VALUES UNDER SIEGE: NAFTA, GATS, AND THE PROPERTIZATION OF RESOURCES

TERRA LAWSON-REMER*

INTRODUCTION

> *Historically and logically, capitalism is tied to the private ownership of the means of production, which allows private appropriation of produced commodities, thus private appropriation of surplus-value, and thus private accumulation of capital. It is surely not accidental that the 'rights of private property' are thus at the bottom of the whole constitutional and juridical super-structure which centuries of law-making have erected upon the basis of commodity production.*[1]

Private property and freedom of contract are the legal underpinnings of a market economy. It is therefore no surprise that free trade agreements, adopted with the goal of expanding markets, implicitly propertize resources. Propertization, or the process of increasing the legally protected ownership rights of private[2] economic actors, is integral to the global expansion of free market capitalism.

Each distinct arena of social space has its own regulative principles that govern social interactions and determine what is important within that field (the "stakes of the game").[3] The sphere of the family, the church, and the market/production economy are examples of different fields governed by distinct regulative principles. The regulative principles within each field, as well as

* J.D. Candidate 2006, New York University School of Law; Ph.D. Candidate 2009, Institute for Law & Society, New York University Graduate School of Arts and Science.

[1] Ernest Mandel, *Introduction* to KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, VOL. I, 57 (Ben Fowkes trans., Penguin Books 1990) (1867).

[2] I use the term "private" to refer to non-state actors, including publicly traded corporations and joint ownership arrangements such as co-ops.

[3] PIERRE BOURDIEU, PRACTICAL REASON: ON THE THEORY OF ACTION 67 (1998).

the boundaries between fields, are founded upon collectively shared doxa[4]—the substratum of presuppositions that structure our cognitive maps. "[R]ooted both in the objectivity of social structures and in the subjectivity of objectively orchestrated mental structures . . . [these social categories] present themselves to experience with the opacity and resistance of things, although they are the products of acts of construction . . . ."[5]

The purpose of this Note is to examine the mechanisms whereby free trade agreements, specifically Chapter 11 of the North American Free Trade Agreement ("NAFTA")[6] and the General Agreement on Trade in Services ("GATS"),[7] propertize resources and transform the cultural doxa that informs how resources are understood by (1) establishing the right of market alienability in relation to services which were not previously conceived of as market commodities, (2) including expected future profits in the "denominator" of protected property interests, and (3) privileging private property rights over competing norms. Legal rights in relation to resources contribute to the construction of doxa, and the process of propertization implicit in free trade agreements challenges social relations ordered according to alternative regimes of value.[8]

I focus on GATS and NAFTA Chapter 11 for a number of reasons. GATS is a central component of the agreement that formed the WTO at the conclusion of the Uruguay Round of General Agreement on Tariff and Trade ("GATT") negotiations in 1994. GATS regulates countries' ability to take measures impacting services and is binding on all 149 members of the World

[4] Bourdieu's concept of doxa is defined as "an unquestionable orthodoxy that operates as if it were the objective truth," or "akin to a substratum of presuppositions." Rohit Chopra, *Neoliberalism as* Doxa*: Bourdieu's Theory of the State and the Contemporary Indian Discourse on Globalization and Liberalization*, 17 CULTURAL STUD. 419, 419, 426 (2003).

[5] BOURDIEU, *supra* note 3, at 67.

[6] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[7] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex ¶ 1B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[8] "Regimes of value," as used in anthropology literature, refers to the conceptions of identity and personhood held by people within a given society. *See, e.g.*, Fred Myers, *Ontologies of the Image and Economies of Exchange*, 31 AM. ETHNOLOGIST 5, 7 (2004).

Trade Organization. GATS is intriguing because of both its wide application (149 countries are members of the WTO and thus bound by GATS)[9] and the fact that it is a first move towards subjecting new resources—services rather than goods—to global market disciplines.[10] NAFTA Chapter 11 is a useful point of departure because, unlike GATS, Chapter 11 establishes an investor right of action, thereby allowing an investor to bring claims on its own behalf arguing that the order of social relations dictated by governments (local as well as national) in a given instance must be overturned as NAFTA-noncompliant.[11] NAFTA therefore allows multinational corporations to challenge alternative legal regimes directly, instead of navigating the complex political process that governs when, and if, a government challenges a measure of another government under trade agreements without investor-suit provisions.[12] By establishing a legal field in which opposing regimes of value can be explicitly juxtaposed and contested, NAFTA case law has allowed the clear articulation of different conceptions of property rights.

The legal reasoning and the social impacts of GATS and NAFTA Chapter 11 are often analyzed separately, since the two agreements are quite different in many ways. This compartmentalization, while useful for gaining a detailed understanding of each agreement, fails to address the implications of the propertizing doxa underlying both agreements. GATS is increasing the number and type of resources considered to be commodities. NAFTA Chapter 11 is expanding the property interests protected by law in relation to already commodified resources, and increasing the deference given to those rights.

In order to establish a framework for the subsequent analysis, I begin by discussing the concept of property, as understood within the Western legal and theoretical tradition. Section II examines the contest over commodification implicit within GATS. Section III discusses how Chapter 11 of NAFTA is being leveraged by

[9] WTO, Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 13, 2006).

[10] GATS, *supra* note 7, pmble.

[11] *See* NAFTA, *supra* note 6, ch. 11 § B.

[12] *See, e.g.*, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex ¶ 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1226 (1994). Only countries, not individual investors, are able to challenge the trade policies of other countries.

investors, with varying degrees of success, to expand recognized property interests and increase the relative protection afforded property rights. Section IV concludes by contrasting the rationality of economic efficiency underlying the private property rights regimes of free trade agreements with alternative justifications of private property.

I. THE CONCEPT OF PRIVATE PROPERTY

What is property? In 1840 Pierre Proudhoun proclaimed "property is theft," arguing that the reasoning usually advanced in order to justify property rights was morally and logically unsound, therefore eviscerating any "right" to private property.[13] Interesting, surely, but Prodhoun challenged the legitimacy of private property without examining the nature of the construct itself. Before we can explore how GATS and NAFTA are propertizing resources, we must understand what we mean by the term *property*.

Property is not a tangible object. As understood in the Western legal tradition, property is a set of rights regarding a resource. The "bundle of rights" enjoyed by any given property owner is a juridical construct, and these rights can be allocated in varying ways. This section has two components. First I examine a few examples where rights in relation to the same resource have been allocated differently in different times or circumstances, in order to clearly elucidate the "bundle of sticks" concept of property. Second I discuss the various rights that the term property is generally considered to denote, and consider which of these are core components of the signifier. The purpose here is not to define the concept of property, but rather to illuminate the nature of the construct, since one purpose of this Note is to illustrate how rights granted by free trade agreements can construct a resource as property when it was formerly not understood as such.

In common law tradition, real property owners are generally considered to have the right to control the air above, the surface, and the ground below any land they own. Yet throughout the 19th and 20th centuries, U.S. coal companies sold the surface rights to land while retaining the underground mineral rights, thereby preserving their ability to extract the coal underneath land whose

[13] PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 198 (Donald R. Kelley & Bonnie G. Smith eds./trans., Cambridge U. Press 1994) (1840).

surface rights were owned by other parties. In this way the "bundle of rights" regarding plots of land with coal mining value were allocated differently than the rights regarding other land without such coal-mining reserves.[14]

Nuisance law is another arena where the law has allocated the same property rights differently in different circumstances. Nuisance law is the allocation of property rights in cases of incompatible uses—the law declares whether a person has the right to conduct activities that negatively impact her neighbors, or, on the other hand, whether a person has the right to be free from the adverse impact caused by her neighbor's conduct. The question in nuisance cases is: How are the rights allocated? The precise rights that an "owner" has in relation to other people regarding a specific resource are demarcated by law. Under U.S. common law, if one has a factory, and the byproducts of the factory create noxious public externalities, the owner may be prevented from using their land to manufacture the good whose production generates the nuisance.[15] In such a case, the bundle of rights possessed by the owner in relation to her land does not include the right to manufacture the nuisance-causing good. In other cases courts have held that owners *do* possess the right to conduct activities and build factories that negatively impact their neighbors, and the neighbors just must bear the consequences.[16]

Property is not a static construct that clearly applies to some resources but not others. The ability of individuals to possess a robust bundle of rights in relation to a given resource is what constitutes that resource as property in the western imaginary. A fee simple absolute in land is the archetypal property, because the owner has the right to use the land in virtually any manner, even to the point of waste, to exclude others, and to sell it or give it away.[17] Generally we think of a resource as property when the law recognizes a minimum number of rights in relation to this

[14] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922); Keystone Bituminious Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 500–01 (1987).

[15] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 413–14 (1915) (enjoining a brickmaker from manufacturing bricks on his land because their production was creating a public nuisance).

[16] *See, e.g.*, Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847, 858 (Or. 1948) (holding that a track owner's bright lights did not constitute a nuisance, even though they interfered with the business of a neighboring drive-in movie theater owner).

