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GUATEMALA'S PEACE ACCORDS IN A FREE TRADE AREA OF THE AMERICAS

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Abstract:

Future Guatemalan governments would find it more difficult, under an FTAA investment regime, to carry out policies mandated by the peace accords. In particular, it would be more difficult to implement a range of policies designed to address land issues in Guatemala, which are at the heart of rural crisis and ongoing conflict in the country. These include policies 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. Under an FTAA, these polices would potentially conflict with high standards of investor protection, such as broad notions of national treatment, compensation for expropriation of assets, and a prohibition on performance requirements. Importantly, investors may be able to directly sue governments for perceived violations of their investor protections under the FTAA. The broad impact of an FTAA investment agreement, therefore, could be to place a new layer of constraint on the "freedom of action" available to Guatemala governments seeking to implement the peace accords.

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, 1951[1]

Introduction

On New Year's Day, 1997, for the first time in nearly four decades, Guatemala was officially 'at peace'. The last of 12 peace accords[2] had been signed, putting in place a broad mandate for reform to address many of the historical grievances of the country's marginalized and impoverished majority. Real hopes were born that a time of democracy and progressive change had finally arrived in Guatemala, after years of terrible conflict.

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 33 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]

The twin paths towards domestic peace and wider economic integration are portrayed as harmonious in the case of Guatemala. 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 fuelled 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 "other matters critical to peace and to development and reconciliation, including economic liberalization, market opening measures, [and] increased trade and investment".[6]

Are the paths to peace and integration so naturally complementary? This paper questions the official invocation of harmony by examining the potential impact of a Free Trade Area of the Americas (FTAA) in relation to 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 government policies on land stemming from the peace accords.[7] The assessment

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[1] Cited in Stephen C. Schlesinger and Stephen Kinzer, *Bitter Fruit: The Untold Story of the American Coup in Guatemala* (New York: Doubleday & Co., 1982) at 52.

[2] For the text of the peace accords, see 36 I.L.M. 274.

[3] See *Summit of the Americas: Declaration of Principles and Plan of Action*, 11 December 1994, Miami, U.S.A., 34 I.L.M. 808 ("Miami Declaration").

[4] Miami Declaration, *supra* note 3 at 810.

[5] Francisco Villagran de Leon, "Should Canada Extend a Commercial Hand to Guatemala?" *The [Toronto] Globe and Mail* (17 May 1996) A17.

[6] Bill Clinton, "Remarks in a Roundtable Discussion on Peace Efforts in Guatemala" (March 15, 1999) 35(10) *Weekly Compilation of Presidential Documents* 395(4). 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".

[7] In order to forecast the contents of an FTAA investment agreement, the paper looks to the standards of investor treatment and protection established in the *North American Free Trade Agreement*, signed 17 December 1992, 32 I.L.M. 296, 605 (entered into force 1 January 1994) ("the NAFTA"); as well as the expanded standards proposed in the draft Multilateral Agreement on Investment ("draft MAI"). See Organization for Economic Cooperation and Development (OECD) - Directorate for Financial,

focuses on commitments relating to land under two of the peace accords: the *Agreement on Identity and Rights of Indigenous Peoples*[8] ("the *Indigenous Accord*") and the *Agreement on Social and Economic Aspects and Agrarian Situation*[9] ("*Socio-Economic Accord*").

The thrust of the paper argues that an FTAA investment agreement, and international investment agreements in general, may be inconsistent with sovereign and democratic decision-making 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 decision-making, 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 because of the deep resonance that they hold as symbols of the hopes for peace and democracy within the country, and across the hemisphere. Indeed, after decades of conflict, the prospect that the hard-won commitments to pursue critical land-related reforms might eventually be undermined by the threat of investor challenges under an FTAA investment agreement is a cause for serious concern.

In Part I of the paper, 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 the land as a source of historical 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, with reference to the process of transnationalization. I also review some of the precedents for an FTAA investment agreement, such as NAFTA and the draft MAI, 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 their commitments on land issues under the peace accords. This assessment relies on an anticipatory analysis of the arguments that investors might use under an FTAA investor-to-state mechanism to challenge various policies stemming from the peace accords.

Finally, I conclude the paper 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

A. The Context of the Accords

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 (*Unidad Revolucionaria Nacional Guatemalteca*) (URNG), on December 29, 1996.[10] They rejoiced in the sensation of peace and the expectation of change. During one of the formal signing ceremonies in

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Fiscal and Enterprise Affairs, "The Multilateral Agreement on Investment - The MAI Negotiating Text", Draft document dated 24 April 1998, online: OECD<http://www.oecd.org//daf/investment/fdi/mai/maitext.pdf>; and OECD - Directorate for Financial, Fiscal and Enterprise Affairs, "The Multilateral Agreement on Investment - Commentary to the MAI Negotiating Text", Draft document dated 24 April 1998, online: OECD <http://www.oecd.org//daf/investment/fdi/mai/maitext.pdf>.

[8] *Agreement on Identity and Rights of Indigenous Peoples*, done at Mexico City, 31 March 1995, UN Doc. A/49/882, 36 I.L.M. 285 (entered into force 29 December 1996) ("*Indigenous Accord*").

[9] *Agreement on Social and Economic Aspects and Agrarian Situation*, done at Mexico City, 6 May 1996, UN Doc. A/50/1996, 36 I.L.M. 292 (entered into force 29 December 1996) ("*Socio-Economic Accord*").

[10] Clark Taylor, *Return of Guatemala's Refugees* (Philadelphia: Temple University Press, 1998) at 49-51.

Oslo, Norway, representatives of different social sectors endorsed the peace accords in pairs: a Mayan *campesino* walked with a *Ladino* university student,[11] a trade unionist with a government official, a military officer with a priest.

Thus ended 36 years of war, and thus began the long process to confront the aftermath of decades of violence and human rights violations,[12] organized primarily by the Guatemalan state,[13] and targeted most ferociously against the country's majority Mayan population.[14] The violence has left deep physical and emotional scars on millions of Guatemalans who suffered from, or carried out, the atrocities.[15]

The peace process began in 1991, in negotiations between representatives of the Government and the URNG, although most of the peace accords were concluded between 1994 and

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[11] There are four defined peoples in Guatemala: the *Maya*, of Indian origin; the *Mestizo* (or *Ladino*), of Indo-European roots; the *Garífuna*, of African and Caribbean origin; and the *Xinca*, of Pipile origin (the Pipile were a subgroup of a nomadic people known as the Nahua who migrated into Central America about 3000 B.C and who spoke a language similar to that of the Aztecs); A. Tay Coyoy, *Análisis de situación de la educación maya en Guatemala* (Guatemala: UNICEF/ Ministry of Education, 1994); cited in Tania Palencia Prado and David Holiday, *Towards a New Role for Civil Society in the Democratization of Guatemala* (Montreal: International Centre for Human Rights and Democratic Development, 1996) at 52.

According to the Mayan publisher's council, 60 percent of the Guatemalan population is Mayan (speaking 20 different languages), 39 percent is *Ladino*, and 1 percent is *Garífuna* or *Xinca*; see Palencia Prado and Holiday *supra* note 11 at 52; and United Nations Commission on Human Rights, 51st Sess., *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*, prepared in accordance with Commission resolution 1994/58, E/CN.4/1995/15 (20 December 1994) ("Pinto Report") at para. 201.

The definition of "Mayan" is admittedly complex. This paper accepts that 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", quoted from Carol A. Smith, "Introduction: Social Relations in Guatemala over Time and Space" in Carol A. Smith (ed.) *Guatemalan Indians and the State: 1540 to 1988* (Austin: University of Texas Press, 1990) at 3.

[12] 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 as many orphaned or widowed. See *Guatemala - Memory of Silence - Tz'inil Na'tab'al*, Report of the Commission for Historical Clarification (CEH), UNGAOR, 53rd Sess., Annex, Agenda Item 44, UN Doc. A/53/928 (1999) ("*CEH Report*"); and United Nations Children's Fund (UNICEF), *Country Programme Recommendation: Guatemala*, Addendum, UNICEF Executive Board, 3rd Reg. Sess., UN Doc. E/ICEF/1996/P/L.23/Add.1 (27 June 1996).

[13] 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 guerillas. See *CEH Report*, *supra* note 12 at 21and 29; and Reuters and AP, "Guatemala blames military for killings" *The [Toronto] Globe and Mail* (26 February 1999) A21.

[14] 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. The strategy involved the "mass execution of defenceless children, women, elderly people, and refugees by military troops", according to Vilas; and the Guatemalan Defence Minister at the time announced his intent to "get rid of the words 'indigenous' and 'Indian'". See respectively: *CEH Report*, *supra* note 12 at 2; Carlos M. Vilas, *Between Earthquakes and Volcanoes* (New York: Monthly Review Press, 1995) at 138; statements of General Mejia Victores quoted in Phillip Wearne, *The Maya of Guatemala* (London: Minority Rights Group, 1989) at 19. Also see UNICEF, *supra* note 12 at 2; and Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (London and Cambridge, Mass.: Zed Books and Cultural Survival, 1987) at 84-5.

[15] 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; Human Rights Office of the Archbishop of Guatemala (ODHA), *Guatemala - Nunca Mas*, vol. IV, "Victimas Del Conflicto" (Guatemala: ODHAG, 1998) ("REMHI Report").

1996.[16] 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, the cease-fire, and constitutional reforms. The end of the conflict was made possible, in part, by the conclusion of the Cold War and the support of the international community.[17] Further, a wide cross-section of Guatemalan society participated in the process leading to the final settlement. Non-governmental organizations from every sector contributed to the negotiations through the Assembly of Civil Society (*Asemblea de la Sociedad Civil*) (ASC), which submitted consensus proposals to the negotiating parties, or, in the case of the business sector, through direct links to the Government.[18]

As such, the peace accords are a vital symbol of Guatemala's historical compromise, between domestic elites seeking to salvage their guttered international reputation and popular organizations reeling from decades of repression and war.[19] According to Susanne Jonas, the accords represent "a splitting of differences between radically opposed forces, with major concessions from both sides".[20] 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,[21] and opens a period of tentative hope for greater democratic accountability.

B. The Land Question

1. *Agro-Export Production*

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, has entailed exploitation of the large Mayan rural population by a small minority of landowners.[22]

The agro-export model has expanded in phases, primarily as a result of active state intervention to expropriate land and guarantee the supply of cheap labour, for the benefit of large

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

[17] Jeremie Armon et al., "Contexto histórico" in *Guatemala 1983-1997 - ¿Hacia dónde va la transición?* (Guatemala: Conciliation Resources/ FLACSO, 1997) at 30-2; and Conciliation Resources, "Actores Clave en el Proceso de Paz" in *Guatemala 1983-1997 - ¿Hacia dónde va la transición?* (Guatemala: Conciliation Resources/ FLACSO, 1997) at 44-7.

[18] The ASC was created in the context of 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 and Holiday, *supra* note 11 at 32-7.

[19] 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 Guatemala", according to Palencia Prado and Holiday, , *supra* note 11 at 17.

[20] Susanne Jonas, "The Peace Accords: An End and a Beginning" (1997) 30(6) *NACLA Report on the Americas* 6 at 6.

[21] 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 American Weekly Report* (8 June 1995) 249.

