporation's will, as shown with Ethyl - the first corporation to use these investment protections granted in NAFTA.

A high-profile case almost mirroring the Ethyl dispute is in the process of being resolved through the investor-state procedures with the United States government as the defendant. This case was chosen for discussion here because is still in the process of being resolved and has drawn much public attention to Chapter 11 in the United States because of the high damages being sought for banning a chemical that has already caused much damage. Methanex Corporation vs. the United States of America is a controversial investment dispute between the Canadian Methanex Corporation and the United States resulting from the state of California’s planned phase-out of the use of MTBE by 2002. This deadline has been extended due to budget pressures unrelated to the Methanex case. MTBE (methyl tertiary butyl ether) is a gasoline additive used to increase oxygen content and act as an octane enhancer in unleaded gasoline and is not produced by the corporation. Methanex is a major producer of methanol, a product used to produce formaldehyde, acetic acid, and other chemicals used to manufacture resins, adhesives, paints, inks, foams, and plastic bottles. Methanol is also a key ingredient to MTBE and Methanex claims that the ban is "tantamount to an expropriation of the company's investment"; a violation of NAFTA's Article 1110. Methanol mainly supplies Methanol to producers located outside of the United States and these producers are the principal
suppliers for California. California is a large market for Methanex’s products and it claims the ban would take away a large share of its market. They also insist the ban was enacted in violation of the national treatment (Article 1102) and minimum international standards of treatment (Article 1105) provisions. The financial compensation being sought by Methanex is nearly one billion dollars, a figure that has raised public interest in the investment measures in the treaty in the United States (IISD, Methanex).

The largest NAFTA claim to date, Methanex is seeking $970 million in compensation for lost profits due to the ban in California using the international dispute resolution method through UNCITRAL. Methanex claims that MTBE in gasoline reduces air pollution, although the University of California at Davis discovered that “there is no significant additional air quality benefit to the use of oxygenates such as MTBE in reformulated gasoline (Bottari 2001).” The report did find MTBE to be highly soluble in water and that it easily flows from leaking gasoline tanks to contaminate groundwater. Its use in boat fuel adds to surface water contamination. MTBE affects humans with neurotoxicological effects such as dizziness, nausea, and headaches, while also acting as a carcinogen. California based its ban on these findings.

Methanex claims that the ban discriminates against the Vancouver-based company because it supports the use of Ethanol, a product made in the United States, effectively violating the national treatment provision in Chapter 11. Methanex cites an executive order that requires the California Energy Commission to investigate developing an ethanol plant in the state as evidence for this discriminatory policy. It also refers to a $210,000 campaign contribution made to the governor by a foremost ethanol producer in the United States. The corporation does not argue that the contributions were made
illegally, yet Methanex supposes that fair and equitable treatment was not given by California in making the ban and that the ban was not the “least trade restrictive” means for solving the water contamination problem. Methanex cites WTO rules, which require countries to use the least trade restrictive means to attain environmental, and public health objectives. The corporation also insists that the ban is an expropriation because it prevents Methanex from enjoying its market share in the U.S. (Public Citizen and Friends of the Earth (b) September 2001). The corporation has filed its claim with UNCITRAL and the panel had its initial meeting in September of 2000. The decision is still pending. Former U.S. Secretary of State Warren Christopher has been appointed to the arbitration panel by the U.S. government.

Due to investigative reporting, residents of California and now the United States are fully realizing the damage that can be done to U.S. governance through the secretive tribunal process. With the Methanex case, MTBE is causing harm, so the state government uses its authority to put an end to that harm, and then the corporation making a key ingredient in MTBE asserts that it deserves payment of a sizable fee as retribution for a loss of profits (Bottari 2001). This seems like a very unreasonable resolution to a challenge that could effectively result in losing important health policies. Water contaminated with MTBE has a strong odor and taste. Because of this and MTBE leeching into drinking water the municipal wells in Santa Monica had to be closed off and dozens of other municipal wells in the state have also been affected. The U.S. argues in a Statement of Defense filed August 20, 2000 that this situation is not under the jurisdiction of the NAFTA tribunal. The U.S. contends that no final regulation banning MTBE has taken effect and that the phase out plan is therefore not yet a “measure.” Also
it is contended that Methanex does not have a case because the ban is directed at MTBE, not methanol, the product produced by Methanex. Methanex's declaration that they have "incurred a loss or damage" due to the state Senate Bill and the Governor's executive order has been attacked by the United States because of its failure to prove a direct or indirect expropriation since its financial injuries are too remote (Methanex Claim not Suitable for NAFTA arbitration, U.S. argues 2001). Methanex claims that it holds 100% of the shares of two U.S.-based companies, one in Texas, which appears to be a marketing operation, and the other in Louisiana that once produced Methanol, but does not appear to be manufacturing it any longer. The U.S. argues that Methanex has not established that it has an investment in this country, because the plant in Louisiana currently is not involved in MTBE production and the office in Texas has no significant assets or noteworthy income. Methanex is not seeking to import into the U.S. market either. Methanex has based its large compensatory sum on its decline in market share. The U.S. blames this on market forces, because its shares began declining in 1995 and thus holds that there has been no expropriation (Public Citizen and Friends of the Earth (b) 2001). The U.S. denies the admissibility of the Methanex claim under Article 1105, because while it is customary that international treaties impose constraints on national legislation and orders, there is no standard that requires States to adopt only "good legislation and orders," as Methanex suggests. Methanex has not been able to identify any "substantive standard of customary international law implicated by the measure here, and its claim under 1105 is inadmissible (Methanex Claim not Suitable for NAFTA arbitration, U.S. argues January 2001). Finally, another reason the U.S. discredits Methanex's claim is that California made the decision democratically after much public
comment and testimony, while also basing the conclusion on abundant scientific findings. So the U.S. sees the claim of the violation of “fair and equitable treatment” as invalid. The U.S. also states that there is no liability for the violations Methanex alleges against their investments in the U.S.

