

Article

Guatemala's Peace Accords in a Free Trade Area of the Americas

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Foreign capital will always be welcome as long as it adjusts to local conditions, remains always subordinate to Guatemalan laws, cooperates with the economic development of the country, and strictly abstains from intervening in the nation's social and political life.

—Guatemalan President Jacobo Arbenz Guzmán
Inaugural address, 1951¹

INTRODUCTION

On New Year's Day, 1997, for the first time in nearly four decades, Guatemala was officially "at peace." The last of twelve peace accords² had been signed, putting in place a broad mandate for reform to address many of the historical grievances of the country's marginalized and

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1. Cited in STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA 52 (1982).

2. For the text of the peace accords, see 36 I.L.M. 274, 274–339.

impoverished majority. Real hopes were born that a time of democracy and progressive change had finally arrived in Guatemala, after thirty-six years of terrible conflict.

2 Alongside the internal peace process, Guatemala has taken part in negotiations toward a hemispheric free trade zone, the Free Trade Area of the Americas (FTAA), along with the thirty-three other countries that launched the project in Miami in 1994.³ Their declared purpose in pursuing an FTAA is a laudatory one. According to the opening words of the Miami Declaration: "The elected Heads of State and Government of the Americas are committed to advance the prosperity, democratic values and institutions, and security of our Hemisphere. For the first time in history, the Americas are a community of democratic societies."⁴

3 The twin paths toward domestic peace and wider economic integration in Guatemala are portrayed as harmonious. The country's ambassador to Canada, for instance, wrote in May 1997 that the momentum toward "far-reaching political, social and economic changes" following the peace process will be fueled by trade and investment liberalization in the Americas "based on openness rather than protectionism" and driven by "Central America's keen desire to expand foreign investment and trade."⁵ U.S. President Bill Clinton spoke in the same vein last year, during a visit to Guatemala in which he apologized for U.S. involvement in the country's conflict, when he highlighted his desire to discuss "other matters critical to peace and to development and reconciliation, including economic liberalization, market opening measures, [and] increased trade and investment."⁶

4 But are the paths to peace and integration so naturally complementary? This Article questions the official invocation of harmony by examining the potential impact of a Free Trade Area of the Americas (FTAA) on the Guatemalan peace accords. More specifically, it attempts to anticipate arguments that foreign investors could pursue under an FTAA agreement on investment in order to resist prospective government policies stemming from the peace accords. Given the centrality of land issues to the preservation of peace and political stability in the Guatemalan context, the assessment focuses on commitments relating to land under two of the peace accords: the *Agreement on Identity and Rights of Indigenous Peoples (Indigenous*

3. See Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808 [hereinafter Miami Declaration].

4. *Id.* 34 I.L.M. at 810.

5. Francisco Villagran de Leon, *Should Canada Extend a Commercial Hand to Guatemala?*, GLOBE & MAIL (Toronto), May 17, 1996, at A17.

6. William J. Clinton, Remarks in a Roundtable Discussion on Peace Efforts in Guatemala City, 35 WEEKLY. COMP. PRES. DOC. 395, 396 (Mar. 10, 1999). Regarding the apology, the President said: "For the United States, it is important that I state clearly that support for military forces or intelligence units which engage in violent and widespread repression of the kind described in the report was wrong, and the United States must not repeat that mistake." *Id.* at 395.

Accord)⁷ and the *Agreement on Social and Economic Aspects and Agrarian Situation (Socio-Economic Accord)*.⁸

The thrust of the Article is that an FTAA investment agreement—and international investment agreements in general—may be inconsistent with sovereign and democratic decisionmaking at the domestic level. Given that one of their central purposes is to “discipline” governments, and thereby protect investors, international investment agreements may provide investors with unwarranted leverage to influence political decisionmaking and thus constrain the scope for governments to pursue national strategies for development and reform. The Guatemalan peace accords provide a compelling example of this phenomenon given the deep resonance that they hold as a symbol of hard-fought democratic negotiation and political compromise by diverse social sectors to end decades of war and violence, itself stemming from extreme political and economic marginalization of popular majorities by a powerful economic elite. Indeed, after decades of conflict, the prospect that the hard-won Government commitments to pursue critical land-related reforms might be undermined by the threat of investor challenges under an FTAA investment agreement is a cause for serious concern.

In Part I of this Article, I review the recent peace process in Guatemala, suggesting that the peace accords create vital possibilities for reform, primarily through the future election of governments that are more democratically accountable to popular priorities. I also discuss the centrality of land as a source of historic conflict in Guatemala, and, in light of this, summarize the Government's commitments on land under the *Indigenous Accord* and the *Socio-Economic Accord*. In Part II, I locate the proposed FTAA agreement on investment within the broader international “push” to establish higher standards of investor protection in the process of transnationalization. I also review some of the precedents for an FTAA investment agreement, based on bilateral investment treaties, the North American Free Trade Agreement (NAFTA),⁹ and the draft Multilateral Agreement on Investment (MAI),¹⁰ and outline the key principles on which stronger investor protection is based. In Part III, I assess the potential impact of an FTAA investment agreement on the ability of Guatemalan governments to carry out the State's commitments on land issues under the peace accords. This assessment relies on an anticipatory analysis of the

7. Agreement on Identity and Rights of Indigenous Peoples, Mar. 31, 1995, U.N. Doc. A/49/882, 36 I.L.M. 285 (entered into force Dec. 29, 1996) [hereinafter *Indigenous Accord*].

8. Agreement on Social and Economic Aspects and Agrarian Situation, May 6, 1996, U.N. Doc. A/50/1996, 36 I.L.M. 292 (entered into force Dec. 29, 1996) [hereinafter *Socio-Economic Accord*].

9. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (entered into force Jan. 1, 1994) [hereinafter *NAFTA*].

10. See Directorate for Fin., Fiscal & Enterprise Aff., OECD, *The Multilateral Agreement on Investment: The MAI Negotiating Text* (visited Mar. 22, 2000) <<http://www.oecd.org/daf/investment/fdi/mai/maitext.pdf>> [hereinafter *Draft MAI*].

arguments that investors might use under an FTAA investor-to-state mechanism to challenge various policies stemming from the peace accords. Finally, I conclude with a short discussion of the significance of the analysis for issues of sovereignty and democratic accountability in Guatemala and elsewhere, and possible popular responses in the case of the FTAA negotiations.

I. GUATEMALAN PEACE ACCORDS

Tens of thousands gathered in Guatemala City's central square to celebrate the signing of the final peace accord between the Guatemalan Government and the country's guerrilla forces, the Guatemalan National Revolutionary Union (URNG), on December 29, 1996.¹¹ They rejoiced in the sensation of peace and the expectation of change. During one of the formal signing ceremonies in Oslo, Norway, representatives of different social sectors endorsed the peace accords in pairs: a Mayan campesino walked with a Ladino university student,¹² a trade unionist with a government official, a military officer with a priest. Thus ended thirty-six years of war, and thus began the long process to confront the aftermath of decades of violence and human rights violations¹³ organized primarily by the Guatemalan State¹⁴ and targeted most ferociously against the country's majority Mayan population.¹⁵ The

11. See generally CLARK TAYLOR, RETURN OF GUATEMALA'S REFUGEES 49–51 (1998) (discussing events on day of signing of peace accords).

12. There are four defined peoples in Guatemala: the *Maya*, of Indian origin (60%); the *Mestizo* (or *Ladino*), of Indo-European roots (39%); the *Garifuna*, of African and Caribbean origin; and the *Xinca*, of Pipile origin (1%). See, e.g., TANIA PALENCIA PRADO & DAVID HOLIDAY, TOWARDS A NEW ROLE FOR CIVIL SOCIETY IN THE DEMOCRATIZATION OF GUATEMALA 52 (1996). The definition of "Mayan" is admittedly complex; the Mayans are distinguished less by biological heritage than by "a changing system of social classification, based on ideologies of race, class, language, and culture." Carol A. Smith, *Introduction: Social Relations in Guatemala over Time and Space*, in GUATEMALAN INDIANS AND THE STATE: 1540 TO 1988, at 3 (Carol A. Smith ed., 1990).

13. During the worst phases of the pervasive repression, dating back to the 1950s, persecution was targeted against virtually any form of organized opposition to the authority of civilian and military governments. One million people were forced to abandon their homes, 200,000 were killed or disappeared, and thousands were orphaned or widowed. See *Guatemala—Memory of Silence—Tz'inil Na'tab'al, Report of the Commission for Historical Clarification*, U.N. GAOR, 53rd Sess., Annex, Agenda Item 44, at 7, 17–18, U.N. Doc. A/53/928 (1999) [hereinafter *CEH Report*]; *Country Programme Recommendation: Guatemala*, Addendum, UNICEF Executive Board, 3rd Reg. Sess., U.N. Doc. E/ICEF/1996/P/L.23/Add.1 (1996) [hereinafter UNICEF]. The final report of the Historical Clarification Commission (conclusions and recommendations) is available at <<http://hrdata.aaas.org/ceh/report/english/toc.html>>.

14. Guatemala's truth commission attributed 93 percent of the human rights violations and acts of violence that it registered to the State, and 3 percent to the guerrillas. See *CEH Report*, *supra* note 13, at 21, 29; *Guatemala Blames Military for Killings*, GLOBE & MAIL (Toronto), Feb. 26, 1999, at A21.

15. According to the truth commission, the Mayan people "bore the full brunt of the institutionalized violence." During the worst years of the conflict, from 1981 to 1983, the military systematically destroyed hundreds of communities in a series of nightmare campaigns across the western highlands. See *CEH Report*, *supra* note 13, at 2. The

violence has left deep physical and emotional scars on millions of Guatemalans who suffered from, or carried out, the atrocities.¹⁶ As is widely understood, these scars can only begin to be healed by systematically addressing the underlying concerns that prompted and fueled the war.

Negotiations between representatives of the Government and the URNG to end the armed conflict began in 1991, although most of the peace accords were concluded between 1994 and 1996.¹⁷ The compromise embodied in the accords is broad in scope, dealing with issues of human rights verification, resettlement of uprooted populations, indigenous rights, socio-economic and agrarian reform, a truth commission, the role of the military in a democratic society, the reintegration of the URNG, a cease-fire, and constitutional reforms. While the conclusion of the Cold War and the support of the international community¹⁸ contributed to the end of the conflict, a wide cross-section of Guatemalan society participated in the process leading to the final settlement. Indeed, nongovernmental organizations from every social sector contributed to the negotiations through the Assembly of Civil Society (ASC), which submitted consensus proposals to the negotiating parties, or, in the case of the business sector, through direct links to the Government.¹⁹

As such, the peace accords are a critical symbol of Guatemala's historic compromise between domestic elites seeking to salvage their gutted international reputation and popular organizations reeling from decades of repression and war.²⁰ According to Susanne Jonas, the

strategy involved the "mass execution of defenseless children, women, elderly people, and refugees by military troops." CARLOS M. VILAS, *BETWEEN EARTHQUAKES AND VOLCANOES* 138 (1995). The Guatemalan Defense Minister at the time announced his intent to "get rid of the words 'indigenous' and 'Indian.'" PHILLIP WEARNE & PETER CALVERT, *THE MAYA OF GUATEMALA* 19 (1989) (quoting statements of General Mejia Victores). *See also* UNICEF, *supra* note 13, at 2; JULIAN BURGER, *REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES* 84–85 (1987).

16. The names of thousands of individual victims of the countless massacres, murders, disappearances, rapes, and acts of torture are listed in an entire volume of the final report of the Project of Recovery of Historical Memory. *See* PROJECT OF RECOVERY OF HISTORICAL MEMORY, HUMAN RIGHTS OFFICE OF THE ARCHBISHOP OF GUATEMALA, *IV GUATEMALA—NUNCA MAS: VÍCTIMAS DEL CONFLICTO* (1998) [hereinafter REMHI REPORT].

17. The final accord was signed on December 29, 1996, bringing virtually all of the other accords into effect.

18. *See, e.g.,* Jeremy Armon et al., *Contexto Histórico*, in *GUATEMALA 1983–1997: ¿HACIA DÓNDE VA LA TRANSICIÓN?* 30–32 (Jeremy Armon et al. eds., 1997) [hereinafter *GUATEMALA 1983–1997*]; Conciliation Resources, *Actores Clave en el Proceso de Paz*, in *GUATEMALA 1983–1997*, *supra*, at 44–47.

19. The ASC was created pursuant to the negotiated commitment on the part of the Government and the URNG to promote participation in the peace process by "non-governmental sectors of Guatemalan society of recognized legitimacy, representation and legality." *See* PALENCIA PRADO & HOLIDAY, *supra* note 12, at 32–37 (discussing contribution of ASC to negotiation of peace accords).

20. Elite resistance to negotiating an end to the conflict was undermined "less by long-term concerns over democratization than by the 'signs of imminent asphyxiation and international isolation'—both economic and political—that would be applied to

accords represent “a splitting of differences between radically opposed forces, with major concessions from both sides.”²¹ In the wider context, the peace process brings to an end one of the worst disasters of human conflict and violence in recent Latin American history,²² and opens a period of tentative hope for greater democratic accountability. The resolution of land issues is central to this process.

A. *The Context of the Accords*

The roots of social crisis and conflict in Guatemala lie in the land. For centuries, the country’s economic model, based on producing agricultural exports for wealthy markets abroad,²³ has entailed exploitation of the largely Mayan rural population by a small minority of landowners. The State has actively promoted this “development” policy by expropriating land from indigenous Mayan communities, guaranteeing a constant supply of cheap human labor for the benefit of large private landowners,²⁴ and providing low-interest agricultural

Guatemala.” *Id.* at 17.

21. Susanne Jonas, *The Peace Accords: An End and a Beginning*, 30 NACLA REP. ON THE AM. 6, 6 (1997).

22. After surveying the literature, the *Latin American Weekly Report* concluded that the violence in Guatemala generated the largest number of “extra-judicial executions and ‘disappearances’ anywhere in Latin America by all accounts.” *Counting the Toll of State Terrorism*, LATIN AM. WKLY REP., Jun. 8, 1995, at 249.

23. The agro-export model has expanded and diversified in phases—from an almost exclusive focus on coffee, to include bananas, then cotton, sugar, cardamom, and cattle-ranching, and, most recently, nontraditional export crops including vegetables, fruits, seeds, and flowers. Between 1956 and 1980, the total land area devoted to cotton increased by 2,100 percent, to sugar by 400 percent, and to coffee by 56 percent; from 1960 to 1978, grazing lands for cattle expanded by 21 times. See JAMES PAINTER, GUATEMALA: FALSE HOPE, FALSE FREEDOM 3 (1987); see also GUILLERMO PEDRONI & ALFONSO PORRES, POLÍTICAS AGRARIAS, PROGRAMAS DE ACCESO A LA TIERRA Y ESTRATEGIAS DE COMERCIALIZACIÓN CAMPESINA 13–14 (1991). Most of the funding for government loans to support export vegetables and fruits has been provided by the World Bank, the Inter-American Bank, and USAID. See LORI ANN THRUPP, BITTERSWEET HARVEST FOR GLOBAL SUPERMARKETS 3, 44–45, 58 (1995). The expansion of snow peas and broccoli has been particularly dramatic. Snow pea production, for instance, rose by 17 times from 1983 to 1991, to a total of 24.6 million pounds. By 1991, Guatemala produced 80 percent of snow peas exported to the U.S. from Mexico and Central America. See *id.* at 44–45; see also Calogero Carletto et al., *Sustainability in the Diffusion of Innovations: Smallholder Nontraditional Agro-Exports in Guatemala*, 47 ECON. & CULTURAL CHANGE 345, pt. I (1999).

24. Agro-export production in Guatemala originates in colonial history. Since 1519, Spanish plantations were established by evicting indigenous communities and requiring Indian labor for the cultivation of cacao, indigo, and cochineal. Under the post-colonial Liberal regime of General Justo Rufino Barrios, beginning in 1871, the agro-export economy was more effectively integrated into the global economy by forcibly expanding private land ownership and increasing coffee exports to meet booming demand on the international market. See PEDRONI & PORRES, *supra* note 23, at 17–18, 41; JIM HANDY, GIFT OF THE DEVIL 21–23 (1984).