[22] Agro-export production in Guatemala originates in colonial history. Since 1519, Spanish plantations were established by evicting indigenous communities and forcing Indians to provide labour 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 Guillermo Pedroni and Alfonso Porres, *Políticas Agrarias, Programas de Acceso a la Tierra y Estrategias de Comercialización Campesina* (Guatemala: Facultad Latinoamericana de Ciencias Sociales - FLACSO - programa Guatemala, 1991) at 17-18, 41; and Jim Handy, *Gift of the Devil* (Toronto: Between the Lines, 1984) at 21-3.

private landowners.[23] A century ago, coffee-centric production was expanded to bananas, under the dominion of the United Fruit Company.[24] Production was later expanded to include cotton, sugar, cardamom, and cattle ranching.[25] Most recently, the government and international donors[26] have committed large investments to expand non-traditional export crops, including vegetables, fruits, seeds, and flowers.[27]

2. *Patterns of Land Use and Ownership*

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.[28] The concentration of land ownership in Guatemala is among the highest in the hemisphere, based on the last official census, conducted in 1979,[29] and the

[23] According to Susan A. Berger, *Political and Agrarian Development in Guatemala* (Boulder: Westview Press, 1992) at 21: "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". Victor Bulmer-Thomas 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* (Cambridge: Cambridge University Press, 1988) at 13.

[24] United Fruit was formed in 1899 from a series of smaller companies operating in the region, and soon acquired a monopoly in banana production in Guatemala; Bulmer-Thomas, *supra* note 23 at 7. The heyday of banana production was from 1931-44, and the crop began to decline by the late 1950s; Peter Calvert, *Guatemala: A Nation in Turmoil* (Boulder: Westview Press, 1985) at 131. Also see Edelberto Torres-Rivas, *History and Society in Central America* (Austin: University of Texas Press, 1993) at 30-41.

[25] Between 1956 and 1980, the total land area devoted to cotton rose by 21 times, to sugar by four times, and to coffee by 56 percent; also, from 1960 to 1978, grazing lands for cattle expanded by 21 times; James Painter, *Guatemala: False Hope, False Freedom* (London: Latin American Bureau, 1987) at 3. Also see Pedroni and Porres, *supra* note 22 at 13-14.

[26] Most of the funding for government loans to support export vegetables and fruits has been provided by the World Bank, Inter-American Bank and USAID. See Lori Ann Thrupp, *Bittersweet Harvest for Global Supermarkets* (New York: World Resources Institute, 1995) at 3, 44-5 and 58.

[27] 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 Thrupp, *supra* note 26 at 44-5.

[28] Over the centuries, Mayan communities were pushed progressively out of the fertile lowlands of the Pacific coast, and eventually from large areas of the more marginal highlands in the north-west. Deprived of their traditional lands and economic base, many Mayans were forced to provide cheap seasonal labour for the plantations. See John Weeks, *The Economies of Central America* (New York: Holmes and Meier, 1985) at 111-14; Steven E. Sanderson, *The Politics of Trade in Latin American Development* (Stanford, California: Stanford University Press, 1992) at 76-7; and Richard Wilson, *Mayan Resurgence in Guatemala* (Norman: University of Oklahoma Press, 1995) at 36.

[29] According to the 1979 census, 66 percent of the arable land was concentrated on 2 percent of farms, with 15 percent of arable land divided among 87 percent of farms. More specifically, 78 percent of farmers were restricted to 10.5 percent of the country's cultivable land, with an average of 1.05 hectares per family. On the other hand, 1,362 plantations - controlled by 0.25 percent of property owners - occupied 34.5 percent of arable land, and averaged 2,500 hectares in size. See R. Hough et al., *Land and Labour in Guatemala: An Assessment*, Report for the U.S. Agency for International Development (USAID) (Guatemala City: Ediciones Papiros, 1982) at 1-2, 7; and United Nations Verification Mission for Guatemala (MINUGUA), *La Problemática de la Tierra en Guatemala* (Guatemala: Unidad de Análisis y Documentación, MINUGUA, April 1995) at 1-2.

Sandoval Villeda calculates that given the distribution of land in 1979, in absolute numbers, 408,704 small farmers held 583,972 hectares (1.43 hectares per farmer), while 13,070 large landowners held 2,568,909 hectares (196.6 hectares per landowner); Leopoldo Sandoval Villeda, "Tenencia de la tierra, conflictos agrarios y acuerdos de paz" (1997) 7 *FLACSO Guatemala Diálogo* 1 at 3.

country's economy remains heavily biased towards agro-export production.[30] In 1995, UN 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".[31] 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.[32]

3. *Land Shortage and Rural Poverty*

The social underbelly of agro-export production consists of land shortage, scant work for low wages,[33] the marginalization of small farmers[34] and traditional agricultural systems,[35] and severe poverty for most of the rural population.[36] In total,

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Finally, conditions of land ownership have not changed significantly since 1979, according to MINUGUA, *La Problemática de la Tierra*, *ibid.* at 1.

[30] The agricultural sector currently accounts for 25 percent of the country's GDP, roughly 60 percent of the labour force, and 70 percent of exports. Coffee, sugar and bananas alone account for nearly half of total exports (banana production was seriously damaged in November 1998 by Hurricane Mitch). See STAT-USA, National Trade Data Bank (NTDB), Report by the U.S. Department of Commerce, "Country Commercial Guide - Guatemala" (July 1999) at 7; Gustavo Palma Murga, "El Acuerdo Socioeconómico y Situación Agraria y la Problemática de la Tierra en Guatemala" in *Guatemala 1983-1997 - ¿Hacia dónde va la transición?* (Guatemala: FLACSO, 1997) at 73-5; and "Fresh Del Monte Produce Inc." *New York Times* (7 November 1998) C3.

[31] Pinto Report, *supra* note 11 at 38.

[32] Weeks *supra* note 28 at 4.

[33] Land shortage and poverty in the highlands drives *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 labour demand on the increasingly mechanized plantations, the displacement of small farmers by cattle farming, and the shift to non-traditional agricultural products that require less labour. See respectively: Wearne, *supra* note 14 at 19; Pedroni and Porres, *supra* note 22 at 15; Rosalinda Hernández Alarcón, *La Tierra en los Acuerdos de Paz: Resumen de la Respuesta Gubernamental* (Guatemala: Inforpress Centroamericana, 1998) at 4; and Palencia Prado and Holiday, *supra* note 11 at 11-12.

One of the hazards of work on the plantations is the risk of chemical contamination from pesticides. In 1994, there were 237 reported cases of pesticide poisonings, mostly in the cultivation of sugar and coffee. It is estimated that for each reported case of a poisoning, there are eight that go unreported. See United Nations Development Program (UNDP), *Guatemala: los contrastes del desarrollo humano* (Guatemala: Sistema de las Naciones Unidas en Guatemala, 1998) at 113-14.

[34] Small farmers suffer from other disadvantages, such as the absence of a simple, low cost system for land registration. They are also commonly denied access to technical support and credit; in 1993, 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 30 at 75; and Hernández Alarcón *supra* note 33 at 4.

[35] Agro-exports have continued to expand at the expense of crops cultivated for local consumption. Since the 1970s, agro-export production has expanded by 6.5 percent per year on average. In contrast, production of crops for domestic consumption has grown by 2.5 percent, less than an average rate of population growth of 3 percent. See Pedroni and Porres, *supra* note 22 at 11, 13; and Berger, *supra* note 23 at 87-9. More recent expansion of cattle ranching and non-traditional agro-exports has also pushed *milpa* producers further into marginal areas. Regarding cattle ranching, UN Food and Agricultural Organization (FAO) data reports a further expansion of land area by 92 percent in the decade leading up to 1993; World Resources Institute (WRI) et al., *World Resources 1996-97* (Oxford University Press, 1996) at 217. Regarding nontraditional exports, see Calogero Carletto, Elisabeth Sadoulet and Alain de Janvry, "Sustainability in the diffusion of innovations: smallholder nontraditional agro-exports in Guatemala" (1999) 47 *Economic and Cultural Change* 345 at Part I; and Thrupp, *supra* note 26 at 58, 108 and 112.

The primary alternative to agro-export production is the cultivation of indigenous crops for subsistence or small-scale exchange in local markets.

about 70 percent of the Mayan[37] population have no workable land.[38] Crowded into the highland regions of the country,[39] farmers are commonly forced to cultivate marginal lands where soils are less fertile, and require about triple the land area for subsistence production as in the coastal lowlands.[40] This squeezing out of small farmers by agro-exports has in turn undermined local food security.[41]

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 and Porres, *supra* note 22 at 12. Speaking generally, the traditional *milpa* system has been practiced in an ecologically sustainable way for millennia, and has provided 'social security' for local communities. Presently, however, it is confronted with a range of social, economic and ecological pressures. See Peter Utting, "Deforestation in Central America: Historical and Contemporary Dynamics" in Jan P. de Groot and Ruerd Ruben, eds., *Sustainable Agriculture in Central America* (New York: St. Martin's Press, 1997) at 17.

[36] In 1994, 72 percent of the rural population was living in conditions of extreme poverty, struggling to get by on a daily per capita income of less than 20 cents. See Pinto Report *supra* note 11 at 18, para.66, citing estimates by the Economic Commission for Latin America (ECLA).

[37] I note that the traditional *milpa* system of agricultural production forms an important part of the strong indigenous identity of the highland population, for whom the land holds deep cultural and spiritual importance. In his study of *Q'eqchi* Mayans, for instance, Wilson, *supra* note 28 at 21-2, describes that:

> Community identity is imagined in the relationship with the local sacred landscape. Villages are frequently named after an aspect of the sacred landscape, usually a mountain. Surnames are often specific to a locale. *Q'eqchis* call themselves *aj ral ch'och'*, or "children of the earth", a term that is also extended to include other indigenous groups.

Maize, in particular, is considered a sacred symbol of Mayan identity: the seed that bore humanity. For indigenous peoples throughout Central America, "corn was the basis and the expression of their cultures, the symbol of life and fertility, of nourishment and identity", according to Vilas, *supra* note 14 at 7. See also Wilson, *ibid.* at 16, 44.

[38] Pinto Report, *supra* note 11 at 38. Those who are able to farm possess insufficient plots of land: roughly 88 percent of farms in the country were considered too small to provide for the needs of a family. See Hough et al., *supra* note 29 at 7; and The World Bank, *Guatemala: Land Tenure and Natural Resources Management* (Natural Resources and Rural Poverty Division, 1995) at 28-9.

[39] Guatemala can be divided into four topographic regions: the Pacific coastal lowlands, the highlands, the Northern Transversal Strip and the Petén; Berger *supra* note 23 at 6. The Mayan population is concentrated in the north-west highlands; thus, the population of highland departments ranges from being 80 to 95 percent indigenous; Palencia Prado and Holiday *supra* note 11 at 53. Further, seven of the nine highland departments have the lowest levels of human development in Guatemala; UNDP, *supra* note 33 at 15.

[40] Land shortages in the *Ixil* region of Quiche have, on average, left families with about half of what they need to support themselves from the land; D. Stoll, *Between Two Armies in the Ixil Towns of Guatemala* (New York: Columbia University Press, 1993) at 247. See also Wilson, *supra* note 28 at 43.