The response from Methanex in the company’s statement of defense asserted that the U.S. “appears to have confused the issue of liability with the issue of jurisdiction.” The inhibitions on part of the company’s activities are reason enough for an arbitral challenge. Methanex also persists in its claim that the removal of MTBE from California’s market effectively denies Methanex’s business in selling methanol to MTBE producers and is an expropriation that is not too remote as claimed by the U.S. Methanex states that the issue of whether or not the legislation or the executive order were “measures,” whether a loss or damage was incurred or the claims are too remote, and whether the measures apply to a minimum standard of treatment under 1105 are all issues of liability not jurisdiction. The company insists that the company does not have to be nationalized, nor the assets seized to prove an expropriation. Methanex denies the U.S. argument that the claim is inadmissible, stating that international law principles require fairness in procedural and substantive matters, especially when considering the application of executive and legislative measures that affect investments of foreign corporations. Methanex asserts that this arbitration is not an attack on the sovereignty of the state of California or the state legislature’s ability to make important environmental policies; rather, it is an attack on an unfair and unjustifiable measure “wrapped in the rhetoric of health and the environment” (Methanex Claim not Suitable for NAFTA Arbitration, U.S. Argues 2001).
This investor-state case has caused hostile responses from both Californian citizens and government officials affected by the contamination from MTBE. The International Institute for Sustainable Development (IISD) is fervently working towards making the Chapter 11 investor-state cases more transparent through their request to submit an amicus brief in the Methanex case. As mentioned in Chapter IV, the Tribunal in this investor-state case is the first to respond to arguments to allow amicus curiae briefs in the dispute resolution process. In a preliminary decision the panel ruled that it did have the right to accept briefs, but was not willing to decide if it would in this instance. The IISD’s arguments for allowing public interest participation is that it would help to build a greater confidence level in international arbitration, no matter what decision is finally made by the Tribunal. The U.S. and Canadian governments formally supported the efforts made by the IISD, while the Mexican government opposed the involvement of the IISD. The UNCITRAL rules of procedure have been understood to include the right for participation by groups representing the public interest in the arbitration process. After Methanex learned of the petition that was submitted to the Tribunal, they argued that the Tribunal had no grounds on which to accept the petition and argued that allowing this participatory role would inevitably lead to a surge of such interventions. This case has encouraged all three NAFTA countries to reinterpret Chapter 11 to support narrower grounds for investor challenges. A clarification was decided on and will be analyzed in Chapter VI of this thesis. So far, the Tribunal hearing this case has received a series of submissions and rebuttals revolving around the controversial aspects of jurisdiction and the admissibility of the claim (IISD, Methanex)
Loewen Group v. the United States is a NAFTA case that is closely being followed because of its potential threat to the U.S. judicial system. In this case the NAFTA panel decided that a domestic court’s decision was well within the boundaries of its jurisdiction. The ability of a tribunal to make a judgment on a previously decided case from the domestic court system is a substantial NAFTA authority that no one had thought could occur. It is thus an important case to analyze. The Loewen Group, a Canadian-based funeral home and insurance conglomerate, filed the first case brought against the United States under Chapter 11. This company aggressively purchased more than 1,100 funeral homes across the United States and Canada in the 1970’s and 1980’s. The Loewen Group and a few other large corporate funeral homes had been acquiring or pushing out of business small family-owned firms, something that began to draw public attention and high-profile investigations it’s of anti-competitive business practices. Jeremiah O’Keefe, a small funeral home owner in Mississippi, sued Loewen alleging that they had committed various unlawful anti-competitive and predatory acts in an attempt to dominate the local funeral market in violation of state laws. The dispute involved three contracts valued at $980,000, and the exchange of two O’Keefe funeral homes worth $2.5 million for a Loewen Insurance Company supposedly worth $4 million (Gaillard 2001). The Mississippi jury found these claims to be true and that Loewen was liable for fraud and other misconduct, and would be forced to pay the punitive damages of $260 million. The jury assessed the fine as to deter companies from engaging in misconduct. Since this decision was made in the judgment phase, Loewen had the option of having the trial reheard with the same jury for the penalty phase of the trial. Loewen chose to go back to court, and this time the jury increased the damages to $500 million. Even so, O’Keefe
had been willing to settle the case for less than $5 million, but Loewen did not accept. The Loewen Group attempted to appeal the jury verdict to a higher court and also sought to be exempted from the civil court procedural rule that requires the losing side to purchase a bond worth 125% of the damages they were to compensate O’Keefe. The bond rule is in place in order to prevent a company from hiding in the appeals system to escape legal liability. The company’s attempt at exemption was rejected, and Loewen appealed to the Mississippi Supreme Court and lost again in 1996. Finally Loewen decided to settle with O’Keefe for $175 million in 1996, rather than continue through the court system and pay the high bond (Public Citizen and Friends of the Earth (b) 2001).