According to Susan Berger, “Contrary to general belief, the Guatemalan state between 1931 and 1991 was a relatively autonomous decisionmaker, and it adopted an aggressive interventionist stance in directing agrarian development.” SUSAN A. BERGER,

credit and technical assistance exclusively to large landowners.²⁵ As a result, the agro-export model has generated a skewed distribution of land, with a small number of Guatemalan and foreign investors controlling sprawling plantations while the great majority of rural people struggle to survive on small plots of marginal land, or without any land at all.²⁶ The concentration of land ownership in Guatemala is among the highest in the hemisphere,²⁷ and the country's economy remains heavily biased toward agro-export production.²⁸ At the close of 1994, U.N. human rights expert Mónica Pinto reported that the inequitable distribution of land "becomes more acute every day and is not included on either official or political agendas."²⁹ This highly inequitable pattern of land ownership is the "most important cause" of underdevelopment in the Central American region, according to economic historian John Weeks.³⁰

POLITICAL AND AGRARIAN DEVELOPMENT IN GUATEMALA 21 (1992). Another commentator adds that "[t]he establishment and development of the coffee trade would not have been possible without strong state support." VICTOR BULMER-THOMAS, *THE POLITICAL ECONOMY OF CENTRAL AMERICA SINCE 1920*, at 13 (1988).

25. Ninety percent of agricultural credit is absorbed exclusively by large landowners and agro-exporters for cultivation of coffee, cotton, sugar, and cardamon. The northwestern highland region, where 80 percent of the population is indigenous and engages in subsistence farming, receives only 4 percent of agricultural credit. See U.N. VERIFICATION MISSION FOR GUATEMALA, *LA PROBLEMÁTICA DE LA TIERRA EN GUATEMALA 2* (1995) [hereinafter MINUGUA].

26. Over the centuries, Mayan communities were pushed progressively out of the fertile lowlands of the Pacific coast, and eventually from large areas of the highlands themselves. Deprived of their traditional lands and economic base, many Mayans were forced to provide cheap seasonal labor for the plantations. See, e.g., JOHN WEEKS, *THE ECONOMIES OF CENTRAL AMERICA* 111–14 (1985); STEVEN E. SANDERSON, *THE POLITICS OF TRADE IN LATIN AMERICAN DEVELOPMENT* 76–77 (1992); RICHARD WILSON, *MAYAN RESURGENCE IN GUATEMALA* 36 (1995).

27. According to the last official census, taken in 1979, 2 percent of landowners possess 65 percent of the arable land, while 88 percent possess only 16 percent of the land. More specifically, 78 percent of farmers are restricted to 10.5 percent of the country's cultivable land, with an average of 1.05 hectares per family. At the same time, 1,362 plantations—controlled by 0.25 percent of property owners—occupy 34.5 percent of arable land, and average 1,056 hectares in size. See R. HOUGH ET AL., *LAND AND LABOUR IN GUATEMALA: AN ASSESSMENT* 1–2, 7 (1982); MINUGUA, *supra* note 25, at 1–2. As MINUGUA affirms, conditions of land ownership have not changed significantly since 1979. See *id.* at 1.

28. The agricultural sector currently accounts for 25 percent of the country's GDP, roughly 60 percent of the labor force, and 70 percent of exports. Coffee, sugar and bananas alone account for nearly half of total exports. See U.S. DEP'T OF COM., *COUNTRY COM. GUIDE FOR GUATEMALA* 7 (1999) [hereinafter *GUATE. COM. GUIDE*], available in *STAT-USA*, Nat'l Trade Data Bank, Country Com. Guides; Gustavo Palma Murga, *El Acuerdo Socioeconómico y Situación Agraria y la Problemática de la Tierra en Guatemala*, in *GUATEMALA 1983–1997*, *supra* note 18, at 73–75; *Fresh Del Monte Produce Inc.*, N.Y. TIMES, Nov. 7, 1998, at C3.

29. *Assistance to Guatemala in the Field of Human Rights, Report by the Independent Expert, Mrs. Mónica Pinto, on the Situation of Human Rights in Guatemala*, U.N. Commission on Hum. Rts., 51st Sess., at 38, U.N. Doc. E/CN.4/1995/15 (1994) [hereinafter *Pinto Report*].

30. See WEEKS, *supra* note 26, at 4.

11

Land shortage,³¹ scant work for low wages,³² the marginalization of small farmers and traditional agricultural systems,³³ and severe poverty for most of the rural population³⁴ characterizes the social underbelly of agro-export production in Guatemala and the context in which the war was fought and the peace accords negotiated. In total, about seventy percent of the Mayan population has no workable land.³⁵ Those who are able to farm possess insufficient plots: roughly eighty-eight percent of farms in the country are considered too small to provide for the needs of a family.³⁶ Crowded into the highland regions by agro-exports in the coastal lowlands and Northern Transversal,³⁷ subsistence

31. Land shortages in the Ixil region of Quiche, for example, have, on average, left families with about half of what they need to support themselves from the land. See DAVID STOLL, *BETWEEN TWO ARMIES IN THE IXIL TOWNS OF GUATEMALA* 247 (1993). See also WILSON, *supra* note 26, at 43.

32. Land shortage and poverty in the highlands drive campesinos to seek work on the plantations on a seasonal basis. In 1984, for example, roughly 650,000 Mayan campesinos made the annual migration from the highlands to work on the coastal plantations. The size and poverty of the rural population keeps wages abysmally low and dilutes pressure to improve the hazardous working conditions on the plantations. Also, rural unemployment has risen in recent years because of falling labor demand on the increasingly mechanized plantations, the displacement of small farmers by cattle farming, and the shift to nontraditional agricultural products that require less labor. See, e.g., WEARNE & CALVERT, *supra* note 15, at 19; PEDRONI & PORRES, *supra* note 23, at 15; ROSALINDA HERNÁNDEZ ALARCÓN, *LA TIERRA EN LOS ACUERDOS DE PAZ: RESUMEN DE LA RESPUESTA GUBERNAMENTAL* 4 (1998); PALENCIA PRADO & HOLIDAY, *supra* note 12, at 11–12.

33. Small farmers suffer from disadvantages other than lack of physical access to land, such as the absence of a simple, low cost system for land registration and lack of access to technical support and credit. In 1993, for example, 16 percent of credit from the banking system went to finance production of basic grains, while 41 percent went to traditional agro-exports. The most disadvantaged small holders are indigenous women, who do not have legal protection for land ownership and access to credit. See Palma Murga, *supra* note 28, at 75; HERNÁNDEZ ALARCÓN, *supra* note 32, at 4.

The primary alternative to agro-export production is the cultivation of indigenous crops for subsistence or small-scale exchange in local markets. Agricultural production in the highlands, in particular, continues to revolve around the traditional Mayan *milpa* system, which combines cultivation of maize and beans, sometimes complemented by chile, squash and vegetables. See PEDRONI & PORRES, *supra* note 23, at 12. Speaking generally, the traditional *milpa* system has been practiced in an ecologically sustainable way for millenia, and has provided “social security” for local communities. It is presently confronted with a range of social, economic and ecological pressures, however. See Peter Utting, *Deforestation in Central America: Historical and Contemporary Dynamics*, in *SUSTAINABLE AGRICULTURE IN CENTRAL AMERICA* 17 (Jan P. de Groot & Rued Ruben eds., 1997).

34. In 1994, 72 percent of the rural population lived in conditions of “extreme poverty,” without the basic essentials necessary for life, struggling to get by on a daily per capita income of less than 20 cents. See *Pinto Report*, *supra* note 29, at 18, ¶ 66 (citing estimates by the Economic Commission for Latin America (ECLA)).

35. See *id.* at 38.

36. See FRANCIS E. JOHNSTON & SETHA M. LOW, *CHILDREN OF THE URBAN POOR: THE SOCIO-CULTURAL ENVIRONMENT OF GROWTH, DEVELOPMENT AND MALNUTRITION IN GUATEMALA CITY* 8 (1995).

37. Guatemala can be divided into four topographic regions: the Pacific coastal lowlands, the highlands, the Northern Transversal Strip, and the Petén. See BERGER, *supra* note 24, at 6. The Mayan population is concentrated in the northwest highlands, with the population of the highland departments ranging from 80 to 95 percent

farmers are commonly forced to cultivate the most marginal of lands,³⁸ often extending their cornfields far up the steep sides of hills and volcanoes. This squeezing out of small farmers by agro-exports has in turn undermined local food security;³⁹ it has also contributed to processes of deforestation⁴⁰ and soil erosion,⁴¹ thus aggravating the related social problems of land shortage and rural poverty. Yet large

indigenous. See PRADO & HOLIDAY, *supra* note 12, at 53. Seven of the nine highland departments have the lowest levels of human development in Guatemala. See U.N. DEVELOPMENT PROGRAM, GUATEMALA: LOS CONTRASTES DEL DESARROLLO HUMANO 15 (1998) [hereinafter UNDP].

38. The most overburdened lands are in the highlands, where the indigenous population is concentrated. More and more people in the region have had to rely on increasingly less land, leading many to clear forests and cultivate soils that are highly susceptible to erosion. In the Ixil Mayan region of Quiche, for instance, only 40 percent of the land is suitable for cultivation, and the majority for only certain crops, according to a government survey conducted in the 1980s; due to land shortages, however, most of the land "had already been deforested for growing maize, leaving behind steeply pitched fields and brush." STOLL, *supra* note 31, at 246. According to 1992 statistics, of eight departments in the country where land use exceeded the relatively high level of 65 percent, four were in the highlands. See UNDP, *supra* note 37, at 224; see also Utting, *supra* note 33, at 15–17.

39. See BERGER, *supra* note 24, at 130 ("The land crisis not only presented a problem of subsistence for the Guatemalan peasantry, it also created a national shortage of grains for domestic consumption."). From 1950 to 1979, the land area per capita dedicated to basic foods fell by more than half, while agro-exports expanded. See TOM BARRY, ROOTS OF REBELLION 7 (1987), citing FAO, FOOD SECURITY IN LATIN AMERICA AND THE CARIBBEAN (1984). As early as 1955, the government was forced to import large quantities of corn to make up for national shortfalls. See BERGER, *supra* note 24, at 8, 89. Since the 1970s, production of crops for domestic consumption has grown by only 2.5 percent, less than the average rate of population growth of 3 percent. See PEDRONI & PORRES, *supra* note 23, at 11, 13; BERGER, *supra* note 24, at 87–89. Between the early 1980s and early 1990s, imports of "food aid" rose by 15 times, while exports of basic cereals more than doubled. See WORLD RESOURCES INST. ET AL., WORLD RESOURCES 1996–97, at 245 tbl.10.4 (1996). Between 1974 and 1994, moreover, the quantity of grains fed to livestock as a percentage of total grain consumption rose from 7 to 25 percent. *Id.* at 243 tbl.10.4. Mayan small farmers, increasingly squeezed off their land by larger agro-interests, produce most of Guatemala's basic grains for domestic consumption, including 60 percent of corn, 42 percent of beans, and 31 percent of rice. See PRADO & HOLIDAY, *supra* note 12, at 53.

40. The country's forest cover is estimated to have fallen from 65 to 34 percent in the last four decades, and the rate of deforestation has apparently been rising; approximately 90 percent of deforestation is attributed to the colonization of new lands by land-hungry campesinos. See UNDP, *supra* note 37, at 103 & n.25. In the highlands, more than 100 communal forests that have been managed and protected by local communities for centuries are under intense pressure. Land-related factors that threaten these forests include over-exploitation, land disputes with neighboring landowners, ambiguity in the definition of property boundaries, lack of community rules and sanctions to guide communal use, lack of land title registration, invasions, and illicit extractions. See Silvel Elías Gramajo, Tenencia y Manejo de los Recursos Naturales en las Tierras Comunales del Altiplano Guatemalteco [Ownership and Management of Natural Resources in the Communal Lands of the Guatemalan Highlands], Paper delivered at the 19th Int'l Congress of the Latin Am. Studs. Ass'n, Sept. 1995, at 6–7 (on file with *The Yale Human Rights and Development Law Journal*).

41. Deforestation has, in turn, led to soil erosion: by 1992, 85 percent of the entire country had experienced some erosion, and 10 percent was in an advanced state of erosion. See UNDP, *supra* note 37, at 104.

areas of arable land continue to lie fallow or underused on the plantations and cattle ranches, while, in many parts of the country, campesino families subsist on a diet of corn tortillas and salt.⁴²

12

Such gross inequality in access to, and ownership of, fertile lands has been at the heart of social conflict in Guatemala for centuries, and remains so today.⁴³ The most significant attempts to address this conflict occurred under the reformist governments of José Arévalo and Jacobo Arbenz Guzmán in the decade from 1944 to 1954, popularly known as the “Ten Years of Spring.”⁴⁴ In 1952, Arbenz passed an agrarian reform that redistributed underused lands from large plantations to landless campesinos.⁴⁵ Such reform, though moderate, invoked the wrath of a number of large landowners and investors in Guatemala, including the U.S.-owned United Fruit Company, the largest landowner in the country at the time, leading in large part to Arbenz’s overthrow in a 1954 U.S.-backed military coup.⁴⁶ The newly installed government of General Carlos Castillo Armas quickly reversed the agrarian reform and brutally silenced political opposition,⁴⁷ giving rise to the Guatemalan guerrilla resistance and ushering in decades of fluctuating waves of popular opposition and repression by the increasingly militarized state.⁴⁸ Land reform has been a central demand

42. See H. JEFFREY LEONARD, *NATURAL RESOURCES & ECONOMIC DEVELOPMENT IN CENTRAL AMERICA* 116 (1987). The departments with the highest proportion of underused land are located in the agro-export zones along the Pacific coast and in the southeast: Jalapa, Retalhuleu, Suchitepéquez, Escuintla, and Izabal. See UNDP, *supra* note 37, at 224.

43. In 1995, for example, the U.N. mission for Guatemala (MINUGUA) reported that the land is “an essential factor, if not the most relevant, in the Guatemalan political, economic, social and cultural state of affairs” and that “a fair and economically productive distribution of land might be an indispensable factor for the avoidance of popular disorder and discontent” MINUGUA, *supra* note 25, at 1 (author’s translation). With greater flourish, the National Coalition of Campesino Organizations declared in July 1998 that “the unjust distribution of land is the center of all the conflicts that our country has experienced and a limitation for the development of the country” Coordinadora Nacional de Organizaciones Campesinas, Documento Final y Resoluciones del II Congreso Nacional Campesino 5 (1998) (on file with *The Yale Human Rights and Development Law Journal*) (author’s translation).

44. See generally SUSANNE JONAS, *THE BATTLE FOR GUATEMALA* 26–27 (1991); HANDY, *supra* note 24, at 149–64; JIM HANDY, *REVOLUTION IN THE COUNTRYSIDE* 86–100 (1994).

45. A total 386,901 acres (16.3 percent) of arable land was expropriated from the United Fruit Company, at a total compensatory payment in agrarian reform bonds of \$8,304,732. The land was redistributed to 137, 437 families. Land expropriated included uncultivated land, land not cultivated directly by or for the owner, land rented in any form, land needed for rural settlements, certain municipal land, and land with water sources not being used for irrigation, industrial, or cultivation purposes. Land was compensated for with agrarian bonds, based on the reported tax value of the property. See BERGER, *supra* note 24, at 65, 70–71.

46. See Armon, *supra* note 18, at 23–24; Palma Murga, *supra* note 28, at 77–78.

47. See BERGER, *supra* note 24, at 88. See also WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY AND CIA INTERVENTIONS SINCE WORLD WAR II* 72–83 (1998). In the political crackdown following the coup, an estimated 2,000 political and union leaders were exiled and another 9,000 imprisoned, many of whom were tortured or killed. See BERGER, *supra* note 24, at 86.

48. In the 1970s, the military, as well as individual officers, established themselves as

of the insurgency since the overthrow of Arbenz and, accordingly, a major issue in the negotiation of the peace accords.

Land continues to be “the epicenter of the social crisis in Guatemala,”⁴⁹ with rural protest confronted time and again by violence and repression.⁵⁰ In recent years, campesino groups have responded to the inequitable land distribution and poverty in the interior of the country by carrying out occupations of plantations.⁵¹ Land disputes have continued to arise since the conclusion of the peace accords.⁵² Although rooted in wider conditions of land shortage and rural poverty, many conflicts are exacerbated by the insecurity of land tenure and the

13

large landowners in the mineral-rich northern provinces. The armed forces also set up commercial enterprises, industrial projects, broadcasting companies, and banking services. See BERGER, *supra* note 24, at 218–20, 157. Today, the military enjoys an economic power base through its “institutional control of financial, commercial, industrial, transport and communications enterprises. . . .” Liisa L. North, *Reflections on Democratization and Demilitarization in Central America*, 55 *STUD. IN POL. ECON.* 155, 162 (1998).

49. Alfredo Guerra-Borges, *La Cuestion Agraria, Cuestion Clave de la Crisis Social en Guatemala* [The Agrarian Issue, Key Issue of the Social Crisis in Guatemala], Paper presented to seminar at National Autonomous University of Mexico, Nov. 14–17, 1983, Mexico City (on file with *The Yale Human Rights and Development Law Journal*).