[41] From 1950 to 1979, the area of land per capita dedicated to basic foods fell by more than half, while agro-exports expanded. As early as 1955, the government was forced to import large quantities of corn to make up for national shortfalls. During the 1980s and early 1990s, imports of 'food aid' rose by 15 times; yet, at the same time, exports of basic cereals more than doubled. Further, between 1974 and 1994, the percentage of grains fed to livestock as a percent of total grain consumption rose from 7 to 25 percent. See respectively: Tom Barry, *Roots of Rebellion* (Boston: South End Press, 1987) at 7; Berger, *supra* note 23 at 8 and 89; and FAO statistics for 1983 to 1993, cited in WRI, *supra* note 35 at 243 and 245.

I also note that the Mayan small farmers, who are generally the most 'squeezed' in terms of access to land, 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 Palencia Prado and Holiday, *supra* note 11 at 53. According to Berger, *supra* note 23 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".

By forcing small farmers onto marginal lands,[42] the agro-export model has also contributed to processes of deforestation[43] and soil erosion.[44] This has aggravated the related social problems of land shortage and rural poverty.

Paradoxically, large areas of arable land continue to lie fallow or underused on the plantations and cattle ranches.[45] Meanwhile, in many parts of the country, *campesino*[46] families subsist on a diet of tortillas and salt. Throughout the highlands, one can observe the patchwork of cornfields, extending far up the sides of hills and volcanoes, planted by *campesino* farmers desperate for land. This is perhaps the clearest physical image of how the structure of agricultural production and land distribution in Guatemala has fuelled broader social ills, and of the need for reform.

4. *Land, Conflict and the Pressure for Reform*

Land has been at the heart of social conflict in Guatemala for centuries, and remains so today.[47] By far, the most significant attempt to address this conflict occurred under the reformist government of Jacobo Arbenz Guzmán.[48] In 1952, Arbenz passed

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[42] 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 less and 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 was 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", according to Stoll, *supra* note 40 at 246. Of eight departments in the country where land use exceeded the relatively high level of 65 percent, four were in the highlands, according to 1992 statistics; UNDP *supra* note 33 at 224. Also see Utting, *supra* note 35 at 15-17.

[43] 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*; UNDP, *supra* note 33 at 103 and Note 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 neighbouring 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, Presentation, "Tenencia y Manejo de los Recursos Naturales en las Tierras Comunales del Altiplano Guatemalteco" (Washington, DC: Latin American Studies Association, 1995); and World Bank, *supra* note 38 at 38-45.

[44] Deforestation has, in turn, led to soil erosion: by 1991, 85 percent of the entire country had experienced some erosion, and 10 percent was in an advanced state of erosion; UNDP, *supra* note 33 at 104.

[45] H. Jeffrey Leonard, *Natural Resources and Economic Development in Central America* (New Brunswick, U.S.A. and Oxford: Transaction Books, 1987) at 116. The departments with the highest proportion of underused land are located in the agro-export zones along the Pacific coast and in the south-east; they include Jalapa, Retalhuleu, Suchitepéquez, Escuintla, and Izabal; UNDP, *supra* note 33 at 224.

[46] Spanish for countryperson or small farmer.

[47] In 1995, for example, the UN 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". With greater flourish, the *Coordinadora Nacional de Organizaciones Campesinas* (National Coalition of Campesino Organizations) (CNOC) declared in July 1998 that "the unjust distribution of land is the centre of all the conflicts that our country has experienced and a limitation for the development of the country". See respectively: MINUGUA, *La Problematica de la tierra*, *supra* note 29 at 1 [my translation]; and Coordinadora Nacional de Organizaciones Campesinas (National Coalition of Campesino Organizations) (CNOC), Final document and resolutions, Second National Congress, July 16-18, 1998, Palín, Escuintla, Guatemala, "Peace accords and rural development" at 5 [on file with author].

[48] See generally Susanne Jonas, *The Battle for Guatemala* (Boulder: Westview Press, 1991) at 57-71; Handy, *supra* note 22 at 149-64; and Jim Handy, *Revolution in the Countryside* (Chapel Hill & London: The University of North Carolina Press, 1994) at 86-100.

an agrarian reform that redistributed underused lands from large plantations to landless *campesinos*.[49] This invoked the wrath of a number of large landowners/investors, including the United Fruit Company, the largest landowner in the country at the time, leading in large part to Arbenz's overthrow in 1954.[50]

The agrarian reform was quickly reversed by the authoritarian government of Carlos Castillo Armas that replaced Arbenz.[51] Following the coup, the country descended into decades of repression of popular organizations by the increasingly militarized state.[52] Although there have since been other efforts to carry out agrarian reform, none have been as wide-ranging or democratically responsive as those attempted under Arbenz.[53]

As a result, the land continues to be "the epicenter of the social crisis in Guatemala", according to one commentator,[54] with rural protest confronted time and again by violence and repression.[55] In recent years, *campesino* groups have carried out occupations of plantations, to respond to the inequitable land distribution and poverty in the interior of the country, according to the UNDP.[56] In particular, a number of land

[49] A total of 16.3 percent of arable land was expropriated, including 386, 901 acres from the United Fruit Company, at a total 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 23 at 65, 70-1.

[50] Armon et al., *supra* note 17 at 23-4; and Palma Murga, *supra* note 30 at 77-8.

[51] 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; Berger, *supra* note 23 at 86-8. Also see William Blum, *Killing Hope - U.S. Military and CIA Interventions Since World War II* (Montreal: Black Rose Books, 1998).

[52] The militarization of the Guatemalan state dates back to 1963. In the 1970s, the military, as well as individual officers, established themselves as large landowners in the mineral-rich northern provinces. Also, the armed forces set up commercial enterprises, industrial projects, broadcasting companies, and banking services; Berger *supra* note 23 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" (1998) 55 *Studies in Political Economy* 155 at 162.

[53] See Berger, *supra note* 23 at 43.

[54] Alfredo Guerra-Borges, "La Cuestion Agraria, Cuestion Clave de la Crisis Social en Guatemala", Presentation to seminar, National Autonomous University of Mexico (UNAM), 14-17 November 1983, Mexico City [on file with author].

[55] To illustrate the cycle of protest and repression leading up to the peace accords: on May 29, 1978, Mayan farmers who had gathered in the main square of Panzos Alta Verapaz, to protest evictions by local landowners, were murdered by soldiers. In 1986, not long after the worst years of repression, 15,000 farmers and landless *campesinos* marched to Guatemala City to protest the land shortages. By 1988, according to Berger, "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". See respectively: International Work Group on Indigenous Affairs (IWGIA), *Guatemala 1978: the massacre at Panzos* (Copenhagen: IWGIA, 1978) at 8; Pedroni and Porres *supra* note 22 at 20; Berger *supra* note 23 at 200; Guatemalan Episcopal Conference, *El Clamor por la Tierra* (The Clamor for the Land) (1988) [my translation];

[56] UNDP, *supra* note 33 at 232. Landowners have commonly responded to these actions by forcibly dislodging the groups of *campesinos*, or by assassinating their leaders, often with explicit government backing. Land conflicts appear to have worsened with the government policy of evicting those who have occupied lands, according to a report from the Washington Office on Latin America (WOLA). See Hernández Alarcón *supra* note 33 at 25 and 63. Also see Dennis Moore, "The Case of El Sauce: Land Conflicts Persist After War's End" 19(2) *Report on*

disputes have risen to the surface since the conclusion of the peace accords.[57] Although rooted in wider conditions of land shortage and rural poverty, many conflicts are exacerbated by the insecurity of land tenure and the absence of a comprehensive land registry.[58] Speaking generally, the country lacks effective legal mechanisms to resolve conflicting claims to land, and, after 36 years of violence, the political culture tends towards confrontation rather than compromise.[59]

Guatemala 8; and James Black, "Scorched Earth In A Time of Peace" (1998) 32(1) *NACLA Report on the Americas* 11.

[57] Víctor Alfredo León Gemmell, Herbert David Ortega Pinto and Roberto Menéndez, "Las Relaciones Intersectoriales en la Conflictividad Sobre la Tierra en Guatemala" (Guatemala City: OEA/ PROPAZ, 1997) at 3.

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 (from June 1997 to February 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 33 at 47-8.

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. I note that 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 23 at 19.

[58] Organization of American States (OAS), *Diagnóstico de Conflictividad*, (Unidad para la Promoción de la Democracia, 1996) at 10-11. This preliminary draft of the OAS study, at 8-19, 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. Also see MINUGUA, *supra* note 29 at 8; and Human Rights Watch/ Americas, *Guatemala - Return to Violence* (New York: 1996) at 28-30.

[59] Palma Murga, *supra* note 30 at 78, Note 8.

C. The Peace Accords

1. *Overview of the Socio-Economic Accord and the Indigenous Accord*

In the face of the historical conflict over land, Guatemala's peace accords follow the path of moderation.[60] Although they do not contemplate 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. As such, the implementation of the accords 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.

The two most important accords dealing with agrarian reform and indigenous land rights[61] are the *Socio-Economic Accord* and the *Indigenous Accord*.[62] Both accords were concluded 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, and only after the removal of articles that were unacceptable

[60] 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 labour conditions; see Hernández Alarcón *supra* note 33 at 63-7. 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 and Porres, *supra* note 22 at 42 [my translation].

[61] Hernández Alarcón *supra* note 33 at 11.

[62] Both accords entered into force with the signing of the final peace accord on December 29, 1996; *Indigenous Accord, supra* note 8; and *Socio-Economic Accord, supra* note 9.

to the private sector.[63] Even so, the accord was roundly criticized in both the popular and private sectors for having given away too much to the other side.[64]

In the case of the *Indigenous Accord* the compromise reached reflects, in part, the moderated position taken by 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.[65]

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 peace, development, and democratic accountability in Guatemala.

2. *Commitments on Land*

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.[66] These include commitments regarding: the implementation of a land trust fund to benefit landless and small farmers;[67] a land tax designed to encourage productive use of land;[68] a comprehensive land registry;[69] the resolution of land conflicts;[70] the reinstatement of usurped land or compensation of their former owners;[71] recognition of communal land ownership;[72] and potential redistribution of underused lands under Article 40 of the Constitution.[73]

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".[74] In particular, the Government makes a range of commitments designed to promote indigenous land rights, including assurances regarding indigenous access to traditional lands;[75] indigenous participation in decision-making regarding natural resources;[76] indigenous rights to compensation for damage caused by resource development projects;[77] the elimination of discrimination against indigenous women with respect to land;[78] and the settlement of indigenous land claims.[79]

In summary, based on both accords, the Government commits to:[80]

A. Facilitate access to land and encourage the productive use of land by means of:

    1. A land trust fund;
    2. Potential redistribution of land under Article 40 of the Constitution; and
    3. A land tax.

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[63] David Holiday, "Guatemala's Long Road to Peace" (1997) 96(607) *Current History* 68 at 71.

[64] Sandoval Villeda, *supra* note 29 at 5-6; and Taylor, *supra* note 10 at 57.

[65] 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 because it was felt to be too radical. See Palencia Prado, *supra* note 11 at 63-4.

[66] See Hernández Alarcón *supra* note 33 at 11; and Sandoval Villeda, *supra* note 29 at 6-10.