In 1998 The Loewen Group filed a NAFTA claim under the ICSID Additional Facility Rules for $725 million contending that the Mississippi jury verdict violated Chapter 11, was discriminatory, was a denial of minimum standard of treatment, and was an expropriation. They also claimed it violated the United States’ national treatment and fair and equitable treatment obligations. The claim was based on the assertion that the trial judge, the jury verdict, the punitive damages, and the Mississippi bond requirement—that is identical to a national procedure—was a breach of its investor rights. The Loewen Group felt that the judge allowed the plaintiff to appeal to an “anti-Canadian bias” and that the bond requirement did not allow the company to appeal its case, so the actions taken were an expropriation of its assets. The United States objected to the competence and jurisdiction of the tribunal for this arbitration, because the government reasoned that judgments in domestic courts in private disputes are not “measures adopted or maintained by a Party” within the scope of Chapter 11.
The Tribunal decided that the jury verdict and the bond requirement were within the meaning of the definition of measure, and that the Tribunal should hear the dispute because Loewen had exhausted the local remedies. This controversial decision by the international tribunal has raised major concerns. If judicial acts are considered "measures" as defined for in Chapter 11, a grave threat is raised that United States' judicial decisions at all levels, including decisions by the U.S. Supreme Court, will be subject to review and reversal by these three-member arbitral panels. The result of this decision affects the interests of all foreign investors if the civil system is declared susceptible to scrutiny by these outside judgments (Gaillard 2001). The Loewen case is still pending, and will be decided within the next several months. This case being followed closely by investors and critics of Chapter 11.

The implications of the decision for democratic procedure and long-standing court principles are potentially drastic and far-reaching. The business strategy used by the Loewen Group through the investor-state process could help increase the value of their stock. The decision to sue through NAFTA arbitration came three years after the original jury verdict, at a time when the company's aggressive acquisition tactics led its stock to begin to plummet in value. Loewen may have decided to bring a case because a $725 million award might appease shareholders. This represents the first instance in which a U.S. jury verdict has been challenged in NAFTA and the results could be that all court decisions relating to NAFTA decisions would be subject to challenge in the tribunals. This case could also encourage other foreign businesses to seek to override the justice system in the United States, while U.S. citizens and firms would still have to comply with the domestic court rulings. Loewen's latest strategy to place the cost of its mistakes and
misconduct into the pockets of U.S. taxpayers, could signal to other firms that domestic
court restitution rulings can be paid for—perhaps even with a profit—by initiating a
NAFTA claim. The Loewen case also threatens the sovereignty of this nation’s legal
system as well as the punitive damages concept, which is primarily meant to deter illicit
activity from happening in the future rather than to compensate the party seeking
damages. The NAFTA panel will not be considering the importance of punitive damages
in this case, only whether or not the investment rights provided for in Chapter 11 were
violated (Public Citizen c ). Domestic courts will be bound to enforce the final decision
of the international tribunal and the decision cannot be appealed by the government.

The strong role guaranteed to juries in the United States could be pre-empted by
foreign companies in NAFTA cases and could lead to an effort to reform the courts and
restrict citizen access (Public Citizen and Friends of the Earth (a) 1999). Most citizens
value the jury system as a means to enact stiff damages and send a powerful message to
corporations. It also limits the power a company or a government agency can have over
the public by allowing the jury to determine a suitable consequence. The initial cause for
the dispute in the Mississippi courts was not related to international trade, but was related
to investment. Now Loewen is challenging these state legal policies in an outside venue
after the company lost its cases and appeals. If Loewen’s NAFTA case is successful it
could send a message to other corporations by declaring that international trade and
investment rights supercede the long-standing civil justice system and the jury trial
safeguard which balances citizen interests against wealthy, more powerful interests.
These democratically embedded principles of the justice system could be found a
violation with regard to investment rights provided to corporations in Chapter 11.
As they learn more about the investor-state cases average Americans will likely change the way they look at international free trade agreements and the “protective” measures taken to ensure fair treatment to all foreign corporations. These cases have been very broad and far-reaching over an extensive range of challenges to various actions taken by local, state, and national governments. A table listing NAFTA Chapter 11 cases and briefly describing their status and the issues involved is in Appendix A. These investor-state cases threaten local, state, and even federal sovereignty and definitely will have an impact on the faith of Americans in their government’s ability to serve and protect its people.
CHAPTER VI: Broader Implications and Possible Revisions to Chapter 11

NAFTA's Chapter 11 investment and arbitration provisions have raised concern as a threat to national as well as state and local sovereignty. The impact of NAFTA on the U.S.'s influence as an international player and the treaty's power over national authority have been criticized as constraining the independence of the United States and its freedom from external control (Weintrab 1996). NAFTA sets guidelines that must be followed in terms of trade policy, and it sets up enforcement measures if its provisions are violated. This puts the U.S. in a position that it must abide, or be left out of the deal, and has led some to suggest a stronger protectionist stance when dealing with international trade. While this may be a drastic measure and would be difficult in a globalizing market where the U.S. has a major role to play, some argue that there must be a balance between protectionist measures by the U.S. government and the promotion of full-scale free international trade. In regards to Chapter 11, national sovereignty is also vulnerable due to the actions taken by international tribunals in that the arbitrators chosen to sit on the panels could be biased and in favor of their own country's cases. Another criticism of private international arbitration is that many of the selected arbitrators are experienced trade lawyers, and may accept the corporation's arguments because they may have formally represented a corporate interest, or their ideals may be in line with free trade arguments. The arbitrators chosen by corporations may be known for their past representation and claims won and also their ability to push corporate positions
while unfairly weighing the government’s arguments against their own opinions.

Neoclassical trade opinions that promote extensive trade liberalization and privatization could result in arbitral decisions that do not account for the contrary arguments giving governments the ability to protect its citizens and the environment from the possible harms. If this theory is correct it undermines the impartialness and legitimacy of the dispute resolution process and has considerable implications for justice.

