

The New Face of Investment Arbitration: Nafta Chapter 11

GUILLERMO AGUILAR ALVAREZ*
WILLIAM W. PARK**

I. Introduction

Like many other industrialized nations, the United States has traditionally favored arbitration for resolution of investment disputes with foreign host states, particularly with respect to expropriation claims. The past decade, however, has seen a noticeable sea change in outlook. Congress has enacted trade legislation giving evidence of an intention to restrict arbitration in investment treaties. And open criticism of investment arbitration has been voiced by significant elements of the media, as well as advocacy groups that focus on environmental and regulatory issues.

The cause of this attitude shift is not difficult to identify. In 1994 the North American Free Trade Agreement (NAFTA) entered into force,¹ brin-

* Partner, SAI Abogados; Principal Legal Counsel for Mexico during the negotiation and implementation of NAFTA.

** Professor of Law, Boston University; Vice-President, London Court of International Arbitration.

¹ North American Free Trade Agreement (NAFTA), Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

ging with it an adjudicatory regime that gives investors the right to require arbitration of disputes arising out of investments in another member country in connection with matters such as expropriation, discrimination, and unfair treatment. The United States and Canada each became respondents pursuant to claims brought by investors from the other country.²

The result was an awareness of the downside of arbitration, including the prospect that key economic and political matters would be decided in confidential proceedings by a tribunal consisting in large part of foreigners. In the United States, this new face of investment arbitration caused a shiver of apprehension. Media attacks and legislative initiatives were launched with the aim of hobbling the neutral adjudicatory process which for years had served to underpin investor confidence in the protection of investments abroad.

This Article suggests that arbitration under investment treaties such as NAFTA will enhance the type of asset protection that facilitates wealth-creating cross-border capital flows, bringing net gains for both host state and foreign investor. While there may be benefits from minor tinkering with this investment protection regime, general attacks on investment arbitration are likely to backfire. A retreat from use of arbitration to resolve investment disputes would create more problems than it would solve.

II. The Contours of Investment Arbitration

A. Historical Context

NAFTA brings investment arbitration full circle, to a time more than two centuries ago when the United States was principally a debtor nation. In 1794 the so-called «Jay Treaty» (named for its American negotiator John Jay, later Chief

² Thus far Mexico seems to have been principally on the receiving end of investment claims. The one well-known arbitration that Mexico did initiate against the United States (In re Cross-Border Trucking Services) was brought under the provisions of NAFTA Chapter 20, relating to state-to-state arbitration, rather than the Chapter 11 mechanism, discussed infra Part III, for claims brought by private investors. See Final Report, NAFTA Panel Established Pursuant to Chapter Twenty in the Matter of Cross-Border Trucking Services, Secretariat File No. USA-MEX-98-2008-01, Feb. 6, 2001.

Justice of the U.S. Supreme Court) gave British creditors the right to arbitrate claims of alleged despoliation by American citizens and residents.³

More recently, however, it was African and Latin American nations that were required by multinational corporations to submit investment disputes to arbitration, either through arbitration clauses contained in custom-tailored concession agreements or through bilateral and multilateral investment treaties.⁴ Such arbitration has often implicated natural resources and elements of industrial infrastructure no less critical to the economic sovereignty and well-being of those countries than the NAFTA cases that have caused controversy in the United States and Canada.

During the late nineteenth and early twentieth centuries, developing countries often perceived investment arbitration as little more than an extension of gunboat diplomacy. Investor nations were seen to control the arbitral process in a way that permitted it to be used simply as a tool for extracting concessions from the host country. In state-to-state proceedings, private investors partici-

³ Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116. The treaty addressed difficulties arising from the 1783 Treaty of Paris ending the American Revolution. Under Article 6, damages for British creditors were to be determined by five commissioners. Two were appointed by the British and two by the United States, with the fifth chosen unanimously by the others, in default of which selection would be by lot from between two candidates, one proposed by each side. For an intriguing comparison of modern investment arbitration and the Jay Treaty, see Barton Legum, *Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794*, News from ICSID, Spring 2001, at 6, <http://www.worldbank.org/icsid/news/news.htm>. Arbitration continued to be significant in resolving Anglo-American tensions during the later part of the nineteenth century. The best known of these arbitrations was the Alabama Claims case in 1871. See J. L. Brierly, *The Law of Nations* 348 (1963). In 1872 an arbitral tribunal composed of five arbitrators (American, British, Italian, Swiss, and Brazilian) awarded more than \$ 15 million dollars to the United States for damages caused by Britain's violation of the laws of war in allowing its nationals to build warships in British ports for the Southern Confederacy during the American Civil War. *Alabama Claims Case, Decision and Award* (Sept. 14, 1872), reprinted in Thomas Willing Balch, *The Alabama Arbitration*, 131 app. (1900).

⁴ Treaty-based arbitration might take place under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes, see *infra* text accompanying note 36, or one of the many Bilateral Investment Treaties. See generally Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (1995); Matthew Cobb, *Development of Arbitration in Foreign Investment*, *Mealey's Int'l Arb. Rep.*, Apr. 2001, at 48; Eloïse Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, News from ICSID, Fall 2001, at 14, <http://www.worldbank.org/icsid/news/news.htm>.

pated only vicariously through their governments. Latin American states were often forced to submit disputes to European sovereigns such as Britain's Queen Victoria, Russia's Tsar Alexander II, Germany's Kaiser Wilhelm II, and King Léopold I of Belgium, whose predispositions and sympathies did not always inspire confidence among developing countries.⁵

Not surprisingly, host states reacted to what they perceived as foreign control of their economies. Invoking principles articulated by the nineteenth century Argentine jurist Carlos Calvo, Latin American countries came to require similar treatment for foreign and domestic investors.⁶ This effectively eliminated as options both diplomatic protection⁷ and arbitration. In 1974 the Calvo doctrine was pushed further in the so-called «New International Economic Order» adopted by the United Nations General Assembly in an attempt (unsuccessful, as history has shown)⁸ to require host state courts rather than international arbitrators to determine the measure of compensation for expropriated property.⁹

⁵ See Lionel M. Summers, *Arbitration and Latin America*, 3 Cal. W. L.J. 1, 6-7 (2001).

⁶ Carlos Calvo, *Le Droit International Théorique et Pratique* (1868) (articulating the principle that foreign nations should not intervene in South America to protect private property and debts based on several rationales, among them investor submission to local jurisdiction and local law, waiver of home state protection, and surrender of rights under customary public international law). See generally Kurt Lipstein, *The Place of the Calvo Clause in International Law*, 1945 Brit. Y.B. Int'l L. 130, 145 (concluding that «before international tribunals the Calvo Clause is ineffective»).

⁷ Diplomatic protection involves state-to-state claims in which a foreign investor invokes his country's intervention against the host state. Traditional perspectives on diplomatic protection are discussed in Brierly, *supra* note 3, at 285-88; Ian Brownlie, *Principles of Public International Law* 465-95 (2d ed. 1972).

⁸ See generally Thomas W. Waelde, *A Requiem for the «New International Economic Order»*, in *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern 771* (Hafner et al. eds., 1998).

⁹ Art. 2(2)(c) of The Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. (No. 1) 3, 5, U.N. Doc. A/9 559 (1974), provides that compensation should be «appropriate» as determined under «the domestic law of the nationalizing State and by its tribunals.» See William W. Park, *Legal Issues in the Third World's Economic Development*, 61 B.U. L. Rev. 1321 (1981) (book review). This principle was rejected in *Texaco Overseas Petroleum Co. (TOPCO)/California Asiatic Oil Co. (CALASIATIC) v. Libya*, Int'l Arbitral Tribunal, Award on the Merits (Jan. 19, 1977), 17 I.L.M. 1 (1978). See also *Libyan American Oil Co (LIAMCO) v. Libya*, 482 F. Supp. 1175 (D.D.C. 1980), vacated without op., 684 F.2d 1032 (D.C. Cir. 1981).

Ultimately, an increasing number of capital importing countries came to realize that their self-interest was served by agreeing to arbitrate investment disputes. Equally as significant, arbitration became a fairer process. Representatives from developing countries began to participate more actively in international arbitral institutions such as the International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID), and the London Court of International Arbitration (LCIA), as well as in the formulation of new procedural rules such as those of the United Nations Commission on International Trade Law (UNCITRAL).¹⁰

Developing countries also came to realize the greater the risk, the higher the cost of investment. Untrustworthy enforcement mechanisms tend to chill cross-border economic cooperation to the detriment of those countries that depend most on foreign capital for development. To the extent that arbitration promotes respect for implicit bargains between investor and host country, it came to commend itself to developing countries as a matter of sound international economic policy.

B. Double Standards

To some observers a double standard seems to be creeping into American attitudes toward investment arbitration.¹¹ Arbitration is good when it corrects misbehavior by foreign host states, but not so desirable when claims are filed

¹⁰See W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* § 36, at 661-78 (3d ed. 2000). On the workings of UNCITRAL, see Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* 4-6 (1989).

¹¹Some may be reminded of the Jules Romains character who liked honesty «but only in others.» The French novelist described a foreign emissary who helped himself to a share of the bribes his government paid newspapers, but was shocked that intermediaries had skimmed from these payments. Romains writes, «M. Choubersky, lequel sans doute se charge de prélever sur ces millions une gorgée abondante, semble trouver mauvais que les intermédiaires aient une soif parente de la sienne. C'est un homme qui aime l'honnêteté d'autrui.» 2 Jules Romains, *Les Hommes de Bonne Volonté* 335 (Robert Laffont 1988) (1958) («Mr. Choubersky, who doubtlessly undertook to deduct from these millions a large mouthful for himself, seemed to take it ill that the intermediaries had a thirst equal to his own. He is a man who likes honesty in others.»).

for alleged wrongdoing by the United States. Many business and political leaders still support arbitration as the preferred method to resolve disputes between host countries and foreign investors. However, recent trade legislation has significantly impaired the vigor of future treaty-based arbitration of investment disputes, with the United States pursuing a course and a tone quite different from when negotiating NAFTA.¹² Moreover, vocal opposition to investment arbitration has been expressed by important segments of the media and several non-governmental organizations.

