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North American Free Trade Agreement's Chapter Eleven

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PANEL TWO

CRITICAL THEORY AND THE NORTH AMERICAN FREE TRADE AGREEMENT'S CHAPTER ELEVEN

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The application of critical race insights to issues involving U.S. foreign relations is likely to benefit both international lawyers and traditional race critics, albeit for different reasons. In critical race theory, international lawyers will find liberation from the prevailing state-centric and positivist modes of analysis that now dominate our field. Traditional race critics, who have usually stopped at the water's edge,[1] may discover that U.S. foreign policy decisions replicate some of the familiar patterns of many domestic U.S. laws. Race critics may find it illuminating that what the U.S. government does, by way of treaty, serves to entrench or even exacerbate racial and ethnic divides within other nations—as well as within our own.

I will limit my remarks to an examination of the North American Free Trade Agreement's (NAFTA) Chapter Eleven governing foreign direct investment (FDI).[2] NAFTA's investment chapter is a direct descendant of the U.S. model bilateral

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1. Adrien Wing is one of the rare counter-examples. *See, e.g.*, Adrien Katherine Wing, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

2. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605 (1993).

investment treaty as well as the nearly 900 similar bilateral investment treaties that now exist throughout the world.[3] At the same time, the NAFTA investment chapter is a much strengthened version of prior U.S. bilateral investment treaties as well as bilateral investment treaties now in force between other countries; it is, in many ways, a U.S. bilateral investment treaty on steroids—a dream come true for the U.S. foreign investor.[4] The NAFTA investment chapter is also significant as it is likely to represent the starting position for U.S. negotiators in other forums addressing FDI issues. Absent a radical shift in the U.S. approach to foreign investment, it is likely that our government will seek the replication of the NAFTA investment provisions through a hemisphere-wide Free Trade Agreement for the Americas or through global arrangements within the Organization of Economic Cooperation and Development or the World Trade Organization.[5]

The rhetorical power of the NAFTA investment chapter—its perceived legitimacy among traditional international lawyers—needs to be compared to some troublesome realities on the ground. The rhetoric of the NAFTA investment chapter is that of scrupulous neutrality and equal protection. Its text is grounded in symmetrical and reciprocal rights as between the NAFTA parties and their investors. This befits the treaty's claim that it is a "fair" contract between "sovereign equals." The reality is quite different. There is no actual symmetry of direct benefits to the national investors of all three NAFTA parties—at least not for the foreseeable future. As few Mexican investors are likely to be in the position to penetrate the U.S. market, it is almost exclusively U.S., not Mexican, nationals that get the benefit of the investment chapter. In reality, U.S. firms, not

3. For a summary of bilateral investment treaties, see RUDOLF DOLZER, BILATERAL INVESTMENT TREATIES (1995).

4. For a summary of the achievements of the NAFTA investment chapter compared to prior U.S. investment agreements, see Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

5. On the prospects for a Free Trade Agreement for the Americas, see Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808 (1995); Frank J. García, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L L. 539 (1995). For discussion of the possibilities for a Multilateral Investment Agreement, see Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181 (1996).

Mexican companies, will be demanding national and most-favored-nation treatment; they, not Mexican firms, will be the ones relying on the NAFTA to renege on their prior promises to litigate in local courts; they, not small- or medium-sized Mexican firms, will be reaching for supposedly "impartial" international arbitration to resolve investor-state disputes; they, not Mexican nationals, will be able to challenge local ordinances as de facto confiscatory measures or as breaches of the NAFTA prohibition on performance requirements. U.S. firms will be the ones claiming the direct benefits of free unencumbered repatriation of profits. Thanks to guaranteed arbitration, U.S. multinationals, who have been largely responsible for the promulgation and entrenchment of the doctrine of state responsibility to aliens, will henceforth be in a strengthened position to claim the benefits of that doctrine as well as the growing body of "lex mercatoria" so favorable to their interests.

The rhetoric of the NAFTA investment chapter suggests that all three NAFTA parties assume the "same" duties and take the same risks. The reality is a world in which U.S. laws and risk-taking remain essentially the same while Mexican policymakers are expected to complete and institutionalize an economic revolution without the resources needed to alleviate the inevitable adjustment pains. The predictable consequences of investment liberalization within Mexico were scarcely considered, much less addressed, by the negotiators of the investment chapter. The social, cultural, and political costs of investment liberalization were not factored into the economists' models that produced this treaty.[6] Yet, in the unmodelled real world, the Mexican people, especially those on the bottom of Mexican society, are now facing severe economic dislocations, which range from sectorial unemployment to a rising tide of bankruptcies for small- and medium-sized Mexican firms. For now, what the vast majority of the Mexican population has witnessed are the social costs of investment liberalization and not its presumed longer term benefits.[7] Moreover, even over the longer term, when the presumptive positive effects of the theory of comparative advantage are to

6. *Cf.* Robert W. Benson, *Free Trade as an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555 (1994).