[67] *Socio-Economic Accord*, art. 34, *supra* note 9.

[68] *Ibid.*, art. 42.

[69] *Ibid.*, arts. 37(a) and 38.

[70] *Ibid.*, arts. 37(f) and (h).

[71] *Ibid.*, art. 37(f)(ii).

[72] *Ibid.*, arts. 37(d) and (e).

[73] *Ibid.*, art. 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... ". *Constitution of the Republic of Guatemala*, Title II, c. 1, art. 40 (Guatemala: Procurador de los Derechos Humanos) [my translation].

[74] *Indigenous Acccord*, c. F, art. 4, *supra* note 8.

[75] *Ibid.*, c. F, art. 6(a).

[76] *Ibid.*, c. F, art. 6(b) and c. E, art. 3.

[77] *Ibid.*, c. F, art. 6(c).

[78] *Ibid.*, c. F, art. 9(g).

[79] *Ibid.*, c. F, art. 7.

[80] For further discussion, see Part III below.

B. Resolve land conflicts and provide security of land tenure by means of:

    1. A comprehensive land registry;
    2. Recognition of communal land ownership;
    3. Reinstatement of usurped lands, or compensation of their former owners.

C. Promote indigenous land rights, including:

    1. Indigenous access to traditional lands for subsistence and spiritual activities;
    2. Indigenous rights regarding natural resources on their traditional lands;
    3. The elimination of discrimination against indigenous women; and
    4. 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 toward key areas for reform through the election of more broadly representative governments. Also, they have made the formerly taboo issue of land reform a part of the landscape of public debate and popular organizing. As such, they are powerful symbols of democracy.[81]

In terms of implementation of the peace accords to date, the United Nations has reported tentative progress, as well as significant setbacks.[82] Although there are no guarantees that future Guatemalan governments will move forward with their commitments,[83] the accords have at least laid a

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[81] David Holiday, *supra* note 63 at 68, 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.

[82] In terms of the successes with respect to land and the agrarian situation, the UN has mentioned: the progress achieved in negotiations toward a land trust fund; the 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 non-governmental organizations in these matters. The UN also gave 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 United Nations Secretary General, *The Situation in Central America - Report of the Secretary General*, UN General Assembly, 53rd Sess., UN Doc A/53/421 (28 September 1998) at 9-10 and 16; and United Nations Secretary General, *The Situation in Central America - Report of the Secretary General*, UN General Assembly, 54th Sess., UN Doc A/54/311 (3 September 1999) at 8-9.

Two major reforms have been derailed, however, 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 the early part of 1998. Most fundamentally, as George Black points out, "Since the signing of the Peace Accords… there has been little change in national patterns of land tenure". See respectively: United Nations Secretary General, *United Nations Verification Mission in Guatemala (MINUGUA) - Report of the Secretary-General*, UN General Assembly, 54th Sess., UN Doc. A/54/355 (13 September 1999) at 3; and Hernández Alarcón *supra* note 33 at 41-4; and Black, *supra* note 56 at 12.

[83] 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 10 at 64-68; and Palencia Prado and Holiday, *supra* note 11 at 28-32. The assassination of Auxiliary

foundation for meaningful changes to occur within a broader, long-term political process.[84] 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".[85] It is this sentiment of hope that leads us to the question of how wider processes such as the FTAA might impact the prospects for democratic reform.

II. Free Trade Area of the Americas

A. Background

In December 1994, 34 countries launched negotiations towards a Free Trade Area of the Americas (FTAA) at the first Summit of the Americas in Miami.[86] To date, investment rules have been an integral part of the FTAA proposals.[87] The FTAA governments formed a working group to study the topic in 1994,[88] and then created a negotiating group on investment, which held its fourth meeting in August 1999. Their work

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Bishop Juan Gerardi in April 1998, for instance, has been linked to high-level military and government officials; see "The Americas: Another kind of reconstruction" *The Economist* (14 November 1998) 36-7.

The election of Alfonso Portillo as president this past January may not bode well for the mandate of the peace accords, at least with respect to land. Portillo is leader of the Guatemalan Republican Front (FRG), founded by the infamous General Efrain Rios Montt, who held power during the early 1980s after a coup, and who will now sit 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* (22 January 2000) 38-9.

[84] "The political opening now is real, despite many obstacles...", according to one Guatemalan commentator; Palma Murga *supra* note 30 at 73 [my translation]. Also, Jonas states that "on 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"; Jonas (1997), *supra* note 20 at 10.

[85] Holiday, *supra* note 63 at 74.

[86] The FTAA governments have committed to creating an FTAA by 2005, and have instructed their FTAA negotiating groups, which are 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 Argentina in April 2001. 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, anti-dumping and countervailing duties; and competition policy. See *Second Summit of the Americas: Santiago Declaration and Plan of Action*, 19 April 1998, Santiago, Chile, 37 I.L.M. 947 at 951 ("Santiago Declaration"); and Summit of the Americas: *Fifth Trade Ministerial Declaration*, 4 November 1999, Toronto, Canada, online: FTAA official website <http://www.alca-ftaa.org/ministerials/minis_e.asp>. See also Miami Declaration, *supra* note 3 at 811.

[87] The prospect of an FTAA investment agreement is an opportunity to "put the Americas at the forefront of multilateral consensus-building", according to the Trade Unit of the Organization of American States (OAS), since the goal of a broad multilateral investment agreement has not yet been accomplished under the WTO; OAS Trade Unit, *Toward a Free Trade Area of the Americas* (1995), online: Organization of American States - Trade Unit <http://www.sice.oas.org/TUnit/tftr/index.asp> (date accessed: 22 February 1999) at 8-9.

[88] 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: *First Trade Ministerial Declaration*, 30 June 1995, Denver, U.S.A., Final Joint Declaration, online: FTAA official website <http://www.alca-ftaa.org/ministerials/denver_e.asp> at para. 5. 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.

See Summit of the Americas: *Fourth Trade Ministerial Declaration*, 19 March 1998, San Jose, Costa Rica, Summary of Workshop on Investment, online: FTAA official website <http://www.alca-ftaa.org/ministerials/costa_e.asp>.

continues towards concluding a hemispheric agreement on investment.[89]

B. The "Push" for Stronger Investor Protection

1. *Context for the "push"*

The FTAA investment negotiations are part of a wider effort to establish higher standards of protection for investors at the international level.[90] The push is driven by capital-exporting countries, in general, and by the United States, Japan, the United Kingdom, France and Germany, in particular.[91] 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.[92]

The push for higher standards of investor protection has occurred within the context of 'transnationalization',[93] characterized by diminished

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[89] Guatemala, along with the other Central American Governments, has maintained its commitments to establishing an FTAA by 2005, and participates in regular meetings of the nine negotiating groups; United Nations Secretary General, *The Situation in Central America - Report of the Secretary General*, UN General Assembly, 54th Sess., UN Doc A/54/311 (3 September 1999) at 5.

[90] J.W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 *International Lawyer* 655 at 661. The U.S., in particular, has pursued higher standards via a series of BITs signed since the early 1980s; C. VanGrasstek, "U.S. Objectives in Trade Negotiations: Implications for Developing Countries", Report prepared for the United Nations Conference on Trade and Development (UNCTAD) (September 3, 1998) at 19-21.

I note that the issue of compensation for a state expropriation of investor assets has been the subject of contention under international law since the 19th Century. This was especially so after the process of post-war decolonization and the efforts of newly independent countries to gain effective control over their natural resources. See Stephen Gill and David Law, *The Global Political Economy* (Baltimore: The Johns Hopkins University Press, 1988) at 208; and United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 1996* (New York/ Geneva: United Nations, 1996) at 191.

[91] These are the primary capital-exporting countries. However, developing countries may also push hard for high standards in negotiating investment regimes at the regional level; (UNCTAD) (1996), *supra* note 90 at 163.

[92] Quoted from the Third World Network; cited in UNCTAD (1996), *supra* note 90 at 163. Many states have sought to regulate the entry and operation of foreign direct investment within their borders. Their broad goal is to maximize the benefits of foreign investment for national development, and to minimize the costs. Thus:

> Most Governments welcome foreign direct investment, but most also regulate it, to a greater or lesser degree. This is because not all forms of foreign direct investment are considered desirable, or because some industries may be reserved for national investment. By regulating investment, Governments seek to maximize the net benefits they receive...

United Nations Centre on Transnational Corporations (UNCTC), *Government Policies and Foreign Direct Investment* (New York: United Nations, 1991) at 1.

Government policies regarding foreign investment may reflect national priorities about the structure of the economy and the allocation of resources and decision-making 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 (1996), *supra* note 90 at 175.

[93] Transnationaliztion as a historical process has involved rapid technological change, enhanced capital mobility, and the remapping of political regions. See Ricardo Grinspun and Maxwell A. Cameron, "The Political Economy of North American Integration: Diverse Perspectives, Converging Criticisms" in Ricardo Grinspun and Maxwell A. Cameron, eds., *The Political Economy of North American Free Trade* (Montreal & Kingston: McGill University Press, 1993) at 17. Also see Gill and Law *supra* note 90 at 146.

state regulation of foreign direct investment[94] (FDI),[95] the rise of transnational corporations (TNCs),[96] and the ideological preeminence of neoliberalism,[97] or, the 'Washington Consensus'.[98]

[94] 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. However, with the rise of transnational corporations (TNCs) in the post-war era, foreign direct investment (FDI) has become the dominant form of international investment. According to the UN Conference on Trade and Development, FDI is:

> …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 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.

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 respectively: Gill, *supra* note 90 at 146-7; UNCTAD (1996), *supra* note 90 at 219; and Barry, *supra* note 41 at 29.

[95] 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 (1991), *supra* note 92 at 8; and UNCTAD (1996), *supra* note 90 at 133.

This trend indicates that governments have adjusted "national policies and practices... to the exigencies of the world economy of international production", as Cox states. Also, according to the UNCTC, many countries believed that host governments, rather than transnational investors, were gaining bargaining power when "the pendulum had in fact swung the other way" by the 1980s. See respectively: Robert W. Cox, *Production, Power, and World Order* (New York: Columbia University Press, 1987) at 253; and UNCTC (1991), *supra* note 92 at 19-20.

Governments have also engaged in "policy competition" with each other to provide favourable conditions for investment by TNCs, according to UNCTAD. This has prompted governments to provide more favourable corporate tax rates, tax holidays, direct subsidies and other incentives "because of competition from other investment locations". In this context, governments have also allowed TNCs to "outgrow" their national boundaries by lowering barriers to investment flows out of the country. According to Nunnencamp, countries that balk at the pressure to provide more favourable conditions for foreign investors run the risk of being "de-linked" from a global economy that is run, increasingly, by TNCs. See respectively: UNCTAD (1996), *supra* note 90 at 163; UNCTC (1991), *supra* note 92 at 8-9; Andrew Jackson, "The MAI and Foreign Direct Investment" in Andrew Jackson and Mathew Sanger, eds., *Dismantling Democracy* (Ottawa and Toronto: Canadian Centre for Policy Alternatives and James Lorimer & Company, 1998) at 251; and Peter Nunnenkamp, "Foreign direct investment in Latin America in the era of globalized production" (1997) 6(1) *Transnational Corporations* 51 at 75.