The main concern revolving around U.S. sovereignty involves the lack of any role for states in trade agreement negotiations. The federal government has supreme power over the states in matters of international trade even though NAFTA’s Chapter 11 investor-state cases have so far primarily targeted state policies and jurisprudence. This trend is likely to continue as long as states are able to make policies that may be seen as incongruent to free trade without the direction of the federal government. State policies to protect the public health and the environment are most in jeopardy due to Chapter 11. Federal preemption has ultimately been viewed as the federal government’s dominance in foreign relations without consideration of the dual federalism structure where states could be offered a voice in international decision-making. States do not have this task and the federal government can preempt any state law that is a barrier to federal responsibilities such as international trade. States make laws to protect their citizens as they see fit and the Courts apply international laws as federal law, which in turn, trumps state laws.

Article I Section 8 grants Congress the power to regulate commerce and this provides the federal government with authority over the states. Treaty makers have power over the states because they can create supreme laws in international agreements that otherwise are beyond the authority of the federal government, giving courts the ability to nullify
state laws that could possibly affect international relations (Bradley and Goldsmith 1998). Fast track adds to the power that the federal government has over the states. Congress does not have to grant the President fast track authority when negotiating trade deals and by not granting it states are provided with more representation in the negotiation process through more debate between those closely representing them.

State and local regulation of businesses in order to protect the public has been criticized by businesses in the United States as causing excessive formalities that collide with their ability to operate freely across borders things that infringe on profits and efficiency. Business favors “one standard world” treaties, such as GATT and NAFTA, which offer the multilateral provisions and protections they desire in order to increase profits to their advantage. Critics of harmonization argue that as the world of commerce becomes more complex, it is necessary for state and local governments to have more power to protect the health, safety, and welfare of their citizens (Walters 2001). The Federal and international preemption through NAFTA has profound potential consequences for state and local governance. Unfortunately state and local governments have been left powerless due to U.S. federal trade policies and cannot address problems without the fear of being preempted by a trade agreement.

Proponents argue that these investment provisions were meant to protect investors from the state seizure of private property through nationalization drawing on the embedded corruption in the Mexican court system and the history of nationalization there. Instead, the majority of investor-state cases challenge the sovereignty of state and local governments through decisions about protective laws and regulations established by them. Chapter 11 has dramatically increased the power of corporations to successfully
attack normal government activities outside their home countries. State governments and even Congress were not given the opportunity to comment and amend NAFTA because of the fast track authority that was granted to the President to negotiate the trade deal secretly and then present it to Congress with the single option of voting yes or no within the establishment of an extremely short time period of ninety days. The limited time period for approval of trade agreements under fast track is also a constraint to Congress, and an extended time frame for acceptance could lead to a more thorough debate on the complex issues. NAFTA was supported by some due to its inclusion of environmental and labor side agreements that were supposed to protect federal and state policies from moving to lower standards. These side agreements do not have enforcement mechanisms in NAFTA and state governments and Congress were unable to ensure that enforcement would be included in the agreement to protect their own regulations and policies. The provisions to harmonize environmental laws of NAFTA were predicted by Carrick (1992) to lead to the probable dilution of state laws. This has happened in several Chapter 11 investor-state cases that have caused a state government to revoke or never implement a protective regulation. State and local governments are now weakened by international trade agreements, especially Chapter 11 of NAFTA, where an international tribunal can challenge the sovereignty of the accountable government by ruling against a policy or action taken by the state. The federal government is legally liable for damages under Chapter 11, even when state and local actions are in question. However, it has many available routes to take in order to bend the domestic laws of the states to its will, such as stopping funding to the state for various projects until the law in question is rescinded or the local government agrees to pay the damage award (Public Citizen and Friends of the
Earth (b) 2001). The transnational corporation can effectively defend the ever expanding rights they are granted through trade agreements; rights that suppress a government’s ability to protect its citizens (Walters 2001).

Jurisdiction over the negotiation, operation, and management of international trade agreements such as NAFTA is a federal responsibility largely carried out by the U.S. Office of the Trade Representative. Members of Congress can set goals for U.S. participation but are not as involved in the discussions, while corporate committees advise U.S. negotiators and have security clearances to the Free Trade Agreement of the Americas (FTAA) documents which are meant to expand NAFTA. This will be discussed later. Non-governmental organizations (NGO’s) attempted to step in and demand protection for the country’s right to democratic governance, environmental and labor rights, and health and safety, but these public interest topics were not as important to the President and Congress as those of the corporate interests and the promotion of free trade. Therefore measures such as Chapter 11 were included in NAFTA (Public Citizen f). Once enacted NAFTA came under the jurisdiction of the Free Trade Commission, whose members include the trade ministers of Canada, Mexico, and the United States.

Chapter 11 of NAFTA undermines the rights of U.S. citizens to determine by democratic means their priorities and values and also works for corporate interests as a weapon to oppose protective policies by filing a claim with an international tribunal citing a “lost market opportunity” (Hossien-Zadeh 1997). Even the threat of Chapter 11 action by a corporation can persuade the federal government to make a settlement without following through with the completion of the arbitration proceedings. The majority of cases to date have been settled prior to a final decision. This allows
corporations an unprecedented amount of leverage against the states, and offers encouragement to other firms to bring claims against local government policies, leading to a revolving door of "regulatory takings" cases. The actions taken through Chapter 11 of NAFTA can impair a state's regulatory powers by extending the regulatory takings doctrine to a new extreme (Greider (a) 2001). While the federal government has put taxpayers in a position of providing insurance to bad investments by corporations, state Governors, legislators, and local officials should be demanding a chance to take part in future trade discussions. These demands are not made widely now, because of lack of attention being paid to investor-state cases as well as the fact that politicians want to be seen as proponents of free trade deals in order to build up the economy (Walters 2001). All parties affected by trade agreements should have the opportunity to take part in the debate surrounding controversial elements and representatives of the governments closest to the citizens should certainly be involved in the discussions. At a minimum the U.S. Congress should fully participate by not granting fast track authority in the future.