[17] RESTATEMENT (FIRST) OF PROPERTY § 14-15 (1936).

resource. Specifically, excludability[18] and alienability[19] are often considered intrinsic to the notion of property. Excludability establishes the right of the owner(s) of a resource to prevent outsiders—non-owners—from using the resource. A private road is private property precisely because the owners can prevent non-owners from driving on the road, even if it's empty. Alienability is the right to control the transfer of a resource by selling it or giving it away. Although the precise definition of inalienability varies, "[t]he traditional meanings of inalienability do have a common core: the notion of alienation as the separation of something—an entitlement, right, or attribute—from its holder."[20]

The number of rights in any given ownership bundle falls on a spectrum. At what point does this bundle of rights become thick enough for the resource to be considered property? In much of Nigeria, land tenure is governed by customary law: family heads acquire the right to farm a particular parcel of land by grant from the village chief, and thus have the exclusive right to all crops, but the farmer cannot transfer the land outside the immediate household (inheritance and sale are both restricted), and often the farmer does not have the right to prevent nomadic herders from grazing animals or the right to exclude the descendants of previous occupants from harvesting fruit from previously planted trees (the farmer may even be forbidden from cutting down the trees).[21] Can this piece land – to which one family head has exclusive farming rights, another person or family group the right to graze animals, a

[18] Any permanent physical occupation, no matter how small, is a compensable taking because it violates a property owner's right to exclude. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 441 (1982). The term "excludable" is often used in a different sense—to describe a resource than free riders can *theoretically* be prevented from using. For example, clean air is a non-excludable resource because it is impossible to prevent anyone in a given geographical area from breathing the air. I use the term to describe the right to exclude, as opposed to the theoretical ability to exclude.

[19] Nontransferable social entitlements, such as social security and welfare benefits, are not property and thus are not protected by the prohibition on government takings. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 19 (2001).

[20] *Id.* at 16.

[21] *See* Karol C. Boudreaux, *The Human Face of Resource Conflict: Property and Power in Nigeria*, 7 SAN DIEGO INT'L L.J. 61, 71–76 (2005); Anna Knox, *Nigerian Country Profile*, *in* COUNTRY PROFILES OF LAND TENURE: AFRICA 1996, at 110, 110–15 (John W. Bruce, ed., Land Tenure Ctr., Research Paper No. 130, 1998), *available at* http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=1153&ftype=.pdf.

third family lineage the right to the product of the trees, and a fourth distinct person the right to transfer the farming rights to subsequent users—be considered property?

The fewer rights a person has in relation to a given resource, the less he or she is generally considered (within the Western legal tradition) to be the "owner" of that resource, and the less that resource is generally regarded as property. Let us examine, as an example, New York University School of Law's current upper level course enrollment system. Enrollment is random, not merit-based, but once a student is selected for a course he or she has the right to enroll. Because more students wish to take certain courses than there are openings in those courses, use of the resource (spot in the class) is both rival and excludable. Yet, while the student can choose to either drop the class or to enroll, she cannot sell or trade her spot. Is a position in an N.Y.U. Law School course property?

Implicit in the notion of a property right is that this right is protected by law.[22] The analysis of takings jurisprudence is useful for illustrating which rights are protected property interests and which are not, as only government infringements on protected rights will trigger the compensation requirement of the Fifth Amendment.[23]

Propertization is the process of allocating ever greater rights in relation to resources to private individuals and collectives, as opposed to governing the use of these resources through the

[22] "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

[23] The existence of a protected property interest—the so-called denominator question—is central to the question of whether a taking has occurred. For example, as Been and Beauvais explain,

> [t]he inquiry into the economic impact of the regulation depends critically upon how the property is defined. If a developer has a parcel of land, for example, and environmental regulation requires that wetlands on one-tenth of the land be left undeveloped, the regulation will destroy one hundred percent of the value if the property is defined as the wetlands but only ten percent of the value if the property is instead defined as the entire parcel. Whether the regulation interferes with 'investment-backed expectations' depends, of course, on what counts as a reasonable expectation.

Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA'S Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 61 (2003).

political realm, or else leaving these resources as part of the commons and not regulating their use at all.[24]

II. CONTESTED COMMODITIES: THE GENERAL AGREEMENT ON TRADE IN SERVICES

The purpose of this section is to illuminate the commodifying rationality inherent within the GATS, and to contrast GATS' conception of services-as-commodities with alternative doxa in which the same services/resources are conceived of in radically different terms—as the collective heritage of all humankind, as a basic human right, or as a spiritual legacy constitutive of individual and group identity. This section is organized as follows: First I demonstrate the commodifying logic of GATS. Second I analyze water to illustrate an alternative, non-commoditized way of conceiving of resources. Finally I argue that alternative ways of understanding resources may be threatened by GATS' commodifying rationality.

The term *commodities* refers to all market alienable resources—goods and services that can be bought and sold.[25] Some goods are completely inalienable, for example, I have the right to use my hands to weave a quilt, but I don't have the right to cut them off and give them away or sell them. Other goods are market-inalienable[26] in that they can be transferred by gift but not by sale, such as (kidneys and children. Commodities are fully alienable. "If I own [a fully alienable good], I may transfer it by either gift or sale; I may abandon or destroy it; I may waive or relinquish my claim to it; and I may forfeit it."[27] *Commodification* is the process of establishing the legal right of market-alienability regarding resources (such as air pollution rights) that formerly could not be bought or sold.[28]

Commodification is inherent within GATS. The agreement

[24] The situation of non-governance is the one usually contrasted with private property. This is the classic commons, where everyone can take as much as they want and no one can prevent anyone else from appropriating. *See* discussion *infra* Section IV.

[25] *See* MARX, *supra* note 1, at 125–38.

[26] "[M]arket-inalienability does not render something inseparable from the person. Rather, it specifies that market trading may not be used as a social mechanism of separation." RADIN, *supra* note 19, at 19.

[27] *Id.* at 18.

[28] *Id*. at 20.

aims to impose market-based disciplines on the distribution of services, similar to the market discipline that the 1947 GATT established vis-à-vis goods such as automobiles.[29] In fact, establishing such a market-based structure in the realm of services is the express purpose of the agreement.[30]

Under GATS, almost everything is conceived of as a commodity that can be bought and sold on the market. The agreement asserts authority over all "measures by Members affecting trade in services."[31] An extraordinarily broad range of activities are considered "services" under GATS; the agreement defines "services" as "any service in any sector except services supplied in the exercise of governmental authority."[32] The government authority exception is quite narrow. "'A service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."[33] Although the Dispute Settlement Body of the WTO has not yet explicitly addressed this governmental authority exception, in EC—Bananas III the Appellate Body declared that the GATS must be interpreted as having a broad scope of application.[34]

Virtually every service is supplied either commercially or by a number of suppliers. For example, public primary education is supplied "in competition" with private schools, thus making education a potential "service" according to GATS.[35] Postal services, even when provided by a government monopoly, are supplied "commercially" in that customers are required to pay a

[29] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[30] "*Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries." GATS, *supra* note 7, pmble.

[31] *Id*. art. I(1).

[32] *Id.* art. I(3)(b).

[33] *Id.* art. I(3)(c).

[34] Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 220, WT/DS27/AB/R (Sept. 9, 1997) (noting an "intent of the drafters to give a broad reach to the GATS").

[35] For a complete discussion of the potential impact of GATS on the provision of public education, see generally Katarina Tomasevski, *Globalizing What: Education as a Human Right or as a Traded Service?*, 12 IND. J. GLOBAL LEG. STUD. 1 (2005).

use fee.[36] Water distribution is a service within the scope of GATS, as is healthcare, education, and the operation of prisons. In short, practically every resource is conceived of as a market-alienable commodity under GATS, and measures affecting the provision of most any resource could potentially be subject to the disciplines of the agreement.

The commodifying logic of market-based discipline is operationalized by the legally enforceable terms of the agreement. Part II of GATS outlines "General Obligations and Disciplines" that apply across the board to all "services."[37] The primary general obligation mandated under Part II of GATS is the Most-Favored-Nation ("MFN") treatment rule.[38] The MFN provision stipulates that a country must treat all foreign companies the same, no matter what their country of origin[39]. As commentators have noted, "In effect, MFN requires that any regulatory or funding advantage gained by a single foreign commercial provider must be extended, immediately and unconditionally, to all."[40] While relatively unrestrictive, the MFN obligation operates according to a free market assumption of services-as-commodities.

Part III of GATS outlines more stringent obligations that apply only to measures impacting services in specified sectors.[41] The services governed by Part III obligations are determined on a country-by-country basis, and are specified in a list of positive commitments. The GATS annex includes country-specific lists, in which each country lists the sectors they are putting under the Part

[36] Two non-WTO cases have addressed the question of whether postal services come under the scope of service agreements. For a description of these two cases, see Catherine B. Harrington, *Weather May Not Stop USPS, But Special Interests Will: The Bush Administration's GATS Offer Supports Private Express Delivery Services But Threatens to Stamp Out USPS*, 19 AM. U. INT'L L. REV. 431, 448–61 (2003).

[37] GATS, *supra* note 7, arts. II–XV.

[38] *See id.* art. II.

[39] "[E]ach Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." *Id*. art. II(1).

[40] SCOTT SINCLAIR & JIM GRIESHABER-OTTO, CAN. CTR. FOR POLICY ALTERNATIVES, FACING THE FACTS: A GUIDE TO THE GATS DEBATE 46 (2002), *available at* http://www.policyalternatives.ca/documents/National_Office_Pubs/facing_facts.pdf.

[41] GATS, *supra* note 7, arts. XVI–XVIII.

III obligations, along with any exceptions to those commitments.[42] The two primary obligations of Part III are: (1) National Treatment[43], and (2) Market Access.[44] The National Treatment provision (Article XVII) provides that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."[45] The purpose of this provision is to prevent countries from adopting protectionist measures that discriminate against foreign companies in favor of domestic suppliers. The Market Access provision (Article XVI) forbids countries from limiting the number of service suppliers or operations, the total value of service transactions, the number of people that can be employed in a sector, the percent of an enterprise held by foreign owners, or the type of legal entity that can provide a service.[46] This guarantee of market access establishes the right of market-alienability in relation to resources distributed within committed service sectors.