Traditionally, American multinationals imposed arbitration as the mechanism for settling investment disputes with foreign countries, particularly in Latin America. Arbitration was justified as a way to level the playing field and to reduce the prospect of host state «home town justice,» thereby safeguarding assets from expropriation without compensation. Foreign investment was seen as a net good for both investor and host state, helping to reduce poverty through international economic cooperation. And arbitration was perceived as one way to promote respect for the rule of law underpinning investment stability.

The argument ran as follows. No supranational courts possess mandatory jurisdiction to decide the appropriate indemnity for nationalized assets.¹³ Absent assertions of diplomatic protection,¹⁴ litigation in the expropriating country remains the default mechanism for adjudicating investment disputes.¹⁵ Consequently, the real or imagined bias of host country judges can create an anxie-

¹² See discussion of Trade Act of 2002 *infra* Part III.B. See also Edward Allen, Washington Alters Line on U.S. Investor Protection, *Fin. Times*, Oct. 2, 2002, at 13 (describing how the United States in its bilateral trade negotiations with Chile and Singapore has attempted to limit the legal recourse available to investors who believe their property has been expropriated without compensation by foreign host states).

¹³ The International Court of Justice («ICJ») is limited both by tradition and by jurisdictional constraints. For one commercial case that did reach the ICJ, see *In Re Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20) (finding no illegal taking of property when Italy requisitioned plant and equipment owned by U.S. nationals in order to prevent planned liquidation).

¹⁴ See *supra* note 7 and accompanying text.

¹⁵ In most cases one would expect investors to prefer arbitration to the more cumbersome process of having their country assert diplomatic protection. Exceptions might arise when the legal basis of the claim was weak and the investor state had a degree of clout with the host country.

ty that inhibits wealth-creating transactions and discourages cross-border economic cooperation,¹⁶ and will inevitably either thwart cross-border economic cooperation or add to its cost.¹⁷

Arbitration responds to this apprehension by providing a forum that is more neutral than host country courts, both politically and procedurally. The relative impartiality of international tribunals bolsters investor confidence and inspires greater certainty that the contract will be interpreted in line with the parties' shared *ex ante* expectations.

When NAFTA came into force, however, the rifle sights were turned in the opposite direction, and the United States and Canada became respondents in cases brought by investors based in other NAFTA countries.¹⁸ After claims for unfair treatment were filed against the United States government, arbitration looked different than when American companies were the investors.¹⁹ This was a new experience, since NAFTA represented the first time two of the so-

¹⁶ The perception of litigation bias may be as significant as its reality. A study of U.S. federal civil actions between 1986 and 1994 found that foreigners actually fared better than domestic parties. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 *Harv. L. Rev.* 1120, 1133-34 (1996). One explanation for this finding lies in a fear of judicial and jury partiality that leads foreign litigants to settle rather than continue to final judgment, unless their cases are particularly strong.

¹⁷ To illustrate, imagine an attractive investment abroad in Country X where there is doubt that local courts will be fair to a foreign party, and another efficient opportunity in the investor's home country. Depending on the size of the disparity between the expected returns, many risk-averse merchants will choose the lower return coupled with the fairer legal system. See generally William W. Park, *Neutrality, Predictability and Economic Cooperation*, *J.Int'l Arb.*, Dec. 1995, at 99.

¹⁸ NAFTA Chapter 11 protects «investors of another Party» and their «investments» (Section B). Article 1139 defines «investor of another Party» to include «a national or an enterprise of such Party,» and provides a broad definition of «investment.» NAFTA, *supra* note 1, arts. 1101, 1139, 32 *I.L.M.* at 639, 647. See also *id.* art. 201, 32 *I.L.M.* at 298 (providing general definitions including, for «enterprise of a Party,» an enterprise «constituted or organized under the law of a Party»).

¹⁹ See Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 *Chi. J. Int'l L.* 193 (2001); Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 *Pepp. L. Rev.* 43 (2001); Charles H. Brower, II, *Structure, Legitimacy and NAFTA's Investment Chapter*, 36 *Vand. J. Transn'l L.* 37 (2003).

called «G-7» industrialized countries²⁰ entered into mandatory arbitration arrangements with each other.²¹

Interestingly, role reversal for the United States and Canada occurred not because investors from Mexico (a traditional host state) began bringing claims against its northern neighbors. Rather, it was Canada and the United States that began attacking each other, with claims by Canadian investors against the American government, and claims by American investors against Canada.²²

As Americans and Canadians began to understand the host state perspective, praise for arbitration's neutrality began to have competition in the form of complaints about infringement of national sovereignty and democracy. The level playing field no longer appeared to be an unconditional benefit. Environmental and consumer groups, as well as the media and Congress, began taking the position that NAFTA undermined legitimate governmental regulations, challenged legislative prerogatives, and opened decision-making to ill-informed foreign tribunals.²³

The NAFTA process was attacked for the confidentiality of its proceedings («lack of transparency»), uncertainty, and absence of accountability to domestic constituents. A dispute resolution process that had been fair for the rest of the world came to be seen as a tool to put business before public interest.

In the present climate of public opinion, many Americans and Canadians fail to understand why arbitration should be available for foreign investors.

²⁰ Beginning in 1986, the finance ministers and central bank governors of seven major industrialized countries (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) began meeting in order to improve communication and cooperation on matters related to economic and financial growth, inflation, and currency developments. In 1997, the summit became known as the G-8 to reflect Russia's participation, particularly in discussions on ways to combat the financing of terrorism. For a history of the G-7 and G-8, see, for example, the French government's website concerning the upcoming G-8 meeting at Evian, at <http://www.g8.fr/evian/index.html> (providing an overview of the G-8 and information about the next G-8 meeting, to be held in Evian in June 2003). A bibliography of publications about the G-7 and G-8 can also be found at <http://www.g7.utoronto.ca>.

²¹ Prior to NAFTA, investment arbitration implicated claims by investors from industrialized countries against developing nations, pursuant to bilateral investment treaties. Although the treaty obligations flowed both ways, the investment did not. By contrast, NAFTA created the potential for investment arbitration between two developed countries, Canada and the United States.

²² See discussion *infra* Appendix (table discussing NAFTA Chapter 11 arbitrations).

²³ See discussion *infra* Part IV.B.

Taking for granted the fairness of their own judicial systems, Americans in particular are often surprised that not everyone feels comfortable with civil juries and the prospect of large punitive damages.²⁴

Regardless of whether such self-perceptions are valid, the fact remains that when NAFTA was being negotiated, it was the United States that insisted on arbitration as a protection for foreign investment. The business community's longstanding hesitation toward foreign litigation made it vital to bolster confidence that investors would receive a «fair shake» in the event of controversy with the host government.

NAFTA also stipulated substantive standards of investor protection that would require interpretation. Reciprocal lack of trust among the three countries made it unlikely that host state courts would be acceptable to construe and apply these standards.

Understandably, this investor protection scheme was based upon equality of treatment among the three countries. For Mexico to accept arbitration of investment disputes within its borders, Canada and the United States had to respect a similar dispute resolution process. It would have been unwise and

²⁴ For evidence of foreign fear of litigation bias in American courts, see discussion *infra* Part III.A.2 of the *Loewen* case and *Clermont & Eisenberg*, *supra* note 16 (discussing xenophilia in American courts). American commentators have also expressed doubts and concerns about civil juries and punitive damages. See, e.g., Perry E. Casazza, *Nevada's Mastrobuono: How the 2001 Legislature Threw Another Wrench into the Punitive Damages Machines of Arbitration Law*, 51 *Drake L. Rev.* 189 (2002); Theodore Eisenberg et al., *Juries, Judges and Punitive Damages: An Empirical Study*, 87 *Cornell L. Rev.* 743 (2003); Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 *St. Louis U. Pub. L. Rev.* 85 (2002); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 *DePaul L. Rev.* 327 (1998); Michelle L. Hartmann, *Is It a Short Trip Back to Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 *SMU L. Rev.* 1827 (2001); John J. Kircher, *Punitive Damages and Business Organizations: A Pathetic Fallacy*, 67 *Tenn. L. Rev.* 971 (2000); Robert A. Klinck, *The Punitive Damage Debate*, 38 *Harv. J. on Legis.* 469 (2001); Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 *U.S.F. L. Rev.* 411 (2002); Richard W. Murphy, *Punitive Damages, Explanatory Verdicts and the Hard Look*, 76 *Wash. L. Rev.* 995 (2001); David A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment*, 39 *Harv. J. on Legis.* 121 (2002); W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 *Harv. J. on Legis.* 139 (2002); Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 *U. Miami L. Rev.* 865 (2002).

unworkable for Chapter 11 to be applied by American and Canadian courts when claims were brought against the United States and Canada, but to have arbitrators appointed for claims against Mexico.

III. NAFTA Chapter 11

A. Safeguarding Cross-Border Investment²⁵

NAFTA Chapter 11 gives business managers from a member country the opportunity to arbitrate investment grievances with the government of another NAFTA country, regardless of whether an agreement to arbitrate actually exists in a negotiated investment concession.²⁶ This private right to direct action eliminates recourse to traditional state-to-state negotiations, in which a foreign investor asks for his country's intervention against the host state.