The lack of transparency of the international tribunals is another basic area of misgivings about Chapter 11. While the world of commerce insists that the procedures must be secret in order to be swift and fair to all parties involved in the dispute, public interest groups question the authority of the tribunal to overrule any court in the U.S. legal system. Discrepancies between free trade proponents and opponents revolve around two words: protection and transparency. Environmentalists, labor groups, and other interests strive for protection, while corporations deem it as an impediment to trade. On the other hand they seek special protection of their interests through the creation and use of international tribunals. Transparency to free trade advocates means that when a rule is
decided upon all investors should be made aware of it to know what to do when trading. To the public interest community transparency “encompasses the whole process of developing a rule, and even thinking about developing a rule: the entire process should be open to public scrutiny and involvement” (Magraw 1994). Many argue that there is no legitimate reason to keep the arbitration confidential when government actions to protect the public interests are causing a problem for investors. Through the Freedom of Information Act, U.S. citizens have access to government documents pertaining to a case, yet the investor is not obliged to provide its submissions to the public.

The use of secretive international arbitration takes the issues outside the legal system of the host country, where most of the evidence and witnesses are present. Upward harmonization of standards was promised to those concerned about their downward direction. Yet, the opportunity to help bring the court system of Mexico up to par with U.S. and Canadian courts is not part of NAFTA and Chapter 11’s arbitration has effectively discouraged the establishment of fairer domestic courts in all three NAFTA signatories. Environmental, expropriation, and investment cases are the types disputes that give courts a rare opportunity to be independent of the other branches of government as well as to provide citizens with a way to hold governments accountable using the law. The privatization of legal principles through arbitration cancels the option of countries to develop their own specialized courts to hear these cases since investors see more protection given to their interests through the international courts (Kass 2000). Through methods of private investment law, foreign investors have are able to guard themselves from new laws and policies that may impact them economically.
Challenges against NAFTA, and especially Chapter 11, are being instigated by a number of different interest groups and governments. In this era of global politics, foreign economic relations are key for commerce as well as acceptance into the worldwide community. Governments have become less capable of protecting the interests of their citizens because their power is being given away in trade deals (McQuaig 2001). The value of promoting free trade was the main reason that Congress and other national legislatures accepted NAFTA. Unfortunately that promotion of trade and investment seems to be occurring at the expense of the principles of democratic governance. Democratic ideals should be empowered to stand up to financially strong corporate institutions. It is possible to have both trade and democracy. To do so governments need to put public interests ahead of corporate ones and ensure that domestic laws and rights are guaranteed and not susceptible to being pre-empted by international economic treaties.

Various NGO’s and citizen groups and the government of Canada are seeking a mechanism for change in order to reinterpret the controversial and broad rights of Chapter 11. Two challenges to the Canadian Parliament have been launched by Canadian groups: 1) the Canadian Union of Postal Workers (CUPW) along with the Council of Canadians (COC) filed a challenge in April 2001 based on Canada’s Charter of Rights and Freedoms; 2) the Canadian Union of Public Employees and Democracy Watch’s challenge against NAFTA argues that Chapter 11 interferes with freedom of the press.

The challenge by CUPW and COC was provoked by the NAFTA Chapter 11 investor-state case where United Parcel Services (UPS), an international courier service, claims that the Canadian postal system violates NAFTA because it allows parcels to be
delivered by the Canadian Post. Critics of Chapter 11 worry that if the tribunal upholds the UPS claim, government participation in any service that competes with the private sector will be threatened. The plaintiffs argue that NAFTA investor-state cases undermine the constitutional authority of Canadian courts to deliver judgment on important public policy issues. They also argue that the measure violates the Canadian Constitution's guarantee of "equal treatment before the law" by giving foreign private investors a powerful legal tool that is not offered to other citizens" (Canadian Union of Public Employees 2001).

The second Canadian NAFTA challenge from CUPE and Democracy Watch is based on the secrecy of the tribunals that makes ineffective the long-established principles of public scrutiny over the jurisprudence of the Canadian judicial system. These coalitions have both filed notices of application with the Superior Court of Justice of Ontario. No decisions have been made yet, but in past decisions Canadian Courts have strongly condemned restrictions on public and media access to domestic courts and tribunals. If the courts accept the challenges presented by these groups then it is predicted that Canada’s agreement to NAFTA will be declared invalid in regards to the secretive process used in investor-state suits. This would require Canada to renegotiate the aspects found unconstitutional with the U.S. and Mexico. The full effect of the judgment would entail suspension of Canada’s participation in NAFTA until the negotiations over the unconstitutional components were settled. These challenges also have a goal of preventing secretive and undemocratic process from being further developed and added to upcoming trade agreements (Canadian Union of Public Employees 2001).
Public interest organizations have been warning of the danger of the Chapter 11's expansive investment rights since the NAFTA proposals were released, but still were unable to predict its broad impact on democratic processes and ideals. As mentioned previously, many are attempting to seek involvement in the cases through *amicus* briefs. The International Institute of Sustainable Development (IISD) is a Canadian NGO committed to fostering local, regional and international policies and practices in support of sustainable development. The IISD has been working to make the tribunal process in NAFTA become more transparent. They have led in the request for permission to submit *amicus* briefs to the arbitration panel in the Methanex case. This panel convened in order to discuss this request, but delayed their decision to allow the concerned parties more time to submit arguments on the participation of public interest groups in such cases. This is an important advancement for critics of Chapter 11, because it shows that the tribunal is taking this request seriously. Canada and Mexico submitted arguments as friends of the court, and the litigants, Methanex Corporation and the U.S. government, had the opportunity to submit arguments. The United States and Canada came through on their public promises for openness and transparency and supported the request for third party comments by the IISD and another NGO, EarthJustice.