Together, these provisions—particularly the more stringent provisions applicable to sectors in which countries have made positive commitments—subject services to market-based rules. The idea that certain resources should be market-alienable commodities contrasts sharply with alternative doxa in which these same resources are viewed as basic human rights or part of an inalienable spiritual legacy. Water is one arena in which this contrast is clear.

The view of water as a market-alienable commodity clashes fundamentally with the belief that water is a basic human right. A regime of value that embraces the "right to water" has been repeatedly articulated by GATS opponents.[47] *The Committee for the World Water Contract*, which includes the former presidents of

[42] *Id*. art. XX. Since country-specific services schedules are amended by subsequent, separate documents, it is difficult to compile all the information on a particular country or sector. The best way to access these commitments is by searching the WTO Services Database, http://tsdb.wto.org/wto/WTOHomepublic.htm (last visited Mar. 8, 2006).

[43] GATS, *supra* note 7, art. XVII.

[44] *Id*. art. XVI.

[45] *Id*. art. XVII(1).

[46] *Id*. art. XVI(2)(a)–(f).

[47] *See, e.g.*, NAT'L FORUM ON WATER PRIVATIZATION, THE ACCRA DECLARATION ON THE RIGHT TO WATER (2001), *available at* http://www.waterobservatory.org/library.cfm?refID=33656.

Portugal and Argentina, issued a statement in 1998 proclaiming:

> As the fundamental and irreplaceable 'source of life' for the eco-system, water is a vital good, which belongs to all the inhabitants of the Earth in common. None of them, individually or as a group, can be allowed the right to make it private property. Water is the patrimony of mankind.[48]

The clash between water-as-commodity and water-as-human right is potently at play in Bolivia, where riots have erupted in opposition to water privatization schemes. The privatization of water distribution in Bolivia was initially precipitated by the World Bank, which recommended privatizing Cochabamba's municipal water supply company through a concession to a Dutch based subsidiary of the international conglomerate Bechtel.[49] The Bolivian government agreed, enacting the Drinking Water and Sanitation Law, which allowed privatization and ended government subsidies.[50]

Whenever a resource is distributed via market mechanisms, access is constrained by ability to pay. The privatization of water in Bolivia precipitated severe price hikes[51] and the exclusion of entire neighborhoods from the potable water distribution system,[52] thus precluding many low and middle income citizens from accessing clean drinking water.

A popular opposition movement arose to protest the privatization scheme: a citizen's alliance was able to effectively shut down the city for four days through mass mobilizations, and later, millions of Bolivians participated in a march to Cochabamba and held a general strike.[53] The conflict continued to roil Bolivia, causing several deaths and the arrests of several protest leaders who were sent to a remote jail in the Bolivian jungle.[54] The

[48] GLOBAL COMM. FOR THE WATER CONTRACT, THE WATER MANIFESTO: THE RIGHT TO LIFE 2 (1998), *available at* http://www.waterobservatory.org/library.cfm?RefID=33678.

[49] VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT 102 (2002).

[50] *Id.*

[51] PUB. CITIZEN, WATER PRIVATIZATION CASE STUDY: COCHABAMBA, BOLIVIA 3 (2001), *available at* http://www.citizen.org/documents/Bolivia_(pdf).pdf.

[52] Jim Shultz, *The Politics of Water in Bolivia*, NATION, Jan. 28, 2005, http://www.thenation.com/doc/20050214/shultz.

[53] SHIVA, *supra* note 49, at 102.

[54] PUB. CITIZEN, *supra* note 51, at 3–4.

President declared martial law and severely restricted freedom of the press.[55]

The citizen's alliance did not merely oppose the price hikes; the critique was fundamentally directed at the commoditization of water. Demonstrators asserted that water is the collective heritage of all mankind and a basic human right. The Cochabamba Declaration, issued during the general strike, called for the protection of universal water rights.[56] Protesters brandished signs that read "Water Is God's Gift and Not A Merchandise," and "Water Is Life."[57] In January, 2005, the citizens of Bolivia once again mobilized to oppose the commodification and privatization of water. [58] The people of El Alto, Bolivia protested, demanding that their water system be de-privatized, forcing Bolivia's president to cancel the water concession.[59]

The conflict over water privatization in Bolivia was not solely about the unequal distribution of resources, and, as the rhetoric of the demonstrators revealed, the privatization debate would not be wholly resolved by redistributing purchasing power. The conflict revealed deep fissures as to cultural conceptions about the nature of water. The demonstrators asserted that water could not be owned by private individuals and corporations because water access was a basic right, while the World Bank and other supporters of the privatization scheme conceived of water in commoditized terms.

In 2005 the citizens of Bolivia once again mobilized to oppose the commodification and privatization of water. [60] "The people of El Alto, Bolivia took to the streets en masse to demand that their water system, privatized in 1997 under World Bank pressure, be returned to public hands. Three days later Bolivia's president cancelled the water concession, which had vested the French water company Suez and an arm of the World Bank with the right to distribute El Alto's water."[61]

Some government agencies have explicitly acknowledged that in order for privatization to succeed, there must be a realignment

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[55] *Id*. at 4.
[56] *See* SHIVA, *supra* note 49, at 102–03.
[57] *Id.* at 103.
[58] Shultz, *supra* note 52.
[59] *Id*.
[60] *Id.*
[61] *Id*.

of socio-cultural doxa regarding water. For example, as the Indian Department for International Development stated, "The entire outlook changes from publicly provided free services as a right, to a consumer orientation with access to services."[62]

The belief that water is a collective resource and a basic right directly contradicts the commodifying rationality of GATS. Inclusion of water in a country's list of sector-specific commitments would preclude a government from taking measures to insure local community control over the water supply or to mandate that water be supplied to all residents, regardless of ability to pay.[63] The cancellation of foreign water concessions, executed by the Bolivian government in response to massive civil protests, would likely be illegal under the market access provision of GATS if a signatory were to include water as a committed sector.[64]

The very structure of GATS indicates that the commodifying rationality implicit within the agreement remains highly contested. Right now, GATS has a loud bark but a limited legal bite. As outlined above, the scope of the agreement encompasses all services in all sectors, but the most stringent GATS provisions are invoked only in sectors in which signatory countries make positive commitments. The lack of binding regulations without positive commitments deviates from the typical architecture of the rest of GATT, in which agreements are binding across the board unless a signatory country reserves a specific exception at the time of negotiation.[65] The fact that the most stringent measures of GATS apply only to sectors in which positive commitments have been made might indicate that signatories believe that some services are not commodities appropriate for free market exchange.

Although the legal impact of GATS is currently quite circumscribed, the conception of services-as-commodities implicit within the agreement nonetheless threatens to displace alternative ways of understanding resources for two reasons. First, Part IV of GATS commits signatories to ongoing negotiations in order to

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[62] SHIVA, *supra* note 49, at 90–91 (citation omitted).

[63] As per the National Treatment and Market Access provisions, government cannot favor domestic suppliers. *See supra* notes 45–46 and accompanying text.

[64] It is important to emphasize that water is currently not a committed sector in Bolivia. For a list of all committed sectors in each country, see WTO Services Database, *supra* note 42.

[65] Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 386 (1996).

achieve "progressive liberalization,"[66] with the explicit goal of increasing the number of service-resources included in the field of commodity exchange.[67] This creates internal momentum towards expanding the number of committed sectors subject to the market access and national treatment provisions of Part III. The commitment to progressive liberalization implicitly characterizes alternative conceptions of resources as deviant exceptions—exceptions that must be eliminated through ongoing negotiations.

Second, the countries that favor expanding GATS have strong negotiating positions within the WTO and consistently leverage their bargaining power to pressure politically weaker countries to make positive commitments in more sectors. Legally, under GATS each country has complete latitude to determine commitment levels, although once committed, a country cannot back out without compensating other WTO members. In practice, however, many developing countries are under intense pressure from more powerful trading partners to increase the number of committed sectors. The European Union ("EU")has taken the lead in pressuring developing countries to increase the number of service sectors bound by positive commitments. This is not surprising, considering the following:

> The EC is the world's largest exporter and importer of services, with around 30% of world trade in services (20% of world trade in goods). The services sector is the single most important economic activity in the EC, accounting for over three quarters of GDP and employment. In addition, more than half of the EC's incoming and outgoing foreign direct investments occurs in services.[68]

The EU has persistently submitted requests for improved market access for services to other WTO members.[69] The requests cover a broad range of sectors, including telecommunications, postal and courier services, construction and related engineering services, financial services, environmental services (including water distribution), tourism, news agency services, and transport

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[66] GATS, *supra* note 7, pt. IV.

[67] *See id*. art. XIX(1), (4).

[68] *Commission Summary of the EC's Revised Requests to Third Countries in the Services Negotiations Under the DDA* 11 (Jan. 24, 2005), *available at* http://trade-info.cec.eu.int/doclib/docs/2005/january/tradoc_121197.pdf.

[69] *Id*. at 1.

and energy services.[70] At the same time, EU negotiators have slammed developing countries for refusing to commit new services within the scope of GATS disciplines. The EC has pointedly declared that "[t]oo many Members have still have not submitted any offers, among them a number of important developing countries."[71] The EU has made pointed attempts to pressure developing countries to expand the sectors governed by positive commitments: the EU Trade Commission stated, "[M]ore countries must be drawn into the negotiations and those countries that have not yet submitted offers must be encouraged to do so." [72] While legally each country is free to decide for itself its own level of commoditization, in practice less powerful WTO members are under pressure from their larger trading partners to make broad concessions.