The first part of Chapter 11 (Section A) imposes the substantive norms for cross-border investment, forbidding discrimination against investors from another member country²⁷ and requiring «fair and equitable» treatment, as well as

²⁵ For scholarly commentary on safeguarding cross-border investment, see generally Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 *Arb. Int'l* 393 (2000); William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 *Hastings Int'l & Comp. L. Rev.* 357 (2000); Patrick Dumberry, *The NAFTA Investment Dispute Settlement Mechanism: A Review of the Latest Case-Law*, 2 *J. World Investment* 151 (2001); Axelle Lemaire, *Le Nouveau Visage de l'Arbitrage Entre État et Investisseur Étranger: le Chapitre 11 de l'ALENA*, 2001 *Revue de l'Arbitrage [R.A.]* 43; Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 *Yale J. Int'l L.* 141 (2002); Leon E. Trakman, *Arbitrating Investment Disputes Under NAFTA*, 18 *J. Int'l Arb.* 385 (2001); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 *Canadian Bus. L.J.* 405 (2002); Todd Weiler, *Substantive Law Developments in NAFTA Arbitration*, *Mealey's Int'l Arb. Rep.*, Dec. 2001, at 69.

²⁶ See generally Todd Weiler, *The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come*, 11 *Am. Rev. Int'l Arb.* 187 (2000).

²⁷ Each member country must treat NAFTA investors and their investments no less favorably than its own investors and investors of other countries. NAFTA, *supra* note 1, arts. 1102, 1103, 32 I.L.M. at 639 (concerning, respectively, national treatment and most-favored-nation treatment). In *S.D. Myers, Inc. v. Canada*, the Partial Award of November 13, 2000 articulated the national treatment standard to require consideration as to whether the

compensation, for nationalized property.²⁸ An entity incorporated and with substantial business activities²⁹ in a NAFTA country qualifies as an investor without regard to any «origin of capital» limitations.³⁰ Thus a Mexican corporation owned by French shareholders qualifies as an investor under NAFTA Chapter 11.

The compensation criteria adopted by NAFTA Chapter 11 were intended to be compatible with standards traditionally advocated by the United States.³¹

NAFTA investor is in the same «economic and business sector» as the national investor. *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408 (2001). A measure breaches the national treatment standard if: (1) it creates a disproportionate benefit for nationals over non-nationals; (2) the measure, on its face, appears to favor nationals over non-nationals; and (3) there is a practical impact, not merely motive or intent. Political subdivisions must provide foreign investors no less favorable treatment than the best treatment accorded to investors of the country to which the subdivision belongs. For example, Massachusetts must treat investors from Quebec no less favorably than it treats investors from New York or Pennsylvania.

²⁸ Article 1102 prohibits discrimination by requiring «national treatment.» NAFTA, *supra* note 1, art. 1102, 32 I.L.M. at 639. Article 1105 requires respect for international law, including «fair and equitable treatment» as a minimum standard. *Id.* art. 1105, at 639-40. Proper compensation for expropriated property is mandated by Article 1110. *Id.* art. 1110, at 641.

²⁹ See *id.* art. 1113(2), at 642.

³⁰ See *id.* arts. 201, 1139, at 298, 647 (giving definitions). Moreover, standing to bring a claim may be based on citizenship regardless of residence. See *Feldman Karpa (CEMSA) v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000), 40 I.L.M. 615 (2001) (determining *inter alia* that permanent residence in Mexico did not deprive a U.S. citizen of the right to arbitrate claims concerning tobacco export tax rebates).

³¹ While the terms «prompt, adequate and effective» do not appear in the text of Chapter 11, some observers consider the combination of Article 1110 factors («paid without delay,» «fair market value,» and «fully realizable») to amount to the same result. NAFTA, *supra* note 1, art. 1110, 32 I.L.M. at 641-42. See Restatement (Third) of Foreign Relations Law § 712 (1986) (stating in comments c and d and Reporter's note 2 that for compensation to be «just» it must be «paid at the time of taking,» «in an amount equivalent to the value of the property taken,» and «in a form economically usable by the foreign national»). The expression «prompt, adequate and effective» originates in a communication to Mexico from U.S. Secretary of State Cordell Hull on August 22, 1938. See *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 888 (2d Cir. 1981). Compare the standard under Restatement (Third) § 712 with The Charter of Economic Rights and Duties of States, G.A. Res 3281, art. 2(2)(c), U.N. GAOR, 29th Sess., Supp. (No. 1) 3, 5, U.N.Doc. A/9559 (1974) (providing that compensation should be «appropriate» as determined under «the domestic law of the nationalizing State and by its tribunals»). See also William W. Park, *Legal Issues in the Third World's Economic Development*, *supra* note 9.

Expropriation must be justified by a public purpose and applied on a non-discriminatory basis.³² Compensation must be «equivalent to the fair market value» of the investment at the date of expropriation, must be «paid without delay and be fully realizable,» and must bear interest at a commercially reasonable rate until the date of actual payment. If paid in a form other than a hard currency,³³ compensation must be in an amount which, at market rates of exchange, would convert into a sum no less than the hard currency equivalent of market value on the payment date. Compensation will not be affected because market awareness of the pending expropriation drove down the price of the expropriated investment.³⁴

The second portion of Chapter 11 (Section B) goes on to provide that, through arbitration, parties may challenge a host state's breach of its duties. An aggrieved investor³⁵ may choose either (i) arbitration supervised by ICSID (part of the World Bank group),³⁶ or (ii) a proceeding conducted under arbitration

³² NAFTA Article 1110(1) adopts a four-part structure, requiring that the expropriation: (1) have a «public purpose»; (2) be applied «on a non-discriminatory basis»; (3) «in accordance with due process of law and Article 1105(1),» which requires «fair and equitable treatment»; and (4) result in «payment of compensation in accordance with paragraphs 2 through 6,» which adopt the «fair market value» standard. NAFTA, *supra* note 1, art. 1110(1), 32 I.L.M. at 641.

³³ NAFTA Article 1110 speaks of a «G-7 currency,» which includes the currencies of Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. *Id.* art. 1110, at 642. For France, Germany, and Italy, members of the European Union's common currency union, the currency would now be the Euro. By contrast, the United Kingdom at present maintains its own currency.

³⁴ *Id.* art. 1110(2), at 641 (providing that fair market value «shall not reflect any change in value occurring because the intended expropriation had become known earlier»).

³⁵ Claims may be made either directly or on behalf of an enterprise owned or controlled by the investor. *Id.* art. 1116, at 642.

³⁶ Established under the 1965 Washington Convention, ICSID normally has jurisdiction over investment disputes between a state that is a party to the Convention and an investor from another Convention state. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 52, 17 U.S.T. 1270, 1290, 575 U.N.T.S. 159, 192 (1985) [hereinafter ICSID Convention]. See generally Dolzer & Stevens, *supra* note 4, at 130-46 (1995); Abby Cohen Smutny, *Arbitration Before the International Centre for Investment Disputes*, 3 *Bus. Law Int'l* 367 (2002).

rules adopted by UNCITRAL.³⁷ Disputes raising common questions of fact or law may be consolidated into a single arbitration.³⁸

Should the investor want ICSID arbitration there is a slight limitation. Neither Mexico nor Canada is yet party to the Washington Convention establishing ICSID. Consequently ICSID-style arbitration must proceed under the so-called ICSID Additional Facility designed for cases in which the Washington Convention does not apply. As discussed below, this will have significant consequences when one side wishes to mount a challenge to the arbitration.

B. The Role of the Arbitral Situs

1. *Current Alternatives*

When a dissatisfied loser in NAFTA arbitration seeks to have an award set aside, the choice of arbitral forum may have a significant impact on the role played by courts at the arbitral situs.³⁹ To understand the impact of local law, a brief contrast might be helpful. Under «pure» ICSID arbitration, the Washington Convention forecloses challenge to awards on normal statutory grounds⁴⁰

³⁷ NAFTA, *supra* note 1, art. 1120, 32 I.L.M. at 643. Unless otherwise agreed, the place of arbitration must be in the territory of a country that is a party to both NAFTA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517 [hereinafter New York Convention]. See *id.* art. 1130, at 645 (referring to a «Party [a NAFTA member] that is a party to the New York Convention»).

³⁸ *Id.* art. 1126, at 644.

³⁹ See generally David Williams, *Challenging Investment Treaty Arbitration Awards: Issues Concerning the Forum*, (unpublished manuscript, on file with the Yale Journal of International Law) (presented at the ICCA Congress XVI, May 15, 2002).

⁴⁰ For ICSID arbitration in the United States, this rule has never been tested in a court action raising the conflict between the Federal Arbitration Act (allowing motions to vacate awards) and the Washington Convention (which excludes such vacatur). Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000). Article VI, cl.2, of the U.S. Constitution lists both treaties and federal statutes as the «supreme Law of the Land,» without establishing a hierarchy. U.S. Const. art. VI, cl. 2. On some matters statutes clearly override treaties. See, e.g., Foreign Investment in Real Property Tax Act of 1980, Pub. L. No. 96-499, §1125, 94 Stat. 2682, 2690, providing that no treaty shall require «exemption from (or reduction of) any tax imposed» on gains from disposition of U.S. realty. When Congress is silent, courts look to

in favor of ICSID's special system of quality control under its own internal challenge procedure.⁴¹

However, since Canada and Mexico are not parties to the Washington Convention, investors currently have only two options for arbitral procedure: (i) the United Nations' UNCITRAL Rules, which is entirely ad hoc, and (ii) the ICSID Additional Facility, supervised by ICSID but outside its treaty framework.

Whether under the UNCITRAL or Additional Facility Rules, arbitration will go forward within the framework of either the New York Convention⁴² or the Panama Convention,⁴³ both of which require deference to valid arbitration agreements and awards but say nothing about proper or improper annulment standards.⁴⁴ In contrast to ICSID, the New York and Panama Conventions leave each country free to establish its own grounds for vacating awards made within its territory.