[96] The bulk of FDI is carried out by large transnational corporations (TNCs). Since the mid-1980s, FDI has overtaken trade as the primary means of transnational business expansion by TNCs. See Gregory Albo and Chris Roberts, "The MAI and the World Economy" in Andrew Jackson and Mathew Sanger, eds., *Dismantling Democracy* (Ottawa and Toronto: Canadian Centre for Policy Alternatives and James Lorimer & Company, 1998) at 297-8. On reasons for TNCs preferring FDI to trade, see United Nations Centre on Transnational Corporations (UNCTC), *The Process of Transnationalization and Transnational Mergers* (New York: United Nations, 1989) at 1.

[97] Neoliberalism calls for greater reliance on market forces and private initiatives, and prescribes monetarist structural adjustment policies, the deregulation of market activity, and the privatization of state enterprises. See Grinspun and Cameron, *supra* note 93 at 21.

[98] The neoliberal model is also referred to as the "Washington Consensus" because it has been promoted by institutions based in that city; T. Lothian, "The Democratized Market Economy In Latin America (And Elsewhere): An Exercise in Institutional Thinking with

As such, the neoliberal "globalization project" aims to liberalize investment rules in order to support the trend towards the dismantling of government policies to regulate FDI, and the consequent unfettering of TNCs.[99] 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.[100] 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.[101]

Law and Political Economy" (1995) 28 *Cornell International Law Journal* 169 at 175-9. The author states at 175:

> The label clearly suggests the decisive nature of the American influence upon the ascendancy of neoliberal ideas in Latin America and elsewhere. This influence has two overlapping sources: the world of the American technocracy, established in the government and in the major multilateral banks and, more importantly, the world of the American universities, especially the graduate economics departments where so many candidates for Latin American elite status have trained.

[99] Chase-Dunn refers to the neoliberal "globalization project" as the abandonment of Keynesian models of national development and a new emphasis on deregulation and the opening of national commodity and financial markets to foreign trade and investment. C. Chase-Dunn, "Globalization From Below in Guatemala", Paper presented at the Conference on Guatemalan Development and Democracy: Proactive Responses to Globalization, 26-28 March 1998, Universidad del Valle, Guatemala at para. 17.

[100] 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 reallocate capital to its most productive uses.

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". See respectively: J.W. Messing, "Towards a multilateral agreement on investment" (1997) 6 *Transnational Corporations* 123 at 126; and *Summit of the Americas: Fourth Trade Ministerial*, *supra* note 88.

[101] Ganesan, former Commerce Secretary to the Government of India, states that the dominant capital-exporting countries have pushed for higher standards because of the "crucial role" they see FDI playing "in the strategies of their enterprises to gain and consolidate market access opportunities around the world". Also, Salacuse comments that the push towards 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.

See A.V. Ganesan, "Strategic Options Available to Developing Countries with regard to a Multilateral Agreement on Investment", Report prepared for the United Nations Conference on Trade and Development (UNCTAD) (January 1998), abstract available online - United Nations Conference on Trade and Development <http://www.unctad.org/en/pub/dplist98.htm> at 2; and Salacuse, *supra* note 90 at 661.

I note that the largest TNCs are based primarily in a small number of capital-exporting countries. According to UNCTAD, 76 of the world's largest 100 TNCs are based in just five countries: the U.S., Japan, the United Kingdom, France and Germany; and 98 of the largest 100 TNCs are based in just 13 industrialized countries. See UNCTAD, *World Investment Report 1998* (New York/ Geneva: United Nations, 1998) at 36-9.

Finally, I note that 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.

An integral part of the context for the FTAA is the preeminence of U.S. capital in the Americas.[102] Under an FTAA, higher legal standards of investor protection would presumably provide greater legal security and leverage for U.S.-based TNCs, which invest heavily in the region.[103] 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 military and economic might to protect the claims of American investors in various episodes during the last century.[104] In legal terms, the conflict has played itself out in the divergent positions, exemplified by the Calvo Doctrine,[105] on the issue of how a foreign investor should be treated in the event of a state expropriation of its property.[106]

Thus, industrialized countries insisted that UN multilateral initiatives to establish standards for the conduct, behaviour and obligations of foreign investors be made non-binding and voluntary. See Ganesan, *ibid.* at 4.

[102] U.S.-based TNCs currently account for about 40 percent of FDI in Latin America and the Caribbean; UNCTAD (1998), *supra* note 101 at 243-5. Indeed, the broad political origins of the FTAA have been tied to the U.S. interest since the 1980s 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 and R. Kreklewich, "Consolidating Neoliberal Reform: 'Free Trade' as a Conditioning Framework" (1994) 43 *Studies in Political Economy* 33 at 46. Also see Kenichi Ohmae, *Triad Power: The Coming Shape of Global Competition* (New York: Free Press, 1985).

[103] Latin America was the destination for 19.6 percent of all U.S. FDI during 1996-98; U.S. Department of Commerce, *Survey of Current Business*, Vol. 79, No. 11 (November 1999) at D-14.

[104] According to VanGrasstek and Vega: "Investment disputes have been a perennial source of friction in U.S. relations with Latin American and Caribbean countries". See Craig VanGrasstek and G. Vega, "The North American Free Trade Agreement: A Regional Model?" in Sylvia Saborio, ed., *The Premise and the Promise: Free Trade in the Americas* (New Brunswick, New Jersey: Transaction Publishers, 1992) at 165.

[105] The Calvo Doctrine, which has expressed the position of many Latin American governments, is named after the Argentinean jurist who first articulated it. 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.

See UNCTAD (1996), *supra* note 90 at 133, referring to C. Calvo in A. Rousseau, ed., *Le Droit International Théorique et Practique* (1896) at 118.

[106] 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 respectively: UNCTAD (1996), *supra* note 90 at 191; and César Augusto Bunge and Diego César Bunge, "The San José de Costa Rica Pact and the Calvo Doctrine" (1984) 16 *Inter-American Law Review* 17 at 32.

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" (1990) 84 *American Journal of International Law* 394 at 419; Tali Levy, "Note - NAFTA's Provision for Compensation in the Event of Expropriation: A

2. *Definition of Stronger Protection*

Broadly speaking, the current push for stronger investor protection calls for:[107]

- Broadening the definitions of "investment"[108] 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 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 policy-making authority. Some of these components are discussed in greater detail below.

- EFFECTS TEST
  The conventional trade principle of *national treatment* requires that a government treat foreign investors no less favourably than it treats domestic persons or companies.[109] Government policies that favour domestic persons or companies are said to be "discriminatory" against foreign investors. An *effects test* expands upon national treatment by requiring that the indirect *effects* of a government measure (in addition to its direct *purpose*) not discriminate against foreign investors.[110]

- RIGHT OF ESTABLISHMENT[111]

Reassessment of the 'Prompt, Adequate and Effective' Standard" (1995) 31 *Stanford Journal of International Law* 423 at 447; and Daniel M. Price, "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement" (1993) 27 *The International Lawyer* 727 at 737.

[107] Adapted from a summary provided in UNCTAD (1996), *supra* note 90 at 162.

[108] To illustrate, under conventional investment agreements, "investment" has been variably defined 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; UNCTAD (1996), *supra* note 90 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?" (1998) 31 *The John Marshall Law Review* 1201 at 1204.

[109] Thomas Singer and Paul Orbuch, *Multilateral Agreement on Investment: Potential Effects on State & Local Government* (Denver: Western Governors' Association, 1997), online: Western Governors' Association <http://www.westgov.org/wga/publicat/maiweb.htm> at Part III A(2).

[110] Singer and Orbuch *supra* note 109 at Part III A(2).

[111] The principle may also be referred to as "market access" or "freedom of entry".

In the past, international investment treaties have 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.[112] 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. Normally this right would be subject to certain exceptions; in absolute terms, however, governments would be required to allow 100 percent foreign access and ownership in every economic sector.

- UNIFORM NATIONAL TREATMENT
  Uniform national treatment expands conventional national treatment by requiring "uniform treatment" of foreign investors within national 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 the country they operate.[113]

- PROHIBITION ON PERFORMANCE REQUIREMENTS
  A prohibition on performance requirements prevents a government from requiring foreign investors to hire local employees, use local resources, transfer technology, and so on, as a condition of an investment or of eligibility for investment incentives.[114]

- EXPANDED NOTIONS OF EXPROPRIATION AND COMPENSATION
  Conventional notions of expropriation and compensation provide for the protection of foreign investors from an expropriation or nationalization of their assets by the state. In the past, the principle has been limited by narrowing the definitions of "investment", "expropriation" and "compensation".[115] Expanded notions of expropriation and compensation, on the other hand, provide for protection of investors from government policies that are "tantamount to… expropriation".[116] Although this language is unprecedented, it may require governments to compensate investors in circumstances where their policies have an indirect or unintended impact on an investor's business, including its future profitability.[117]

[112] Ganesan *supra* note 101 at 17.
[113] Singer and Orbuch *supra* note 109 at Part III A(2).
[114] Singer and Orbuch *supra* note 109 at Part III A(5).

[115] UNCTAD (1996), *supra* note 90 at 173-4, 191.
[116] As defined in the NAFTA, art. 1110(1), *supra* note 7 at 641. The draft MAI proposed to apply the principle to an expropriation or "any measure or measures having similar effect"; OECD, MAI Negotiating Text dated 24 April 1998, Part IV, art. 2.1, *supra* note 7. 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 'a measure 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 (4 December 1997) at para. 15.
[117] The government's 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", for example. The preliminary definition of investment proposed under the draft MAI is particularly broad:

> 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;

- INVESTOR-TO-STATE DISPUTE RESOLUTION
  Investor-to-state dispute resolution gives investors the right to directly claim compensation from foreign governments, before an international arbitration panel, for alleged violations of their investor rights. It differs from more conventional mechanisms, known as state-to-state dispute settlement, which require an investor to appeal to its home government to pursue enforcement of the investor's rights on behalf of the investor.[118]

- STANDSTILL AND ROLLBACK PROVISIONS
  A standstill provision freezes any general exceptions or country-specific reservations[119] to the agreement, by prohibiting future government measures in the excepted area.[120] A rollback provision phases out exceptions or reservations to the agreement over a period of time.[121]

C. FTAA and Other Investment Agreements

1. *Bilateral Investment Treaties*

The FTAA represents only the latest manifestation of this push for higher standards of investor protection at the international level.[122] Since the 1960s, governments have negotiated bilateral investment treaties (BITs) that apply conventional principles of investor protection, based on a narrow definition of investment.[123] 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

(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.

OECD, MAI Negotiating Text dated 24 April 1998, Part II, art. 2, *supra* note 7.

[118] Price, *supra* note 106 at 731. 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 and Orbuch, *supra* note 109 at Parts I and III C(1).

[119] 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 Singer and Orbuch, *supra* note 109 at Part III B(1).

[120] As proposed in the draft MAI; OECD, Commentary to the MAI Negotiating Text dated 24 April 1998, Part IX, art. 2, *supra* note 7. See also see Singer and Orbuch, *supra* note 109 at Parts III A(5) and B(2); and UNCTAD (1996), *supra* note 90 at 194.