The sphere of market exchange, in which owners have the right of market-alienation regarding specific resources, is a juridical construction. Are water, cultural practices, and healthcare commodities that should be governed by the laws of supply and demand, marginal cost and marginal benefit, and willingness (ability) to pay? GATS advances a worldview in which everything can be conceived of as private property. Analyzing the genealogy of this doxa reveals the particularity of the commodifying rationality of GATS, and illuminates how this doxa may efface alternative conceptions of a resource as a basic human right or part of humanity's collective heritage.

III. EXPANDING RECOGNIZED PROPERTY INTERESTS AND THE RELATIVE PROTECTION AFFORDED PROPERTY RIGHTS: NAFTA CHAPTER 11

Chapter 11 of NAFTA contributes to the process of propertization by expanding legally recognized property interests for foreign investors and reordering the importance of private property rights relative to other rights. Certainly NAFTA jurisprudence does not exhibit a radical move towards propertization.[73] NAFTA tribunals have recognized expanded

[70] *Id*.

[71] *Id*. at 2.

[72] *Id*.

[73] In *Pope & Talbot, Inc. v. Canada*, the NAFTA tribunal explicitly rejected arguments advanced by claimants that the vague wording of Article 1110

property right protections in some cases, but rejected such arguments in other cases. Moreover, NAFTA is by no means unique; Chapter 11 mirrors standard Bilateral Investment Treaties ("BITs"), which have grown explosively in number in the last two decades, from 385 in 1989 to 2,265 in 2003.[74] NAFTA therefore must be examined as representative of a larger trend, and its jurisprudence is illustrative of how free trade doxa in general contributes to the process of propertization.

The purpose of this section is to explore the opportunity created by NAFTA for investors to argue for expanded private property rights and to examine the receptivity of the NAFTA tribunals to these arguments. The opportunity for private investors to promote their interests by demanding greater property protections follows both from the substantive investor rights created by Chapter 11, which contrast sharply with pre-existing legal regimes in Canada and Mexico, and from the right of investor action created by the treaty.

NAFTA Chapter 11 creates an *investor's bill of rights*, which lays out obligations that signatory governments owe to investors, without any corresponding obligations owed by investors to governments.[75] Chapter 11 also provides an investor state dispute mechanism ("ISDM"), whereby foreign investors can directly challenge the actions of signatory countries by filing a claim with a NAFTA-designated arbitration panel instead of relying on the state-to-state negotiations usually invoked to resolve disputes.[76] The ISDM theoretically increases the ability of foreign investors to proactively file claims to protect their own interests, and therefore

expands the scope of government actions subject to the widespread expropriation-compensation requirement under international law. Pope & Talbot, Inc. v. Canada, Interim Award by Arbitral Tribunal, paras. 103–05 (June 26, 2000), *available at* http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF.

[74] United Nations Conference on Trade and Dev., Quantitative Data on Bilateral Investment Treaties and Double Taxation Treaties, http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1 (last visited Feb. 20, 2006). A Bilateral Investment Treaty, concluded between two sovereign nations, grants investors of one country investment rights in another country.

[75] In contrast, chapters 1–10 and 12–20 of NAFTA impose constraints and obligations owed by signatory states to each other. *See generally* NAFTA, *supra* note 6.

[76] *Id*. art. 1115–22. For more detailed discussion of NAFTA's ISDM, see Been & Beauvais, *supra* note 23, at 45–46.

to pursue compensation in the case of regulatory takings, as opposed to relying on domestic courts and politicians, who may fail to protect these interests.

The rights of investors granted by NAFTA Chapter 11 that are most relevant for this analysis include: National Treatment (Article 1102),[77] Most-Favored-Nation Treatment (Article 1103),[78] Minimum Standard of Treatment (Article 1105),[79] and, most significantly, Expropriation and Compensation (Article 1110), which mandates that

> No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105; and (d) on payment of compensation . . . .[80]

As discussed above, property is a juridical construct, a collection of rights in relation to resources protected by law. Are expected future profits a property interest, whose diminution through government action constitutes a "taking", requiring compensation? Do owners of a resource have a "right" to market access? NAFTA Tribunal decisions to date suggest that, under NAFTA, expected future profits and market access are protected property interests. This represents an expansion of property rights compared to prior Canadian and Mexican law. The relative protection afforded property rights versus the government's ability to promote the public interest through the imposition is likewise a

[77] "Each Party shall accord to investors [and investments of investors] of another Party treatment no less favorable than [the most favorable treatment] that it accords, in like circumstances, to its own investors [and investments of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments." NAFTA, *supra* note 6, art. 1102.

[78] "Each Party shall accord to investors [and investments of investors] of another Party treatment no less favorable than that it accords, in like circumstances, to investors [and investments of investors] of another Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments." *Id*. art. 1103.

[79] "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." *Id.* art. 1105.

[80] *Id.* art 1110.

product of the socio-juridical superstructure. The text of NAFTA, and relevant decisions of NAFTA tribunals establishing a regulatory takings regime, privilege private property rights over conflicting rights to a greater extent than do the domestic laws of either Canada or Mexico.

Of the three NAFTA signatories (U.S., Canada, and Mexico), only the U.S.'s Constitution unequivocally guarantees the protection of private property.[81] The Fifth Amendment to the U.S. Constitution provides, "Nor shall private property be taken for public use, without just compensation,"[82] and the Fourteenth Amendment extends this federal obligation to state governments.[83] Yet the protection of private property rights is circumscribed by both substantive and procedural mechanisms, and courts are often reluctant to find that a government regulation constitutes a compensable taking.[84] Because property rights must be balanced against the legitimate exercise of police powers, the U.S. Supreme Court has been unable to declare a bright line rule as to when a government regulation constitutes a compensable taking under the Fifth Amendment. The Supreme Court has declared that a permanent physical occupation is always a taking,[85] as is a regulation that destroys 100 percent of the economic value of property.[86] Beyond these two *per se* rules, U.S. courts must engage in an "ad hoc, factual inquiry" to determine whether a regulation constitutes a taking for which the government must provide compensation.[87] The courts consider "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action" in determining whether a taking is compensable.[88] The protection of private property rights must also be balanced against other fundamental rights guaranteed by the

[81] *See* Gregory M. Starner, Note, *Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property*, 33 LAW & POL'Y INT'L BUS. 405, 406–17 (2002).

[82] U.S. CONST., amend. V.

[83] *Id.* amend. XIV.

[84] *See* Been & Beauvais, *supra* note 23, at 61–62.

[85] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 441 (1982).

[86] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1029 (1992).

[87] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[88] *Id*.

U.S. Constitution, such as freedom of speech and religion, the right to due process of law, and protections from cruel and unusual punishment.[89]

Some commentators argue that NAFTA Article 1110 is merely an extension of the Fifth Amendment;[90] others contend that expanded definitions of property interests,[91] conceptual severance,[92] and lower standards for determining when a regulation "goes too far" provide property owners with greater protection from government expropriation under NAFTA than under the Fifth Amendment.[93]

Canadian doxa regarding property rights differs markedly from the high level of property rights protections granted by U.S. law. In contrast to the U.S. Bill of Rights, the Canadian Charter of Rights and Freedoms protects "life, liberty, and security of the person,"[94] but does not reference deprivation of property.[95] The Canadian Constitution therefore provides no explicit protection against government expropriation of private property, although rules of statutory interpretation provide "that a statute that expropriates private property is to be read, in the absence of explicit language to the contrary, as implicitly requiring that compensation be paid to the property owner."[96] Although there is no constitutional obligation for the Canadian government to pay compensation for expropriated private property,[97] in practice government authorities must compensate for expropriations unless the statute directing the expropriation explicitly declares that compensation is not required.[98] However, unlike the U.S., government regulations in Canada are almost never considered expropriations. Canadian courts consider a government measure

[89] U.S. CONST., amends. I, V, VIII.

[90] *See, e.g.*, David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499 (1996).

[91] *See* discussion *supra* note 23.

[92] Been & Beauvais, *supra* note 23, at 63–67.

[93] *See id.* at 63–78.

[94] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

[95] *Id.*

[96] Starner, *supra* note 81, at 409; *see* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 705–07 (3d ed. 1992).

[97] Starner, *supra* note 81, at 409; HOGG, *supra* note 96, at 707.

[98] *See* Starner, *supra* note 81, at 409–10 (describing two cases in which compensation was required despite the silence of a statute).

to be a compensable expropriation only when the measure actually transfers ownership rights to the government. Recently the Ontario Court of Appeals denied a compensation claim, reasoning that "While the property rights of the plaintiffs [have been] voided by the [law] . . . in no sense can they be said to have been acquired by the Crown."[99] Using the logic of *expressio unio*, the court explained,

> if regulatory legislation voiding but not expropriating property rights triggered a presumed right to compensation from the state, the effect would be to give property rights the equivalent of the protection accorded [to other fundamental rights] by . . . the *Charter* despite the clear exclusion of such rights from the *Canadian Charter of Rights and Freedoms* by its drafters. In other words, an individual would have the right not to be deprived of his property by regulatory legislation except with compensation or with explicit override of that right by legislative language. This would seem to do indirectly something the framers of the Charter declined to do.[100]

Thus Canadian Courts have determined that, in Canada, property rights are afforded less protection than the fundamental rights of life, liberty, and security.