50. Popular protests over land distribution are consistently met with, and follow, state violence. See, e.g., INT’L WORK GROUP ON INDIGENOUS AFF., *GUATEMALA 1978: THE MASSACRE AT PANZOS 8* (1978) (discussing murder of Mayan farmers protesting evictions by local landowners); PEDRONI & PORRES *supra* note 23, at 20 (discussing march of 15,000 farmers and landless campesinos to capital in 1986 to protest land shortages, shortly after worst years of repression). According to Berger, by 1988 “the popular movement” in the countryside “had been radicalized” and “state terror had increased.” That same year, in its famous declaration entitled *El Clamor por la Tierra* [*The Clamor for the Land*], the Guatemalan Episcopal Conference announced its support for “those campesino and indigenous organizations that struggle, for just and legitimate causes, to conserve or reacquire their lands.” BERGER, *supra* note 24, at 200.

51. See UNDP, *supra* note 37, at 232. Landowners have commonly responded to these actions by forcibly dislodging campesino groups or by assassinating their leaders, often with explicit government backing. According to the Washington Office on Latin America, land conflicts appear to have worsened with the government policy of evicting land occupiers. See HERNÁNDEZ ALARCÓN, *supra* note 32, at 25; see also Dennis Moore, *The Case of El Sauce: Land Conflicts Persist After War’s End*, REP. ON GUATEMALA, Summer 1998, at 8–9; James Black, *Scorched Earth In A Time of Peace*, 32 *NACLA REP. ON THE AM.* 11 (1998).

52. See, e.g., VÍCTOR ALFREDO LEÓN GEMMELL, ET AL., *OEA/PROPAZ, LAS RELACIONES INTERSECTORIALES EN LA CONFLICTIVIDAD SOBRE LA TIERRA EN GUATEMALA 3* (1997) (noting increase in land conflicts as political spaces have opened with signing of peace accords). A special Presidential commission created under the peace accords to resolve land conflicts received 178 submissions on specific conflicts during its first 8 months of operation (June 1997–Feb. 1998). Of the reported conflicts, 74 percent related to demands for land, disputes over land rights, or occupations of lands, and the rest dealt with conflicts over usurped lands or border disputes among municipalities and communities. The vast majority of reported conflicts were located in the highlands. See HERNÁNDEZ ALARCÓN, *supra* note 32, at 47–48.

In some cases, land that was usurped by military officers and large landowners in the 1970s and 1980s has been reclaimed by its former campesino and community owners. The Government handed over large areas of land to military officers and other large landowners from 1974 to 1985; and, as late as 1988, small farmers were still being dislocated from properties that their families had worked on for generations. See BERGER, *supra* note 24, at 19.

absence of a comprehensive land registry.⁵³ Speaking generally, the country lacks effective legal mechanisms to resolve conflicting claims to land and, after thirty-six years of violence, the political culture tends toward confrontation rather than compromise.⁵⁴

B. *The Peace Accords*

14 In the face of this historical conflict over land, Guatemala's peace accords follow the path of moderation.⁵⁵ Although they do not contemplate a wide-ranging land redistribution, the Government makes significant commitments in the accords to (1) facilitate access to land and encourage the productive use of land, (2) resolve land conflicts and provide security of land tenure, and (3) promote indigenous land rights generally. As such, the implementation of the accords, and the achievement of greater democratic accountability, will depend to a large extent on the degree to which these commitments on agrarian issues are transformed into meaningful reforms that address conditions of land shortage and rural poverty. The fate of the commitments on land, in a very real way, could determine the consolidation of peace in Guatemala.

15 The two most important accords dealing with agrarian reform and indigenous land rights are the *Socio-Economic Accord* and the *Indigenous Accord*.⁵⁶ Both accords were concluded only after long and difficult negotiations toward a compromise on land. This was especially true in the case of the *Socio-Economic Accord*, which was concluded, following more than a year of negotiations, only after the removal of sections that were unacceptable to the private sector.⁵⁷ The accord was roundly criticized by popular organizations for having given away too much to the other side.⁵⁸ In the case of the *Indigenous Accord* the compromise reached reflects, in part, the moderated position taken by

53. UNIDAD PARA LA PROMOCIÓN DE LA DEMOCRACIA, OAS, DIAGNÓSTICO DE CONFLICTIVIDAD 10–11 (1996). This preliminary OAS study identifies land as the primary source of conflict in the country, manifested in legal uncertainty about possession, the post-war return of refugees and displaced persons, border disputes involving communities and municipalities, and peasant occupations of plantations. See *id.* at 8–19; see also MINUGUA, *supra* note 25, at 8; HUM. RTS. WATCH/AM., GUATEMALA: RETURN TO VIOLENCE 28–30 (1996).

54. Palma Murga, *supra* note 28, at 78 n.8.

55. A program of more fundamental reform would entail state-directed redistribution of land, taxation of land to encourage its productive use, and support for basic services in rural areas, including improved labor conditions. See HERNÁNDEZ ALARCÓN, *supra* note 32, at 63–67. In the face of continuing resistance by traditional elites, options for this type of fundamental reform “are excluded as alternative policies even though, in another context, they would demand a great deal of discussion.” PEDRONI & PORRES, *supra* note 23, at 42 (author’s translation).

56. See Indigenous Accord, *supra* note 7; Socio-Economic Accord, *supra* note 8.

57. See David Holiday, *Guatemala’s Long Road to Peace*, CURRENT HIST., Feb. 1997, at 71.

58. See TAYLOR, *supra* note 11, at 57.

the Assembly for Civil Society (ASC) during the peace negotiations. During the negotiations, the ASC pushed for the recognition of the indigenous right "to possess, use and administer the lands inhabited by the Mayan linguistic communities and those they acquire in the future in accordance with international law," but decided to exclude positions that were perceived as more radical.⁵⁹ Given the degree of participation and compromise that went into the negotiation of both accords, the commitments on land represent key symbols of the aspirations for democratic accountability, peace, and development in Guatemala.

Under the *Socio-Economic Accord*, the Guatemalan Government makes various commitments to carry out policies designed to facilitate access to land, encourage the productive use of land, resolve land conflicts, and improve security of land tenure.⁶⁰ These include commitments regarding a land trust fund to benefit landless and small farmers,⁶¹ a land tax designed to encourage productive use of land,⁶² a comprehensive land registry,⁶³ the resolution of land conflicts,⁶⁴ the reinstatement of usurped land or compensation of their former owners,⁶⁵ recognition of communal land ownership,⁶⁶ and potential redistribution of underused lands under Article 40 of the Constitution.⁶⁷

Under the *Indigenous Accord*, the Government recognizes "the special importance which their relationship to the land has for the indigenous communities" and commits to undertake broad measures of reform "in order to strengthen the exercise of their collective rights to the land and its natural resources."⁶⁸ In particular, the Government makes a range of commitments designed to promote indigenous land rights, including commitments concerning indigenous access to traditional lands,⁶⁹ indigenous participation in decisionmaking regarding natural resources,⁷⁰ indigenous rights to compensation for damage caused by resource development projects,⁷¹ the elimination of

59. The ASC proposal was essentially based on the position put forward by the Mayan sector of the ASC, with one important exception related to land: the Mayan demand for restitution of expropriated communal lands was excluded from the ASC proposal as too radical. See PALENCIA PRADO & HOLIDAY, *supra* note 12, at 63–64.

60. See HERNÁNDEZ ALARCÓN, *supra* note 32, at 11; Leopoldo Sandoval Villeda, *Tenencia de la Tierra, Conflictos Agrarios y Acuerdos de Paz [Land Ownership, Agrarian Conflicts, and the Peace Accords]*, 7 FLACSO GUATE. DIÁLOGO 1, 6-10 (1997).

61. See Socio-Economic Accord, *supra* note 8, para. 34.

62. See *id.* para. 42.

63. See *id.* paras. 37(a), 38.

64. See *id.* paras. 37(f), 37(h).

65. See *id.* para. 37(f)(ii).

66. See *id.* paras. 37(d), 37(e).

67. See *id.* para. 34(c)(vi). Article 40 provides: "In concrete cases, private property may be expropriated for reasons of collective utility, social benefit or public interest, duly proven . . ." GUATE. CONST. tit. II, ch. 1, art. 40 (author's translation).

68. Indigenous Accord, *supra* note 7, pt. IV(F)(4).

69. See *id.* pt. IV(F)(6)(a).

70. See *id.* pts. IV(F)(6)(b), IV(E)(3).

71. See *id.* pt. IV(F)(6)(c).

discrimination against indigenous women with respect to land,⁷² and the settlement of indigenous land claims.⁷³

In summary, based on both accords, the Government commits to:⁷⁴

- Facilitate access to land and encourage the productive use of land by means of:
 - i. A land trust fund;
 - ii. Potential redistribution of land under Article 40 of the Constitution;
 - iii. A land tax.
- Resolve land conflicts and provide security of land tenure by means of:
 - i. A comprehensive land registry;
 - ii. Recognition of communal land ownership;
 - iii. Reinstatement of usurped lands, or compensation of their former owners.
- Promote indigenous land rights, including
 - i. Indigenous access to traditional lands for subsistence and spiritual activities;
 - ii. Indigenous rights regarding natural resources on their traditional lands;
 - iii. The elimination of discrimination against indigenous women;
 - iv. Settlement of indigenous land claims.

These commitments are extremely significant in the Guatemalan context given the close connection between land issues and conditions of rural poverty and social conflict. As a whole, the accords point to key areas for reform, achievable through the election of more broadly representative governments, and have made the previously taboo issue of land reform a part of the landscape of public debate and popular organizing. As such, they are powerful symbols of democracy.⁷⁵ In terms of implementation to date, the United Nations has reported tentative progress⁷⁶ as well as significant setbacks.⁷⁷ Although there are no

72. *See id.* pt. IV(F)(9)(g).

73. *See id.* pt. IV(F)(7).

74. For further discussion, see *infra* Part III.

75. David Holiday comments:

The “war” has not been the defining element of everyday life in Guatemala for at least the last 10 years, and the average Guatemalan does not see that “peace” will bring any radical transformation. Yet it is precisely this sense of alienation by ordinary citizens from the political process that the peace negotiations seek to address.

Holiday, *supra* note 57, at 68.

76. In terms of the successes with respect to land and the agrarian situation, the U.N. has mentioned the progress achieved in negotiations toward a land trust fund, the

guarantees that future Guatemalan governments will move forward with the State's commitments,⁷⁸ the accords have at least laid a foundation for meaningful changes to occur within a broader, long-term political process.⁷⁹ David Holiday suggests that, at best, the peace accords have given Guatemala "its last viable chance to create a national agenda for development and democratization."⁸⁰ It is this sentiment of hope that leads us to the question of how wider processes like the FTAA might impact on the prospects for democratic reform.

creation of the *Institutional Commission for the Development and Strengthening of Land Ownership* to coordinate government institutions involved in agricultural issues, and the increased participation of nongovernmental organizations. The U.N. has also given special tribute:

both to the State authorities . . . and to the indigenous and peasant organizations which are responsible for the success of several unprecedented experiments with consultation. This willingness to put one's faith in negotiation and conciliation on such sensitive issues as inter-ethnic relations and access to land reflects a desire for change which, we hope, will grow stronger and extend to other areas . . .

Other achievements have been highlighted of late in the areas of fiscal policy, human rights, and the status of women. See *The Situation in Central America—Report of the Secretary General*, U.N. GAOR, 53rd Sess., at 9–10, 16, U.N. Doc A/53/421 (1998); *The Situation in Central America—Report of the Secretary General*, U.N. GAOR, 54th Sess., at 8–9, U.N. Doc A/54/311 (1999).

77. Two major reforms have been derailed following opposition by elite groups. First, a package of constitutional reforms incorporating elements of the peace accords was approved by Congress, but was rejected in a national referendum in May, 1999, in the face of a high abstention rate (83 percent). Second, proposals for a land tax, as mandated by the *Socio-Economic Accord*, were defeated in the face of widespread rural opposition, instigated by large landowners, during early 1998. See HERNÁNDEZ ALARCÓN, *supra* note 32, at 41–44. Most fundamentally, "[s]ince the signing of the Peace Accords . . . there has been little change in national patterns of land tenure." *United Nations Verification Mission in Guatemala (MINUGUA)—Report of the Secretary-General*, U.N. GAOR, 54th Sess., at 3, U.N. Doc. A/54/355 (1999).

78. Indeed, implementation of the peace accords faces resistance from powerful social groups within Guatemala. For an outline of the agricultural, commercial, financial, and industrial elite interests lined up against fundamental reform, see TAYLOR, *supra* note 11, at 64–68; PALENCIA PRADO & HOLIDAY, *supra* note 12, at 28–32. High-level military and government officials, for instance, have been linked to the assassination of a leading advocate of human rights and the peace accords, Bishop Juan Gerardi. See *The Americas: Another Kind of Reconstruction*, THE ECONOMIST, Nov. 14, 1998, at 36–37.

The election of Alfonso Portillo as President of Guatemala in January 2000 may also not bode well for the mandate of the peace accords, at least in the area of land. Portillo is leader of the Guatemalan Republican Front (FRG), founded by the infamous General Efraín Ríos Montt, who held power in the early 1980s, overseeing some of the worst violence against indigenous highland communities, and who now sits in Congress. The FRG has close ties to landowners and it opposed the land tax in 1998. See *The Americas: Portillo's progress*, THE ECONOMIST, Jan. 22, 2000, at 38–39.

79. See, e.g., Palma Murga, *supra* note 28, at 73 ("The political opening now is real, despite many obstacles . . .") (author's translation); Jonas, *supra* note 21, at 10 ("[O]n the positive side of the balance sheet, the peace process and the Accords have laid the basis for completing the country's long-interrupted democratic revolution.").

80. Holiday, *supra* note 57, at 74.

II. FREE TRADE AREA OF THE AMERICAS

²⁰ In December 1994, thirty-four countries, including Guatemala,⁸¹ launched negotiations toward a Free Trade Area of the Americas (FTAA) at the first Summit of the Americas in Miami.⁸² To date, investment rules have been an integral part of the FTAA proposals.⁸³ The FTAA governments formed a working group to study the topic in 1994,⁸⁴ and created a negotiating group on investment, which held its fourth meeting in August 1999. Their work continues toward concluding a hemispheric agreement on investment.

A. *The "Push" for Stronger Investor Protection*

1. *Context for the "push"*

²¹ The FTAA investment negotiations are part of a wider effort to establish higher standards of protection for investors at the

81. Along with the other Central American Governments, Guatemala has maintained its commitments to establishing an FTAA by 2005 and participates in regular meetings of the nine FTAA negotiating groups. See *The Situation in Central America: Report of the Secretary General*, U.N. GAOR, 54th Sess., at 5, U.N. Doc A/54/311 (1999).

82. The FTAA governments have committed to creating an FTAA by 2005 and have instructed their FTAA negotiating groups, made up of government trade negotiators, to prepare draft texts of diverse parts of the agreement by January 2001. Since 1994, five trade ministerial meetings have been held, with a sixth meeting scheduled for April 2001 in Argentina. Formal FTAA negotiations have been taking place in Miami since mid-1998. In total, there are nine negotiating groups, covering the following areas: market access; investment; services; government procurement; dispute resolution; agriculture; intellectual property rights; subsidies, antidumping and countervailing duties; and competition policy. See *Second Summit of the Americas: Santiago Declaration and Plan of Action*, Apr. 19, 1998, 37 I.L.M. 947, 951 [hereinafter *Santiago Declaration*]; see also *Miami Declaration*, *supra* note 3, 34 I.L.M. at 811. For more information on each negotiating group, see FTAA, *Negotiating Groups* (visited Mar. 21, 2000) <http://www.ftaa-alca.org/ngroup_e.asp>.

83. According to the OAS Trade Unit, the prospect of an FTAA investment agreement is an opportunity to "put the Americas at the forefront of multilateral consensus-building," since the goal of a broad multilateral investment agreement has not yet been accomplished under the WTO. See Trade Unit, OAS, *Toward a Free Trade Area of the Americas* (visited Mar. 21, 2000) <<http://www.sice.oas.org/TUnit/tftr/index.asp>> [hereinafter OAS Trade Unit].