7. For an overview of some of these consequences, see Alejandro Nadal, *Mexico: Open Economy, Closed Options* (working paper on file with author); Elvia A. Quintana Adriano, *The North American Free Trade Agreement and its Impact on the Micro-, Small- and Medium-Sized Mexican Industries*, 39 ST. LOUIS U. L.J. 967 (1995).

emerge, investment liberalization will produce a Mexican economy increasingly dominated by multinationals from one country—the United States. Few have asked what the political consequences of such domination are likely to be for a country whose history, as Amy Chua has most recently reminded us, consists of repeated oscillations between periods of market openness punctuated by cycles of reaction and nationalization.[8] After all, this is a country whose history consists of cycles of often violent reactions to domination by "ugly anglos" intent on achieving their "manifest destiny."[9] Why are we content to assume that this fifth Mexican oscillation—this time in favor of the market—will be permanent or constitute the end of Mexico's history?

The economic models that produced the NAFTA investment chapter focus on Mexican GNP, not equity.[10] Even assuming that the sanguine estimates of economists prove correct with respect to the growth of the Mexican economy as a whole, no one knows whether the widening gap between Mexican elites and the desperately poor, along racial and ethnic lines, will only be exacerbated by FDI nor what the resulting social and political costs will be if the gap increases. Furthermore, investment liberalization, NAFTA-style, has been pursued without regard for the need to legitimize FDI to the Mexican people, and not merely to those in Chiapas. In Mexico and elsewhere, investment liberalization has been pursued without a vision of social justice, without real democratic legitimacy, and without concern for the historical record of FDI. NAFTA negotiators from all sides pretended that free trade and free investment were interchangeable phenomena—as if the import of a Sony television and the sale to a foreign investor of a treasured cultural icon are as indistinguishable politically as they are under economic theory.[11] Many

8. *See* Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

9. *Id.* at 228-38.

10. *See generally* John Whalley & Colleen Hamilton, *The Intellectual Underpinnings of North American Economic Integration*, 4 MINN. J. GLOBAL TRADE 43 (1995). *See also* Calvin D. Siebert & Mahmood A. Zaidi, *Employment, Trade and Foreign Investment Effects of NAFTA*, 5 MINN. J. GLOBAL TRADE 333 (1996).

11. For examples of the fears prompted by and repercussions of incoming FDI, see EARL H. FRY, THE POLITICS OF INTERNATIONAL INVESTMENT (1983). *See also* Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSN'L L. 259 (1994); Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT'L L.J. 161 (1996).

real world effects of incoming FDI flows were not addressed, at least not for Mexico.[12]

No one engaged in story-telling about foreign investors of old; instead, the rhetoric of the NAFTA investment chapter suggests that all foreign investors, regardless of their bargaining power or the histories of particular companies, are all "innocents" abroad, equally needful of protection from all-powerful government interests bent on their destruction.[13] Instead of addressing the likely consequences of a tide of FDI in the 1990s and beyond, U.S. negotiators insisted on using the NAFTA investment chapter to address the concerns of the Cold War. Instead of looking forward, Chapter Eleven of the NAFTA looks back: it insists on protecting foreign investors from the last wave of Third World nationalizations, without much attention to the factors that produced those waves or the possible backlash that may accompany future incoming FDI flows.

The rhetoric of the investment chapter suggests a narrow economic treaty dealing with a limited set of protections for a defined group. The drafters of the NAFTA, as well as the commentators who have addressed it, tend to see it as a treaty within the self-contained sphere of "private" international law or, even more narrowly, "international economic law." In reality, this is a treaty that has an impact on the civil, political, economic, and social rights of a variety of individuals—from national investors driven out of business to those employed and unemployed by the changing fortunes and preferences of foreign multinational enterprises, especially in those sectors of the Mexican economy most likely to be dominated by foreign investors such as commercial agriculture and export manufacturing. But, if viewed as the human rights treaty that, in fact, it is, the NAFTA investment chapter is the most bizarre human rights treaty ever conceived.

Under the NAFTA investment chapter, corporate and natural investors have gained direct access to binding denationalized adjudication of any governmental measure that interferes with their ample rights. Many of the NAFTA investor protections

12. *Cf.* North American Agreement on Labor Cooperation, Sept. 8-14, 1993, U.S.-Mex.-Can., 32 I.L.M. 1499. The labor side agreement emerged from concerns within the United States that its laws relating to these issues would be disregarded or avoided.