The consequence of arbitration under the rules of UNCITRAL or the Additional Facility is that NAFTA awards are now subject to the judicial review mechanisms that exist at the place of arbitration.⁴⁵ NAFTA Article 1136(3)(b)

canons of statutory interpretation such as «later in time prevails» or «specific restricts general.» See Detlev Vagts, *The United States and its Treaties: Observance and Breach*, 95 *Am. J. Int'l L.* 313 (2001).

⁴¹ See ICSID Convention, *supra* note 36, at art. 52. See generally W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* 46-50 (1992).

⁴² New York Convention, *supra* note 37.

⁴³ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 *I.L.M.* 336 (1975) [hereinafter Panama Convention].

⁴⁴ At present the United States and Mexico, but not Canada, are parties to the Panama Convention. In the United States, when both Conventions are applicable, the Panama Convention prevails. See 9 U.S.C. § 305. While similar in their basic structure, the New York and Panama Conventions differ in significant respects. For example, the Panama Convention does not require judges to refer parties to arbitration, or to set forth conditions that must be satisfied by the party seeking award enforcement. Moreover, only the Panama Convention contains reference to arbitration rules (those of the Inter-American Commercial Arbitration Commission) that apply in default of party choice. See generally John Bowman, *The Panama Convention and Its Implementation under the Federal Arbitration Act*, 11 *Am. Rev. Int'l Arb.* 1, 116 (2000); Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 *Arb. Int'l* 214, 229 (1989).

⁴⁵ In the United States, award «finality» has been interpreted to mean final as allowed under relevant arbitration laws. See, e.g., *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847 (6th Cir. 1996); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992). However, the concept has been interpreted differently in Ontario. In *Noble China*

explicitly contemplates such review. Award enforcement for arbitration under «Additional Facility» or UNCITRAL rules may not be sought until a court either dismisses or allows an application to revise, set aside, or annul the award and there is no further appeal, or three months have elapsed without such application being made.

2. *Metalclad*

The much-discussed *Metalclad* case⁴⁶ illustrates the role currently given to the arbitral situs, by which judicial scrutiny of awards varies in function of the monitoring standards deemed appropriate by the relevant court. An «Additional Facility» award had granted damages to an American company for expropriation of a hazardous waste disposal facility. Regulatory action by a Mexican municipality had prevented a subsidiary of a U.S. company from operating. Arbitrators had found that Mexican regulatory action denied «fair and equitable treatment» and constituted expropriation without adequate compensation. Mexico then petitioned to have the award set aside by the British Columbia Supreme Court, which had jurisdiction by virtue of the arbitration's official situs fixed in Vancouver.⁴⁷

As a preliminary matter the court had to decide between application of two different provincial arbitration statutes. The International Commercial

Inc. v. Lei, 42 Ont. Rep. (3d) 69, 87 (1998), the UNCITRAL Model Law exclusion of judicial review was deemed to foreclose a motion to set aside an award, although the court noted that evidence of bias might have led to a different result. The authors are not aware of any analogous interpretations of award «finality» in Mexico, which adopted the UNCITRAL Model Law in June 1993.

⁴⁶ See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), reprinted in Mealey's Int'l Arb. Rep., Jan. 2001, at A-1 (finding expropriation without adequate compensation where a U.S.-owned company was prevented by a Mexican municipality from operating a hazardous waste facility in Mexico). See also Clyde C. Pearce & Jack Coe, Jr., *Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed Against Mexico*, 23 *Hastings Int'l & Comp. L. Rev.* 311 (2000-01); Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 *J. World Investment* 685 (2001).

⁴⁷ For convenience, however, arbitration hearings had been held in Washington, D.C. For the British Columbia decision on vacatur, see *United Mexican States v. Metalclad Corp.*, 89 B.C.L.R.3d 359 (2001), reprinted in 16 *Int'l Arb. Rep.*, May 2001, at A-1 (partially setting aside the amount of interest awarded to *Metalclad* prior to Sept. 27, 1997).

Arbitration Act⁴⁸ (based on the UNCITRAL Model Law) provides a relatively narrow scope of review, while the Commercial Arbitration Act⁴⁹ (which catches arbitration excluded from the International Act) allows a more generous role for court intervention, including appeal on points of law.

Surprisingly, the choice turned on the meaning of «commercial» rather than «international.» As the Court noted, the International Commercial Arbitration Act requires that the arbitration be commercial as well as international.⁵⁰ Mexico argued against application of the International Act on the ground that the arbitration related to a regulatory rather than commercial relationship.

The court disagreed, finding that the arbitration was commercial in the sense that it «arose out of a relationship of investing.»⁵¹ Characterizing the arbitration by reference to the underlying transaction (a cross-border investment) placed the dispute within the terms of the International Act, which meant that court scrutiny focused on whether the award exceeded the arbitrators' powers or violated public policy.

As to the substance of the challenge, the Canadian court found that some but not all of the arbitrators' findings exceeded their jurisdiction. In particular, the court held that the tribunal went beyond its authority in finding that Mexico breached a NAFTA requirement of «transparency» in the sense that investment requirements should be knowable and free from doubt. In finding a transparency requirement, the arbitral tribunal «did not simply interpret the wording of Article 1105 [but] misstated the applicable law . . . and then made its decision on [that] basis.»⁵² Nevertheless, the court upheld the bulk of the award, given that one prong of the arbitrators' reasoning fell within their jurisdic-

⁴⁸ International Commercial Arbitration Act, R.S.B.C. 1996, ch. 233.

⁴⁹ Commercial Arbitration Act, R.S.B.C. 1996, ch. 55.

⁵⁰ See *United Mexican States v. Metalclad Corp.*, 89 B.C.L.R.3d 359 (2001), para. 41 (pointing out that «[a]s its name indicates, the International CAA applies to international commercial arbitrations,» and citing portions of section 1(6) of the Act relating to the definition of a «commercial» arbitration).

⁵¹ See *United Mexican States v. Metalclad Corp.*, 89 B.C.L.R.3d 359 (2001), para. 44.

⁵² *Id.* para. 70. This aspect of the case presents an example of how the line between excess of jurisdiction and simple error of law is often quite thin. The court noted that the tribunal had defined the concept of transparency earlier in the decision. *Id.* para. 27.

tion.⁵³ Consequently, only a portion of the award (dealing with interest) was set aside and remitted for recalculation.⁵⁴

The practical lesson to be learned from *Metalclad* is that courts at the place of arbitration will have the last word in an arbitration proceeding. Consequently, care should be taken in selecting a venue where judges exercise a control function over the arbitration's basic procedural integrity (looking at matters such as bias, excess of authority, and due process), but do not second guess the arbitrator on the substantive merits of the dispute.⁵⁵

From the American perspective, the decision in *Metalclad* seemed quite normal. An investor from the United States was found to have been treated unfairly by a political subdivision of Mexico. Thus the proper way to resolve the dispute was the relatively neutral mechanism of arbitration rather than in Mexican courts. As discussed below, however,⁵⁶ when the shoe is on the other foot, perceptions of fairness may be quite different.

C. Investor Protection in Practice

Considerable grist for the arbitration mill has been supplied by two particular aspects of Chapter 11: (i) «minimum standard of treatment» and (ii) compensation standards for expropriation. Several recent cases illustrate the way NAFTA has been applied in practice in these areas.

⁵³ The court agreed that the arbitrators were correct in resting their decision on an «ecological decree» as tantamount to expropriation. Thus excess of authority was deemed to exist in only two out of the three breaches of NAFTA found by the arbitrators.

⁵⁴ This decision has caused some scholars to argue in favor of a supranational appellate mechanism to replace review of awards by national courts. See Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 *J. Int'l Arb.* 185 (2002); William S. Dodge, *Metalclad Corp. v. Mexico*, 95 *Am. J. Int'l L.* 910, 918 (2001).

⁵⁵ See William W. Park, *Duty and Discretion in International Arbitration*, 93 *Am. J. Int'l L.* 805 (1999).

⁵⁶ See discussion *infra* Part V.B.

1. Minimum Standard of Treatment

NAFTA Article 1105(1) requires each country to «accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.» Although the meaning of «international law» has been the object of controversy,⁵⁷ at least two conclusions seem warranted. First, the «fair and equitable standard» has not been met simply by an extension of national or most favored nation treatment to NAFTA investors. Second, reference to «full protection and security» adopts the settled principle that a nation is liable for failure to exercise due diligence to prevent injuries to an investor caused by third parties.⁵⁸

In *Metalclad*,⁵⁹ Mexico was held to be in breach of Article 1105(1) as a result of a lack of «orderly process» and «timely disposition» in relation to a NAFTA investor acting under the expectation that it would be treated fairly and justly in accordance with NAFTA. In *S.D. Myers*,⁶⁰ treatment of NAFTA investors was held to fall below this minimum standard of treatment even in a situation where government conduct was not discriminatory. A breach of Article 1105(1) thus occurs when the NAFTA investor is treated in such an unjust or arbitrary manner as to rise to a level unacceptable from the international perspective.

It is worth noting that several aspects of what might loosely be considered fair treatment are the subject of separate NAFTA provisions. For example, under Article 1106 a NAFTA country may not «impose or enforce ‘performance requirements’ in connection with investments in its territory,» which include achievement of export levels, domestic procurement requirements, minimum local content, trade balancing, product mandating, or the transfer of

⁵⁷ See *infra* Part V.C (discussion of Free Trade Commission Notes of Interpretation).

⁵⁸ Ian Brownlie, *System of the Law of Nations: State Responsibility* 161 (1983); *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), 4 ICSID Reports 246 (1997).

⁵⁹ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), discussed *supra* at text accompanying note 46.