84. An FTAA working group on investment was formed at the first trade ministerial meeting in Denver, Colorado in June 1995. See *Summit of the Americas Trade Ministerial: Denver Ministerial Declaration*, Jun. 30, 1995, para. 5, available at <http://www.alca-ftaa.org/ministerials/denver_e.asp>. In March 1998, the national trade ministers of the FTAA governments declared their intent: "To establish a fair and transparent legal framework to promote investment through the creation of a stable and predictable environment that protects the investor, his investment and related flows, without creating obstacles to investments from outside the hemisphere." *Summit of the Americas Fourth Trade Ministerial: San José Ministerial Declaration*, Mar. 19, 1998, Annex II (Investment), available at <http://www.alca-ftaa.org/ministerials/costa_e.asp> [hereinafter *Fourth Trade Declaration*].

international level.⁸⁵ The push is driven by capital-exporting countries in general and by the United States, Japan, the United Kingdom, France, and Germany in particular.⁸⁶ The main purpose is not to establish standards of investor protection where none have existed before; rather, it is to strengthen and expand existing international standards. In this sense, the focus is on changing international investment rules in order to bolster the position of investors. From another perspective, the broad impact is to restrain the “degrees of freedom” available to governments in a range of policy areas that impact on international investment.⁸⁷

The push for higher standards of investor protection has occurred within the context of “transnationalization,”⁸⁸ characterized by diminished state regulation of foreign direct investment (FDI),⁸⁹ the

22

85. See, e.g., J.W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 661 (1990). The United States, in particular, has pursued higher standards via a series of BITs signed since the early 1980s. See C. VANGRASSTEK, U.N. CONF. ON TRADE & DEV., U.S. OBJECTIVES IN TRADE NEGOTIATIONS: IMPLICATIONS FOR DEVELOPING COUNTRIES 19–21 (1998).

The issue of compensation for state expropriation of assets, particularly those of foreign investors, has been an issue of conflict in international law since the 19th century, especially after the process of post-war decolonization and the struggles of newly independent countries to gain effective control over their natural resources. See generally STEPHEN GILL & DAVID LAW, *THE GLOBAL POLITICAL ECONOMY* 208 (1988) (discussing U.S. military intervention to overthrow governments that nationalized U.S. firms with inadequate compensation).

86. These are the primary capital-exporting countries. Developing countries may, however, also push hard for high standards in negotiating investment regimes at the regional level. See, e.g., U.N. CONF. ON TRADE & DEV., *WORLD INVESTMENT REPORT 1996*, at 163 (1996) [hereinafter UNCTAD].

87. See *id.*; see also U.N. CENTRE ON TRANSNAT'L CORPS., *GOVERNMENT POLICIES AND FOREIGN DIRECT INVESTMENT 1* (1991) [hereinafter UNCTC] (noting that, while most Governments welcome foreign direct investment, most also regulate it to varying degrees in order to protect against undesirable investment, reserve some industries for national investment, and maximize net benefits received). Government policies regarding foreign investment may reflect national priorities about the structure of the economy and the allocation of resources and decisionmaking among public and private actors. For instance, many countries have restricted foreign involvement in especially sensitive or important sectors, such as natural resources, energy, utilities, or banking, or have permitted investment only under certain conditions designed to improve domestic economic benefits. See UNCTAD, *supra* note 86, at 175.

88. Transnationalization as a historical process has involved rapid technological change, enhanced capital mobility, and the remapping of political regions. See Ricardo Grinspun & Maxwell A. Cameron, *The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms*, in *THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE* 17 (Ricardo Grinspun & Maxwell A. Cameron eds., 1993); see also GILL & LAW, *supra* note 85, at 146–55.

89. Prior to World War II, most international investment was portfolio investment, involving foreign ownership of assets in a country without foreign control of productive enterprises. With the rise of transnational corporations (TNCs) in the post-war era, however, FDI has become the dominant form of international investment. FDI is defined as:

an investment involving a long term relationship and reflecting a lasting interest and control of a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident

rise of transnational corporations (TNCs),⁹⁰ and the ideological preeminence of neoliberalism,⁹¹ or, the “Washington Consensus.”⁹² As such, the neoliberal “globalization project” aims to liberalize investment rules in order to support the trend toward the dismantling of government policies to regulate FDI, and the consequent unfettering of TNCs. In ideological terms, the push for higher standards has been framed as an effort to establish a stable, predictable and transparent framework for international investment, to reduce investor uncertainty, and to facilitate a more efficient allocation of capital across borders.⁹³

in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate). Foreign direct investment implies that the investor exerts a significant degree of influence on the management of the enterprise resident in the other economy.

UNCTAD, *supra* note 86, at 219. FDI is distinct because it entails foreign control over the location and management of assets within a country. Control may be exercised through direct ownership, or through decisions about the management and financing of operations, the use of technology, and so on. In the case of agro-export production, for instance, TNCs frequently control the financing, marketing, processing, and distribution of products while production remains in the hands of local growers. See GILL & LAW, *supra* note 85, at 146–47; UNCTAD, *supra* note 86, at 219; BARRY, *supra* note 39, at 29.

Governments, especially in developing countries, expanded their policies to regulate FDI during the 1970s. Since the 1980s, however, governments have dismantled many of these policies. See UNCTC, *supra* note 87, at 8; UNCTAD, *supra* note 86, at 133. This trend indicates that governments have adjusted “national policies and practices . . . to the exigencies of the world economy of international production.” ROBERT W. COX, *PRODUCTION, POWER, AND WORLD ORDER* 253 (1987).

Governments have also engaged in “policy competition” with each other to provide favorable conditions for investment by TNCs. See UNCTAD, *supra* note 86, at 163. This has prompted governments to provide more favorable corporate tax rates, tax holidays, direct subsidies, and other incentives “because of competition from other investment locations.” UNCTC, *supra* note 87, at 8–9. In this context, governments have also allowed TNCs to outgrow their national boundaries by lowering barriers to investment flows out of the country. See Andrew Jackson, *The MAI and Foreign Direct Investment, in DISMANTLING DEMOCRACY* 250 (Andrew Jackson & Mathew Sanger eds., 1998). According to Nunnenkamp, countries that balk at the pressure to provide more favorable conditions for foreign investors run the risk of being “de-linked” from a global economy that is run increasingly by TNCs. See Peter Nunnenkamp, *Foreign Direct Investment in Latin America in the Era of Globalized Production*, TRANSNAT'L CORP., Apr. 1997, at 51, 75.

90. The bulk of FDI is carried out by large TNCs. Since the mid-1980s, FDI has overtaken trade as the primary means of transnational business expansion by TNCs. See Gregory Albo & Chris Roberts, *The MAI and the World Economy, in DISMANTLING DEMOCRACY*, *supra* note 89, at 283. On reasons for TNCs preferring FDI to trade, see U.N. CENTRE ON TRANSNAT'L CORP., *THE PROCESS OF TRANSNATIONALIZATION AND TRANSNATIONAL MERGERS* 1 (1989).

91. Neoliberalism calls for greater reliance on market forces and private initiative and prescribes monetarist structural adjustment policies, the deregulation of market activity, and the privatization of state enterprises. See Grinspun & Cameron, *supra* note 88, at 21.

92. The neoliberal model is also referred to as the “Washington Consensus” because it has been promoted by institutions based in Washington D.C., such as the IMF. See Tamara Lothian, *The Democratized Market Economy In Latin America (And Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, 28 CORNELL INT'L L.J. 169, 175–79 (1995).

93. Thus, the purpose of the proposed MAI, according to one trade lawyer, was “to reduce or eliminate obstacles to foreign investment, open markets, eliminate discriminatory treatment (both before and after establishment), reduce ‘country risk’ and

Alternatively, perhaps, it may be regarded as a part of the effort by capital-exporting countries to support the global business strategies of large TNCs.⁹⁴

U.S. capital occupies a preeminent position in the Americas, and this forms an important part of the context for the FTAA.⁹⁵ Under an FTAA, higher legal standards of investor protection would presumably provide greater security and leverage for U.S.-based TNCs, which invest heavily in the region.⁹⁶ It is worth recalling that the U.S. has clashed with Latin American countries over investor protection in the past, and the U.S. Government has responded by exerting its economic and military might to protect the claims of American investors in

23

reallocate capital to its most productive uses." Joel W. Messing, *Towards a Multilateral Agreement on Investment*, TRANSNAT'L. CORP., Apr. 1997, at 123, 126. In the same vein, the FTAA governments have stated that an FTAA investment agreement is needed to establish "a fair and transparent legal framework" aiming "to promote investment through the creation of a stable and predictable environment that protects the investor, his investment and related flows." *Fourth Trade Declaration*, *supra* note 84.

94. Ganesan, former Commerce Secretary to the Government of India, states that the "main motive" of the dominant capital-exporting countries in pushing for higher standards "is the gaining and consolidation of market access opportunities for their business enterprises around the world." A.V. Ganesan, *Strategic Options Available to Developing Countries With Regard to a Multilateral Agreement on Investment*, 1998 UNCTAD iv, abstract available online at <<http://www.unctad.org/en/pub/a134-98.htm>>. Salacuse further comments that the push toward higher standards within bilateral investment treaties:

has been initiated and driven by Western, capital-exporting states. Their primary objective has been to create clear international legal rules and effective enforcement mechanisms to protect investment by their nationals in the territories of foreign states. The essence of this protection is to defend the investment and the investor from exercises of state power by host governments with respect to such matters as expropriation, treatment, transfer of currency abroad, and restrictions on operations.

Salacuse, *supra* note 85, at 661.

Meanwhile, industrialized countries have resisted proposals from developing countries for a binding international code of conduct for TNCs, while pushing for higher standards of investor protection. Thus, industrialized countries insisted that U.N. multilateral initiatives to establish standards for the conduct, behavior, and obligations of foreign investors be made nonbinding and voluntary. *See* Ganesan, *supra*, at 4.

It may be noted that the largest TNCs are based primarily in a small number of capital-exporting countries. Seventy-six of the world's largest 100 TNCs are based in just five countries: the U.S., Japan, United Kingdom, France and Germany. Ninety-eight of the largest 100 TNCs are based in just 13 industrialized countries. *See* UNCTAD, *WORLD INVESTMENT REPORT 1998*, at 36–39 (1998) [hereinafter UNCTAD REPORT].

95. U.S.-based TNCs currently account for about 40 percent of FDI in Latin America and the Caribbean. *See* UNCTAD REPORT, *supra* note 94, at 243–45. Indeed, the broad political origins of the FTAA have been tied, since the 1980s, to the U.S. interest in establishing a western hemispheric trade bloc in order to retrench its economic position in the face of challenges from Europe and Asia. *See* R. Grinspun & R. Kreklewich, *Consolidating Neoliberal Reforms: "Free Trade" as a Conditioning Framework*, 43 *STUD. IN POL. ECON.* 33, 46 (1994). *See generally* KENICHI OHMAE, *TRIAD POWER: THE COMING SHAPE OF GLOBAL COMPETITION* (1985).

96. Latin America was the destination for 19.6 percent of all U.S. FDI during 1996–98. *See* U.S. DEP'T OF COM., 79 *SURVEY OF CURRENT BUS.*, at D–14 tbl.G.2 (1999).

various episodes during the last century.⁹⁷ In legal terms, the conflict has played itself out in the divergent positions, exemplified by the Calvo Doctrine,⁹⁸ on the issue of how a foreign investor should be treated in the event of a state expropriation of its property.⁹⁹

2. *Definition of Stronger Protection*

24

The current push for stronger investor protection has generally aimed to get governments to adopt various policies regarding international investment for prescribed periods. Broadly speaking, these include the following:¹⁰⁰

97. According to commentators, “[i]nvestment disputes have been a perennial source of friction in U.S. relations with Latin American and Caribbean countries.” Craig VanGrasstek & G. Vega, *The North American Free Trade Agreement: A Regional Model?*, in *THE PREMISE AND THE PROMISE: FREE TRADE IN THE AMERICAS* 165 (Sylvia Saborio ed., 1992).

98. The Calvo Doctrine, which many Latin American governments have espoused as official policy, is named after the Argentinian jurist, C. Calvo, who first articulated it in *LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE* 118 (A. Rousseau ed., 1896). The main tenets of the doctrine are:

- (a) that, under international law, States are required to accord to aliens the same treatment as afforded to their own nationals under national law,
- (b) claims by aliens against the host State must be decided solely by the domestic courts of that State, and
- (c) diplomatic protection by the State of the investor’s nationality can be exercised only in cases of direct breach of international law and under restrictive conditions.

UNCTAD, *supra* note 86, at 133.

99. The historical U.S. position has been that state expropriations of foreign property are unlawful under international law unless they meet rigorous conditions, including the payment of “prompt, adequate and effective” compensation. Latin American countries, on the other hand, have asserted that foreign property is subject to the exclusive jurisdiction of the government of the host country, which may determine how compensation for an expropriation is to be assessed and paid. According to one commentator: “By adhering to the Calvo Doctrine, Latin American countries have been fighting against the use of force or pressure by other countries under the guise of diplomatic protection.” See UNCTAD, *supra* note 86, at 191; César Augusto Bunge & Diego César Bunge, *The San José de Costa Rica Pact and the Calvo Doctrine*, 16 *INTER-AM. L. REV.* 17, 32 (1984).

In this light, NAFTA was a significant breakthrough for the U.S. position, since both Canada and Mexico accepted what is essentially the U.S. standard of compensation under the agreement. Prior to NAFTA, both countries had resisted pressure to concede on the issue of sovereign authority over foreign investors and Mexico, in particular, had been a leading proponent of the Calvo Doctrine. The shift in orientation prompted Daniel Price, a key U.S. negotiator of Chapter 11, to call the NAFTA expropriation provisions “one of the truly significant provisions of the agreement.” See J. Raby, *The Investment Provisions of the Canada–United States Free Trade Agreement: A Canadian Perspective*, 84 *AM. J. INT’L L.* 394, 419 (1990); Tali Levy, Note, *NAFTA’s Provision for Compensation in the Event of Expropriation: A Reassessment of the “Prompt, Adequate and Effective” Standard*, 31 *STAN. J. INT’L L.* 423, 447 (1995); Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor–State Dispute Settlement*, 27 *INT’L LAW.* 727, 737 (1993).

100. The following is adopted from a summary provided in UNCTAD, *supra* note 86,

2000]

Guatemala's Peace Accords in a FTAA

133

- broadening the definitions of “investment”¹⁰¹ and “investor,”
- applying “disciplines” to a wider range of government policies,
- expanding notions of national treatment (by means of an effects test and a right of establishment, for example),
- prohibiting performance requirements imposed by governments,
- broadening definitions of expropriation and compensation,
- creating an enforceable investor-to-state dispute resolution mechanism,
- providing for “rollback” of exceptions to the agreement,
- providing for “standstill” regarding future government measures, and
- establishing a much longer “lock-in” period.

In essence, all of these elements of the push for higher standards of investor protection have the corresponding effect of expanding and deepening existing legal restraints on the ability of governments to regulate investors. As such, the higher standards may be contrasted with more conventional principles of international investment law in terms of the degree to which they constrain government policymaking authority. Below, I briefly describe each of the expanded investor standards, contrasting them with the more conventional principle they aspire to replace.

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i. *Effects Test*

The conventional trade principle of *national treatment* requires that a government treat foreign investors no less favorably than it treats

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at 162.

101. To illustrate, “investment” has been variably defined under conventional investment agreements to include such assets as movable and immovable property rights, equity in companies, claims to money and contractual rights, copyrights and industrial property rights, concessions, licenses, and similar rights. More recent agreements have expanded—or sought to expand—the definition, by including non-equity forms or contractual rights concerning the transfer of technology, intangible assets and such administrative rights as licenses and permits, or even portfolio investment. See UNCTAD, *supra* note 86, at 174. Some commentators have proposed expanding the notion of investment even further. See Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement on Investment?*, 31 J. MARSHALL L. REV. 1201, 1204 (1998).

domestic persons or companies.¹⁰² Government policies that favor domestic actors—by, for example, giving them exclusive benefits or preferred treatment—are said to be “discriminatory” against foreign investors, and may be attacked under conventional principles of international investment law. An *effects test* expands upon national treatment by requiring not only that a government not *purposely* exclude foreign investors from benefits conferred upon nationals, but that it also not implement any policy or measure that has any indirect *effects* on foreign investors that are not equally felt by nationals.¹⁰³ Thus, even a facially neutral policy that evinces no intent to confer any distinct benefit may be open to attack under the expanded investor standards if, because of circumstances unique to a given country or foreign investor, it disadvantages a foreign investor vis-à-vis domestic persons or companies.

ii. *Right of Establishment*¹⁰⁴

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International investment treaties have, in the past, tended to limit the application of national treatment to the post-establishment phase of an investment. That is, a foreign investor would be guaranteed non-discriminatory treatment only after it was allowed into the host country, in accordance with the country’s laws and regulations.¹⁰⁵ A *right of establishment* in effect applies national treatment to the entry and establishment phases of an investment. As such, it requires a government to allow foreign investors to enter its domestic market without restriction. This right would normally be subject to certain exceptions; in absolute terms, however, governments would be required to allow one hundred percent foreign access and ownership in every economic sector. Any barrier to free foreign access and ownership in the domestic economy would potentially be open to an investor attack.

iii. *Uniform National Treatment*

28

The principle of *uniform national treatment* expands conventional national treatment by requiring that foreign investors be treated uniformly by all regulatory entities within a nation’s borders. Thus, it would be a violation of national treatment for subnational governments (i.e. local, provincial, state, territorial) to provide varying standards of treatment within a country. In some cases, foreign investors might be entitled to the *best* subnational treatment available, no matter where in

102. See Thomas Singer & Paul Orbuch, W. Governors’ Ass’n, *Multilateral Agreement on Investment: Potential Effects on State & Local Government* pt. III(A)(2) (1997) (visited Mar. 21, 2000) <<http://www.westgov.org/wga/publicat/maiweb.htm>>.