The decision by the Tribunal on amicus participation was released on January 15, 2001. The Tribunal ruled in favor of allowing amicus briefs in writing. The basis for this decision relied on the statement in article 15 of the UNCITRAL Arbitration Rules "broad discretion as to the conduct of this arbitration," noting that there are no provisions supporting or preventing such participation. The scope of participation is limited to the submission of written testimonies, and the interested third party could not adduce their
own factual or expert evidence, and could not present witnesses. The Tribunal holds the right to determine the admissibility of amicus participation that does not constitute written evidence. The Tribunal recognized the public interest with their main reasoning being that the closed nature of Chapter 11 proceedings was damaging to the public credibility of the process itself. A rejection would do harm to the process and could cause more public outcry against the arbitration procedure. This decision may also lead to revisions of the WTO arbitration process allowing for petitions in matters there as well (Mann 2001).

The Free Trade Commission (FTC) has the power to develop an interpretive statement to Chapter 11, which could ease concerns about the broad uses of the Chapter by foreign investors. The FTC is made up of trade ministers from each NAFTA party and has the task of administering the treaty and dealing with problems. Thus, there is a mechanism for revising the NAFTA document. Canada has been leading the cause for more transparency and clarifications of Chapter 11 so that tribunals will take those clarifications into account in decisions in the future as binding precedent. Many groups in the NAFTA countries lobbied their governments to ask the FTC to develop this interpretation. The IISD, Public Citizen, and other watchdog groups are constantly worked towards reaching this goal. Congressional members from the Californian Democratic delegation composed a letter to President Bush on September 28, 2001 expressing their concerns regarding the negotiation of the investment provisions in new trade initiatives, and asked that Chapter 11 be substantially revised. An interpretive statement was developed but did not go far enough in narrowing the broad uses of Chapter 11 to satisfy the interested parties. This interpretive statement is included as
Appendix B. The Congressional members from California found that the interpretation did not address many of the most fundamental and critical problems with the Chapter 11 rules and was not specific enough in resolving the problems involving transparency and the disclosure of documents (Waxman and Cappa, et al). With this lack of any meaningful change in mind, Congress members indicated to President Bush that a new model for investment must be developed for future trade agreements. Municipal governments have voiced their concerns through the National League of Cities in a letter to U.S. Senators. They are also specifically concerned with future trade negotiations that could include Chapter 11, a provision they state that has “expanded the definition of a regulatory taking.”

The outcomes and broader implications of Chapter 11 have led many members of Congress to withhold support for the Free Trade Agreement of the Americas (FTAA), a treaty that will expand NAFTA rights to investors in most of Latin and South America. This new agreement would include 34 countries in a hemisphere-wide free trade area by 2005. Negotiations are already being conducted in secret with the trade ministers of each country, and also over 500 corporate representatives. Organized labor, environmental groups, and other public interest organizations stress the need to develop a new strategy when developing trade policies that includes establishing new rules on the environment, labor, food safety, and investment. In another letter, some Congress members proposed detailed revisions for the FTAA regarding Chapter 11 such as:

- Ensure that foreign investors will enjoy no greater protection than that afforded to domestic U.S. investors under the U.S. Constitution:
• Require that all private investors gain approval from their home country government before bringing a case under the investment provisions;

• Limit expropriation to cases in which there is direct expropriation of all economically beneficial use of property;

• Provide a clear exception for the governmental exercise of police powers, including legitimate health, safety, environmental, consumer and employment opportunity laws and regulations;

• Establish a standing appellate mechanism to correct erroneous decisions by tribunals; and

• Ensure that all proceedings, submissions, findings, and decisions are promptly made public and that all hearings are open to the public, consistent with the need to protect classified and business confidential information, and ensure that amicus briefs will be accepted and considered by the tribunals (Lee et al. 2001).

Other alternative visions for U.S. trade policy include new approaches to fast track, now known as trade promotion authority. Congress members from California have called for a move away from fast track after witnessing first hand the implications caused by a large investor-state case aimed at their own legislation. The Californian Congress members, as well as many public interest groups, insist that the rest of Congress must have the ability to debate future trade agreements to clarify terms like expropriation and minimum treatment so that foreign investors have no greater rights than those available under U.S. law. The demand that all proceedings, submissions, findings, and decisions of the arbitration tribunals be made available to the public is also a major movement.
towards reinventing NAFTA's Chapter 11. By guaranteeing that foreign corporations have no greater rights to challenge domestic laws protecting the environment, public health, safety, and consumer and employment opportunity laws and regulations than U.S. law provides, new trade agreements could prevent attacks on viable legislation (Waxman and Cappa, et al. 2001). Fast track authority did not allow Congress to define and correct these important inadequacies of NAFTA, and new approaches must be taken in future trade agreements. With this in mind many bills being introduced into Congress now focus on setting criteria for trade negotiations that call for more transparent investor-state procedures and arbitration methods.