[121] OECD, Commentary to the MAI Negotiating Text dated 24 April 1998, Part IX. See also Singer and Orbuch, *supra* note 109 at Parts III A(5) and B(2).

[122] I note that 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 International Centre for Trade and Sustainable Development (ICTSD), "Implementation Issues: the Rocky Road to Seattle" (October-November 1999) 3(8) BRIDGES Between Trade and Sustainable Development (Geneva: ICTSD, 1999-2000), online: ICTSD <http://www.ictsd.org/html/arct_sd.htm> at 3.

[123] Conventional BITs usually recognize traditional standards of investor protection such as national treatment and most-favoured-nation treatment, often qualified by a number of exceptions; UNCTAD (1996), *supra* note 90 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", according to Ganesan, *supra* note 101 at 8.

protection.[124] 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.[125]

2. *NAFTA*

The North American Free Trade Agreement (NAFTA)[126] is a flagship example of the international push for higher standards of investor treatment and protection, and has served as a precedent for other multilateral investment negotiations.[127] Although NAFTA deals with a range of legal and economic issues, its provisions on investment are especially significant.[128] 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.[129] Perhaps most importantly, NAFTA expands on standards of expropriation and compensation, and allows investors to directly challenge government policies under an investor-to-state dispute settlement mechanism.[130]

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 (UNCTAD).[131] During the Uruguay Round of world trade negotiations, the U.S. presented an ambitious proposal for a multilateral investment agreement, which was rejected in the face of resistance from developing

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[124] By 1996, for instance, over two thirds of the roughly 1,100 BITs in existence had been concluded in the 1990s; UNCTAD (1996), *supra* note 90 at 163.

[125] David A. Gantz, "Environmental 'Takings' Under Chapter 11: Does NAFTA Require Compensation for Environmental Protection?" (March 2000), Paper presented to the Canadian Bar Association, Toronto, Canada, Session entitled *NAFTA Chapter 11 - Investor-state Disputes: Litigating Against Sovereigns*.

[126] NAFTA, *supra* note 7.

[127] See, for instance, Singer and Orbuch, stating that "NAFTA set a precedent for the treatment of performance requirements" that was adopted in proposals for an MAI; *supra* note 109 at Part III (A)(5). The NAFTA is "frequently considered to be 'state of the art'" for the new generation of investment agreements, according to report prepared by the Permanent Secretariat of the Latin American Economic System (Sistema Económico Latinoamericano) (SELA), *International Negotiations on Foreign Investment* (1997), online: SELA <www.lanic.utexas.edu/project/sela/docs/spdredi18-97.htm> (date accessed: 19 August 1999) at Part II, Note 17. Price comments that Chapter 11 of NAFTA "ought to set a standard for further multilateral and bilateral investment accords in the hemisphere"; *supra* note 106 at 736. See also Michael Gestrin and Alan M. Rugman, "The NAFTA Investment Provisions: Prototype for Multilateral Investment Rules?" in Pierre Sauvé and Americo Beviglia Zampetti, eds., *Market Access after the Uruguay Round: Investment, Competition and Technology Perspectives* (Paris: OECD, 1996) at 63-77.

[128] The NAFTA provisions on investment are "one of [its] primary pillars", according to H.H. Camp, Jr. and A.R. Kontrimas, "Direct Investment Issues" in J.J. Norton and T.L. Bloodworth, eds., *NAFTA and Beyond* (1995) at 87, 89. Appleton agrees that "in terms of importance, these provisions constitute the very heart and soul of NAFTA"; Barry Appleton *Navigating NAFTA: a concise user's guide to the North American Free Trade Agreement* (Toronto, Carswell, 1994) at 79.

[129] For instance, an investment is defined broadly under NAFTA "to include virtually all types of ownership interests, either direct or indirect, actual or contingent", according to Appleton (1994), *supra* note 128 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; SELA, *supra* note 127 at Part II (2)(a)(i).

[130] NAFTA represents the first time that Mexico has entered into an international agreement providing for investor-state arbitration. Also, it is the first time two OECD countries have included such provisions in agreements between themselves. See Price, *supra* note 106 at 731.

[131] UNCTAD (1996), *supra* note 90 at 129. Discussion regarding a multilateral investment agreement dates back to the Bretton Woods negotiations of the mid-1940s. However, the high standards of investor treatment and protection currently on the table have been rejected by most governments until quite recently.

countries.[132] Negotiations were subsequently shifted to the Organization for Economic Cooperation and Development (OECD). However, the OECD negotiations towards a Multilateral Agreement on Investment (MAI) ended shortly after France withdrew from the process in October 1998.[133]

4. *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.[134] 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.[135] Also, within the U.S. Government, opposition to the push for higher standards may have intensified following the demise of the MAI. According to the Office of the U.S. Trade Representative (USTR), for example, the U.S. Environmental Protection Agency (EPA) "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 governments' right to issue regulations without crossing over into an expropriation dispute". 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.[136] More broadly, the public opposition to the MAI that arose in North America and elsewhere, as well as events surrounding the recent Seattle ministerial meeting of the World Trade Organization (WTO), may signal rough waters ahead for future FTAA talks.

On the other hand, there remains a powerful momentum behind the push for stronger investor protection. The U.S. Government, in

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[132] See, for example, B.B. Ramaiah, "Towards a multilateral framework on investment?" (1997) 6 *Transnational Corporations* 117; and Ganesan, *supra* note 101. The World Trade Organization (WTO) Agreement on trade-related measures (TRIMS) was limited to a relatively narrow range of investment provisions; SELA, *supra* note 127 at Part II, note 68.

[133] For background on France's withdrawal from the MAI, see Catherine Lalumière and Jean-Pierre Landau, *Report on the Multilateral Agreement on Investment - Interim Report (MAI)* (Paris: Ministry of the Economy, Finance, and Industry, September 1998), online: Council of Canadians (Archives - MAI) <www.canadians.org.; original available online: Government of France, Ministry of Economics, Finance and Industry <http://www.finances.gouv.fr/pole_ecofin/international/ami0998/ami0998.htm> (date accessed: 18 February 1999).

[134] At the Fourth Business Forum of the Americas, the President 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, President, U.S. Chamber of Commerce, Address, March 1998, San Josi, Costa Rica, online [no longer available]: Organization of American States - Trade Unit <http:www.sice.oas/Ftaa/costa/forum/donohu_e.stm> (date accessed: 1 February 1999).

[135] 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; SELA, *supra* note 127 at Part 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 90 at 672-3.

A Canadian government analyst reportedly stated: "[k]eeping 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" *The [Toronto] Globe and Mail* (28 January 1999) B9. See also Heather Scoffield, "North-South split shadows trade talks" *The [Toronto] Globe and Mail* (18 April 1998) A1.

[136] SELA, "U.S. Preparations for FTAA Negotiations" (October 1998) SELA Antenna in the United States Bulletin, Edition No. 49, online: SELA <http://www.lanic.utexas.edu/project/sela/eng_antena/engant49.htm> (date accessed: 24 January 1999).

particular, has forcefully advanced the NAFTA investment provisions as a prototype for the FTAA.[137] Canada and Mexico have also reportedly pushed for higher standards since committing to NAFTA.[138] Investors themselves have organized to support higher standards, holding annual business forums alongside FTAA government meetings, to state an obvious 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, modelled after NAFTA, or perhaps the draft MAI.[139]

[137] See VanGrasstek, *supra* note 90 at 19-21; P.A. O'Hop Jr., "Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System" (1995) 36 *Harvard International Law Journal* 127 at 127-8; and Richard Bernal, "Jamaica and the Process of Free Trade in the Western Hemisphere" in Anne Weston and Usha Viswanathan, eds., *Jamaica After NAFTA: Trade Options and Sectoral Strategies* (Kingston and Ottawa: Ian Randle Publications and The North-South Institute) at 19-20.

[138] Mexico, in particular, is pursuing broad investment agreements with El Salvador, Guatemala, Honduras, Nicaragua, Panama, and others. Canada is in negotiations towards 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; Heather Scoffield, "Canada, Mercosur agree on framework" *The [Toronto] Globe and Mail* (17 June 1998) B7; and Heather Scoffield, "Canada, Costa-Rica to begin formal bilateral trade talks" *The [Toronto] Globe and Mail* (1 February 2000) B1, B13.

[139] Summit of the Americas: *Second Trade Ministerial Declaration*, 21 March 1996, Cartagena, Columbia, Working Group on Investment, Annex III, online: FTAA official website <http://www.alca-ftaa.org/ministerials/carta_e.asp> at Part 3(III)(2). The Working Group identified various elements for a broad FTAA investment agreement, including: expropriation and compensation, capital transfers, mobility of top managerial personnel, performance requirements, investor-to-state dispute settlement, and others. See also *Summit of the Americas: Fourth Western Hemisphere Trade Ministerial and Business Forum*, Summary of the Workshop on Investment, and Summary of the Workshop on Dispute Settlement.

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

The NAFTA investment provisions are contained in Chapter 11 of the agreement. They provide an important, if tentative, example of how higher standards of investor provisions have played out in terms of their impact on government decision-making.

NAFTA was the first multilateral agreement to create an investor-to-state mechanism, which has been described as "an untapped source of extensive private investor rights, including guaranteed access to a NAFTA panel for a private party".[140] Under Chapter 11, an investor may directly challenge a government before a NAFTA arbitration panel, rather than domestic courts, and does not need the consent of its home government to do so.[141] Chapter 11 disputes are heard and resolved by international arbitration panels, made up of experts in such fields as international commerce, finance, industry, and law.[142] Perhaps most significantly, NAFTA panel decisions are insulated from judicial review in domestic courts.[143]

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".[144] Eklund suggests that the rules are so favourable to investors that it is "inconceivable that an investor would elect to litigate a Chapter Eleven dispute

[140] Appleton (1997), *supra* note 116 at Note 23, quoting G.N. Horlick and A.L. Marti, "NAFTA Chapter 11B, A Private Right of Action to Enforce Market Access Through Investments" (March 1997) 14(1) *Journal of International Arbitration* 54.

[141] NAFTA, c.11, art. 1120, *supra* note 7 at 643. See also Cheri D. Eklund, "A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes" (1994) 11 *Journal of International Arbitration* 135 at 135; and Price, *supra* note 106 at 731-5.

[142] Eklund, *supra* note 141 at 150.

[143] *Ibid.* at 140, 146.

[144] *Ibid.* at 135.

before a national court".[145] 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; and a moratorium on water exports.[146] In each case, investors have argued that the policies violated the investment principles established under NAFTA, and that they are entitled to compensation for the harm suffered.[147]

The full significance of the NAFTA investor-to-state mechanism has been subject to great debate. Critics claim that Chapter 11 gives investors unwarranted leverage over political decision-making, allowing them to interfere with the ability of elected governments to implement legitimate public policies.[148] They have warned of a 'chill effect' on government policy-makers faced with the threat of an investor challenge.[149] Other

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[145] *Ibid.* at 157.