103. See *id.*

104. The principle may also be referred to as “market access” or “freedom of entry.”

105. See Ganesan, *supra* note 94, at 17.

the country they operate.¹⁰⁶ This would largely constrain the policymaking options of local governments, permitting them to develop in only one direction: toward greater foreign investor protection.

iv. *Prohibition on Performance Requirements*

As sovereigns, governments often leverage their ability to deny entry to foreign investors in order to extract investment commitments for the benefit of local development needs. Heightened standards of investor protection, however, exclude this possibility. A prohibition on performance requirements, for example, prevents a government from requiring foreign investors to hire local employees, use local resources, transfer technology, develop local utilities and services, etc., as a condition of an investment or of eligibility for investment incentives.¹⁰⁷ This, in effect, makes domestic governments passive receivers, rather than active negotiators, of the externalities—both positive and negative—of foreign investor undertakings within their jurisdictions.

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v. *Expanded Notions of Expropriation and Compensation*

Under conventional notions of expropriation and compensation, foreign investors are protected from expropriation or nationalization of their assets by the host state. In the past, however, the principle has been limited by narrowing the definitions of “investment,” “expropriation,” and “compensation.”¹⁰⁸ Expanded notions of expropriation and compensation, by contrast, protect investors from government policies that are “tantamount to . . . expropriation.”¹⁰⁹ Although this language is unprecedented, it could require governments to compensate investors in circumstances where their policies merely have an indirect or unintended impact on an investor’s business, including its future profitability.¹¹⁰

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106. See Singer & Orbuch, *supra* note 102, pt. III(A)(2).

107. See *id.* pt. III(A)(5).

108. See UNCTAD, *supra* note 86, at 173–74, 191.

109. This definition is contained in NAFTA, *supra* note 9, art. 1110(1), 32 I.L.M. at 641. The draft MAI proposed to apply the principle to an expropriation or “any measure or measures having similar effect.” See Draft MAI, *supra* note 10, pt. IV, art. 2.1. According to one trade lawyer, the draft MAI’s provisions on expropriation “have broadened the types of activity that will be considered as expropriations by including the words and measures having equivalent effect. Any substantial interference with a property right is likely an activity in the nature of expropriation and almost certainly a measure tantamount to expropriation.” Barry Appleton, The MAI and Canada’s Health and Social Service System, Submission to the House of Commons Standing Committee on Health (Can.), para. 15 (Dec. 4, 1997) (on file with *The Yale Human Rights and Development Law Journal*).

110. The government obligation to pay compensation can also be expanded by widening the definition of investment to include intellectual property rights, portfolio investment, or “all tangible and intangible property.” The preliminary definition of investment proposed under the draft MAI is particularly broad:

vi. *Investor-to-State Dispute Resolution*

31 Heightened standards of investor protection also change the way investors may challenge government policies that act to their detriment. Under conventional mechanisms, known as state-to-state dispute settlement, an investor whose rights have been violated must appeal to its home government, which then has the option to pursue enforcement of the investor's rights with the host government by diplomatic or other means on the investor's behalf.¹¹¹ Heightened standards, by contrast, allow the foreign investor to claim compensation directly from the host government before an international arbitration panel. The investor-to-state dispute resolution greatly increases the ability of foreign investors to directly influence host governments by threatening suit for injunctive relief and substantial compensatory damages in the absence of the sovereign immunity protections normally ensured by domestic courts.¹¹²

vii. *Standstill and Rollback Provisions*

32 Standstill and rollback provisions also enhance the protections afforded foreign investors. A standstill provision freezes any general exceptions or country-specific reservations¹¹³ to the agreement, by prohibiting future government measures in the excepted area.¹¹⁴ A

2. Every investment means:

Every kind of asset owned or controlled, directly or indirectly, by an investor, including:

- (i) an enterprise . . . ;
- (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;
- (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;
- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to performance;
- (vi) intellectual property rights;
- (vii) rights conferred pursuant to law or contract such as concessions, licenses, authorizations, and permits;
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

Draft MAI, *supra* note 10, pt. II, art. 2.

111. See Price, *supra* note 99, at 731.

112. Singer and Orbuch comment that the draft MAI provisions on investor-to-state dispute settlement would "create rights that are not now available to foreign investors through American statutes or case law." Singer & Orbuch, *supra* note 102, pts. I, III(C)(1).

113. General exceptions are negotiated to remove broad areas of government lawmaking authority from the rules of an agreement for all country-members. Country-specific reservations are negotiated to remove more specific areas of government lawmaking authority from the rules of an agreement for a particular country-member. See *id.* pt. III(B)(1).

114. This has been proposed in the draft MAI. See DIRECTORATE FOR FIN., FISCAL &

rollback provision phases out exceptions or reservations to the agreement over a period of time.¹¹⁵

B. *Other Investment Agreements on Which an FTAA is Likely To Be Based*

1. *Bilateral Investment Treaties*

The FTAA represents only the latest manifestations of the push for higher standards at the international level.¹¹⁶ In fact, higher standards of investor protection have been negotiated in both bilateral and multilateral agreements on investment. Since the 1960s, governments have negotiated bilateral investment treaties (BITs) that apply conventional principles of investor protection based on a narrow definition of investment.¹¹⁷ The BIT negotiating pace has accelerated, especially during the past ten years, and the more recent BITs have tended to expand on earlier standards of investor protection.¹¹⁸ In fact, much of the legal language of BITs entered into by the U.S. since the early 1980s was used as a precedent for the NAFTA investment provisions.¹¹⁹

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2. *NAFTA*

The North American Free Trade Agreement (NAFTA)¹²⁰ is a flagship example of the push for higher standards of investor treatment and protection at the international level, and has served as a precedent

34

ENTERPRISE AFF., OECD, COMMENTARY TO THE MAI NEGOTIATING TEXT pt. IX, art. 2 (1998) [hereinafter MAI COMMENTARY]; see also Singer & Orbuch, *supra* note 102, pts. III(A)(5), III(B)(2); UNCTAD, *supra* note 86, at 194.

115. See MAI COMMENTARY, *supra* note 114, pt. IX. See also Singer & Orbuch, *supra* note 102, pts. III(A)(5), III(B)(2).

116. Capital-exporting countries have continued of late to attempt to negotiate a multilateral investment agreement under the auspices of the World Trade Organization. Most developing countries, on the other hand, are against elaborating investment rules at the WTO. See *Implementation Issues: The Rocky Road to Seattle*, BRIDGES BETWEEN TRADE & SUSTAINABLE DEV. (ICTSD), Oct–Nov. 1999, at 1, available at <http://www.ictsd.org/html/arct_sd.htm>.

117. Conventional BITs usually recognize traditional standards of investor protection such as national treatment and most-favored-nation treatment, often qualified by a number of exceptions. See UNCTAD, *supra* note 86, at 134. The aim of conventional BITs is generally to provide “protection and equitable treatment of FDI after the investment has taken place in consonance with the host countries’ laws and regulations.” Ganesan, *supra* note 94, at 8.

118. By 1996, for instance, over two thirds of the roughly 1,100 BITs in existence had been concluded in the 1990s. See UNCTAD, *supra* note 86, at 163.

119. David A. Gantz, Environmental “Takings” Under Chapter 11: Does NAFTA Require Compensation for Environmental Protection?, Paper presented to the Canadian Bar Association, Toronto, Canada (Mar. 2000) (on file with *The Yale Human Rights and Development Law Journal*).

120. NAFTA, *supra* note 9.

for other multilateral investment negotiations.¹²¹ Although the NAFTA deals with a range of legal and economic issues, its provisions on investment are considered especially significant.¹²² The NAFTA sets high standards of investor protection by expanding the definitions of investment and investor, granting a right of establishment in some sectors, and prohibiting performance requirements.¹²³ Perhaps most importantly, the NAFTA expands on standards of expropriation and compensation, and allows investors to directly challenge government policies under an investor-to-state dispute settlement mechanism.¹²⁴

3. *Multilateral Investment Agreements*

The push for higher standards has also manifested itself at the multilateral level. Although no comprehensive world agreement on investment has yet been established, the issue has been “prominent on the international policy agenda” for a number of years, according to the United Nations Conference on Trade and Development.¹²⁵ During the Uruguay Round of world trade negotiations, the U.S. presented an ambitious proposal for a multilateral investment agreement that was

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121. As commentators have noted, “NAFTA set a precedent for the treatment of performance requirements” that was adopted in proposals for an MAI. See Singer & Orbuch, *supra* note 102, pt. III(A)(5). According to the Permanent Secretariat of the Latin American Economic System, NAFTA is frequently considered “state of the art” for the new generation of investment agreements. See SELA, *Las Negociaciones Internacionales Sobre la Inversion Extranjera [International Negotiations on Foreign Investment]* pt. II(B) n.17 (1997), available at <www.lanic.utexas.edu/project/sela/docs/spdredi18-97.htm>. Price comments that Chapter 11 of NAFTA “ought to set a standard for further multilateral and bilateral investment accords in the hemisphere.” Price, *supra* note 99, at 736; see also Michael Gestrin & Alan M. Rugman, *The NAFTA Investment Provisions: Prototype for Multilateral Investment Rules?*, in MARKET ACCESS AFTER THE URUGUAY ROUND: INVESTMENT, COMPETITION AND TECHNOLOGY PERSPECTIVES 63–77 (Pierre Sauvé & Americo Beviglia Zampetti eds., 1996).

122. The NAFTA provisions on investment are “one of [its] primary pillars,” according to H.H. Camp, Jr. & A.R. Kontrimas, *Direct Investment Issues, in NAFTA AND BEYOND* 87, 89 (J.J. Norton & T.L. Bloodworth eds., 1995). Appleton agrees that “in terms of importance, these provisions constitute the very heart and soul of the NAFTA.” BARRY APPLETON, *NAVIGATING NAFTA: A CONCISE USER’S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT* 79 (1994).

123. For instance, an investment is defined broadly under the NAFTA “to include virtually all types of ownership interests, either direct or indirect, actual or contingent.” APPLETON, *supra* note 122, at 80. Since the definition of investment “delimits the scope” of an investment agreement, a broad definition provides the basis for establishing broad restrictions on the lawmaking authority of NAFTA governments. See SELA, *supra* note 121, pt. II(2)(a)(i).

124. NAFTA is the first international agreement providing for investor-state arbitration into which Mexico has entered; it is also the first such agreement that two OECD countries have entered into between themselves. See Price, *supra* note 99, at 731.

125. See UNCTAD, *supra* note 86, at 129. Discussion regarding a multilateral investment agreement dates back to the Bretton Woods negotiations of the mid-1940s. The high standards of investor treatment and protection currently on the table, however, had been rejected by most governments until quite recently.

rejected in the face of resistance from developing countries.¹²⁶ Negotiations were subsequently shifted to the Organization for Economic Cooperation and Development (OECD). The OECD negotiations toward a Multilateral Agreement on Investment (MAI) ended shortly, however, after France withdrew from the process in October 1998, stating resolutely “it does not seem wise to allow private interests to chew away at the sovereignty of states.”¹²⁷

C. Prospects for the FTAA

Despite the demise of the MAI, the push for higher standards of investor protection continues in other international fora, including the negotiations toward an FTAA.¹²⁸ The end result of the FTAA negotiations is, of course, a very open question. Some Latin American governments, such as Brazil and Chile, may have serious concerns about the degree to which higher standards would constrain their domestic policy options.¹²⁹ Also, opposition to the push for higher standards may have intensified within the U.S. Government following the demise of the MAI. According to the Office of the U.S. Trade

36

126. See, e.g., B.B. Ramaiah, *Towards a Multilateral Framework on Investment?* 6 TRANSNAT'L CORP. 117 (1997). The World Trade Organization Agreement on Trade-Related Investment Measures (TRIMS) was limited to a relatively narrow range of investment provisions. See SELA, *supra* note 121, pt. II n.68.

127. Council of Canadians, *An Update on MAI Negotiations: October 14, 1998* (visited May 20, 2000) <<http://www.canadians.org/>> (publications, MAI) (quoting French Prime Minister Lionel Jospin summing up the French decision to withdraw). For background on France's withdrawal from the MAI, see Catherine Lalumière et al., Ministry of the Economy, Finance, and Industry (Fr.), *France's Official Position on Withdrawing from the MAI Negotiations (Rapport sur l'Accord multilatéral sur l'investissement (AMI)-Rapport Intérimaire*) (Sept. 1998), available in English at <<http://www.canadians.org/>> (publications, MAI).

128. At the Fourth Business Forum of the Americas in March 1998, the President and CEO of the U.S. Chamber of Commerce called for FTAA governments to conclude “a hemispheric Convention on Investments, to take effect by the year 2000” to “establish world-class protection for investors, including national treatment; full and free repatriation of capital profits and dividends; a prohibition against performance requirements; and protection against appropriation [sic].” Thomas J. Donohue, *Free Trade in the Americas: Why Business Must Take the Lead* (visited Mar. 21, 2000) <http://www.sice.oas.org/Ftaa/costa/forum/donohu_e.asp>.

129. For example, although almost every country in the western hemisphere has signed at least one BIT, less than a third have committed to the higher threshold of investor protection established in more recent BITs. See SELA, *supra* note 121, pt. II(A). Salacuse suggests that compulsory arbitration provisions “may be the reason that so few Latin American countries have signed BITs, since international arbitration conflicts with the Calvo doctrine, an important element in the legal systems of most countries in the region.” Salacuse, *supra* note 85, at 672–73. Also, a Canadian government analysis was reported as stating: “Keeping Brazil positively engaged in the Free Trade Area of the Americas process . . . and a ‘millennium’ round of multilateral trade negotiations may prove increasingly difficult.” Heather Scoffield, *Crisis Hits Canadian Exports to Brazil*, GLOBE & MAIL (Toronto), Jan. 28, 1999, at B9 [hereinafter *Crisis Hits*]; see also Heather Scoffield, *North-South Split Shadows Trade Talks*, GLOBE & MAIL (Toronto), April 18, 1998, at A1.

Representative, for example, the U.S. Environmental Protection Agency “is playing a larger role than might previously have been the case” in U.S. preparations for FTAA negotiations “because of the agency’s concern over an individual government’s right to issue regulations without crossing over into an expropriation dispute.”¹³⁰ The comments suggest apprehension on the part of the EPA about the impact of high investment standards on the ability of governments to regulate environmental matters. More broadly, the strong public opposition to the MAI that has arisen in North America and elsewhere, as well as events surrounding the recent Seattle ministerial meeting of the World Trade Organization, may signal rough waters ahead for future FTAA talks.

37

On the other hand, there remains a powerful momentum behind the push for stronger investor protection. The U.S. Government, in particular, has forcefully advanced the NAFTA investment provisions as a prototype for the FTAA.¹³¹ Canada and Mexico have also reportedly pushed for higher standards since committing to NAFTA.¹³² Investors themselves have organized to support higher standards, holding annual business forums alongside FTAA government meetings, for example. On the whole, therefore, there is good reason to expect that the FTAA investment negotiations may lead to the establishment of higher standards of investor protection in the Americas, modeled after NAFTA, or perhaps the draft MAI.

D. *Investor-to-State Mechanism: Leveraging Democratic Accountability*

38

The NAFTA investment provisions, contained in Chapter 11 of the agreement, provide an important, if tentative, example of how higher standards of investor protection have impacted government decisionmaking. The NAFTA was the first multilateral agreement to create an investor-to-state mechanism, described as “an untapped source of extensive private investor rights, including guaranteed access

130. SELA, *U.S. Preparations for FTAA Negotiations* (Oct. 1998) (visited Mar. 21, 2000) <http://www.lanic.utexas.edu/project/sela/eng_antena/engant49.htm>.

131. See VANGRASSTEK, *supra* note 85, at 19–21; Paul A. O’Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT’L L.J. 127, 127–28 (1995); Richard Bernal, *Jamaica and the Process of Free Trade in the Western Hemisphere*, in JAMAICA AFTER NAFTA: TRADE OPTIONS AND SECTORAL STRATEGIES 19–20 (Anne Weston & Usha Viswanathan eds., 1998).