Mexican law has traditionally afforded even less weight than Canadian law to the importance of property rights relative to individual liberty, considerations of the public interest, rights of democratic governance, and concerns for equality. From 1910 until the mid-1980's, Mexico's property rights regime was explicitly nationalistic.[101] Natural resource nationalism reflected the political ethos of the Mexican revolution of 1910, which triumphed over the government of Porfirio Diaz.[102] The Diaz government was highly dependent on foreign support and investment and revolutionaries blamed these foreign investors for Mexico's poverty and underdevelopment.[103] They enshrined their opposition to foreign property rights in the Constitution of 1917 by

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[99] A & L Invs. Ltd. v. Ontario (Minister of Housing), [1997] 36 O.R.3d 127, 134.

[100] *Id.* at 135.

[101] Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 281 (1994).

[102] *Id.* at 283–84.

[103] *Id.* at 281.

asserting national sovereignty over natural resources; Article 27 declares in relevant part,

> Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity. The Nation shall at all times have the right to impose on private property rights the limitations dictated by the public interest, as well as to regulate, for the collective good, the use of natural resources susceptible to appropriation, to ensure a more equitable distribution of the public wealth, to conserve them, to achieve the well-balanced development of the country and the improvement of the living conditions of the rural and urban population.[104]

Article 27 thus explicitly declares that conservation, equality, and the collective good trump private property interests in natural resources. More than fifty years later, through the Foreign Investor Law of 1973, Mexico continued to assert that domestic concerns trumped foreign property rights.[105] This position was reflected by Mexico's response in the wake of the nationalization of U.S. and British owned oil investments in 1938. Mexico refused to pay compensation, asserting the Calvo Doctrine[106] principle that a government may expropriate foreign investments without compensation, so long as the expropriation accords with domestic law and policy.[107]

Article 27 clearly distinguishes between expropriation, which consists of taking a resource from the owner for public use, and limitations, which constitute "a partial extinction of the rights of

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[104] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], art. 27, 5 de Febrero de 1917 (Mex.).

[105] The Foreign Investment Law of 1973 gave the Mexican government "wide-ranging authority to regulate foreign property interests" and "prohibited majority ownership by foreign entities in much of the Mexican economy." Starner, *supra* note 81, at 416.

[106] "[T]he Calvo Doctrine involves the following principle: . . . any dispute derived from foreign investment, or negotiations in connection therewith, must be resolved by local courts, and in accordance with domestic law." Raymundo E. Enriquez, *Expropriation Under Mexican Law and Its Insertion into a Global Context Under NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 385, 387 (2000). *See also* DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 9–37 (1955) (explaining Mexican support for the Calvo Clause in the first half of the 20th century).

[107] Starner, *supra* note 81, at 415–16.

the owner."[108] This distinction is similar to the Canadian bright line between expropriations and regulations. Expropriations require indemnifications, while limitations do not, leaving no room for the shades of gray found within U.S. jurisprudence regarding regulatory takings. Regulations that do not transfer property rights to the state or another private entity are not takings and are not entitled to compensation.

The establishment of property rights through NAFTA Chapter 11 displaces pre-existing orders of value in Canada and Mexico, and arguably within the U.S. as well. The NAFTA "investor bill of rights" grants property interests extensive legal protections while failing to establish the rights of equality, security, liberty, and democratic governance enshrined in the constitutions of signatory countries. Property rights do not exist in a vacuum, as is evident in the takings jurisprudence in all three NAFTA signatories. By enshrining investor's property rights in international law while ignoring other, potentially competing norms, NAFTA privileges displaces these alternative regimes of value. NAFTA tribunals have made it abundantly clear that Article 1110, unlike the Mexican and Canadian Constitutions, requires compensation for regulatory takings. At the same time, tribunals have indicated that the compensation requirement will be applied in the context of an expansive definition of protected property interests.

Forty-two claims had been filed under NAFTA Chapter 11 as of February 2005.[109] Eleven were currently in active arbitration, six were decided in favor of NAFTA governments, and five were decided in favor of investors.[110] This article will focus on four cases: *S.D. Myers, Inc. v. Canada*,[111] *Pope & Talbot Inc. v. Canada*,[112] *Metalclad Corp. v. United Mexican States*,[113] and

[108] J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 514–16 (1999).

[109] PUB. CITIZEN, TABLE OF NAFTA CHAPTER 11 INVESTOR-STATE CASES & CLAIMS 4 (2005), *available at* http://www.citizen.org/documents/CH11cases_chart.pdf.

[110] *Id.*

[111] S.D. Myers Inc. v. Canada, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408 (2001).

[112] Pope & Talbot, Inc. v. Canada, Interim Award by Arbitral Tribunal, paras. 103–05 (June 26, 2000), *available at* http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF.

[113] Metalclad Corp. v. United Mexican States, Award, ICSID Case No.

Glamis Gold Ltd. v. United States.[114] These cases are particularly relevant in that they directly address property rights issues. Moreover, in three of these disputes, *S.D. Myers*, *Pope & Talbot* and *Metalclad*, arbitration panels have issued decisions. *Glamis Gold*, which is pending, is relevant because the issues at stake starkly illuminate the contest of values that hinge on differing conceptions of property rights.

A. Metalclad

Metalclad v. United Mexican States has the dubious distinction of being the first decision, and to date the only decision, in which a tribunal has found a violation of NAFTA Article 1110. The facts of the case are as follows.

A Mexican corporation, COTERIN, had legally recognized ownership rights over land in San Luis Potosi, Mexico.[115] In 1990, the federal government of Mexico authorized a permit to build a hazardous waste transfer station on the site.[116] Thereafter about 20,000 tons of waste were deposited at the site untreated, in violation of its permit, and in 1991, the federal government ordered the closure of the transfer station.[117] The federal government did not effectively enforce this order, however, and instead local residents with machetes forced the plant to close.[118] The same year, COTERIN applied for, and was denied, a municipal permit to construct a hazardous waste landfill.[119] In

ARB(AF)/97/1 (Aug. 30, 2000), 16 ICSID REV.—FOREIGN INVESTMENT L.J. 168 Spring 2001, *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf.

[114] Glamis Gold Ltd. v. United States, Notice of Arbitration (Dec. 9, 2003), *available at* http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Claim.pdf [hereinafter Glamis Gold Notice of Arbitration].

[115] Metalclad Corp. v. United Mexican States, Memorial, ISCID Case No. ARB(AF)/97/1, at 40–41 (Oct. 13, 1997), *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladInvestorMemorial.pdf [hereinafter Metalclad Memorial].

[116] *Id.* at 56.

[117] *Id.* at 58; Metalclad Corp. v. United Mexican States, Counter-Memorial, ICSID Case No. ARB(AF)/97/1 (Feb. 17, 1998), *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalCladMexicoCounterMemorial.pdf [hereinafter Metalclad Counter-Memorial].

[118] Andrew Wheat, *Toxic Shock in a Mexican Village*, MULTINATIONAL MONITOR, Oct. 1995, at 21, *available at* http://multinationalmonitor.org/hyper/mm1095.07.html.

[119] Metalclad Counter-Memorial, *supra* note 117, para. 44.

1993, however, COTERIN secured permits to build a landfill from the federal government, despite the fact that it had not received authorization from municipal authorities.[120] Shortly thereafter, Metalclad, a U.S. corporation, contracted for an option to buy COTERIN and its permits, subject to the condition that COTERIN obtain either a municipal building permit for the landfill or a definitive judgment from the Mexican courts that a building permit was not necessary.[121] The state of San Luis Potosi issued a state land use permit to construct the landfill, and Metalclad secured assurances from several high-ranking officials that all the permits necessary for the landfill had been issued.[122] Metalclad then exercised its option to purchase COTERIN and the permits, and shortly began construction on the project.[123]

There was widespread local opposition to the project from the start. Many residents did not trust the federal government to enforce environmental laws, based on their experience with the hazardous waste transfer station.[124] The municipal authority of Guadalcazar, buckling to local political pressure, in October 1994 demanded that construction cease on the grounds that Metalclad had not obtained a municipal landfill permit.[125] When Metalclad complained to federal officials the federal government promised Metalclad that it had all the necessary permits, and that the municipality had no authority to halt construction, so Metalclad completed building the landfill in March 1995.[126]

Local residents organized demonstrations and succeeded in stopping the landfill from opening.[127] Although the federal government continued to support the landfill project, in December 1995 the City of Guadalcazar again denied Metalclad's application for the landfill construction permit on four grounds: "it had earlier denied COTERIN's applications for such permits; Metalclad

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[120] *Id.* paras. 47, 50.

[121] *Id.* para. 57.

[122] Metalclad Memorial, *supra* note 115, at 3.

[123] *Id.* at 59.

[124] PUB. CITIZEN, NAFTA CHAPTER 11: LESSONS FOR THE CENTRAL AMERICAN FREE TRADE AGREEMENT 27–28 (2005), *available at* http://www.citizen.org/documents/NAFTAReport_Final.pdf.

[125] Vicki Been, *NAFTA's Investor Protections and the Division of Authority for Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 19, 38 (2002).

[126] *Id.*

[127] PUB. CITIZEN, *supra* note 124, at 28.

improperly began construction without a permit; the municipality had environmental concerns about the landfill; and Guadalcazar's residents opposed the grant of the permit."[128] Metalclad then filed a claim under NAFTA, alleging that Mexico, through its state and local governments, violated NAFTA's Article 1105 (Fair and Equitable Treatment) and the compensation requirements of Article 1110.[129] While the claim was pending and just before he was to leave office, the governor of San Luis Potosi issued an ecological decree declaring the site part of a 600,000 acre ecological zone, which had the effect of preventing operation of the landfill.[130]

The *Metalclad* tribunal found Mexico in violation of both Articles 1105 and 1110,[131] basing the Article 1110 ruling on two grounds. First, the court asserted that the municipality of Guadalcazar only had authority over matters related to physical construction defects, and therefore had no legal basis for denying the permit.[132] The tribunal found that by blocking this construction, the city had effectively seized Metalclad's property.[133] Moreover, the tribunal held that the ecological decree issued by the governor of San Luis Potosi "had the effect of barring forever the operation of the landfill" and therefore constituted an act of expropriation.[134] The tribunal transferred title to the site to Mexico and awarded Metalclad $16.7 million, or Metalclad's investment in the project, plus interest.[135]

Mexico challenged the award in the Supreme Court of British Columbia.[136] That court set aside the NAFTA tribunal's decision on Article 1105 and the first prong of the Article 1110 decision (holding that the denial of a municipal permit constituted a taking), because those issues were beyond the scope of what could be

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[128] Been & Beauvais, *supra* note 23, at 45–46.