In reaction to the weaknesses of NAFTA’s side agreements there is also pressure on governments to take environmental and labor issues more seriously. By incorporating these types of protective agreements in the NAFTA text using much stronger enforcement language will result in a more active stance against downward harmonization. As trade agreements such as the FTAA propose incorporating more protections for investments, property rights, privatization, deregulation, while giving corporations more power abroad, rather than focusing on the basic issues of tariffs and other barriers, the development and maintenance of protective measures for citizens in terms of public health, the environment, and labor are becoming less important. Unfortunately, there is a great amount of difficulty in implementing stronger side agreements in the FTAA because many Latin and South American governments oppose strict environmental and labor agreements. The U.S. has included progressive labor and environmental protections in its free trade agreement with Jordan, and that could be looked at as a basis to include in all future trade agreements. Some say that the side
agreements were accepted into the text of the U.S.-Jordan Free Trade Agreement because the U.S. trades little with Jordan and it is not a major world player either. A new focus must be instilled in trade negotiators to include these necessary provisions to create a more sustainable method of globalization (Moberg 2001).

Steps to move away from the NAFTA model of corporate privilege towards a new model that promotes democracy, equality, and sustainable development start with the challenge to secretive negotiation processes for trade agreements (McIntosh 2001). A transparent and inclusive process for negotiation and implementation of trade deals would provide interested groups with access to information and shed more light on the negotiations that have always been shrouded in secrecy. The profound consequences for state and local sovereignty that trade policies can impose through Chapter 11 are cause for more citizen and Congressional discussions on proposed new trade agreements.
CONCLUSION: Summary of Arguments

The free trade arguments defending Chapter 11 seemingly conclude that the protection of investment over domestic regulations is an acceptable and necessary feature of NAFTA. Economic benefits are viewed as being more valuable than democracy and the protection of economic liberty worldwide more important than securing democracy and long-standing legal principles. However the arguments against the secretive measures in arbitration and the broad investment rights conclude that these global trade ideologies in NAFTA subvert democratic practices, such as national, state, and local decision-making, judicial processes, and transparency. Much of the administration of NAFTA has been moved from accessible state and national governments to international bodies that are on the whole inaccessible to citizens, while also operating without the accountability to the people that must live with decisions being made. The situation with Chapter 11 investor-state cases follows this example in the reduction of democracy in the United States because NAFTA is an international agreement that supercedes the laws and policies of its signatories. While NAFTA was meant to bring about fairness in free trade through its uniformity and collaborative agreements for outside dispute resolution, the complications for losses of sovereignty through these processes has led to calls for a set of changes in the trade policy towards democratization. Chapter 11 is major barrier in NAFTA to a more democratic trade policy and this thesis has highlighted the foremost main controversies surrounding Chapter 11 that have generated support for revision of the treaty. Those divisive measures in NAFTA include the guarded negotiation process
and fast track authority, the broad interpretation of investment rights granted in Chapter
11, the secretive dispute resolution process, and the implications for national and state
sovereignty. In conclusion I will refer back to the major points of the thesis and make
recommendations and suggestions that will hopefully allow for a coexistence between
U.S. trade policy and democracy.

An outline of the major issues of the acceptance process starts through the
Congress granting fast-track authority to the President. Fast track authority undermines
the checks and balances system set forth in the U.S. Constitution and may well end up
requiring states to give up power to protect their own citizens. Rather than relying on
“advise and consent” from the Senate on proposed trade treaties, a practice that is seen as
major procedural and political constraint on the executive because he must obtain a 2/3’s
majority, the President urges Congress to grant fast-track authority when negotiating
trade agreements so that final approval is reduced to a simple majority with no chance for
amendments. Congress is still somewhat involved in the fast track negotiating process,
but passage is much less of a constraint on the executive due to a 90 day limited
approval/rejection deadline. This time limit is seen as necessary to trade negotiators in
speeding up the promotion of free trade that aims to boost the economy and lead to more
harmonization. However Congress can reject fast track and participate as fully in the
negotiation of trade agreements if there is enough political pressure to do so. The
negative results felt through Chapter 11 could have been prevented with more debate of
this investment chapter. Strengthening congressional input in the negotiation of trade
agreements is a measure that could be taken to distract from the power of this procedural
mechanism. Currently fast-track agreements are not distinguished from other agreements
by size, complexity, or importance. The request for the fast track procedure only for those complex treaties that warrant its use could also limit opposition against it (Brainard and Shapiro 2001). By also giving U.S. lawmakers more opportunities for input in shaping agreements there may be more support domestically for free trade agreements. Congressional oversight into the negotiation of trade agreements is conducive to a productive and democratic institution like the United States.

Recommendations from Friends of the Earth, a non-profit interest group, include the need for draft texts or proposals of future agreements to be made public during the negotiation process. U.S. citizens can obtain access to Congressional Bills or proposed regulations that may have significant impacts on the environment or public welfare, but most trade agreements remain secret and are not fully disclosed to the public until signed. They are thus undemocratic negotiations. Also, advisory committees that are involved in the negotiation process are mainly business interests. These committees should be opened up to include non-governmental public interest organizations (Blackwelder 2000). These initiatives, if welcomed by the USTR, would help to give trade negotiations a more positive image because a variety of citizens would have the opportunity to read the texts and find provisions that may be interpreted negatively and representatives from citizen groups could voice these concerns.