⁶⁰ *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408 (2001). In *S.D. Myers*, a U.S. investor hoped to capture a large portion of the Canadian market for destruction of Polychlorinated Biphenyl (PCBs) by sending materials to Ohio facilities, thus gaining a competitive advantage over Canadian facilities further away. Canadian environmental authorities responded to Canadian lobbying with an emergency ban preventing export of PCB waste.

technology.⁶¹ NAFTA also grants investors an explicit right to choose senior managers⁶² and the right to convert local currency into foreign currency at the prevailing market rate of exchange, in order to repatriate earnings, proceeds of a sale, loan repayments, or other investment-related transactions.⁶³

2. Expropriation

NAFTA Article 1110 extends protection against un-compensated expropriation to measures «tantamount to nationalization or expropriation,» thus encompassing takings that have often been referred to as «creeping» expropriation. In all cases compensation for expropriation must be paid without delay, be equal to the fair market value of the investment prior to the expropriation, include interest, and be fully realizable and freely transferable.

While «tantamount to expropriation» is not defined in NAFTA, this well-established concept has been applied to cover not only openly avowed state takings of property, but also other actions that have the effect of «taking» the property, in whole or in large part, outright or in stages [including] when [a state] subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property.⁶⁴ An indirect expropriation may occur if the investor's

⁶¹ In two early cases testing this requirement, arbitral tribunals hearing claims against Canada have failed to find improper imposition of performance requirements. See *Pope & Talbot, Inc. v. Canada*, Interim Award (June 26, 2000), <http://www.naftaclaims.com>; *Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages (May 31, 2002), 41 I.L.M. 1347 (2002) (dismissing all of U.S. investor's damage claims in connection with Canadian softwood export prohibitions except the claim that Canada had engaged in denial of fair treatment); *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000), 40 I.L.M. 1408, paras. 271-78, at 1439-40 (2001) (finding that the export ban in question was not a requirement on «the conduct or operation of the investment» under Article 1106).

⁶² NAFTA, supra note 1, art. 1107, 32 I.L.M. at 640.

⁶³ *Id.* art 1109, at 641.

⁶⁴ Restatement (Third) of Foreign Relations Law of the United States §712 cmt. g (1990). ICSID cases that have addressed indirect expropriation include *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction (Sept. 25, 1983), 23 I.L.M. 351 (1984); *Liberian E. Timber Corp. (LETCO) v. Liberia*, ICSID Case No. ARB/83/2, Award (Mar. 31, 1986; rectified May 14, 1986), 26 I.L.M. 647 (1987); and *Southern Pacific Properties Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award on the Merits (May 20, 1992), 32 I.L.M. 933 (1993). See generally Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Rev: Foreign Inv. L.J. 41 (1986); Rosalyn Higgins, *The Taking of Property by the*

expected entitlement to the benefits are impaired by host state interference, even if property is not legally taken by the state,⁶⁵ or when the host state itself acquires nothing of value but «at least has been the instrument of its redistribution.»⁶⁶

Several Chapter 11 arbitrations, including *Azinian*,⁶⁷ *Metalclad*,⁶⁸ *Pope & Talbot*,⁶⁹ and *S.D. Myers*,⁷⁰ have addressed the question of what constitutes

State: Recent Developments in International Law, 176 *Recueil des Cours* 259 (1982); Burns H. Weston, «Constructive Takings» under International Law: A Modest Foray into the Problem of «Creeping Expropriation,» 16 *Va. J. Int'l L.* 103 (1975).

⁶⁵ Istvan Posgany, *Bilateral Investment Treaties: Some Recent Examples*, 2 *Icsid Rev. — Foreign Inv. L.J.* 457 (1987).

⁶⁶ Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* 66 (1994) (quoting *Eastman Kodak Co. v. Gov't of Iran*, Partial Award No. 329-227/12384-3 (Nov. 11, 1987), 17 *Iran-U.S. C.T.R.* 153, 181 (concurring and dissenting opinion of Judge Brower)); *Poehlmann v. Kulmbacher Spinnerei AG*, 3 *U.S. Ct. Rest. App.* 701, 702-04, 710 (1952).

⁶⁷ *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), 14 *Icsid Rev. — Foreign Inv. L.J.* 68 (1999). U.S. investors contracted with a local municipality to provide waste treatment services. The Tribunal concluded that the claimant had not shown that the Mexican actions were illegal under international law.

⁶⁸ *Metalclad Corp. v. United Mexican States*, Award (Aug. 30, 2000), *Mealey's Int'l Arb. Rep.*, Jan. 2001, at A1. The Tribunal ruled that 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 favour 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 the property even if not necessarily to the obvious benefit of the host State. *Id.* at A13. The Tribunal also applied an «effects» test and held that the motivation or intent of the adoption of an environmental decree was not relevant to a determination under NAFTA Article 1110.

⁶⁹ *Pope & Talbot, Inc. v. Canada*, Interim Award (June 26, 2000), <http://www.naftaclaims.com>; *Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages (May 31, 2002), 41 *I.L.M.* 1347 (2002). In the Interim Award of June 2000 the Tribunal dismissed all but the claim that Canada had denied fair treatment under NAFTA Article 1105, but indicated that «creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.» *Pope & Talbot*, Interim Award (June 26, 2000), para. 99, at 35. On whether there was an expropriation, the Arbitral Tribunal indicated that «the test is whether th[e] interference is sufficiently restricted to support a conclusion that the property has been 'taken' from the owner.» *Id.* para. 102, at 37. For discussion of the awards, see generally Patrick Dumberry, *The Quest to Define «Fair and Equitable Treatment» for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards*, 3 *J. World Inv.* 657 (2002).

⁷⁰ *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000), 40 *I.L.M.* 1408 (2001). The Tribunal decided that the term «tantamount» in NAFTA Article 1110 means «equivalent»

expropriation. Thus far, none has departed from traditional notions of customary international law.

IV. Arbitration and the New Host States

A. Three Illustrations

Three Canadian claims against the United States illustrate how a traditional investor country has seen the tables turned by mandatory arbitration with foreign investors.⁷¹ Each case involves complaints about an American state rather than the federal government. In *Methanex Corp. v. United States*,⁷² California banned gasoline additives manufactured from a feedstock produced by a Canadian company; in *Loewen Group, Inc. v. United States*,⁷³ a Mississippi jury awarded \$500 million against a Manitoba-based funeral services provider; and in *Mondev International Ltd. v. United States*,⁷⁴ the Supreme Judicial Court of Massachusetts upheld the city of Boston in refusing to sell land to a Montreal real estate developer. In all three cases American interests were subject to adjudication outside of American courts. As discussed later, this question of forum lies at the heart of American disquiet over NAFTA Chapter 11.

The protest is pregnant with irony when one remembers how often the United States has imposed arbitration on other countries⁷⁵ and how American

and is intended to capture acts of creeping expropriation but does not broaden the scope of expropriation under customary international law. *Id.* para. 285, 42 I.L.M. at 1440.

⁷¹ The fourth claim against the United States, filed on July 19, 2000 by ADF Group of Québec, involved a «Buy American» requirement of the Federal Highway Administration that interfered with the participation of a Canadian manufacturer of complex steel components in a Virginia highway project.

⁷² See *Methanex Corp. v. United States*, Preliminary Award on Jurisdiction and Admissibility (Aug. 7, 2002), <http://www.naftaclaims.com>.

⁷³ *Loewen Group, Inc. v. United States*, ICSID Case No. ARB (AF)/98/3, Interim Award on Jurisdiction (Jan. 5, 2001), <http://www.naftaclaims.com>.

⁷⁴ *Mondev International Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2, Award (Oct. 11, 2002), 42 I.L.M. 85 (2003).

⁷⁵ See Craig et al., *supra* note 10, at 661-78.

negotiators advocated arbitration to promote the security of foreign investment over Mexico's longstanding opposition.⁷⁶

Two of the cases, *Loewen* and *Mondev*, are of particular significance in that court decisions serve as the hook on which to found a NAFTA claim. NAFTA not only prohibits any «measure» tantamount to expropriation,⁷⁷ but also gives the term «measure» an understandably broad scope, to include «any law, regulation, procedure, requirement or practice.»⁷⁸ Such a reading of the concept of measure is entirely consistent with the American position in connection with bilateral investment treaties.⁷⁹

By implicating the judiciary, NAFTA arbitrations obviously strike an especially sensitive nerve. However, such actions follow a long line of «denial of justice» claims, traditionally brought against developing countries⁸⁰ and recently made by an American investor against Mexico under NAFTA.⁸¹

⁷⁶ The NAFTA Statement of Administrative Action makes this point: «The NAFTA provides a historic investor-state dispute settlement mechanism, so that individual U.S. companies no longer face an unbalanced environment in an investment dispute with the Mexican government but can seek arbitration outside Mexico by an independent body.» See North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, at 685 (1993).

⁷⁷ NAFTA *supra* note 1, art. 1110, 32 I.L.M. at 641.

⁷⁸ *Id.* art. 201, at 298. Both *Loewen* and *Azinian* (discussed *supra* note 67) rejected the suggestion that a judicial action constituted an exclusion to such a broadly defined notion of governmental measure.

⁷⁹ See Submittal Letter Accompanying the United States-Panama Bilateral Investment Treaty, reprinted in Kenneth J. Vandeveld, *United States Investment Treaties: Policy and Practice* app. C at 166 (1992) (noting the State Department position that bilateral investment treaty prohibitions on expropriations apply to «essentially any measure regardless of form» which may deprive an investor of management, control, or economic value in a project) (internal quotations omitted).

⁸⁰ See Brierly, *supra* note 3, at 286-87, noting two different views on what constitutes a denial of justice, also sometimes referred to as *déni de justice*. The narrower interpretation (on occasion adopted by Latin American scholars) contends that denial of justice exists only when foreigners have been denied access to courts. The broader view (embraced in much English, American and Continental literature) includes in the notion of denial of justice substandard judicial acts such as corruption, dishonesty, unwarranted delay, and decisions imposed by the executive. See also Brownlie, *supra* note 7, at 514-16.