[129] Metalclad Memorial, *supra* note 115, at 108–09.

[130] *Id.* at 27.

[131] Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, para. 72 (Aug. 30, 2000), 16 ICSID REV.—FOREIGN INVESTMENT L.J. 168, 189, Spring 2001, *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf.

[132] *Id.*

[133] *Id.* paras. 106–07.

[134] *Id.* paras. 109–11.

[135] *Id.* para 131.

[136] United Mexican States v. Metalclad Corp. [2001], 89 B.C.L.R. 3d 359, 363, *modified*, 95 B.C.L.R. 3d 169, 178.

submitted to arbitration under NAFTA.[137] The court upheld that portion of the tribunal's award finding the ecological decree to be an expropriation, and thus upheld the $17 million award.[138]

In deciding *Metalclad*, the NAFTA tribunal stated,

> expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or *reasonably-to-be-expected economic benefit* of property even if not necessarily to the obvious benefit of the host state.[139]

This declaration represents a significant elevation of the Mexican conception of property rights in two respects.

First, it articulates NAFTA's principle that regulatory takings are compensable expropriations. In other words, NAFTA mandates monetary damages not only for takings in the traditional sense (transferring property rights to the state), but also for government actions that deny a private property owner of some, but not all, of her rights in relation to a resource or limit particular uses of property. While the idea that government regulations may be takings is enshrined in U.S. law,[140] as discussed above, it had been absent from both Canadian and Mexican law prior to NAFTA.

Second, the dicta in the ruling embraced an expansive conception of protected property interests in awarding damages. Metalclad Corporation asserted a protected property interest in the economic benefit it expected to gain from operating the landfill, initially claiming damages equal to the present value of its expected future profits.[141] While the NAFTA tribunal in this case refused to award speculative damages based on Metalclad's projected profits,[142] it did recognize projected future profits as a protected property interest that could be subject to compensation

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[137] *Id.* at 380–82.

[138] *Id.* at 387–88.

[139] *Metalclad*, ICSID Case No. ARB(AF)/97/1, para. 103 (emphasis added).

[140] *See* text accompanying notes 81–89.

[141] *Metalclad*, ICSID Case No. ARB(AF)/97/1, paras. 254–66.

[142] *Id.* para. 103. The Arbitral Tribunal based the award on "the fair market value of the expropriated investment immediately before the expropriation took place." *Id.* para 118.

requirements.[143] This interpretation of a compensable taking was affirmed by the Supreme Court of British Columbia, which declared the question of law to be within the scope of NAFTA's jurisdiction and thus not challengeable outside the NAFTA tribunal. *Metalclad* confirmed that Article 1110 of NAFTA required compensation for regulatory takings, in sharp departure from the property rights regimes of Canada and Mexico.

B. Pope & Talbot *and* S.D. Myers

In two separate cases, NAFTA arbitration panels have indicated that market access is a legally protected property interest, and that regulations unduly infringing upon this interest might constitute an expropriation requiring compensation. In reaching the question as to whether market access is a protected property interest, the tribunals accepted the principle that regulatory takings are expropriations within the meaning of NAFTA, and thus require compensation.

The legal logic regarding an investor's property interest in market access is most succinctly articulated in *Pope Talbot v. Canada*. Among a variety of other charges, Pope & Talbot Inc., a U.S. corporation, alleged that Canada's allocation of lumber export quotas violated Article 1110's prohibition on expropriation without compensation.[144] The company complained that Canada's lumber-export quota system expropriated its "ordinary ability to alienate its product through its traditional and natural market."[145] In order to determine whether an expropriation has occurred and whether this expropriation requires compensation, a court must ascertain (1) the property interests in question (which rights a

[143] *Metalclad*, ICSID Case No. ARB(AF)/97/1, para. 121. The tribunal noted that "the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis." In this case, however, the tribunal rejected such a damages calculation, as "the enterprise has not operated for a sufficiently long time to establish a performance record . . . , [so] future profits cannot be used to determine going concern or fair market value." *Id.* paras. 119–20.

[144] For a more complete discussion of the facts of this case, see, for example, David A. Gantz, *International Decisions*, Pope & Talbot, Inc. v. Canada, 97 AM. J. INT'L L. 937 (2003); Been, *supra* note 125, at 30–33.

[145] Pope & Talbot Inc. v. Canada, Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, ¶ 93 (Mar. 25, 1999), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc3.pdf.

claimant has in relation to a resource),[146] and (2) the standard by which to judge whether or not the violation of these property interests is compensable.[147] Although the arbitration panel eventually declared that the quota regulation was not an expropriation and refused to order the Canadian government to compensate the company, the panel notably declared, "[Pope & Talbot's] access to the U.S. market is a property interest subject to protection under Article 1110."[148] The court determined that the lumber export regulations did not constitute a compensable taking because an insufficient percent of the denominator property interests had been abrogated by the regulations, as evidenced by the fact the company continued "to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on these sales."[149] At the same time, however, the court declared that market access *is* a protected property interest, finding simply that this interest wasn't infringed upon sufficiently in this particular case for the infringement to be a compensable expropriation.

In *S.D. Myers, Inc. v. Canada*, the tribunal similarly indicated that market access is a protected property interest under NAFTA, without going so far as to declare that the government regulations at issue triggered the 1110 compensation requirement. S.D. Myers, a U.S. corporation in the business of remediating the toxin polychlorinated biphenyl ("PCB"), claimed that an eighteen month Canadian ban on the export of PCBs to the U.S.[150] was a compensable taking (and that Canada's failure to compensate S.D. Myers for the expropriation was a violation of NAFTA Article 1110) because the ban caused S.D. Myers to suffer "harm to its

[146] As commentators have noted, "[t]he issue [of property interests] is related to the expropriation/regulation debate because the broader the array of protected rights, the broader the array of measures that can be brought within the scope of Article 1110." HOWARD MANN & JULIE A. SOLOWAY, UNTANGLING THE EXPROPRIATION AND REGULATION RELATIONSHIP: IS THERE A WAY FORWARD? 11 (2002), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/untangle-e.pdf. In other words, the greater the number of rights recognized as legally protected property interests, the more likely it becomes that a government regulation will infringe on these rights, necessitating compensation.

[147] *Id.*

[148] Pope & Talbot, Inc. v. Canada, Interim Award by Arbitral Tribunal, para. 96 (June 26, 2000), *available at* http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF.

[149] *Id*. paras. 100–01.

[150] S.D. Myers Inc. v. Canada, Partial Award, para. 284 (Nov. 13, 2000), 40 I.L.M. 1408, 1440 (2001).

investment through lost contracts and lost opportunities".[151] The tribunal declared that the PCB export-ban was not in fact an expropriation triggering Article 1110's compensation requirement since the limitation of market access caused by Canada's PCB export ban was merely temporary.[152] However, the tribunal explicitly based its ruling in part on the fact that the denial of market access was not permanent, thus reinforcing the *Pope & Talbot* precedent establishing that the opportunity to sell one's products in a particular market is a property interest that may trigger the Article 11110 compensation requirement.[153]

The tribunals in both *Pope & Talbot* and *S.D. Myers* asserted that market access is included in the bundle of rights that constitute ownership and is thus a protected property interest. It is only because the arbiters found insufficient infringements on the protected interest of market access that the specific government regulations challenged in these two cases narrowly escaped classification as compensable expropriations.

C. Glamis Gold

Glamis Gold Ltd., a Canadian corporation, owns approximately 187 mining claims located on federal public land in the Southern California Imperial Desert, east of San Diego,[154] land that has been recognized for its scenic beauty.

> Indian Pass, a broad sweep of sand and sky in southeastern California, has the elusive beauty of desert landscapes, a sense of creation drawn in the simplest lines, leaving plenty of room for the human imagination. The rock-strewn desert of black basalt and white quartz rises to a crescent ridge that frames the bottom of a flawless blue sky. The Chocolate Mountains hang in the distance, and there is an almost unnatural silence at midday.[155]

The land is managed by the U.S. Department of the Interior

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[151] Statement of Claim Under the Arbitration Rules of the U.N. Commission on International Trade Law and the North American Free Trade Agreement at 13–15, 33, S.D. Myers v. Canada, *available at* www.appletonlaw.com/cases/mclaim.pdf.

[152] *S.D. Myers Partial Award*, paras. 283–88, 40 I.L.M. at 1440.

[153] *See id*. para. 287.

[154] Glamis Gold Notice of Arbitration, *supra* note 114, para. 4.

[155] Reed Karaim, *Losing Sacred Ground*, PRESERVATION, Mar.–Apr. 2003, at 30–31.