13. *Cf.* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

echo human rights contained in the Universal Declaration of Human Rights and the principal human rights coventions, including rights against discrimination, to security, to recognition as a legal person, to nationality, to freedom of movement, and to own property and not be arbitrarily deprived of it.[14] Interestingly, the United States has only managed to agree on such a potentially effective regime for human rights enforcement in the context of one type of legal person, the foreign investor, and not for any other human being.[15]

Seen from this perspective, the NAFTA investment chapter is a human rights treaty for a special-interest group. Except for relatively weak side agreements, which deal with environmental and labor issues, this is a treaty that is effectively silent with respect to the rights of others, who may be affected by FDI flows, and that ignores many of the other rights also contained in the Universal Declaration of Human rights. In the chapter protecting the rights of businesses, there is no mention of a human being's right to "economic" rights "indispensable for . . . dignity and the free development of . . . personality."[16] Similarly, there is no mention of a right to work, of free choice of employment, of just and favorable conditions of work, or of protection against unemployment. Neither is there mention of rights of "equal pay for equal work" and "just and favourable remuneration ensuring ... an existence worthy of human dignity," or of the "right to form and to join trade unions."[17] No one, not even the foreign investor's employees, are given enforceable rights to "rest and leisure, including reasonable limitations of working hours and periodic holidays with pay."[18] No one is given a right to an "adequate" standard of living[19] or a "right to education,"[20] and, of course, there is no discussion of a "social and international order" in

14. *Cf. Universal Declaration of Human Rights*, G.A. Res. 217(A), U.N. Doc. A/810 at arts. 2, 3, 6, 7, 8, 10, 13, 15, 17, and 27(2) (1948) [hereinafter *Universal Declaration*].

15. The category of "foreign investor" that the investment chapter singles out for special treatment tends to render others, including national investors, invisible. It also focuses on only one aspect of the foreign investor—nationality—at the expense of the whole, including the history of the sector in which the foreign investor plans to invest or the history of the multinational corporation. *Cf.* Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 573, 578 (Richard Delgado ed., 1995).

16. *Universal Declaration*, *supra* note 14, art. 22.

17. *Id.* art. 23.

18. *Id.* art. 24.

19. *Id.* art. 25(1).

20. *Id.* art. 26.

which all of these human rights can be fully realized for all persons, not merely foreign investors.[21] What is perhaps most striking in a treaty whose essential goal is economic development is that there is no attempt to connect the rights it so lavishly bestows on its investors to the needs of the collective; there is no real attempt to put flesh on concepts such as a "right to development" or "sustainable development."[22]

It might be said that the comparison between the NAFTA and human rights instruments is, in itself, a rhetorical stance that is as questionable as the NAFTA's invocation of "equal rights." Nonetheless, the idea that NAFTA advocates would find comparisons with human rights instruments inapposite or absurd, at a minimum, shows the limited frame of reference in which that treaty was negotiated.

Furthermore, the NAFTA investment chapter does not purport to impose any corresponding duties on the U.S. multinationals it privileges. The NAFTA chapter contains scarcely one word about the many duties that multinationals should owe host states under international law. These duties have been canvassed, for example, in the Draft Code on the Conduct of Transnational Corporations, which has been under discussion at the United Nations for years.[23] There is no mention of duties to respect the national sovereignty of the states in which they operate; to contribute towards the achievement of national economic goals and development objectives; to implement contracts in good faith and to renegotiate contracts subject to a fundamental change in circumstances; to adhere to socio-cultural objectives and values; to respect human rights; to abstain from corrupt practices; to cooperate in the allocation of decisionmaking powers among their entities such as to enable them to contribute to economic development, local equity participation, and the manage-

21. *Cf. id.* art. 28. Of course, it does not need to be said that the NAFTA investment chapter does not attempt to lend its considerable legitimacy and enforcement tools to making real the promises contained in the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1967).

22. "Sustainable development" includes the concept that economic growth and environmental protection are neither discrete nor inherently contradictory goals, but are structurally related and may be mutually supportive. *See, e.g.*, Kenneth W. Abbott, *"International Economic Law": Implications for Scholarship*, 17 U. PA. J. INT'L ECON. L. 505, 509 (1996).

23. *See* Daniel B. Magraw, *United Nations ECOSOC Draft Code of Conduct on Transnational Corporations*, *in* BASIC DOCUMENTS INTERNATIONAL ECONOMIC LAW 533, 541 (Stephen Zamora & Ronald A. Brand eds., 1990).

rial and technical training of nationals; and to give priority to the employ of nationals. Moreover, there is no mention of duties to avoid transfer pricing practices, which have the effect of modifying the tax base on which their entities are assessed or of evading exchange control measures; to cooperate with host state's transfer of technology goals; to perform their activities with due regard to relevant international standards of consumer protection; and to disclose financial information.[24] While many of these duties are not regarded as controversial in the abstract, the prospect of making them as enforceable as the rights recognized in the NAFTA would have seemed heretical to NAFTA negotiators.