⁸¹ See *Calmark Commercial Dev., Inc. v. United Mexican States*, Notice of Intent to Commence Arbitration (Jan. 11, 2002), <http://www.naftaclaims.com>. In a case whose beginning

1. *Methanex*

When California became concerned about risks to drinking water as a result of leakage from underground fuel storage tanks, its Governor banned gasoline containing a methanol-based gasoline additive called «MTBE.»⁸² A Canadian corporation producing feedstock for this additive responded by filing an arbitration claim arguing discrimination, denial of minimum standard of treatment, and improper expropriation of its investment.⁸³

brings to mind the real estate development in *Mondev*, an American corporation that had agreed to develop a tourist attraction in Mexico ended up paying for land that was transferred to a third party. A lawsuit in the courts of the State of Baja California failed to recover the misplaced investment. The American claimant then alleged «procedural and substantive denial of justice» through improprieties such as failure to give notice of defendant's submissions, disregard of evidence, and «blatantly wrongful and unjust conclusion» of the matter. *Id.* para. 52. The NAFTA claim was primarily based on Article 1105: «treatment in accordance with international law, including fair and equitable treatment and full protection and security.» NAFTA, *supra* note 1, art. 1105(1), 32 I.L.M. at 639. Supporting authorities cited by the American claimant included the *Loewen* case (discussed *infra* Part IV.A.2) and a 1927 American claim against Mexico, cited as *United States (Laura Janes) v. Mexico* (Opinions of Commissioners 108, 1927, General Claims Commission 1926), in which non-punishment was deemed to constitute approval of wrongdoing. *Calmark*, para. 60.

⁸² It is significant that the claimant *Methanex* does not produce MTBE (Methyl Tertiary-Butyl Ether), but rather the feedstock (methanol) for the banned additive. This fact seems to have played a part in the recent partial award in this case. See *Methanex Corp. v. United States*, Preliminary Award on Admissibility and Jurisdiction (Aug. 7, 2000), <http://www.naftaclaims.com>. The arbitral tribunal appears to have posited that the connection between methanol and the ban was too remote in the context of NAFTA Article 1101, since the government measure did not apply to the investor's product itself. The ban became effective on December 31, 2002. See Exec. Order No. D-5-99, <http://www.ca.gov> (promulgated by Governor Gray Davis).

⁸³ Violations were alleged with respect to NAFTA Articles 1102, 1105 and 1110. See *Methanex Corp. v. United States*, Amended Claim (Feb. 12, 2001), <http://www.naftaclaims.com>. The arbitration proceeding was brought under the UNCITRAL Rules and has already resulted in an interim ruling. See *Methanex Corp. v. United States*, Decision on Authority to Accept Amicus Submissions (Jan. 15, 2001), *Mealey's Int'l Arb. Rep.*, Jan. 2001, at D1, D12 (finding that it «could be appropriate» for an environmental group to make submissions). UNCITRAL Rules Article 15(1) permits conduct of the proceedings «in such manner as [the tribunal] considers appropriate.» *Id.* at D7. Amicus briefs from NAFTA member countries are permitted under NAFTA Article 1128, which authorizes submissions on questions related to interpretation of NAFTA. See NAFTA, *supra* note 1, art. 1128, 32 I.L.M. at 645.

The filing of the claim led to protests by environmentalists and the U.S. Environmental Protection Agency (EPA). Charges were made that NAFTA Chapter 11, by allowing corporations to recover for unfair treatment, favored corporate profits over the legitimate exercise of sovereignty by local governments. This arbitral process was attacked as undemocratic, cloaked in secrecy, and lacking adequate rights of appeal and protection for equally injured domestic producers. NAFTA was further criticized as denying the American public a right to protect its water and air.⁸⁴

2. *Loewen*

In *Loewen v. United States*, a Mississippi jury verdict led to claims of failure to grant «fair and equitable treatment» and expropriation without adequate compensation.⁸⁵ The jury had awarded half a billion dollars in favor of a Mississippi funeral director who claimed that a Canadian buyer had breached a contract for the purchase of his funeral parlors. When the Canadian attempted to appeal, he found that a state law required the posting of a bond as security for payment of the judgment equal to 125% of the amount awarded. In this case the sum would have been \$625 million, high enough to force a substantial settlement.

The Canadian defendant then filed a NAFTA Chapter 11 claim against the United States in an ICSID Additional Facility arbitration. The merits of the case are still being arbitrated, but an interim award did decide that a court judgment can be considered a governmental «measure» that might give rise to liability for discrimination, failure to grant «fair and equitable treatment,» and expropriation without adequate compensation.⁸⁶

⁸⁴ For a survey of the criticisms of NAFTA provoked by *Methanex*, see Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 *Am. Bus. L.J.* 475, 478-79 (2001).

⁸⁵ The \$500 million verdict awarded by the Mississippi jury included \$400 million in punitive damages. See *Loewen*, ICSID Case No. ARB (AF)/98/3, Interim Award on Jurisdiction (Jan. 5, 2001), para. 2, <http://www.naftaclaims.com>. The arbitration claim was based on NAFTA Articles 1102, 1105, and 1110. *Id.* para. 30. The rich tapestry of this dispute is set forth in Jonathan Harr, *The Burial*, *New Yorker*, Nov. 1, 1999, at 70, which describes the backgrounds of the Mississippi plaintiff, Jeremiah O'Keefe, his Florida lawyer, Willy Gary, the allegedly xenophobic comments to the jury, and the circumstances surrounding the \$175 million settlement.

⁸⁶ *Loewen*, Interim Award on Jurisdiction (Jan. 5, 2001).

3. *Mondev*

In the final example, a Quebec corporation commenced arbitration arising from a decision by the Massachusetts Supreme Judicial Court dismissing an action against the city of Boston for breach of a contract to sell property in connection with municipal redevelopment, and against the Boston Redevelopment Authority for tortious interference with contractual relations.⁸⁷ The developers had entered into an agreement with Boston to acquire a parcel of downtown real estate. When the city balked at going through with the transfer, the failure was ultimately excused on the basis that the Canadian investment vehicle did not «follow the steps» required under the agreement, since its offer to buy the parcel had not manifested a «precise time and place for passing papers.»⁸⁸ The claim against the Boston Redevelopment Authority was dismissed on the basis that this public body was immune from tort liability under the Massachusetts Tort Claims Act.⁸⁹

Aggrieved by the court decision, the Montreal investor brought a \$50 million claim under the ICSID Additional Facility alleging discrimination, expropriation without compensation, and denial of «fair and equitable treatment.» The decision of the Massachusetts Supreme Judicial Court endorsing the denial of the developer's right to purchase the land was described as «unprincipled» and «arbitrary.»⁹⁰

One can understand that such a proceeding might surprise many Americans. What could be more likely to fall within the power of the Supreme Judi-

⁸⁷ *Mondev International Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2, Award (Oct. 11, 2002), 42 I.L.M. 85 (2003). The arbitral tribunal dismissed *Mondev's* claims, finding that the American court decisions «did not involve any violation of Article 1105(1) of NAFTA or otherwise.» *Id.* award cl. (c), 42 I.L.M. at 116. The party-nominated arbitrators were James Crawford (for Claimant) and Stephen Schwebel (for Respondent), and the Presiding Arbitrator was Ninian Stephen. See also *Lafayette Place Associates v. Boston Redevelopment Auth.*, 694 N.E.2d 820 (Mass. 1998). Operating in Boston through the limited partnership, *Mondev* had agreed to participate in a project originating in an attempt to rehabilitate the so-called «combat zone,» a dilapidated area near Boston's downtown shopping district. Although the Supreme Judicial Court found the contract with Boston to be enforceable, the developers were deemed to have forfeited their rights due to lack of evidence that they were ready, able, and willing to close the sale.

⁸⁸ *Lafayette Place Associates*, 694 N.E.2d at 827.

⁸⁹ *Id.* at 831-35. See Mass. Gen. Laws Ann., ch. 258, §§ 1, 10(c) (West Supp. 2002).

⁹⁰ *Mondev*, Notice of Arbitration (Sept. 1, 1999), at 74, [http:// www.naftaclaims.com](http://www.naftaclaims.com).

cial Court of Massachusetts than an action relating to land in Boston? Imagine, however, the reverse situation, in which rights of similarly situated Boston investors are rebuffed by a foreign court. It is not hard to imagine New England voices crying foul play.⁹¹

B. Reactions and Complaints

As the first Chapter 11 cases were filed against the United States and Canada,⁹² voices began to be heard saying that investment arbitration infringes national prerogatives. Investor protection has been presented by activists as a subterfuge to challenge laws simply because they have a negative impact on the foreign capitalist.⁹³ In one New York Times article NAFTA arbitration was thus described: «Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.»⁹⁴ A December 2001 advertisement in

⁹¹ The story in the Boston newspapers might read something like this: A xenophobic judge in [Country X] refused to enforce a promise to sell property to an American company. The investing company asks why it should take the trouble of entering into contracts when local judiciary excuses a breach of the agreement on a technicality, citing nothing more than absence of a ‘precise time and place for passing papers.’ The seller was granted total immunity from liability.

⁹² Thus far twenty-seven notices of intent (not all of which have been followed by claims) have been brought under Chapter 11: nine against Canada, ten against Mexico, and eight against the United States. See *infra* Appendix. Cases raising environment issues include Metalclad, Methanex, Ethyl, S.D. Myers, and Crompton.

⁹³ See Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 *Hastings Int'l & Comp. L. Rev.* 303, 306 (2000); Charles N. Brower & Lee A. Steven, *supra* note 19, at 198 (2001); Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 *Hastings Int'l & Comp. L. Rev.* 421 (2000).