132. Mexico, in particular, recently concluded a free trade agreement with Guatemala, Honduras, and El Salvador, and already has free trade agreements with Nicaragua and Costa Rica. Canada is also in negotiations toward a bilateral trade and investment deal with Costa Rica, and has reportedly pushed for an investment agreement with Mercosur, as well as other Central American countries, including Guatemala. See *News From the Regions: The Americas*, BRIDGES BETWEEN TRADE & SUSTAINABLE DEV. (ICTSD), June 1999, at 8, available at <<http://www.ictsd.org/html/weekly/story5.07-06-00.htm>>; Heather Scofield, *Canada, Mercosur Agree on Framework*, GLOBE & MAIL (Toronto), June 17, 1998, at B7; Heather Scofield, *Canada, Costa-Rica to Begin Formal Bilateral Trade Talks*, GLOBE & MAIL (Toronto), Feb. 1, 2000, at B1, B13.

to a NAFTA panel for a private party.”¹³³ Under Chapter 11, an investor may avoid domestic courts, and thus sovereign immunity issues, by directly challenging a government before a NAFTA arbitration panel, where consent of the home country is not needed.¹³⁴ Chapter 11 disputes are heard and resolved by international arbitration panels, made up of experts in fields like international commerce, finance, industry, and law.¹³⁵ Perhaps most significantly, NAFTA panel decisions are insulated from judicial review in domestic courts.¹³⁶

The great portent of the investor-to-state mechanism is that it allows individual investors to launch their own international legal claims against states. According to one international arbitration lawyer, Cheri Eklund, Chapter 11 represents “a remarkable step” since it “transfers control over the incidence and conduct of investor disputes from the [NAFTA] Parties to private persons.”¹³⁷ Eklund suggests that the rules are so favorable to investors that it is “inconceivable that an investor would elect to litigate a Chapter Eleven dispute before a national court.”¹³⁸ These comments reveal the *potential* that exists for investors to apply Chapter 11, or a similar FTAA mechanism, to advance their positions in new ways vis-à-vis domestic governments.

How have investors applied these new rights? To date, at least thirteen NAFTA lawsuits have been initiated in response to a diverse range of government policies in Canada, Mexico, and the U.S. The impugned policies have included a phase-out of a gasoline additive, a ban on exports of PCBs, the creation of an ecological preserve, a jury damages award, a bilateral agreement on softwood lumber exports, a mall deal gone bad, a banana gasoline additive, and a moratorium on water exports.¹³⁹ In each case, investors have argued that the policies

133. Appleton, *supra* note 109, text accompanying n.23, quoting G.N. Horlick & A.L. Marti, *NAFTA Chapter 11B, A Private Right of Action to Enforce Market Access Through Investments*, 14 J. INT'L ARB. 54 (1997).

134. See NAFTA, *supra* note 9, ch.11, art. 1120, 32 I.L.M. at 643; see also Cheri D. Eklund, *A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes*, 11 J. INT'L ARB. 135, 135 (1994); Price, *supra* note 99, at 731–35.

135. See Eklund, *supra* note 134, at 150.

136. See *id.* at 140, 146.

137. *Id.* at 135.

138. *Id.* at 157.

139. See, e.g., Heather Scoffield, *NAFTA Lawsuits Cloud MAI Discussions*, GLOBE & MAIL (Toronto), Aug. 24, 1998, at B2; Barry McKenna, *Loewen Action Called a Threat to U.S. Justice*, GLOBE & MAIL (Toronto), Nov. 25, 1998, at B5; Heather Scoffield, *B.C. Water Export Ban Brings U.S. Lawsuit*, GLOBE & MAIL (Toronto), Dec. 9, 1998, at B1; William Glaberson, *NAFTA Invoked to Challenge Court Award*, N.Y. TIMES, Jan. 28, 1999, at C6; *Crisis Hits*, *supra* note 129; Heather Scoffield, *Ottawa Thought Debate Ended Five Years Ago*, GLOBE & MAIL (Toronto), Feb. 11, 1999, at A14; Eric Reguly, *Water Tap Will Be Hard to Shut Off*, GLOBE & MAIL (Toronto), Feb. 16, 1999, at B2; Heather Scoffield, *Another U.S. Firm Sues Ottawa Under NAFTA*, GLOBE & MAIL (Toronto), Feb. 16, 1999, at B1; Heather Scoffield, *Mexico, Canada At Odds on NAFTA Rule Changes*, GLOBE & MAIL (Toronto), Feb. 19, 1999, at B2 [hereinafter *Mexico, Canada at Odds*]; Evelyn Iritani, *Trade Pacts Accused of Subverting U.S. Policies*, L.A. TIMES, Feb. 28, 1999, at A1; Heather Scoffield, *Quebec Real Estate Company Sues U.S. Government*, GLOBE & MAIL (Toronto), Sept. 28, 1999, at B4; Heather Scoffield, *Methanex Set to Sue Uncle Sam under*

violated the investment principles established under NAFTA, and that they were entitled to direct state compensation for the harm suffered.¹⁴⁰

41 The full significance of the NAFTA investor-to-state mechanism has been the subject of great debate. Critics claim that Chapter 11 gives investors unwarranted leverage over political decisionmaking, allowing them to interfere with the ability of elected governments to implement legitimate public policies.¹⁴¹ They have warned of a “chill effect” on government policymakers faced with the threat of an investor challenge.¹⁴² Other commentators counter that the breadth of the NAFTA investment provisions is in fact much more narrow, and that NAFTA panels will respect the legitimate authority of governments.¹⁴³

NAFTA Over Gas Additive, GLOBE & MAIL (Toronto), Nov. 3, 1999, at B7; Heather Scoffield, *UPS sues Ottawa in subsidy dispute*, GLOBE & MAIL (Toronto), Feb. 18, 2000, at B1 [hereinafter *UPS Sues Ottawa*].

140. Only one of the investor challenges has actually been decided by a NAFTA arbitration panel, and that challenge was dismissed on both the facts before the panel and on a “credibility gap” that adhered to DESONA, the investor making the claim. The challenge involved a decision by municipal authorities to revoke a permit allowing DESONA to pick up waste in a Mexico City suburb. See Robert Azinian v. United Mexican States, 14 ICSID REV. 538, 572–74 (1999); see also Heather Scoffield, *Mexico Wins NAFTA Decision*, GLOBE & MAIL (Toronto), Nov. 5, 1999, at B7.

141. See, e.g., TONY CLARKE & MAUDE BARLOW, MAI—THE MULTILATERAL AGREEMENT ON INVESTMENT AND THE THREAT TO CANADIAN SOVEREIGNTY (1997) [hereinafter MAI THREAT TO SOVEREIGNTY]; TONY CLARKE & MAUDE BARLOW, MAI ROUND 2—NEW GLOBAL AND INTERNAL THREATS TO CANADIAN SOVEREIGNTY (1998); Jackson, *supra* note 89; MARK VALLIANATOS, LICENSE TO LOOT (1998). See also Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259 (1994); José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L.REV. 303 (1996–97); Special Comm. on the Multilateral Agreement on Investment, Legislative Assembly of British Columbia (Can.), *First Report* (Dec. 29, 1998), available at <www.legis.gov.bc.ca/cmt/mai/1998/1report/index.htm> [hereinafter BC Special Comm.].

142. As Clarke & Barlow note with respect to challenges under an investor-state dispute resolution:

[T]hese mechanisms would not have to be fully exercised to have their desired effect. The fact that corporations would have these weapons at their disposal, coupled with the threat (implied or otherwise) to use them against governments, could generate considerable political clout. . . . There are likely dozens of lesser-known cases where corporations have used the threat of these tools to shape and determine government policy decisions.

MAI THREAT TO SOVEREIGNTY, *supra* note 141, at 42.

143. To illustrate the debate: in hearings on the FTAA before a Canadian Parliamentary subcommittee, two trade law experts took rather divergent positions on the potential impact of Chapter 11. On the one hand, law professor Robert Howse commented that investor claims to date “arise out of an unreasonable or, to put it charitably, very speculative interpretation of the legal language of NAFTA” and that there is no “accepted definition of expropriation or taking of property just because some business loses revenues due to the government changing some general public policy.” On the other hand, trade lawyer Howard Mann argued that Chapter 11 has become “an offensive weapon, a lobbying weapon, a strategic tool that any form of corporation has virtually unfettered access to” in order “to challenge public policy making, public regulation making, and public welfare activity in the normal course of government” *Canadian Interests in Negotiating a Free Trade Area of the Americas: Comprehensive*

Indeed, much of the legal language is broadly-drafted and unprecedented in international law, and thus awaits interpretation by NAFTA panels on a case-by-case basis.¹⁴⁴ The bottom line appears to be that the implications of the NAFTA investment provisions will remain uncertain for years to come, and may potentially be revolutionary from a legal point of view.¹⁴⁵

Of course, this uncertainty has not prevented investors from using Chapter 11 to challenge government policies. In some cases, the mere threat of a lawsuit has reportedly caused governments to reconsider proposed policies.¹⁴⁶ In one prominent case of an actual NAFTA lawsuit, a U.S.-based company sued the Canadian government after it banned the import and inter-provincial sale of a gasoline additive manufactured by the company. The Canadian government settled the claim by agreeing to drop its ban, pay a multi-million dollar damage settlement, and issue a public statement disclaiming its previous finding that the additive was a threat to the environment and human health.¹⁴⁷ Further,

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Public Hearings on the FTAA Before the Sub-Comm. on Int'l Trade, Trade Disputes, and Investment (House of Commons, Can.) (Jun. 9, 1999) (visited Mar. 21, 2000) <<http://www.parl.gc.ca/InfoComDoc/36/1/SINT/Meetings/Evidence/sintev33-e.htm>> [hereinafter *House of Commons Testimony*] (statements of Robert Howse & Howard Mann).

144. NAFTA language, for example, goes beyond simple expropriation to include acts "tantamount to . . . expropriation." NAFTA, *supra* note 9, art. 1120, 32 I.L.M. at 643. NAFTA does not define what constitutes the latter, thus leaving the issue up to an arbitral panel in cases where the host state and a NAFTA investor disagree. *See, e.g.*, APPLETON, *supra* note 122, at 86. According to trade lawyer Larry Herman, "Chapter 11 has potentially broad reach. No one knows how far it extends." *UPS sues Ottawa*, *supra* note 139. Mann goes on to state that "[t]he drafting of these obligations today is far too broad and leaves essentially every single public policy measure open to challenge, and in a very easy way." *House of Commons Testimony*, *supra* note 143 (statement of Howard Mann).

145. With reference to the MAI investor-to-state mechanism, Stumberg notes that "none of us today can predict how the MAI dispute panels are going to resolve disputes about the agreement. . . . What we can say is that . . . the law in question will be the MAI text and international law . . . not the constitutional law of your country." BC Special Comm., *supra* note 141, pt. II (testimony of Robert Stumberg).

146. Foreign investors have reportedly threatened Chapter 11 lawsuits in opposition to government policies, and, in a number of such cases, the policies were subsequently altered or abandoned. The reported cases include proposals for public auto insurance, mandatory plain cigarette packaging, restrictions on advertising in split-run magazines, and renegotiation of an airport privatization contract. *See* MAI THREAT TO SOVEREIGNTY, *supra* note 141, at 42; Bruce Campbell, *Free Trade: Year 3*, 26 CANADIAN DIMENSION 5, 7 (1992); *House of Commons Testimony*, *supra* note 143.

147. The Government of Canada agreed last year to settle a US\$250 million NAFTA lawsuit launched by Ethyl Corporation, based in Richmond, Virginia. Ethyl had challenged Canada under Chapter 11 after the federal government banned the import or inter-provincial sale of the gasoline additive MMT, which is manufactured by the company. The Canadian Government claimed at the time that MMT was an environmental hazard because it gums up automobile emission controls. Ethyl responded with an investor challenge under NAFTA, seeking compensation for, among other claims, lost profits, damage to its assets and loss of the value expropriation of its assets, and damage to its reputation. Under the settlement, the Government agreed to drop its MMT ban, pay Ethyl \$19 million for legal costs and lost profits, and issue a public statement that the gasoline additive is not a threat to the environment or human health. In return, Ethyl agreed to drop the NAFTA challenge. Since the settlement, Canada has reportedly

despite the uncertainty surrounding the full significance of Chapter 11, trade negotiators from the OECD governments proposed an expanded investor-to-state mechanism under the MAI. The same may occur in the FTAA negotiations, although this will likely depend on how the panel interpretations of Chapter 11 unfold in the investor challenges initiated to date. On the whole, there is a real prospect that the FTAA governments will conclude an agreement on investment, and that its impact will be to enhance foreign investors' ability to influence a gamut of domestic policy issues, by means of strategic reference to the threat of an investor-to-state challenge.

III. POTENTIAL IMPACT OF AN FTAA ON THE GUATEMALAN PEACE PROCESS

43 Despite the centrality of land in the Guatemalan context, prospective Government policies on agrarian reform, stemming from the peace accords, could run afoul of high standards of investor protection under an FTAA investment agreement. In particular, an investor could challenge the policies, and demand compensation for its losses, on the grounds that they violate broad notions of national treatment, prohibitions on performance requirements, and protections from expropriation. Potentially, then, the FTAA could serve to derail the Guatemalan peace process by constraining the ability of the government to fulfill its commitments under the accords.

44 This section aims to demonstrate the rationale behind this forecast of potential conflict, and the types of arguments that an investor could use to challenge various Government policies undertaken pursuant to the peace accords. In particular, it explores some of the arguments that an investor could make in challenging Government policies on land stemming from the accords. Other commentators have attempted to anticipate the impact of proposed investment agreements in this way, especially in the case of the draft MAI.¹⁴⁸ The analysis in this Article is modeled, in particular, on the approach adopted in a 1997 report on the MAI prepared for the U.S. Western Governors' Association (WGA). According to the authors of the WGA report:

Our approach is to rely not only on the stated intent of MAI negotiators, but to anticipate how the language of MAI

asked Mexico and the U.S. to agree to clarify the scope of the NAFTA rules on investment, without success. See Shawn McCarthy, *Threat of NAFTA Case Kills Canada's MMT Ban*, GLOBE & MAIL (Toronto), July 20, 1998, at A1; Shawn McCarthy, *Gas War: The Fall and Rise of MMT*, GLOBE & MAIL (Toronto), July 24, 1998, at A1; Heather Scoffield, *Controversial NAFTA Chapter Lets Companies Sue Governments*, GLOBE & MAIL (Toronto), Dec. 21, 1999, at B15; *Mexico, Canada At Odds*, *supra* note 139, at B2.

148. See, e.g., Singer & Orbuch, *supra* note 102; Appleton, *supra* note 109; Garry T. Neil, Multilateral Agreement on Investment (MAI) and Canada's Cultural Sector, Unpublished report prepared for the Canadian Conference of the Arts (Oct. 15, 1997) (on file with *The Yale Human Rights and Development Law Journal*).

proposals might be interpreted by future dispute panels or courts in response to legal claims brought by investors. This approach is necessary because a core purpose of the MAI is to legally empower investors to seek their own remedies and make their own arguments against state laws without mediation by their home governments.¹⁴⁹

I note that the analysis here is based on a number of critical assumptions about the FTAA. For one, it assumes that an FTAA would establish high standards of investor treatment and protection, modeled after the NAFTA and the draft MAI. In other words, the analysis assumes that an FTAA would include broad definitions of investment and investor, an investor right of establishment, a prohibition on performance requirements, broad notions of expropriation and compensation, and an investor-to-state mechanism. The analysis also assumes that an FTAA investment agreement would apply to the Guatemalan peace accords without any exceptions.¹⁵⁰ Finally, I note that the aim of the analysis is to provide some examples, rather than an exhaustive review, of prospective investor challenges to Government policies concerning land issues. For this reason, the Article provides only a tentative tip-of-the-iceberg assessment of the potential impact of an FTAA investment agreement. Clearly, actual investor arguments would be driven by the particular facts of a given investor-state dispute, including the specific structure of the impugned government policy.

It is also important to point out that Guatemalan citizens and companies might also be able qualify as foreign investors under an FTAA investor-to-state mechanism and thereby gain the right to challenge their own government for violations of FTAA standards. A Guatemalan citizen might gain access to the investor-to-state mechanism, for instance, by obtaining ownership interests in a foreign

149. Singer & Orbuch, *supra* note 102, pt. IV.

150. It is conceivable that an FTAA investment agreement could contain exceptions that shelter some areas of government policy from the impact of high standards of investor protection. For example, the agreement might apply the standard of national treatment only in the post-establishment phases of an investment, and thus *not create a right of establishment*. More significantly, the agreement might state explicitly and broadly that its provisions do not apply to any government policies designed to implement commitments under the peace accords. Alternatively, the agreement might include a *general exception* to shelter all government policies dealing with land reform (for example) from the impact of the agreement. Finally, the agreement might permit Guatemala to claim *specific reservations* for certain commitments under the peace accords. For discussion of various forms of exceptions, see SELA, *supra* note 121, pt. III(B)(2); UNCTAD, *supra* note 86, at 184.