The bottom line is that instead of the comprehensive, balanced, and truly reciprocal investment regime that it purports to be, the NAFTA investment chapter is merely a short-sighted, one-way ratchet to reward and attract U.S. capital. Even those who assume that the attraction of foreign capital provides its own reward ought to be concerned should this treaty's imbalances undermine its promise to supply *stable* and *enduring* rights for foreign investors.

But if the investment chapter is not as color-, class-, and ethnicity-blind as its rhetoric suggests, are there consequences for Latinos within the United States as well? Others have already suggested the possibility that racial and ethnic minorities within the United States are likely to experience a disproportionate share of any adverse environmental and labor effects of that treaty and I need not dwell on that possibility here.[25] I would suggest that race critics explore another question as well: namely, the possible connections between FDI flows and immigration flows into the United States.

NAFTA's proponents argue that FDI flows into Mexico will reduce the pressures on Mexicans to emigrate.[26] Those who have examined the history of FDI flows and their impact on U.S. im-

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24. *Id. See also* José E. Alvarez, *Remarks*, 86 AM. SOC'Y INT'L L. 532, 550 (1992).

25. *See, e.g.*, Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. J. INT'L L. 357, 367 (1993)(arguing Mexican-Americans are most likely to be affected by NAFTA-induced environmental racism).

26. *See, e.g.*, Judith H. Bello & Alan F. Holmer, *The North American Free Trade Agreement: Its Major Provisions, Economic Benefits, and Overarching Implications, in* NAFTA: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 1, 12-13 (Judith H. Bello & Alan F. Holmer eds., 1994).

migration, such as Saskia Sassen, would suggest otherwise.[27] Sassen argues that U.S. investments abroad actually encourage greater emigration to the United States through:

> (a) the incorporation of new segments of the population into wage labor and the associated disruption of traditional work structures both of which create a supply of migrant workers;
>
> (b) the feminization of the new industrial workforce and its impact on the work opportunities of men, both in the new industrial zones and in the traditional work structures; and
>
> (c) the consolidation of objective and ideological links with the highly industrialized countries where most foreign capital originates, links that involve both a generalized westernization effect and more specific work situations wherein workers find themselves producing goods for people and firms in the highly industrialized countries.[28]

If Sassen is correct and FDI encourages Mexican immigration, the NAFTA investment chapter is directly implicated in many of the core issues that now preoccupy LatCrit theorists, as much of their work—consisting of critiques of initiatives such as English-only statutes or proposals to deny government benefits to legal and illegal aliens—address the backlash to immigration. The NAFTA investment chapter may have a causal link to proposals that pose risks to the rights of all Latinos, legal and illegal, within the United States. Moreover, if FDI promotes Mexican immigration, it is yet one more reason why Mexican immigration cannot, morally, be seen as "Mexico's" problem. If its investors help create the plight of Mexican immigrants, the United States is morally obligated to do more than simply build "fortress America" in reaction.

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There are many other promising avenues of inquiry that race critics might pursue in connection with the NAFTA invest-

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27. SASKIA SASSEN, THE MOBILITY OF LABOR AND CAPITAL (1988).
28. *Id.* at 120.

ment chapter. Some of these may clarify the past. Critical race perspectives may have much to say about how the NAFTA investment chapter came about. They may help explain the "naive" faith of its negotiators in facially neutral rules and forums that ignore North/South power differentials. Critical insights may pose issues for the future, suggesting, for example, that there are risks should FDI flows encourage the "harmonization" of laws between sending and receiving countries.[29] While many have assumed that such harmonization is desirable, race critics may not be quite as sanguine, especially if harmonization should proceed, as has investment liberalization, on U.S. terms.

Once we use critical insights to "deconstruct" and "reconstruct" the NAFTA investment chapter, we may become aware that investment liberalization, NAFTA-style, is not what it appears to be: a manifestation of neutral or impersonal "market" forces. We may realize just how much the NAFTA investment chapter reflects U.S. laws and perspectives.

At the same time, it is important that race critics not be seen as mere naysayers. The challenge for race critics, as well as other critics of the NAFTA, is to help construct alternative models for "sustainable investment liberalization." As the United States strives for hemisphere-wide investment liberalization through a Free Trade Agreement for the Americas, or even globally, through negotiations in the Organization of Economic Cooperation and Development and the World Trade Organization, race critics may usefully remind government negotiators of the need to keep investment liberalization responsive to the desperate plight of the underclass in both FDI sending and receiving states as only this kind of liberalization is likely to survive the pressures of representative government. What everyone, on both sides of the North/South divide, *should* want are investment rules of the road that endure because they are perceived as, and are, fair.

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29. For one examination of integrative possibilities, see Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917 (1992).