⁹⁴ Anthony De Palma, *NAFTA's Powerful Little Secret*, N.Y. Times, Mar. 11, 2001, at C1. For an attempt at a more broad-based rebuttal of claims that international trade undermines governmental regulatory structures, see Ronald A. Cass & John R. Haring, *Domestic Regulation and International Trade: Where's the Race? Lessons from Telecommunications and Export Controls*, in *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* 111 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

the Washington Post attacked investment arbitration under the headline «Fast Track Attack on America's Values,» which appeared against the background of the preamble to the U.S. Constitution («We the people . . .») with captions that read: «Secret Courts for Corporations» and «Taxpayer Dollars for Foreign Polluters.»⁹⁵

The full-page advertisement urged rejection of the trade bill (ultimately passed by one vote in the House of Representatives) giving the President «fast track» authority to negotiate agreements in the Free Trade Area of the Americas (FTAA).⁹⁶ These agreements could extend the NAFTA model to thirty-four countries in the Western Hemisphere. In one well-publicized television show hosted by Bill Moyers, NAFTA was labeled a «sophisticated extortion racket,» and «an end-run around the Constitution» in which «secret NAFTA tribunals can force taxpayers to pay billions of dollars in lawsuits.»⁹⁷

Environmentalists have been particularly vocal in saying that NAFTA makes it possible to undermine legitimate governmental regulations.⁹⁸ Chapter 11 arbitration is portrayed as a forum insulated from rightful domestic political and legal safeguards.⁹⁹ The World Wildlife Fund and the Institute for Sustainable

⁹⁵ Sponsored by Public Citizen's «Global Trade Watch,» the advertisement referred to possible extension of a NAFTA provision permitting «foreign corporations to sue the federal government in secret tribunals, demanding our tax dollars as payment for complying with U.S. health, safety and pollution laws.» The advertisement continued that foreign manufacturers of toxic chemicals could use «private courts» (i.e., arbitration) «to sue U.S. taxpayers ... if zoning rules kept them from building a chemical plant near a school.» Referring to arbitration's confidentiality, the advertisement said that «even the identity of judges can be kept secret indefinitely,» and closed with the rhetorical question: «Whose side is Congress on—foreign corporations or the American people?» A «Fast Track» Attack on America's Values, Wash. Post, Dec. 5, 2001, at A5.

⁹⁶ Id.; Trade Act of 2002, H.R. 3009, 107th Cong. (2002) (enacted).

⁹⁷ Bill Moyers Reports: Trading Democracy (PBS television broadcast, Feb. 4, 2002) (transcript available at http://www.pbs.org/now/transcript/transcript_tdfull.html).

⁹⁸ No administrative veto prohibits arbitration of disputes implicating environmental measures. NAFTA simply provides that nothing in Chapter 11 shall be construed as preventing adoption of measures «to ensure that investment activity ... is undertaken in a manner sensitive to environmental concerns.» See NAFTA, *supra* note 1, art. 1114, 32 I.L.M. at 642.

⁹⁹ See, e.g., State and Local Opposition to NAFTA Chapter 11, available at http://www.citizen.org/trade/nafta/ch_11.articles.cfm?ID=7619 (listing state and local governmental groups opposing Chapter 11). See also Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State

Development published a report entitled *Private Rights, Public Problems* which labels NAFTA Chapter 11 arbitration as «one-sided» and «lacking transparency,» and concludes that arbitration is «shockingly unsuited to the task of balancing private rights against public goods.»¹⁰⁰

Members of Congress also complain that NAFTA tribunals override health and labor laws, and express alarm that the United States federal government might be held liable for the idiosyncratic acts of local authorities and state courts.¹⁰¹ During debate on an appropriations bill, a congressman lamented that the Justice Department might have to sue local governments to enforce

Process on the Environment, Int'l Inst. for Sustainable Dev. Working Paper (1999), available at <http://iisd1.iisd.ca/pdf/nafta.pdf> (last visited April 29, 2003). Complaints include the «virtually unfettered right of foreign investors to initiate direct actions against their host governments,» *id.* at 5, and the «aggressive use of this process to challenge public policy and public welfare measures,» *id.* at 6. The authors complain about «uncertainty and unpredictability for environmental regulations,» *id.* at 17, lack of procedural or public interest safeguards, and «non-transparent, secretive and non-appealable» arbitration, *id.* at 6, all of which mean that host governments must «pay foreign investors in order to be able to effectively regulate the environment.» *Id.* See also Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 *Hastings Int'l & Comp. L. Rev.* 409 (2000); Todd Weiler, *A First Look at the Interim Merits Award in S.D. Myers v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 *Hastings Int'l & Comp. L. Rev.* 173 (2001).

¹⁰⁰ Howard Mann, *International Institute for Sustainable Development and World Wildlife Fund, Private Rights, Public Problems: A Guide To NAFTA's Controversial Chapter of Investor Rights* 46 (2001). The report by Dr. Mann, a lawyer based in Ottawa, led to follow-up commentary in Canada and the United States that furthered the negative characterization of NAFTA. See Mark Thomsen, *Companies Using NAFTA to Undermine Legitimate Regulations*, *The SocialFunds Investor*, June 12, 2001, <http://www.socialfunds.com/news>; Chantal Blouin, *NAFTA Goes Too Far on Investor Protection*, *The North-South Institute*, Aug. 31, 2001, <http://www.nsi-ins.ca/ensi/news>.

¹⁰¹ See 145 Cong. Rec. H7368 (Aug. 5, 1999) (statement of Rep. Tierney). Federal statute prohibits challenge of state laws inconsistent with NAFTA, «except in an action brought by the United States [i.e., the federal government] for the purpose of declaring such law or application invalid.» 19 U.S.C. § 3312(b)(2) (2000) (codifying §102(b) of the NAFTA Implementation Act). Similar protections apply to state laws in conflict with Uruguay Round trade agreements. See 19 U.S.C. § 3512(b)(2) (2000). An amendment to the Bill offered by Representative Kucinich (Ohio) would have prohibited the Department of Justice from using appropriated funds to challenge state laws that run afoul of NAFTA, such as the Mississippi bond requirement in *Loewen*. See 145 Cong. Rec. H7368 for full text of amendment. The amendment failed by a vote of 196 to 226.

NAFTA decisions, and in a burst of fervor proclaimed, «This is nuts!... We must stand together to protect the sovereignty of American laws.»¹⁰²

A recent indication of American discontent with the NAFTA model for investment dispute resolution came in response to legislative efforts to extend trade benefits to Latin American countries. The Chairman of the Senate Finance Committee wrote to the Bush Administration endorsing attempts to deny foreign investors any substantive rights not given to American investors, to establish an appellate review of NAFTA awards,¹⁰³ and to support government screening of arbitration requests to reduce the prospect that trade disputes would be examined by arbitrators.¹⁰⁴

While not all legislators accepted the wisdom of such measures,¹⁰⁵ some went even further. Senator Kerry of Massachusetts proposed amendments to the Andean Trade Preferences Act which would have given the investor state

¹⁰² 145 Cong. Rec. H7368 (Aug. 5, 1999) (statement of Rep. Shows). Congressman Tierney (Massachusetts) expressed concern that the pace of globalization might result in «sacrificing state and local laws at the altar of ill-defined international investor rights.» Id. Congressman Shows (Mississippi) opposed allowing «American taxpayer dollars [to] pay American lawyers to help a foreign corporation fight American state laws in court.» Id. Congressman Bonior (Michigan) added, «The question ... is very clear: Should the rights of an investor come before the rights to enact a chemical ban to prevent cancer?» Id. Observers will note, of course, that NAFTA prohibits discrimination, not the right to ban carcinogens. The essence of the concern would seem to be that arbitrators hearing antidiscrimination claims might strike down otherwise valid health regulations.

¹⁰³ Letter from Max Baucus, Senate Finance Committee Chairman, to Robert Zoellick, U.S. Trade Representative (Mar. 26, 2002), reprinted in Baucus Welcomes Options Administration Is Considering on Investor-State Disputes, 19 Int'l Trade Rep. (BNA) (Mar. 28, 2002) at 529 [hereinafter Baucus].

¹⁰⁴ A similar screening mechanism already exists with respect to expropriation claims that implicate tax measures. See NAFTA, supra note 1, art. 2103(6), 32 I.L.M. at 700 (discussed infra at notes 128-33 and accompanying text).

¹⁰⁵ On March 28, 2002 the Senate Finance Committee's ranking Republican Charles Grassley urged Trade Representative Zoellick to reject such screening. See Grassley Urges Zoellick to Reject Government Screening for Investor Suits, Int'l Trade Daily, Apr. 1, 2002, <http://www.bna.com>. Industry groups, including the National Association of Manufacturers, have also expressed concern for the preservation of investor protections for American-owned businesses abroad. See Baucus, supra note 103, at 529; see also In Partisan Markup, House Ways and Means Approves TPA Legislation, Int'l Trade Rep. (BNA) (Oct. 11, 2001) at 1586 (discussing H.R. 3005, the Bipartisan Trade Promotion Authority Act of 2001).

the right to prohibit arbitration on the basis that the claim «lacks legal merit» and would have established a «single appellate body» to review decisions in investment arbitration.¹⁰⁶

As finally enacted, last year's trade legislation includes several provisions designed to restrict the type of arbitration provisions normally found in investment treaties. After a self-congratulatory preamble to the effect that the United States «provides a high level of protection for investment,» the Trade Act of 2002 defines American trade negotiating objectives to include making sure that foreign investors receive no «greater substantive rights with respect to investment protections» than domestic investors—thus echoing objections to investment arbitration long propounded by developing countries.¹⁰⁷ The Act sets forth the means to this end, including an improvement of investor/host state dispute resolution through «mechanisms to eliminate frivolous claims,» and «an appellate body . . . to provide coherence to the interpretations of investment provisions in trade agreements.» It also includes a mandate to make public all investment arbitration proceedings and to allow *amicus curiae* submissions from business, labor, and non-governmental organizations.¹⁰⁸

Some groups in Canada have likewise complained bitterly about NAFTA, alleging that it serves «to limit the legitimate rights of governments to regulate.»¹⁰⁹

¹⁰⁶ See S.A. 3430 (Kerry Amendment to H.R. 3009), 107th Cong., 148 Cong. Rec. S4504 (2002). While some might imagine that this veto right would be given to the host state, in fact the Kerry proposals accorded this to the «competent authority in the investor's country.» See S.A. 3430, §§. 2102(b)(3)(H)(i) & (ii). This approach follows the lines of traditional practice in matters of state responsibility, with a capital exporting country espousing its national's claim in order to assert protection of the investor's foreign assets. The Kerry proposals would also have modified the substantive contours of what NAFTA arbitrators could award, requiring, *inter alia*, that trade agreements with investment provisions: (1) ensure that foreign investors receive no greater legal rights than American citizens; (2) exclude compensation for regulatory measures that cause «mere diminution» in the value of property; and (3) ensure that standards for minimum treatment grant foreigners no greater legal rights than possessed by American citizens under the Constitution's due process clause. See S.A. 3430, Sec. 2102(b)(3)(D-F). The amendment was tabled on May 21, 2002.