("DOI") as part of the California Desert Conservation Area.[156] Under the 1872 Mining Law, U.S. citizens can acquire mining claims for free,[157] and "[t]he holder of the claim can then mine the minerals located on that land for its own profit, without paying any royalties to the federal or other governments."[158] Mineral claims are recognized under U.S. law as freely transferable property.[159]

In 1994, Congress enacted the California Desert Protection Act, which precluded mining or development on hundreds of thousands of acres of California desert.[160] The area in which Glamis had acquired mineral rights lay outside the designated wilderness area. According to Glamis, once they were "assured that the Imperial [Mining] Project remained comfortably outside of the wilderness areas designated by the California Desert Protection Act," they "undertook the significant investment necessary to establish and begin gold mining operations."[161] Although the mine would be located near pristine wilderness and in area of spiritual significance to the Quechan Indians,[162] initially both the Bureau of Land Management ("BLM") and Imperial County recommended approval of the mining project (subject to some additional impact mitigation conditions).[163] Glamis claimed that as of December 2002 it had invested approximately $13 million in development of the project in reliance on the 1994 Congressional Act and initial approval by local and federal government.[164]

On January 17, 2001, the U.S. Department of the Interior under the Clinton administration denied a permit to Glamis to operate the mine,[165] based on "the pollutant impacts of the mining

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[156] Glamis Gold Notice of Arbitration, *supra* note 114, paras. 4–5. The designation of California Desert Conservation Area was made pursuant to the Federal Land Policy Management Act of 1976. 43 U.S.C. § 1781 (2000).

[157] 30 U.S.C. § 26 (2000).

[158] FRIENDS OF THE EARTH & OXFAM AM., GLAMIS GOLD: A CASE STUDY OF INVESTING IN DESTRUCTION 2 (2003), *available at* http://www.foe.org/camps/intl/greentrade/glamis.pdf.

[159] Glamis Gold Notice of Arbitration, *supra* note 114, para. 4.

[160] Pub. L. No. 103–433, § 2, 108 Stat. 4471, 4471–72 (1994) (codified at 16 U.S.C. §§ 410aaa–410aaa-83 (2000)).

[161] Glamis Gold Notice of Arbitration, *supra* note 114, para. 8.

[162] FRIENDS OF THE EARTH & OXFAM AM., *supra* note 158, at 2.

[163] Glamis Gold Notice of Arbitration, *supra* note 114, para 9.

[164] *Id*. para. 10.

[165] CAL. DESERT DIST., BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BLM CASE FILE NO. CA 670-41027, RECORD OF DECISION FOR THE IMPERIAL PROJECT GOLD MINE PROPOSAL, IMPERIAL COUNTY,

operation and the cumulative adverse impact on Quechan religious sites, as well as on environmental justice grounds."[166] As Glamis recognized in its arbitration brief,

> the Secretary's Record of Decision stated in its rationale that the Imperial Project—albeit on federal not tribal land—was within a Native American 'spiritual pathway' which ran for at least 130 miles in the California Desert area, and that tribal members believed the proposed mine would 'impair the ability to travel, both physically and spiritually, along . . .' this 'Trail of Dreams.'"[167]

On November 23, 2001, the DOI under the new Bush administration took steps to reverse this ruling, formally rescinding the prior denial of the Imperial Project,[168] but as of 2003 had still not approved Glamis's mining plan.[169]

In response to the continuing possibility that Glamis's mine project would be allowed to go forward, in April 2003 California Governor Gray Davis signed legislation designed to stop the project.[170] The bill required backfilling and restoration of all metallic mining sites to pre-mining conditions if the proposed mine is near a sacred site.[171] The statute effectively blocked the Glamis mine by making the gold mining operation cost prohibitive; as the governor's office declared, "[b]y requiring complete restoration of metallic mining sites, the bill essentially stops the Glamis Gold Mine proposal in Imperial County."[172]

CALIFORNIA (2001), *available at* http://www.blm.gov/ca/pdfs/elcentro_pdfs/Glamis_ROD_final_1-01.pdf [hereinafter GLAMIS ROD]. *See also* Press Release, Office of the Secretary, U.S. Dep't of the Interior, Secretary Babbitt Denies Gold Mine in Imperial County, California (Jan. 17, 2001), *available at* http://www.doi.gov/news/archives/010118.htm.

166 FRIENDS OF THE EARTH & OXFAM AM., *supra* note 158, at 2.

167 Glamis Gold Notice of Arbitration, *supra* note 114, para. 15 (quoting GLAMIS ROD, *supra* note 165, at 10).

168 *See* News Release, Glamis Gold Ltd., Imperial Project Denial to be Vacated by Department of the Interior (Oct. 25, 2001), http://www.glamis.com/pressreleases/2001/oct25-01.pdf.

169 Glamis Gold Notice of Arbitration, *supra* note 114, para. 16.

170 CAL. PUB. RES. CODE §§ 2770–2775 (West 2006); *see* Gregg Jones, *Davis Signs Law to Deter Gold Mining at Site Sacred to Indians*, L.A. TIMES, Apr. 8, 2003, at B6.

171 CAL. PUB. RES. CODE § 2773.3.

172 Press Release, Office of the Governor, Governor Davis Signs Legislation to Stop Proposed Gold Mine Near "Trail of Dreams" Sacred Site, Apr. 7, 2003 (on file with author).

On December 9 2003, Glamis Gold Ltd. filed a Notice of Arbitration against the U.S., alleging that refusal on the part of the BLM and the State of California to allow the mining project violated Articles 1105 (minimum standard of treatment) and 1110 (expropriation and compensation).[173] Glamis argued that the California Desert Protection Act and initial federal assurances effectively gave Glamis a property interest in the expected economic benefit of the mining operation.[174] As in the previously discussed cases, if the tribunal accepts Glamis' argument, it will support two premises: (1) expected economic benefit is a protected property interest, and (2) government regulations which negatively affect projected profits can trigger the Article 1110 compensation requirement, regardless of the public benefit. A ruling has not yet been made in this case, and it remains to be seen whether a tribunal will agree that Glamis has a protected property interest that was expropriated by the California regulation.

Like *Metalclad*, *Glamis* illustrates the conflict in values underlying the competing rights claimed in NAFTA litigation. "The pass [where the mining operation would be constructed] is crisscrossed by paths sacred in the Quechan's traditional faith, including the Trail of Dreams, where tribal members travel in search of visions."[175] As a member of the tribe's culture committee, explained, the pass is "like a church without the church," it is "[a] place we can go for reflection and prayer."[176] The California legislature, the Clinton Administration, and the Quechan tribe assert that an open-pit gold mine should not be built on the site because the land is a place of spiritual significance and intrinsic natural beauty and that Glamis' interest in the potential mining profits is secondary.

Implicit within the allocation of rights advocated by Glamis is a rationality, outlined in Part IV, that conceives of resources in instrumental terms, as inputs to be used for the generation of material (economic) gains. The tribunal in *Metalclad* held that the owner of a parcel of land has a right to the "reasonably-to-be-expected economic benefit of the property," even when generation of this profit requires the destruction of other (non-economic)

[173] Glamis Gold Notice of Arbitration, *supra* note 114, para. 25.
[174] *See id*. paras. 11–25.
[175] Karaim, *supra* note 155, at 31.
[176] *Id.*

benefits presently enjoyed by the project's neighbors.[177] The tribunals in *S.D. Myers* and *Pope & Talbot* likewise indicated that the right of a company to sell its goods in a particular market may be a protected property interest, while the right of the public to establish regulations denying such access is not – and if the public wishes to establish such regulations compensation must be paid.[178] Glamis Gold likewise contends that it has a right to put the desert to an economically productive use, even when this would infringe on the ability of the Quechan tribe to worship. Glamis assumes that the value of the desert landscape can be reduced to economic terms, and argues that, under NAFTA, if the community of California doesn't want an open-pit cyanide mine in the Quechan spiritual pathway, Article 1110 requires California to pay for the privilege of barring the mine. Both the text of NAFTA and NAFTA jurisprudence to date codify and extend a doxa in which the primary identity of resources under free trade agreements is instrumental and productive; all alternative valuations are secondary.

IV. THE RATIONALITY OF ECONOMIC EFFICIENCY: THE CONSTITUTIVE IMPACT OF FREE TRADE AGREEMENTS

In order to understand how free trade agreements threaten regimes of value in periphery communities we must "reveal[] the ways in which their modes of exercising power depend upon specific ways of thinking (rationalities) and specific ways of acting (technologies), as well as upon specific ways of 'subjectifying' individuals and governing populations."[179] The preceding two sections focused on the legal mechanisms (the technologies) of GATS and NAFTA and the doxa regarding what constitutes property promoted by these legal mechanisms. I now turn to the

[177] Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, para. 103 (Aug. 30, 2000), 16 ICSID REV.—FOREIGN INVESTMENT L.J. 168, 195, Spring 2001, *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf.

[178] *See* discussion *supra* Part III.

[179] David Garland, *'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology*, 1 THEORETICAL CRIMINOLOGY 173, 174 (1997) (explaining the analytical framework for applying Foucault's concept of "governmentality", which is the process by which states govern populations by constructing subjectivities to facilitate self-governance).

rationalities implicit within trade agreements, in order to illuminate how the ways of thinking upon which these agreements are predicated may preclude alternative normative value systems.

Property has been justified on radically different grounds than the economic efficiency rationale that underlies free trade agreements. These alternative justifications reveal ways of thinking about resources that concern justice, democratic sustainability, and the constitution of individual subjectivity, not economic production. For example, according to Locke's labor theory of value, property rights are the just reward for combining one's labor with a resource.[180] Other theorists, such as Hegel, have justified property rights on the grounds that private property is a necessary component in the development of personality.[181] By allowing control over the external world, property rights allow us to differentiate ourselves as individual subjects, and thereby constitute ourselves to ourselves and others.[182] Finally, some Western theorists have argued that private property is "an essential pillar in the protection of political liberty," justifying private property on the grounds that it safeguards against the potentially totalitarian power of the state.[183] These alternative property rights theories privilege justice, the protection of liberty, or the constitution of conceptions of the self over the maximization of economic efficiency. The rationality underlying NAFTA and GATS, on the other hand, constitutes our relations to resources in a specifically economic way.