[146] See for example: Heather Scoffield, "NAFTA lawsuits cloud MAI discussions" *The [Toronto] Globe and Mail* (24 August 1998) B2; Barry McKenna, "Loewen action called a threat to U.S. justice" *The [Toronto] Globe and Mail* (25 November 1998) B5; Heather Scoffield, "B.C. water export ban brings U.S. lawsuit" *The [Toronto] Globe and Mail* (9 December 1998) B1; William Glaberson, "NAFTA invoked to challenge court award" *New York Times* (28 January 1999) C6; Heather Scoffield, "Crisis hits…", *supra* note 135; Heather Scoffield, "Ottawa thought debate ended five years ago" *The [Toronto] Globe and Mail* (11 February 1999) A14; Eric Reguly, "Water tap will be hard to shut off" *The [Toronto] Globe and Mail* (16 February 1999) at B2; Heather Scoffield, "Another U.S. firm sues Ottawa under NAFTA" *The [Toronto] Globe and Mail* (16 February 1999) at B1; Heather Scoffield, "Mexico, Canada at odds on NAFTA rule changes" *The [Toronto] Globe and Mail* (19 February 1999) B2; Evelyn Iritani, "Trade pacts accused of subverting U.S. policies" *Los Angeles Times* (28 February 1999) A1; Heather Scoffield, "Quebec real estate company sues U.S. government" *The [Toronto] Globe and Mail* (28 September 1999) B4; Heather Scoffield, "Methanex set to sue Uncle Sam under NAFTA over gas additive" *The [Toronto] Globe and Mail* (3 November 1999) B7; and Heather Scoffield, "UPS sues Ottawa in subsidy dispute" *The [Toronto] Globe and Mail* (18 February 2000) B1.

[147] Only one of the investor challenges has actually been decided by a NAFTA arbitration panel, and that challenge was dismissed on 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 et al. v. United Mexican States*, Award, November 1, 1999, Case no. ARB(AF)/97/2 (1999) *ICSID Review* 1 (November 1, 1999) at paras. 121-4. Also see Heather Scoffield, "Mexico wins NAFTA decision" *The [Toronto] Globe and Mail* (5 November 1999) B7.

[148] See for example: Tony Clarke and Maude Barlow, *MAI - The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (Toronto: Stoddart, 1997); Tony Clarke and Maude Barlow, *MAI Round 2 - New Global and Internal Threats to Canadian Sovereignty* (Toronto: Stoddart, 1998); Andrew Jackson, "The MAI and Foreign Direct Investment" in Andrew Jackson and Mathew Sanger, eds., *Dismantling Democracy* (Ottawa and Toronto: Canadian Centre for Policy Alternatives and James Lorimer & Company, 1998); and Mark Vallianatos, *License to Loot* (Washington, D.C.: Friends of the Earth, 1998). See also Gloria L. Sandrino, "The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective" (1994) 27 *Vanderbilt Journal of Transnational Law* 259; and Jose E. Alvarez, "Critical Theory and the North American Free Trade Agreement's Chapter Eleven" (1996-97) 28 *Inter-American Law Review* 303. Finally, see Special Committee on The Multilateral Agreement on Investment, Legislative Assembly of British Columbia, First Report (29 December 1998) ("B.C. Special Committee"), online: Legislative Assembly of British Columbia <www.legis.gov.bc.ca/cmt/mai/1998/1report/index.htm> (date accessed 4 February 1999).

[149] Clarke and Barlow (1997), *supra* note 148 at 42, state with reference to challenges under an investor-state dispute resolution:

> …these mechanisms would not have to be fully exercised to have their desired effect. The fact that corporations would have these

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.[150] 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.[151] The bottom line appears to be that the implications of the NAFTA investment provisions will remain uncertain for years to come, and potentially revolutionary from a legal point of view.[152]

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.[153] In one prominent case, a U.S.-based company sued the Canadian government after it banned the import and inter-provincial trade of a gasoline additive manufactured by the company. The Canadian government settled the claim by agreeing to drop its ban, pay damages, and issue a public statement that

> 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.

[150] To illustrate the debate, in hearings on the FTAA before a Canadian Parliamentary sub-committee, two trade law experts took rather divergent positions on the potential impact of Chapter 11. On the one hand, law professor Robert House commented that the 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…". See Testimony, 9 June 1999, before The Sub-Committee on International Trade, Trade Disputes and Investment, of the House of Commons Standing Committee on Foreign Affairs and International Trade to Undertake Comprehensive Public Hearings on Canadian Interests in Negotiating a *Free Trade Area of the Americas*.

[151] In terms of unprecedented legal language, for example, NAFTA, art. 1120, *supra* note 7 at 641, goes beyond simple expropriation to include acts "tantamount to… expropriation". NAFTA does not define what constitutes the latter, thus leaving the issue up to the arbitration panel in cases where the host state and a NAFTA investor disagree; Appleton (1994), *supra* note 128 at 86.

In this regard, according to trade lawyer Larry Herman, "Chapter 11 has potentially broad reach. No one knows how far it extends". Further, Mann states 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". See respectively: Larry Herman, quoted in Scoffield, "UPS sues…", *supra* note 146 at B6; and Howard Mann, Testimony, *supra* note 150.

[152] 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.

Robert Stumberg, Testimony, 8 October 1998, in Special Committee on The Multilateral Agreement on Investment, Legislative Assembly of British Columbia, First Report, 3rd session, 36th Parliament (December 29, 1998) at Part II, "Investor-State Dispute Settlement", online: Legislative Assembly of British Columbia <www.legis.gov.bc.ca/cmt/mai/1998/1report/index.htm > (date accessed 4 February 1999).

[153] 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 Clarke and Barlow (1997), *supra* note 148 at 42; Bruce Campbell, "Free trade: Year 3" (1992) 26(1) *Canadian Dimension* 5 at 7; and Howard Mann, Testimony, *supra* note 150.

the additive is not a threat to the environment or human health.[154]

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 that have been 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 FTAA on the Guatemalan Peace Process

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 their losses, as violations of broad notions of national treatment, prohibitions on performance requirements, and protections from expropriation.

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. In particular, it explores some of the arguments that an investor could make in challenging Government land policies that stem from the peace accords.

Other commentators have attempted to anticipate the impact of proposed investment agreements in this way, especially in the case of the draft MAI.[155] The analysis in this paper is modelled largely 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 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.[156]

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, modelled after NAFTA and the draft MAI.[157] The

[154] The $250 million (U.S.) NAFTA lawsuit was launched by Ethyl Corporation, based in Richmond, Virginia. Ethyl challenged Canada under Chapter 11 after the federal government banned the import or inter-provincial sale of the gasoline additive MMT. The Canadian Government claimed at the time that MMT was an environmental hazard because it gums up automobile emission controls. Under the NAFTA claim, Ethyl sought compensation for, among other things, lost profits, lost value of its assets, and damage to its reputation. Under the settlement, the Government agreed to drop its MMT ban, pay Ethyl $19 million, 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 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" *The [Toronto] Globe and Mail* (20 July 1998) A1; Shawn McCarthy, "Gas War: the fall and rise of MMT" *The [Toronto] Globe and Mail* (24 July 1998) A1; Heather Scoffield, "Controversial NAFTA chapter lets companies sue governments" *The [Toronto] Globe and Mail* (21 December 1999) B15; and Scoffield, "Mexico, Canada at odds...", *supra* note 146.

[155] For example: Singer and Orbuch, *supra* note 109; Appleton (1997), *supra* note 116; and Garry T. Neil, "Multilateral Agreement on Investment (MAI) and Canada's Cultural Sector", Report prepared for the Canadian Conference of the Arts (CCA) (15 October 1997).

[156] Singer and Orbuch, *supra* note 109 at Part IV.

[157] More specifically, the analysis assumes that an FTAA would include broad definitions of investment and investor, an investor right of establishment, a

analysis also assumes that an FTAA investment agreement would apply to the Guatemalan peace accords without any exceptions.[158] 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 paper 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 an investor-state dispute, including the specific structure of the respective government policy.

It is 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 rights 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 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.[159]

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

1. *Land Trust Fund*

Under the *Socio-Economic Accord*, the Guatemalan Government agrees to create a land trust fund designed to facilitate *campesino* access to land.[160] This commitment took further shape in July 1997, when the Joint Commission on land rights,[161]

prohibition on performance requirements, broad notions of expropriation and compensation, and an investor-to-state mechanism [see Part II(B)(2)].

[158] 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 127 at Part III B (2); and UNCTAD (1996), *supra* note 90 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. Also, any exceptions in an FTAA investment agreement might be limited by "standstill" or "rollback" provisions. See generally UNCTAD (1996), *supra* note 90 at 194; and Ganesan, *supra* note 101 at 17-18.

[159] I acknowledge that some of these scenarios, although possible, may not be probable. I also stress that all them would depend on the actual wording and interpretation of an FTAA agreement.

[160] In particular, the Government commits to:

> Establish 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.

See *Socio-Economic Accord*, art. 34(a), *supra* note 9.

[161] Comisión Paritaria sobre Derechos Relativos a la Tierra de los Pueblos Indígenas, "Anteproyecto - Ley Del Fondo de Tierras" (Guatemala: 1998) ("Joint Commission proposal"). 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

formed under the *Indigenous Accord*, specifically proposed 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. Eligibility would be further restricted to "Guatemalans"; by extension, foreigners would not be eligible.[162]

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

2. *Redistribution of Undeveloped Lands*

Under the proposals for a land trust fund, the Government is entitled to facilitate access to land by redistributing undeveloped land that it has acquired under Article 40 of the Guatemalan Constitution. Article 40 provides:

> In concrete cases, private property may be expropriated for reasons of collective utility, social benefit or public interest, duly proven.…[163]

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. Depending on the circumstances, compensation might be awarded for the lost value of the land itself (in cases where the investor owned the land directly). It might also be awarded for the lost value of agri-business contracts breached by local producers who owned the land as a result of the expropriation. Finally, compensation might include the lost value of rights to exploit natural resources on the expropriated lands, granted to a foreign investor under a previous concession, license or permit. In each of these cases, the investor could argue that compensation includes the lost value of the investor's opportunities for future profit.

3. *Land Tax*

The Government agrees under the *Socio-Economic Accord* to establish a land tax designed to encourage productive use of land. These include commitments to tax undeveloped and under-utilized lands that exceed a certain size at a higher rate of taxation.[164]

In response, a foreign investor could argue that a land tax that discriminates *directly* against foreign investors violates national treatment. Thus, for example, a land tax could not apply higher levies to foreign investors. More broadly, a foreign investor could argue that a land tax 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 are 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.

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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. *Indigenous Accord*, c. F, art. 10; and c. V, arts. (a) and (d), *supra* note 8.

[162] Joint Commission proposal, art. 21, *supra* note 161.

[163] *Constitution of the Republic of Guatemala*, *supra* note 73 [my translation].

[164] *Socio-Economic Accord*, art. 42, *supra* note 9, which provides 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.

Finally, the FTAA might not exempt taxation from provisions on expropriation.[165] If it does not, the Government might have to compensate 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.[166]

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

1. *Land Registry*

The Government commits under the *Socio-Economic Accord* to regulate land ownership by creating a comprehensive land registry described as "a juridical framework governing land ownership that is secure, simple and accessible to the entire population".[167] Also, the Government commits to "apply flexible juridical or non-juridical procedures for the settlement of disputes relating to land and other natural resources".[168]

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 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 a disfavourable 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.