The interpretations of Chapter 11 that governments must compensate foreign investors when regulation entirely within the scope of traditional governmental authority to protect citizens and the environment have any sort of negative investment impact is a radical concept in terms of democratic practices. All governments--federal, local and state--are being stripped of their rights, sovereignty, and delegated powers through trade
agreements being negotiated by the federal government that become the law of the land. The investment rights in Chapter 11 are too broad and that is allowing corporations to take advantage of vague language. A detailed reinterpretation of Chapter 11 by the FTC is warranted to limit the use of the investment rights granted so as to protect regulations meant for the protection of the public good. All parties to NAFTA should formally realize the need for a change to Chapter 11 especially since the attempt to extend NAFTA to 34 Central and South American countries is underway in the FTAA negotiations.

The dispute resolution process used in Chapter 11 arbitration is detrimental to due process and justice. Its secretive nature distorts the normal principles of judicial decision-making through the lack of precedent and not allowing outside observation. Economic arguments made that secrecy is necessary to ensure the quick resolution of the dispute and to protect against negative public opinions leave the foundational legal principles of this democracy undermined. Regulatory takings cases face difficulties in U.S. courts and Chapter 11 has taken this to a new extreme by working around the venerable principles of a democratic court system (Bottari 2001). This process would be accepted more widely if the public had the chance to follow and participate in the dispute resolution proceedings. The positive recognition from the Methanex Tribunal of the importance of amicus briefs is a vital step towards a more open and accountable alternative justice system used for international agreements but it still does not change the broad powers granted to tribunals.

The negotiation of the FTAA agreement is causing reconsideration of the major chapters of NAFTA, such as Chapter 11, that have led to drastic challenges to sovereignty and democratic principles. The complexity of the federal government
compensating in instances where a corporation challenges local and state laws is inciting debate on the federalist foundations of the United States. State and local governments can pass any law because the federal government is held responsible in the tribunals through NAFTA. The federal government however, may choose to force the state and local government to revoke a law and comply with NAFTA or face significant consequences such as less funding from the federal government for those states and localities. The decisions made by the tribunals are also causing anxiety from parties to the agreement due to their effect on policies and regulations seen as important to protect the public interest. Canadian governance has been harmed significantly through investor-state cases and the focus for revision there is on Chapter 11. Canadian Trade Minister Pierre Pettigrew has publicly stated that Canada will not sign the FTAA language granting broad regulatory takings rights is included. Canada, as stated earlier, has led in the review of the consequences of Chapter 11 and the formation of a reinterpretation. The United States has been the dominant leader in the creation of the FTAA and it is uncertain whether or not Canada will gather enough support from the other countries involved to revise the detrimental NAFTA provisions that the FTAA is currently centered around. Publicity of the implications of Chapter 11 will certainly cause a greater amount of public opposition to new treaties and could possibly lead to an intense revision of the controversial provisions in NAFTA.

The intention of Chapter 11 was to create a level playing field for foreign investors in all NAFTA countries. If people establish a business in another country they want to be sure that their business competes equally with another business that may be in the same area or may provide the same kind of service or product. They want the same
rules that exist in that country to apply to them. The protection of industries abroad from expropriation drove the reasoning behind including Chapter 11. NAFTA was not a perfect trade agreement when it was enacted and governments are now realizing the significant ramifications of Chapter 11. It is evident that investment protections are needed in any extensive trade agreement, but the secretive process makes people skeptical about the purpose for Chapter 11. The likely extension of Chapter 11 to the FTAA has caused serious protests, mainly due to the undemocratic negotiation process and giving away of sovereignty caused through Chapter 11 of NAFTA. From April 20th to the 22nd in 2001, 60,000 protestors assembled in Quebec City, Canada for the Summit of the Americas, the meeting of the 34 leaders of the countries proposed for the FTAA. These protesters demanded participatory democracy rights because they wanted to have a say in the kinds of deals being made for the future of the world and countries involved in the trade agreement. The common complaints regarding Chapter 11’s negative impacts on democratic practices in all three NAFTA countries have led to an increasingly more heated debate. Democracy is the foundation for the United States government and its decision-making and this should be held in the highest regard in times of trade negotiations. Accountability and transparency require citizen access and representation by elected leaders. Chapter 11 does not ensure any of these fundamental characteristics of democratic governance. Guaranteeing rights to corporations at the expense of sovereignty is not advantageous to securing democratic institutions and individual rights. Chapter 11 of NAFTA needs swift and clear revisions that incorporate transparency and a protection of state, local, and national governments’ ability to protect the public interest in a non-discriminatory manner. The safeguarding of democratic practices and rights
should be identified as key in preserving a well-functioning society, while also keeping in mind that trade policies are essential in a global economy. Fostering new trade policies does not have to be a hindrance to democratic practices and ideals. Both are necessary in this era of global economics, so world leaders must remember to respect the democratic foundation and strive to develop fair and free trade while keeping democracy intact. Democracy in the United States is much more fundamental to the country than economic matters and these ideals must not be compromised in the pursuit of economic prosperity.
## TABLE OF NAFTA CHAPTER 11 CASES

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*All dates correspond with filing of Notice of Arbitration.

** Award pending as of August 2001.
Appendix B

Free Trade Commission Clarifications Related to NAFTA Chapter 11
July 31, 2001

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

2. In the application of the foregoing:

   (a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

   (b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

   (i) confidential business information;

   (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

   (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

   (c) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.

   (d) The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.

3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it
may withhold in accordance with Articles 2102 or 2105.

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Closing Provision

The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement.

Done in triplicate at Washington, D.C., on the 31st day of July, 2001, in the English, French and Spanish languages, each text being equally authentic.

For the Government of the United States of America

__________________________
Robert B. Zoellick
United States Trade Representative

For the Government of the United Mexican States

__________________________
Luis Ernesto Derbez Bautista
Secretary of Economy

For the Government of Canada

__________________________
Pierre S. Pettigrew
Minister for International Trade
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