In all of these cases, the relevant wording in the agreement would be critical since exceptions tend to be interpreted narrowly by dispute resolution bodies. Also, an exception might still permit investors to challenge government policies under an investor-to-state provision, or place the onus on governments to establish that a policy fell within an excepted area. Further, any exceptions in an FTAA investment agreement might be limited by “standstill” or “rollback” provisions. See generally UNCTAD, *supra* note 86, at 194; Ganesan, *supra* note 94, at 17–18.

company operating in Guatemala. In order to qualify as a “foreign” investor, an astute Guatemalan landowner might form a corporation in the U.S. (or another FTAA country), with himself as the controlling shareholder, and transfer ownership of his assets to the foreign corporation. Alternatively, a Guatemalan investor could arrange for joint ownership, with a foreign investor, of its local assets. These options, as well as other innovative legal strategies, could provide Guatemalan investors with access to an FTAA investor-to-state mechanism, in order to challenge the policies of their home government.¹⁵¹

⁴⁷ The following analysis considers how investors could potentially challenge each of the government commitments on land considered in Part I(B), including specific policies to facilitate access to land and encourage its productive use; to resolve land conflicts and provide security of land tenure; and to promote indigenous land rights.

A. *Policies to Facilitate Access to Land and Encourage Productive Use of Land*

1. *Land Trust Fund*

⁴⁸ Under the *Socio-Economic Accord*, the Guatemalan Government agrees to create a land trust fund designed to facilitate campesino access to land.¹⁵² This commitment took further shape in July 1997, when the Joint Commission on Indigenous Land Rights, formed under the *Indigenous Accord*,¹⁵³ submitted a detailed bill to Congress proposing a law to establish a land trust fund. The proposed fund was designed to benefit campesinos without land, campesinos living in poverty, and campesinos with insufficient land based on criteria of the size and soil quality of land owned, relative to basic family needs.¹⁵⁴ Eligibility would be further restricted to “Guatemalans”; consequently,

151. I acknowledge that some of these scenarios may not be probable, although they are certainly possible. All of them would of course depend on the wording and interpretation of the agreement.

152. In particular, the Government commits to “[e]stablish a land trust fund . . . to provide credit and to promote savings, preferably among micro-, small and medium-sized enterprises. The land trust fund will have prime responsibility for the acquisition of land through Government funding.” *Socio-Economic Accord*, *supra* note 8, art. 34(a).

153. The Joint Commission was created under the *Indigenous Accord* “to study, devise and propose appropriate institutional arrangements and procedures” to carry out the commitments on land rights in the accord. It is made up of an equal number of representatives from Government and indigenous organizations, and adopts its conclusions by consensus. *See Indigenous Accord*, *supra* note 7, pts. IV(F)(10), V(a), V(d).

154. *See Anteproyecto de Ley del Fondo de Tierras*, presentado por la Comisión Paritaria sobre Derechos Relativos a la Tierra de los Pueblos Indígenas al Congreso de la República de Guatemala [Land Fund Law Bill, presented by the Joint Commission on Indigenous Land Rights to the Guatemalan Congress], tit.IV, ch. I, art. 21 (July 1998) [hereinafter Joint Commission Proposal].

foreigners would not be eligible.¹⁵⁵

Based on the provisions of an FTAA agreement, an investor could potentially challenge the establishment of the proposed land trust fund by arguing that it is a violation of national treatment to limit eligibility to Guatemalans. As such, the investors could argue that foreign investors suffer discrimination because they are denied benefits made available to their domestic counterparts, and are entitled to compensation from the Government for losses stemming from this discriminatory treatment.

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2. *Redistribution of Undeveloped Lands*

Under the proposals for a land trust fund, the Government is authorized to facilitate access to land by redistributing undeveloped land that it has acquired under Article 40 of the Guatemalan Constitution. Article 40 provides that “[i]n concrete cases, private property may be expropriated for reasons of collective utility, social benefit or public interest, duly proven”¹⁵⁶ Thus, under the peace accords, the Government has the power to expropriate undeveloped private land in order to redistribute it to landless and land poor campesinos.

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If the Government acted on its powers under Article 40 to claim undeveloped lands for redistribution, an investor whose assets were diminished in value as a result of the expropriation could argue that it is entitled to compensation. Under broadened definitions of expropriation and compensation, such compensation might be found to include the lost value of the land itself in cases where the investor owned the land directly. It might also include the lost value of agribusiness contracts breached by local producers who owned the land. Finally, it might include the lost value of rights granted to a foreign investor under a previous concession, license or permit to exploit natural resources on the expropriated lands. In each of these cases, the investor could also argue that compensation includes the lost value of the investor's opportunities for future profit. Even the threat of bringing such a potentially bankrupting claim before an arbitration panel would likely be enough to dissuade a state from exercising its constitutional powers to fulfill its land commitments under the peace accords.

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3. *Land Tax*

The Government further agrees under the *Socio-Economic Accord* to establish a land tax designed to encourage the productive use of land by taxing undeveloped and under-utilized lands that are over a certain size

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155. Joint Commission Proposal, *supra* note 154, art. 21.

156. GUATE. CONST. art. 40 (author's translation).

at a higher rate of taxation.¹⁵⁷

53 A foreign investor might challenge the imposition of such a tax under the principles of national treatment, particularly as broadened by the *effects test*. Under national treatment, a land tax could not apply higher levies to foreign investors; this would constitute direct discrimination against foreign investors in violation of conventional international investment law. More broadly, a foreign investor could argue that a land tax directed at large-landowners might have *indirect* discriminatory effects and thereby violate expanded notions of national treatment. To illustrate, a land tax designed to encourage productive use of arable land would likely apply higher rates of taxation to large plantations or underused lands. These modes of land ownership tend to be prevalent in the agro-export sector, where foreign investors are, in many cases, more likely to own land or do business. As a result, a land tax targeting these lands would have a disproportionate and therefore discriminatory *effect* on foreign investors, and thus violate broad notions of national treatment.

54 Finally, the FTAA might not exempt taxation from provisions on expropriation.¹⁵⁸ If no exemption were made, the Government might have to pay compensation to an investor for increasing the tax rate on the investor's assets. In essence, this would make foreign investors immune from certain types of tax hikes, since a government would have to pay back any additional tax revenue as compensation for the expropriation.¹⁵⁹

B. *Policies to Resolve Land Conflicts and Provide Security of Land Tenure*

1. *Land Registry*

55 Under the *Socio-Economic Accord*, the Government commits to regulate land ownership by creating a comprehensive land registry, described as "a juridical framework governing land ownership that is

157. See Socio-Economic Accord, *supra* note 8, art. 42 (providing that the Government will promote "the legislation and mechanisms for the application . . . of a land tax in the rural areas The tax, from which small properties will be exempt, will help to discourage ownership of undeveloped land and underutilization of land").

158. Regarding the MAI provisions on expropriation, most country delegations supported inclusion of the following additional statement in the Interpretive Note to the agreement: "MAI Parties understand that no taxation measures of the Parties effective at the time of signature of the Agreement could be considered as expropriatory or having the equivalent effect of expropriation." Some delegations were not in a position to associate themselves with such a statement, however. See MAI COMMENTARY, *supra* note 114, pt. VIII(1); see also Martin Khor, *The MAI and Developing Countries*, in DISMANTLING DEMOCRACY, *supra* note 89, at 281.

159. See, e.g., Singer & Orbuch, *supra* note 102, pt. III(D)(4) ("[H]eavy tax burdens can be attacked as expropriation.").

secure, simple and accessible to the entire population.”¹⁶⁰ The Government further commits to “apply flexible judicial or non-judicial procedures for the settlement of disputes relating to land and other natural resources.”¹⁶¹

In the process of resolving land conflicts and developing a land registry, the Government might be forced to make a determination of ownership amidst conflicting claims. If a determination worked against a foreign investor, the investor could argue that the criteria used to resolve competing claims to land ownership was discriminatory. In so doing, the investor would have to demonstrate that the criteria created some direct or indirect advantage for Guatemalans. This might occur, for example, if the criteria gave preference to historical claims to the land over more recent claims, since investors are probably less likely than Guatemalans to hold long-standing historical claims to disputed lands. Finally, an investor could argue that an unfavorable resolution of a land dispute was “tantamount to expropriation” if the resolution of the dispute caused a reduction in the value of the investor’s assets connected to the land area in question.

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2. Communal Land Ownership

The Government commits under the *Indigenous Accord* to “regularize the legal situation with regard to the communal possession of lands by communities that do not have the title deeds to those lands” including “measures to award title to municipal or national lands *with a clear communal tradition*.”¹⁶² The Government further commits under the *Socio-Economic Accord* to “[p]rotect common and municipal land, in particular by limiting to a strict minimum the cases in which it can be transferred or handed over in whatever form to private individuals.”¹⁶³

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One might assume that only Guatemalan communities, and primarily Mayan communities, would be in a position to demonstrate the “clear communal tradition” required for recognition of communal land ownership. If so, the benefits of a Government policy to recognize communal land ownership would flow disproportionately (or exclusively) to Guatemalans. An investor could argue that this effectively discriminates against foreign investors and violates national treatment.

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In addition, the Government might restrict the entitlement of private individuals to own common and municipal land. This could be

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160. Socio-Economic Accord, *supra* note 8, para. 37(a). The Accord further provides that “the Government undertakes to promote legislative changes that would make it possible to establish an efficient decentralized multi-user land registry system Likewise, the Government undertakes to initiate . . . the process of land surveying and systematizing the land register information.” *Id.* para. 38.

161. *Id.* para. 37(f).

162. Indigenous Accord, *supra* note 7, pt. IV(F)(5) (emphasis added).

163. Socio-Economic Accord, *supra* note 8, para. 37(d).

challenged by a foreign investor as a violation of the right of establishment since investors would be prevented from owning (and establishing themselves to do business on) common and municipal land. In such cases, an investor could claim compensation for the lost profit it would otherwise have gained if permitted to own common and municipal land without restriction.

3. *Reinstatement or Compensation for Usurped Lands*

60 The Government further commits under the *Socio-Economic Accord* to reinstate lands or compensate their former owners in cases where the land “has been usurped or has been allocated in an irregular or unjustified manner involving abuse of authority.”¹⁶⁴

61 An investor could challenge this intervention if the Government reinstated usurped land that the investor had come to own. For example, land usurped by a large Guatemalan landowner during the conflict of the 1980s might have been sold or transferred to a foreign investor. Indeed, the land might have been transferred by a Guatemalan landowner to a foreign corporation owned by the landowner, thus potentially qualifying him as a foreign investor. In either case, the investor could demand Government payment to compensate for the value of the usurped land that has been restored to its former owners.

C. *Policies to Promote and Protect Indigenous Land Rights*

1. *Indigenous Access to Traditional Lands*

62 In terms of indigenous rights to land, the Government commits under the *Indigenous Accord* to recognize and guarantee:

the right of access to lands and resources which are not occupied exclusively by communities but to which the latter have historically had access for their traditional activities and their subsistence (rights of way, such as passage, wood-cutting, access to springs, etc., and use of natural resources) and for their spiritual activities.¹⁶⁵

63 If the Government recognized special indigenous rights of access to traditional lands, this would potentially violate national treatment. Such rights would provide preferential treatment to Guatemalan citizens—in this case to the members of an indigenous community—and

164. *Id.* para. 37(f)(ii).

165. *Indigenous Accord*, *supra* note 7, pt. IV(F)(6)(a).

thus discriminate against foreign investors.¹⁶⁶

In addition, the Joint Commission on indigenous land rights proposed that indigenous sacred sites should be “carved out” of lands delivered under the land trust fund, and held in public ownership.¹⁶⁷ In cases where the Government granted special indigenous rights of access to portions of an investor’s land, the investor could argue that it is entitled to compensation on the basis that such access is “tantamount to expropriation” of the land. Thus, if an indigenous sacred site was “carved out” of an investor’s land to guarantee indigenous access to the site, the investor might be entitled to compensation for the lost value of the land “carved out.” Again, the mere threat of investor challenges over such issues is likely to deter government attempts to fulfill its commitments under the two land-related accords.

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2. *Indigenous Rights over Natural Resources*

Under the *Indigenous Accord*, the Government further commits to “[r]ecognize and guarantee the right of communities to participate in the use, administration and conservation of the natural resources existing in their lands.”¹⁶⁸ To carry out these commitments, the Government might grant a degree of authority over local natural resources to the local community. In such cases, an investor could argue that the local community is a form of subnational government, and is thus bound by the same standards of investor treatment and protection as other levels of Guatemalan government. Similarly, the investor could argue that the “customary norms” of indigenous communities are also bound by the same restrictions, since they are given legal force by the

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166. An exception for the Sami indigenous people regarding the local use of resources by indigenous peoples was proposed by the Scandinavian countries in negotiations towards the MAI. The exception proposed that “exclusive rights to reindeer husbandry within traditional Sami areas may be granted to the Sami people” and that the exception “may be extended to take account of any further development of exclusive Sami rights linked to their traditional means of livelihood.” See Draft MAI, *supra* note 10, Annex I, at 133; see also Ovide Mercredi, *The MAI and the First Nations*, in *DISMANTLING DEMOCRACY*, *supra* note 89, at 78, 82.

167. See Joint Commission Proposal, *supra* note 154, art. 39, which provides:

When with respect to the plantations acquired by means of the mechanism of the Lands Fund it is determined and recognized, by the indigenous communities neighboring the plantation, that traditional places exist for ceremonial purposes, the segment of land where the ceremonial place is located will be detached from the plantation

Id. (author’s translation).

168. Indigenous Accord, *supra* note 7, pt. IV(F)(6)(b). The Government also commits under the *Socio-Economic Accord* “to regulate participation by communities in order to ensure that it is they who take the decisions relating to their land.” *Socio-Economic Accord*, *supra* note 8, para. 37(e). Further, the Government commits under the *Indigenous Accord* to promote legal recognition of “the right of indigenous communities to manage their own internal affairs in accordance with their customary norms provided that the latter are not incompatible with the fundamental rights defined by the national legal system or with internationally recognized human rights.” Indigenous Accord, *supra* note 7, pt. IV(E)(3).

authority residing in Guatemalan national or subnational governments. If the policies of a community violated the standards of investor treatment and protection contained in an investment agreement, an investor could argue that either the community itself or the national government must pay compensation.

⁶⁶ The Government also commits under the *Indigenous Accord* to recognize indigenous rights to approve “any project for the exploitation of natural resources which might affect the subsistence and way of life of the communities” and to receive “fair compensation for any loss which they may suffer as a result of these activities.”¹⁶⁹ In light of these provisions, it is possible that a community might restrict participation in resource development projects on local lands to members of the community, so as to retain some of the economic benefits of the project within the community. An investor could challenge this restriction as a violation of national treatment, since it discriminates in favor of members of the community, and against foreign investors. The investor could also challenge the restriction as a violation of the right of establishment, if the investor was effectively barred from establishing operations in the local community.

⁶⁷ Additionally, a community might go so far as to reject a proposal for a resource development project. If an investor had received previous approval for the project from another level of government, such as a concession, license, or permit to exploit natural resources, the investor could claim compensation for the expropriation of the lost business opportunity.

⁶⁸ Finally, given an FTAA prohibition on performance requirements, investors would be protected from community requirements that the investor hire a certain proportion of local employees, process resources locally, or do business with local enterprises, as conditions of investment.

3. *Affirmative Action for Indigenous Women*

⁶⁹ The Government also commits under the *Indigenous Accord* to “[e]liminate any form of discrimination against women, in fact or in law, with regard to facilitating access to land”¹⁷⁰ This could conceivably be interpreted as a mandate for affirmative action programs to make up for the historical disadvantage faced by indigenous women in terms of land ownership and access to land.

⁷⁰ An investor could challenge affirmative action programs for indigenous women as a violation of national treatment. Affirmative action to make up for historical discrimination suffered by indigenous women entails contemporary discrimination against foreign investors. An investor could further argue that a Government requirement that it

169. *Indigenous Accord*, *supra* note 7, pt. IV(F)(6)(c).