At the heart of free trade agreements is an economic

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[180] JOHN LOCKE, GOVERNMENT AND A LETTER CONCERNING TOLERATION § 27 (Ian Shapiro, ed., Yale U. Press 2003) (1690).

[181] G.W.F. HEGEL, PHILOSOPHY OF RIGHT 40–46 (T.M. Knox trans., Oxford U. Press 1967) (1821).

[182] *Id.*

[183] Stewart E. Sterk, *What's in a Name?: The Troublesome Analogies Between Real and Intellectual Property* 5 (Benjamin N. Cardozo Sch. of Law, Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 88, 2004). *See also* FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 109 (1976); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1352 (1993).

> [P]rivate property, by insulating owners from expropriations by neighbors and state officials, provides an economic security that may embolden owners to risk thumbing their noses at the rest of the world. The private ownership of any valuable resource . . . can confer the economic independence that permits genuine political and social choice.

Id.

efficiency theory of property rights. According to such theories, property rights are justifiable because they enhance economic efficiency by (1) encouraging individuals to take account of all the gains and losses resulting from the use of a resource, (2) fixing the value of assets so they can be used as capital to finance investment, and (3) allowing entitlements to be optimally allocated through market transactions.

The first efficiency argument, based on the notion of externalities, is that "enforcing rights to private property serves the vital function of encouraging individuals to make socially desirable investments in improving assets."[184] An externality is an impact (either positive or negative) that the decision-maker does not take into account in choosing how to use a resource.[185] The oft-repeated parable regarding "the tragedy of the commons" hypothesizes that when a resource is owned communally, people use too much of it, because they do not take into account the future value of the resource or the impact of their use on others.[186] Theory would posit that fishermen may over-fish a species or an area, driving stock down to unsustainable levels, because none of them possess a property right in the fish (and therefore the ability to exclude others).[187] Harold Demsetz argued that "property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization."[188] He asserted,

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[184] Kevin Davis, *The Rules of Capitalism*, 22 THIRD WORLD Q. 675, 676 (2001).

[185] Demsetz offers the following explanation of externalities:

> [T]he concept includes external costs, external benefits, and pecuniary as well as nonpecuniary externalities. No harmful or beneficial effect is external to this world. Some person or persons always suffer or enjoy these effects. What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile . . . . 'Internalizing' such effects refers to a process, usually a change in property rights, that enable these effects to bear (in greater degree) on all interacting persons.

Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

[186] *See generally* Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[187] John Tierney, *A Tale of Two Fisheries*, N.Y. TIMES MAG., Aug. 27, 2000, at 38, 42.

[188] Demsetz, *supra* note 185, at 350.

> [n]ew techniques, new ways of doing the same things, and doing new things—all invoke harmful and beneficial effects to which society has not been accustomed . . . . [T]he emergence of new property rights takes place in response to the desire of the interacting persons for adjustment to new benefit-cost possibilities.[189]

For Demsetz, therefore, the primary function of private property rights is to increase economic efficiency by internalizing externalities.

Demsetz's theory is descriptive: property rights emerge when the social benefit of forcing resource users to take full account of the impacts of their choices exceeds the social cost. Implicit within this descriptive account is the normative assumption that no moral or ethical concerns except the goal of efficient resource use are relevant in determining what should and should not be propertized. Taking the implicit normative framework of Demsetz's theory to its logical conclusion, clean air, waves, and babies should all be treated as private property if the efficiency gains from propertization outweigh the costs. Demsetz and similar theorists never consider the impact of propertization on social and cognitive maps.

Hernando de Soto advances a second economic rationale for private property, putting the relation between property rights and functioning capitalist economies in a modern development context. De Soto's central thesis is that the lack of legal property rights prevents citizens of underdeveloped countries from "securing the interests of other parties as 'collateral' for a mortgage, for example, or by assuring the supply of other forms of credit and public utilities."[190] According to de Soto, capital—the necessary engine of growth—emerges only when the value of assets are fixed by the legal system.[191] The argument that economic growth

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[189] *Id*.

[190] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 39 (2000).

[191] De Soto writes,

> But consider whether it is possible for assets to be used productively if they do not belong to something or someone. Where do we confirm the existence of these assets and the transactions that transform them and raise their productivity, if not in the context of a formal property system? Where do we record the relevant economic features of assets, if not in the records and titles that formal property systems provide? Where are the codes of conduct that govern the use and transfer of

requires formal legal property rights is highly contested,[192] but regardless of its accuracy, de Soto's thesis relies heavily on the rationality of economic efficiency. Like Demsetz, de Soto primarily considers efficiency, as opposed to interpersonal relations or individual subjectivity, in his discussion as to whether resources should be propertized.

Facilitating the efficient allocation of resources through market transactions is the third economic justification for private property rights. According to market theorists, no matter which party has the rights to a resource to begin with, if costless bargaining can occur through the market, inputs will eventually be allocated in the same economically efficient manner.[193] For example, regardless of whether a cattle rancher has the right to allow her cattle to roam freely through a neighboring farmer's wheat field or the farmer has the right to be compensated for damages resulting from roaming cattle, the ultimate number of cattle raised, acres of wheat planted, and lengths of fence built will be identical and economically efficient. However, this efficient outcome can only occur when transaction costs are low. The absence of property rights can be a source of transaction costs that might prevent the efficient allocation of resources through market exchanges. If property rights are unknown, unenforceable, fluid, or unreliable, exchanges cannot occur.

Efficiency-maximization implies that satisfying the desires of the rich is more important than satisfying the desires of the poor. Productive resources are allocated efficiently when the marginal cost of producing one more good equals the marginal benefit accrued to the producer from the sale of one more good, which depends directly on the willingness and ability of consumers to pay for the good. A resource that is highly valued for one use by people with a low ability to pay will not be allocated to that use, and will instead be used to satisfy the desires of people with a

> assets, if not in the framework of formal property systems? It is formal property that provides the process, the forms, and the rules that fix assets in a condition that allows us to realize them as active capital.

Id. at 46.

[192] *See, e.g.*, William P. Alford, *The More Law the More . . . ?: Measuring Legal Reform in the People's Republic of China*, *in* HOW FAR ACROSS THE RIVER? CHINESE POLICY REFORM AT THE MILLENNIUM 122, 125–26 (Nicholas C. Hope et al. eds., 2003).

[193] R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–8, 15 (1960).

relatively higher ability to pay. *Glamis Gold* provides an example to contextualize this discussion. If a given parcel of land is spiritually important to an indigenous tribe and also a potentially lucrative gold mining investment, economic efficiency rationality would dictate that the land *should* be mined for gold if the potential profits exceed the amount the tribe is willing to pay to buy the land and protect it. The gold mine *should* be built, therefore, if the tribe or the state lacks sufficient resources to purchase the potential mine.[194] Likewise, when the marginal cost to producers of providing services such as such as water and healthcare exceeds the price the poor are able to pay, then an efficient market dictates that water and education shouldn't be provided. Under efficiency rationality, the dual facts that (a) more resources are used to satisfy the desires of the rich, and (b) the poor are excluded from basic necessities, are fine because such an allocation is efficient.[195]

Free trade agreements shape societies not merely through their concrete technologies, but also subtly, by way of the modes of thinking upon which they are premised. Bourdieu claimed that

> the generalization of monetary exchanges and the correlative constitution of the 'economic' idea of work as paid labor—in opposition to work as an occupation or function which is an end in itself—leads to the generalization of calculating dispositions, threatening the indivisibility of goods and tasks on which the family unit rests."[196]

The rationality of GATS and NAFTA conceives of resources

[194] Within an efficiency framework, the compensation provision of Article 1110 can be read as a property right protected with a liability rule, an arrangement made necessary by the presence of transaction costs. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–07 (1972).

[195] An economist might respond by arguing that the solution to inequality lies in directly redistributive programs and asserting that governments should provide the poor with enough money to enable them to buy water and education if they so choose. According to these economists the problem is not markets, but the distribution of endowments or purchasing power. While redistribution may be effective in an economic sense, this argument does not address the constitutive role of law in structuring regimes of value. If economic efficiency, and not liberty or individual subjectivity, is the dominant rationality, it is unclear where the political impetus for such redistributive programs would come from when the goals of these programs are not economic efficiency.

[196] BOURDIEU, *supra* note 3, at 106.

primarily in economic terms; private property is justified in reference to the maximization of efficiency. International trade agreements extend the sphere of economic logic to incorporate interpersonal relations that may have formerly been understood in different terms. The potential effect of propertization on social relations and the constitution of individual subjectivity cannot be ignored.

CONCLUSION

The stakes in the contest over global trade agreements are high. The contest involves far more than the delineation of limited legal rights regarding property. Both NAFTA Chapter 11 and GATS contribute to the establishment of a regime in which private property rights trump other values. NAFTA Chapter 11 enacts powerful protections for investor's property rights, while failing to create any framework that would guarantee the right of democratic self-governance, access to basic goods like food and water, or minimum standards of environmental quality. GATS enshrines a doxa in which all services are (potentially, fundamentally) market-alienable commodities, not rights. This process of propertization is expanding the field in which economic logic governs, redefining the terms under which people engage with each other, and rewriting assumptions about what matters in our relations with resources, and with one another.