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 which do not have the title deeds to those lands" including "measures to award title to municipal or national lands with *a clear communal tradition*" [my emphasis].[169] 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".[170]

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

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[165] Regarding the MAI provisions on expropriation, most countries' 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 OECD, Commentary to the MAI Negotiating Text dated 24 April 1998 at Part VIII(1), *supra* note 7. See also Martin Kohr, "The MAI and Developing Countries" in Andrew Jackson and Mathew Sanger, eds., *Dismantling Democracy* (Ottawa and Toronto: Canadian Centre for Policy Alternatives and James Lorimer & Company, 1998) at 281.

[166] According to Singer and Orbuch, *supra* note 109 at III D(4): "heavy tax burdens can be attacked as expropriation…".

[167] *Socio-Economic Accord*, art. 37(a), *supra* note 9. Further, article 38 provides:

> … 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 registrar information…

[168] *Ibid.*, art. 37(f).

[169] *Indigenous Accord*, c. F, art. 5, *supra* note 8.

[170] *Socio-Economic Accord*, art. 37(d), *supra* note 9.

ownership would flow disproportionately (or exclusively) to Guatemalans. An investor could argue that this effectively discriminates against foreign investors and violates national treatment.

In addition, the Government might restrict the entitlement of private individuals to own common and municipal land. This could be 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 that it otherwise would have gained if it were permitted to own common and municipal land without restriction.

3. *Reinstatement or Compensation for Usurped Lands*

The Government 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".[171]

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 compensation for the value of 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*

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.[172]

Government recognition of special indigenous rights of access to traditional lands potentially violates national treatment. Such rights provide preferential treatment to Guatemalan citizens, in this case the members of an indigenous community, and thus discriminate against foreign investors.

Also, the Joint Commission on Indigenous Land Rights proposed that indigenous sacred sites should be 'carved out' of plantations affected by the land trust fund, and held in public ownership.[173] If 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.[174] Thus, if an

[171] *Ibid.*, art. 37(f)(ii).

[172] *Indigenous Accord*, c. F, art. 6(a), *supra* note 8.

[173] Joint Commission Proposal, art. 39, *supra* note 161, which provides [my translation]:

> 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 neighbouring the plantation, that where traditional places exist for ceremonial purposes, the segment of land where the ceremonial place is located will be detached from the plantation…

[174] 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 OECD, MAI Negotiating Text dated 24 April 1998, MAI: Proposed Annex on the Sami People, *supra* note 7. See also Ovide Mercredi, "The MAI and the First Nations" in Andrew Jackson and Mathew Sanger, eds., *Dismantling Democracy* (Ottawa

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 such land.

2. *Indigenous Rights over Natural Resources*

The Government commits under the *Indigenous Accord* 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".[175]

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 bound by the same restrictions, since they are given legal force by the 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.

The Government further 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".[176]

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 favour 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.

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 this lost business opportunity.

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*

The Government 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..."[177] 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.

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and Toronto: Canadian Centre for Policy Alternatives and James Lorimer & Company, 1998) at 78, 82.

[175] *Indigenous Accord*, c. F, art. 6(b), *supra* note 8. Also, the Government 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*, art. 37(e), *supra* note 9. Further, the Government commits under the *Indigenous Accord*, c. E, art. 3, 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.

[176] *Ibid.*, c. F, art. 6(c).

[177] *Ibid.*, c. F, art. 9(g).

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 giving preference to indigenous women in its hiring or contracting decisions is a prohibited performance requirement.[178]

4. *Indigenous Land Claims Settlements*

Under the *Indigenous Accord*, the Government 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".[179]

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.[180] Also, an investor could 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.[181] 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.[182]

Conclusion

This paper has attempted to show that a range of Guatemalan Government land policies, 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 such as 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.[183]

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[178] I note that 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; NAFTA, Annex II, *supra* note 7 at 749, 754 and 756-7.

[179] *Indigenous Accord*, c. F, art. 7, *supra* note 8. Also, the Government will promote measures "to ensure recognition, the awarding of title, protection, recovery, restitution and compensation for those rights"; *ibid.*, c. F, art. 1.

[180] 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.

Government of British Columbia, Submission to The House of Commons Sub-Committee on International Trade, Trade Disputes, and Investment, of the Standing Committee on Foreign Affairs and International Trade, regarding the proposed Multilateral Agreement on Investment (26 November 1997).

[181] *Indigenous Accord*, Parts I-IV, *supra* note 8.

[182] I note that 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, Annex II - Canada, *supra* note 7 at 749.

[183] 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 an MAI provision on which they can base a claim"; Appleton (1997), *supra* note 116 at para. 24.

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 awarding substantial damages, to think twice before pursuing errant policies. It is this element of risk facing governments that could effectively increase the weight afforded to the priorities of investors, relative to other social groups, in the process of political decision-making that surrounds the implementation of the peace accords. Moreover, I suggest that an overarching purpose of the FTAA may be 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 choking of the peace accords.

These observations go to the heart of criticisms regarding the new push for higher standards of investor protection. Critics have argued that investment agreements like NAFTA or the draft MAI prevent elected governments from pursuing legitimate policies in the public interest.[184] 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.[185] 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".[186]

Some proponents of stronger investor protection outwardly express their intention to reduce the policy options available to future elected governments in the face of a liberalized hemispheric economy. The Latin American Economic System (SELA), for example, has commented that the trend towards 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".[187] 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".[188]

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".[189] 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".[190]

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

[184] For sources see note 148.

[185] 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 and Kreklewich *supra* note 102 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 the IMF conditionality is usually temporary (3-5 years), whereas free trade agreements are intended to be permanent; *ibid.* at 39, 41.

[186] Grinspun and Kreklewich, *supra* note 102 at 40.

[187] SELA, *supra* note 127 at Part 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 (1996), *supra* note 90 at 194.

[188] SELA, *supra* note 127 at Part I.

[189] Grinspun and Kreklewich, *supra* note 102 at 39, 51.

[190] B.C. Special Committee, *supra* note 148 at Part II, "Investor Protection: Expropriation".

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.[191] 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.[192] Perhaps the starkest example is the role the U.S. played in toppling the Arbenz government in 1954, after its initiation of a broad program of land reform.[193] 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.[194] Today, American investors remain the largest sources of FDI in the country "by far", according to the U.S. Department of Commerce, and one wonders how much their essential interests have changed.[195]

Within Guatemala itself, domestic elites have historically allied themselves with foreign interests in order to reinforce their control of the state and resist popular pressure for reform.[196] 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.[197] Today's agenda shares

[191] Weeks, *supra* note 28 at 4. On the Central American region, Weeks comments at 59: "These are not national economies which trade part of their production, but economies whose foreign trade penetrates into every aspect of economic life".

[192] Cox describes the uppermost U.S. priority in Central America, since the 1950s, as being "to protect the investment climate for all U.S. corporations". See Ronald W. Cox, *Power and Profits: U.S. Policy in Central America* (Lexington, Kentucky: The University Press of Kentucky, 1994) at 14-15. Also, Weeks comments that "probably nowhere else in the hemisphere have U.S. corporate interests so blatantly determined North American foreign policy; Weeks, *supra* note 28 at 55.

[193] See Blum, *supra* note 51 at 72-83. In subsequent decades, U.S. influence and intervention continued to shape Guatemala's political and economic destiny. See Cox (1994), *supra* note 192 at 16, 56; and Blum, *ibid.* at 147-8, 229-39.

[194] United Fruit also resisted the 1947 labour legislation passed under Juan José Arévalo on the basis that it discriminated against foreign companies. See Berger, *supra* note 23 at 44, 66, 70.

[195] Exact figures are unavailable since the Guatemalan Government does not track FDI data; STAT-USA, NTDB, Report by the U.S. Department of Commerce, *supra* note 30 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, non-traditional agro-exports, and oil; see Peter Morici, "Free Trade in the Americas: A U.S. Perspective" in Sylvia Saborio, ed., *The Premise and the Promise: Free Trade in the Americas* (New Brunswick, New Jersey: Transaction Publishers, 1992) at 57-60.

In the *maquila* sector, Guatemala imported almost 1/5 of U.S. exports to Central America of semi-manufactured apparel; and exported back nearly 1/3 of regional shipments to the U.S.; OAS Trade Unit, *supra* note 87 at 17. Agri-business is attracted to the non-traditional agro-export sector by the cheap labour and low land rent costs, more lenient environmental standards and enforcement, and a favourable climate; Thrupp, *supra* note 26 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, highlighting the fact that U.S. investors are not alone in their pursuit of stronger protection under an FTAA. See STAT-USA, NTDB, Report by the U.S. Department of Commerce, *supra* note 30 at 53.

[196] Painter, *supra* note 25 at 29-30. Moreover, the agro-export model is controlled by a small minority of economic and military elites, often with close connections to foreign businesses; *ibid.* at 35-57. Also see Berger, *supra* note 23 at 159.

[197] Holiday states:

> In the 1990s… two events occurred that made the private sector think more seriously about the possible advantages of ending the

certain aspects of previous elite strategies to expand and intensify export production, and encourage foreign investment.[198] 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 distributed...[199]

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.[200]

The popular response to the FTAA, on the other hand, should be the same as under the peace accords; that is, it should aim to *enhance* future opportunities for greater democratic accountability.[201] 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.[202] Thus, for instance, 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

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> 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 63 at 70-1. See also Rachel Sieder, "Introduction" in Rachel Sieder, ed., *Central America: Fragile Transition* (New York: St. Martin's Press, 1996) at 7; and Taylor, *supra* note 10 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* (Westport: Praeger Publishers, 1995) at 190-91.

[198] It was "a goal considered desirable by all Central American leaders in the nineteenth century" to "integrate the region into the world economy", according to Bulmer-Thomas, *supra* note 23 at 1.

[199] Dosal, *supra* note 197 at 192. On the whole, the Guatemalan elites have:

> 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 and Holiday, *supra* note 11 at 6.

[200] 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); Holiday, *supra* note 63 at 70.

[201] 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 and Kreklewich, *supra* note 102 at 54.

[202] 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 labour mobility, compensatory financing for less developed regions, and a social charter that would promote harmonization of social, labour, and environmental standards to the highest common denominator; C. Cárdenas, *The Continental Development and Trade Initiative: A Statement* (New York: February 8, 1991), cited in Grinspun and Cameron, *supra* note 93 at 19.

state regulation of FDI.[203] 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.[204] In the case of Guatemala, I have identified a need to preserve the ability of future governments to carry out their commitments on land under the peace accords. Similar concerns can be raised about a host of other issues, in every country.

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[203] UNCTAD (1996), *supra* note 90 at 133, 166. Rules regarding permissible state regulation might include policies on employment, protection of the environment, consumer protection, information disclosure, technology transfer, transfer pricing and taxation, bribery, and restrictive business practices, for example; Ganesan, *supra* note 101 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". See Red Mexicana de Acción Frente al Libre Comercio, *Espejismo y Realidad: El TLCAN Tres Años Después* (Mexico City: 1997) at 177-8.

[204] Regarding the content of the FTAA itself, non-governmental 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 "Civil Society Views: The FTAA Process" (April 1999) 3(3) BRIDGES Between Trade and Sustainable Development (Geneva: ICTSD, 1999-2000), online: ICTSD <http://www.ictsd.org/html/arct_sd.htm> at 10.