170. *Id.* pt. IV(F)(9)(g).

give preference to indigenous women in its hiring or contracting decisions is a prohibited performance requirement.¹⁷¹

4. *Indigenous Land Claims Settlements*

Under the *Indigenous Accord*, the Government further recognizes “the particularly vulnerable situation of the indigenous communities, which have historically been the victims of land plundering” and commits “to institute proceedings to settle the claims to communal lands formulated by the communities and to restore or pay compensation for those lands.”¹⁷²

An investor could sue for compensation if a settlement to an indigenous land claim reduced the value of the investor's assets connected to the indigenous traditional lands.¹⁷³ An investor could also claim compensation if the resolution of an indigenous land claim prevented or delayed the investor in its efforts to carry out a planned resource development project.

The *Indigenous Accord* includes a wide range of other Government commitments to promote indigenous linguistic, cultural, civil, political, social, and economic rights.¹⁷⁴ An investor could challenge the preferential treatment for indigenous people that is inherent in the recognition and protection of indigenous rights, arguing that it discriminates against (non-indigenous) foreign investors, and thus violates national treatment.¹⁷⁵

171. Under NAFTA, Canada, Mexico, and the United States reserved “the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities” from the impact of national treatment and the prohibition on performance requirements. See NAFTA, *supra* note 9, 32 I.L.M. at 749, 754, 756–57.

172. *Indigenous Accord*, *supra* note 7, pt. IV(F)(7). The Government will further promote measures “to ensure recognition, the awarding of title, protection, recovery, restitution and compensation for those rights.” *Id.* pt. IV(F)(1).

173. In terms of the aboriginal land claims process in Canada, the Government of British Columbia stated in a 1997 submission on the MAI:

To take a current, complex and highly sensitive issue—if the settlement of an Aboriginal land claim involves depriving third parties of property interests covered under the broad MAI definition, then, if that third party is a foreign-affiliated investor, it could seek full compensation under the investor-state provisions of the MAI Consequently, the MAI could expose governments to increased costs and, by providing foreign-affiliated investors with a unilateral option to go to binding international arbitration, could adversely change the dynamics of land claim settlement negotiations.

Gov't of British Columbia, Submission to The House of Commons Sub-Committee on International Trade, Trade Disputes, and Investment regarding the proposed Multilateral Agreement on Investment (Nov. 26, 1997) (on file with author).

174. *Indigenous Accord*, *supra* note 7, pts. I–IV.

175. Under NAFTA, Canada reserved “the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal parties.” NAFTA, *supra* note 9, 32 I.L.M. at 749.

IV. CONCLUSION

74 This Article has attempted to show that a range of Guatemalan Government policies on land, stemming from commitments contained in the peace accords, could conflict with broad notions of investor treatment and protection under an FTAA. At the very least, investors—e.g., landowners, agribusiness companies, and resource development firms—could challenge all of the prospective reforms outlined above by strategically resorting to an FTAA investor-to-state claim.¹⁷⁶ It may be that not all of the investor arguments I have outlined would be successful before an international arbitration panel. In many cases, however, they would not have to be. The mere threat of an investor challenge would no doubt cause a Guatemalan government, facing costly litigation and the prospect of a substantial damages award, to think twice before pursuing errant policies. It is this climate of risk, in the face of the uncertainty generated under an FTAA, that would effectively increase the weight afforded to the priorities of investors relative to other social groups in the process of political decisionmaking that surrounds implementation of the peace accords. It may be, in fact, that an overarching purpose of the FTAA is to insure that the process of reform and democratization in Guatemala *does not get out of hand* from an investor's point of view, regardless of any consequent smothering of the peace accords.

75 These observations go to the heart of criticisms of the new push for higher standards of investor protection. Critics have argued that investment agreements like the NAFTA and the draft MAI will prevent elected governments from pursuing legitimate policies in the public interest. According to Ricardo Grinspun and Robert Kreklewich, the real purpose of “free trade” is to apply a long-term “conditioning framework” to the policy options available to governments, and to “lock in” neoliberal reforms.¹⁷⁷ Further, the “essence of this new conditionality” is “to restrict choice at the national level and to impose policies against the will of people, but in a disguised manner.”¹⁷⁸

76 Some proponents of stronger investor protection outwardly express their intention to reduce the policy options available to future elected

176. According to one commentary on the draft MAI, an investor-to-state mechanism “is likely to result in investors carefully scrutinizing government practices to find a MAI provision on which they can base a claim.” Appleton, *supra* note 109, para. 24.

177. A conditioning framework is “an institutional mechanism that effectively restricts policy choices at the nation-state level,” which “becomes binding due to international constraints and obligations incurred to another country, to foreign corporations, foreign investors, or to a multilateral agency.” Grinspun & Kreklewich, *supra* note 95, at 36. Free trade agreements represent a “higher level” of constraint, on top of other formal constraints such as the imposition of IMF conditionality in the context of debt crisis. One important difference between the two is that IMF conditionality is usually temporary (3–5 years), whereas free trade agreements are intended to be permanent. *Id.* at 39, 41.

178. *Id.* at 40.

governments in the face of a liberalized hemispheric economy. The Latin American Economic System (SELA), for example, has commented that the trend toward the conclusion of bilateral investment treaties (BITs) in Latin America “has contributed to ‘lock’ the adopted reforms inasmuch as their reversal is now more difficult.”¹⁷⁹ SELA also reports that an FTAA investment agreement “could play an important role for governments” by acting as “a deterrent to [future governments] later making changes in the liberalization process.”¹⁸⁰

Thus, although framed in the narrow context of the rules of international investment, the full impact of an FTAA investment agreement extends deep into the realm of public policy. According to Grinspun and Kreklewich, “[t]he new trading arrangements effectively remove many economic and social policy objectives from democratic consideration,” and “[t]he outcome, if unchallenged, will be a narrower set of societal choices; an unprecedented entrenchment of barriers to progressive social change.”¹⁸¹ Along these lines, a committee created by the British Columbia provincial government to study the draft MAI concluded that signing the agreement “would be an unacceptable, even reckless, surrender of sovereignty and democratic control.”¹⁸² In all countries, therefore, the “free trade” debate is really about the nature of society and democracy. With respect to Guatemala, should foreign investors and their counterparts among local elites have access to international avenues where they can resist state-directed reforms authorized by the peace accords? What, in essence, is the appropriate scope of democratic governance?

There is no doubt that progressively-minded Guatemalan governments (as rare as they are) have long faced constraints on their policy options stemming from the country’s economic dependence on international markets, intervention by external actors, and the extreme internal concentration of power, among other factors.¹⁸³ In the past, the U.S. Government, in particular, has thwarted attempts at reform in Guatemala in cases where they were viewed as harmful to the interests of American investors.¹⁸⁴ Perhaps the starkest example is the role the U.S. played in toppling the Arbenz government in 1954, after its

179. SELA, *supra* note 121, pt. V. UNCTAD states that current governments sign investment agreements “to bind themselves with respect to actions and measures that they do not wish to take . . . and make it more difficult for such measures to be taken [by subsequent governments] in the future.” UNCTAD, *supra* note 86, at 194.

180. SELA, *supra* note 121, pt. I.

181. Grinspun & Kreklewich, *supra* note 95, at 39, 51.

182. BC Special Comm., *supra* note 141, pt. II (Investor Protection: Expropriation).

183. See WEEKS, *supra* note 26, at 4. On the Central American region, Weeks comments: “These are not national economies which trade part of their production, but economies whose foreign trade penetrates into every aspect of economic life.” *Id.* at 59.

184. According to Cox, the uppermost U.S. priority in Central America since the 1950s has been “to protect the investment climate for all U.S. corporations.” RONALD W. COX, POWER AND PROFITS: U.S. POLICY IN CENTRAL AMERICA 14–15 (1994). Weeks also comments that “probably nowhere else in the hemisphere have U.S. corporate interests so blatantly determined North American foreign policy.” WEEKS, *supra* note 26, at 55.

initiation of a broad program of land reform.¹⁸⁵ It is telling that the U.S. intervention was prompted in large part by claims that the United Fruit Company had not received adequate compensation for the expropriation of some of its lands.¹⁸⁶ Today, American investors remain the largest source of FDI in the country “by far,” according to the U.S. Department of Commerce,¹⁸⁷ and one wonders how much their essential interests have changed.

79 Within Guatemala itself, domestic elites have historically allied themselves with foreign interests in order to reinforce their control of the state and resist reform.¹⁸⁸ For these groups, one of the primary goals of the peace process has been to facilitate further integration into the global economy by providing greater security for foreign investors.¹⁸⁹ Today’s agenda shares certain aspects of previous elite

185. See BLUM *supra* note 47, at 72–83. In subsequent decades, U.S. influence and intervention continued to shape Guatemala’s political and economic destiny. See *id.* at 147–48, 229–39; COX, *supra* note 184, at 16, 56.

186. United Fruit also resisted the 1947 labor legislation passed under Juan José Arévalo on the basis that it discriminated against foreign companies. See BERGER, *supra* note 24, at 44, 66, 70.

187. Exact figures are unavailable since the Guatemalan Government does not track FDI data. See GUATE. COM. GUIDE, *supra* note 28, at 60. The primary areas of U.S. FDI in Guatemala are low-cost assembly of textiles and apparel in the *maquila* sector, bananas and other traditional agro-exports, nontraditional agro-exports, and oil. See Peter Morici, *Free Trade in the Americas: A U.S. Perspective*, in THE PREMISE AND THE PROMISE: FREE TRADE IN THE AMERICAS 165 (Sylvia Saborio ed., 1992).

In the *maquila* sector, Guatemala imported almost one-fifth of U.S. exports to Central America of semi-manufactured apparel, and exported back nearly one-third of regional shipments to the U.S. See OAS Trade Unit, *supra* note 83, at 17. Agri-business is attracted to the nontraditional agro-export sector by the cheap labor and low land rent costs, more lenient environmental standards and enforcement, and a favorable climate. See THRUPP, *supra* note 23, at 27.

Finally, a U.S. bidder recently won a 50-year concession to operate the previously state-owned railroad, and other U.S. firms may acquire other privatized state enterprises in the telecommunications and energy sectors. Incidentally, a concession to operate the postal service was granted to a private Canadian entity, suggesting that U.S. investors are not alone in their pursuit of stronger protection under an FTAA. See GUATE. COM. GUIDE, *supra* note 28, at 53.

188. See JAMES PAINTER, GUATEMALA: FALSE HOPE, FALSE FREEDOM 29–30 (1987). Moreover, the agro-export model is controlled by a small minority of economic and military elites, often with close connections to foreign businesses. *Id.* at 35–57; see also BERGER, *supra* note 24, at 159.

189. Holiday states:

In the 1990s . . . two events occurred that made the private sector think more seriously about the possible advantages of ending the war through the peace process. First, the globalization of the world economy has meant that hemispheric free trade will be the future economic model, and the insurgency has been considered a serious barrier to Guatemala’s insertion into the world economy. Second, the URNG began to collect “war taxes” from large landowners and ranchers

Holiday, *supra* note 57, at 70–71; see also Rachel Sieder, *Introduction*, in CENTRAL AMERICA: FRAGILE TRANSITION 7 (Rachel Sieder ed., 1996); TAYLOR, *supra* note 11, at 65. For a discussion of Guatemalan neoliberal elite support for joining the NAFTA in the early 1990s, see PAUL J. DOSAL, POWER IN TRANSITION 190–91 (1995).

strategies to expand and intensify export production, and encourage foreign investment.¹⁹⁰ Paul Dosal describes the current Guatemalan elite in this way:

The neoliberals are industrialists, agro-exporters, bankers, and professionals, a breed of entrepreneurs who distinguish themselves from the landed oligarchy in their commitment to a degree of democratization and their willingness to consider a nonmilitary solution to the civil war. They are, nevertheless, oligarchs, with a vested interest in the maintenance of a system in which wealth and power is inequitably distributed¹⁹¹

In terms of the FTAA, therefore, Guatemala's elite is more likely to support, rather than oppose, the restraints that stronger investor protection would place on the potential for broad-ranging reform under the peace accords.¹⁹²

The popular response to the FTAA, on the other hand, should be the same as in the case of the peace accords themselves: to seek to *enhance* opportunities for greater democratic accountability and progressive change in the future.¹⁹³ The first step is to attempt to identify and understand the potential implications of an FTAA and to nurture alternative visions of integration in the Americas.¹⁹⁴ Thus, for instance,

190. As has been noted, it was "a goal considered desirable by all Central American leaders in the nineteenth century" to "integrate the region into the world economy." BULMER-THOMAS, *supra* note 24, at 1.

191. DOSAL, *supra* note 189, at 192. Palencia Prado & Holiday offer the following description of Guatemalan elite:

The conception of modernization that predominates in the private sector is that of freeing the market to the greatest extent possible from state intervention and regulation. The idea is for the government to withdraw from activities that are profitable for the private sector and provide tax exemptions and other investment incentives.

PALENCIA PRADO & HOLIDAY, *supra* note 12, at 6.

192. In the area of tax reform, for instance, Guatemala's private sector has successfully blocked every attempt at reform in the last decade, even though Guatemala has the lowest tax revenues in the hemisphere—under 8 percent, compared to the regional norm of 18 percent. *See* Holiday, *supra* note 57, at 70.

193. According to Grinspun and Kreklewich, progressive activists:

must articulate the means by which FTAs transfer significant powers to unelected and unaccountable bodies and institutions, and give the highest guarantees of expression to the rights and freedoms of transnational capital. The rhetoric of "globalization" must be unmasked as it is invoked to deny similar countervailing rights and freedoms to community-based organizations, associations, and unions.

Grinspun & Kreklewich, *supra* note 95, at 54.

194. Cuauhtémoc Cárdenas, a prominent leader of the Mexican Party of the Democratic Revolution (PRD) and the mayor of Mexico City, has called for an alternative *Trade and Development Pact* in North America that would utilize managed trade as a tool for development, and would include provisions on labor mobility, compensatory financing for less developed regions, and a social charter that would promote harmonization of social, labor, and environmental standards to the highest common denominator. *See* Grinspun & Cameron, *supra* note 88, at 19.

a truly comprehensive legal framework to govern hemispheric investment flows should provide stable and predictable rules not only for the protection of investors, but also for the legitimate exercise of state regulation of FDI.¹⁹⁵ At the very least, it should include specific and clear wording to explicitly limit the application of principles of investor protection in cases where the risk of constraining legitimate democratic choices is simply too great.¹⁹⁶ In the case of Guatemala, I have identified concerns regarding the ability of future governments to carry out commitments on land under the peace accords. Similar concerns could be raised with respect to a host of other issues, in every country. As in most cases, the journey toward a transnational civil society begins quite close to home.¹⁹⁷

195. UNCTAD, *supra* note 86, at 133, 166. Rules regarding permissible state regulation might include, *inter alia*, policies on employment, protection of the environment, consumer protection, information disclosure, technology transfer, transfer pricing and taxation, bribery, and restrictive business practices. See Ganesan, *supra* note 94, at 4–5.

Mexican civil society organizations have taken the position, in the context of NAFTA, that foreign investment “needs to be regulated by the State so that it may play a positive role in national development” and that expropriations should be compensated “according to timing and value established under Mexican law and in the national currency.” RED MEXICANA DE ACCIÓN FRENTE AL LIBRE COMERCIO, ESPEJISMO Y REALIDAD: EL TLCAN TRES AÑOS DESPUÉS 177–78 (1997).

196. Regarding the content of the FTAA itself, nongovernmental groups from the Americas have submitted 72 proposals to the Committee of Government Representatives on the Participation of Civil Society in the Free Trade Area of the Americas (FTAA). Civil society groups presented a letter to the FTAA investment working group on April 19, 1999, stating that they wished “to inform governments early in the negotiating process that civil society will oppose efforts to write an MAI or NAFTA-style investment agreement for the Western Hemisphere through the FTAA.” The letter expressed concern about the impact of an investment agreement on “democratic procedures, economic development, financial stability, environmental protection, and human rights,” and stated that civil society organization opposed “binding investor-to-state arbitration rules as the centerpiece of an FTAA investment agreement” as “a closed avenue by which corporations can bypass normal political and legal channels and attack domestically enacted laws.” See *The FTAA Process*, BRIDGES BETWEEN TRADE & SUSTAINABLE DEV. (ICTSD), Apr. 1999, at 10, available at <http://www.ictsd.org/html/arct_sd.htm>.

197. “Transnational civil society” is the forum for “globalization-from-below,” described by Falk as “an array of transnational social forces animated by environmental concerns, human rights, hostility to patriarchy, and a vision of human community based on the unity of diverse cultures seeking an end to poverty, oppression, humiliation, and collective violence.” Richard Falk, *The Making of Global Citizenship*, in GLOBAL VISIONS 39, 39 (J. Becher et al. eds, 1993).