¹⁰⁷ See Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(3), 116 Stat. 933, 995 (2002).

¹⁰⁸ See *Id.*, § 2102(b)(3)(G-H).

¹⁰⁹ See Nihal Sherif, *Canadian Memo Identifies Options for Changing NAFTA Investment Rules*, Inside U.S. Trade, Feb. 12, 1999, at 20 (commenting upon a memo of the Canadian Department of Foreign Affairs and International Trade); see also Pope & Talbot NAFTA Arbitration Moving Into Damages Phase, *Mealey's Int'l Arb. Rep.*, July 2001, at 20, (discuss

An editorial in the *Toronto Globe and Mail* criticized the confidentiality inherent in arbitration as a «cone of silence,» claiming that «lawsuits against the Canadian government under NAFTA's Chapter 11 end up being composed almost entirely of rumor and leaks rather than official documents.»¹¹⁰

C. Understandable Concerns

Many host state concerns about NAFTA arbitration are understandable. Considerable ambiguity exists with respect to what constitutes «fair and equitable» treatment. The law on expropriation is also relatively malleable, with little consensus on the standards that determine when administrative regulations give rise to a governmental taking that requires compensation. Must a claimant show an abuse of power by the host government? Must the nationalization include an element of bad faith? May a foreign investor recover in circumstances where the claim of a domestic owner would fail?

The crux of the problem is that not all discrimination is outright and abrupt. Arbitrary taking of property may occur in a gradual fashion through abusive manipulation of the legal system. Various names have been applied to such de facto nationalization: «creeping expropriation,» «indirect expropriation,» and «constructive expropriation,» as well as measures «tantamount to» or «equivalent to» expropriation.¹¹¹ Indirect nationalization through improper administrative mea-

suring *Pope & Talbot's Interim Award* (June 26, 2000), which held that Canadian export controls on softwood lumber discriminated against an Oregon investor); *Pope & Talbot, Award in Respect of Damages* (May 31, 2002), 41 I.L.M. 1347 (2002); Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 *Hastings Int'l & Comp. L. Rev.* 409 (2000); Weiler, *supra* note 99.

¹¹⁰ NAFTA Cone of Silence, *The Globe and Mail*, Aug. 26, 1998, at A14. Responses to this editorial include letters to the editor by Sergio Marchi (Canadian Trade Minister), who asserted that investor rights must not «inhibit the sovereign responsibility of governments to legislate and regulate in the public interest,» *The Globe and Mail*, Aug. 31, 1998, at A12, and Maude Barlow, who asserted that NAFTA was the «first international treaty in history to grant foreign investors the right to bypass their own governments in a trade dispute and sue the government of another country for cash compensation» and that NAFTA arbitrators were all «trade bureaucrats,» *The Globe and Mail*, Sept. 5, 1998, at D7.

¹¹¹ See generally Markham Ball, *Assessing Damages in Claims by Investors Against States*, 16 *Icsid Rev.—Foreign Inv. L.J.* 408 (2001); Dolzer, *supra* note 64; Higgins, *supra* note 64; Weston, *supra* note 64. See also *infra* discussion of Overseas Private Investment Corporation (OPIC).

asures has long served as a back door to deprive the investor of its assets.¹¹² In some cases a taking might occur through non-action, as when a state refuses to interfere with popular seizure of foreign property or fails to fulfill a contractual obligation to grant fiscal benefits.

Expropriation under the guise of otherwise valid regulations is often easier to recognize than to define, as illustrated by the practice of the Overseas Private Investment Corporation (OPIC).¹¹³ A federally chartered agency of the United States government, OPIC insures American investors against expropriation and currency inconvertibility (as well as political violence) in connection with their foreign investments.¹¹⁴ Notwithstanding OPIC's broad definition of expropriation,¹¹⁵ the experience of investors seeking reimbursement has not always been consistent.¹¹⁶ In many instances jurists will experience di-

¹¹² See, e.g., *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)* (2d Phase), 1970 I.C.J. 50 (Feb. 5), 9 I.L.M. 227 (1970). By refusal to authorize transfer of foreign currency to pay Sterling bond interest, Spain allegedly engineered the bankruptcy of a Canadian owned company as a way to deprive the parent of its property. See also V.V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, 47 *Int'l & Comp. L.Q.* 747 (1998).

¹¹³ See generally Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* 348-57 (2d ed. 1995); Vance Koven, *Expropriation and the «Jurisprudence» of OPIC*, 22 *Harv. Int'l L.J.* 269 (1981).

¹¹⁴ The OPIC Contract of Insurance provides for controversies between OPIC and the investor to be settled by arbitration. See Koven, *supra* note 113, at 324 (reprinting Article 11.01 of the OPIC Contract, providing for arbitration). For more information about OPIC, see <http://www.opic.gov>.

¹¹⁵ OPIC's current Program Handbook, available at <http://www.opic.gov>, defines expropriation coverage as protection against «nationalization, confiscation or expropriation of an enterprise, including creeping expropriation—unlawful government actions that deprive the investor of fundamental rights in a project» but excluding «losses due to lawful regulation or taxation» and «actions provoked or instigated by the investor.» OPIC, *Program Handbook* 9 (2002). See also <http://www.opic.gov/finance/products/expropriation.htm> (website describing expropriation insurance policies offered by OPIC).

¹¹⁶ In one case OPIC acknowledged that rights could be denied through a «chain of conduct,» but found that the investor's control over its assets continued even after it lost managerial and shareholder control of the investment vehicle. See Koven, *supra* note 113, at 291 n.107 (discussing *Cabot Int'l Capital Corp., Contract 8383, Memorandum of Determination* (Dec. 27, 1980)); see also *Revere Copper & Brass, Inc. v. OPIC, American Arbitration Association Case No. 1610013776, Award* (Aug. 24, 1978), 17 I.L.M. 1321 (1978), motion to vacate denied, 628 F.2d 81 (D.C. Cir. 1980), cert. denied, 446 U.S. 983 (1980). The OPIC Contract of Insurance at issue in the case defined «expropriatory action» to include actions

fficulty establishing intellectually rigorous standards, and thus will be consigned to a «we-know-it-when-we-see-it» attitude toward de facto takings.

Not all scholars see the case law of expropriation as a threat to environmental regulations. One thoughtful study of regulatory takings has identified a number of standards applied in nationalization cases, such as proportionality, necessity, and non-discrimination.¹¹⁷ Not every governmental measure that diminishes the worth of an investment requires compensation, and some balance must be struck between the right to regulate and the preservation of property values. At minimum, the investor has the right to be concerned with uncertainty, surprise, and breaches of prior commitments.¹¹⁸

To some extent the United States may have become a victim of its own success. In the past, Americans sometimes persuaded arbitrators to adopt broad standards providing «protection and security» that might override otherwise legitimate domestic laws.¹¹⁹ Regulations which, in a domestic context, constituted normal protection of the public interest, appeared in a cross-border transaction as violations of international law. Thus Americans were, to paraphrase

(taken or authorized by the government) that prevented (a) effective exercise by the investor of its fundamental rights, (b) disposition by the investor of securities, or (c) exercise by the foreign firm of effective control over its property, or the construction or operation of the project. See *Revere Copper & Brass*, 17 I.L.M. at 1322.

¹¹⁷ See Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 *Int'l & Comp. L.Q.* 811 (2001).

¹¹⁸ Waelde and Kolo conclude: «[I]t is unlikely that courts or arbitrators will find a compensable expropriation in cases where governments issue environmental regulation for legitimate purposes, in accordance with the state of scientific knowledge and accepted international guidelines.» *Id.* at 846. The authors remain optimistic that regulatory taking would be found «only when the environment becomes a pretext for domestic protectionism and when elements of discrimination, of breach of governmental commitments or ... [when regulation has been used] to extract benefits unrelated to the legitimate purpose of the regulation.» *Id.*

¹¹⁹ See, e.g., *Am. Mfg. & Trading (AMT) v. Zaire*, ICSID Case No. ARB/93/1 (1993), 36 I.L.M. 1531 (1997) (arising under the US-Zaire 1984 Bilateral Investment Treaty and involving damage to property of an American subsidiary by the Zaire army). Referring to the host state's «obligation of vigilance» to «ensure the full enjoyment of protection and security of [the U.S. company's] investment,» the arbitral Tribunal stated that Zaire «should not be permitted to invoke its own legislation to detract from any such obligation.» *Id.* at 1548. The case is cited in *Methanex Corp. v. United States*, Draft Amended Claim (Feb. 12, 2001) at 65, <http://www.naftaclaims.com>.

Shakespeare, «hoist with their own petard,»¹²⁰ having contributed to the creation of pro-investor substantive standards applied by international tribunals, and to a blurring of distinctions between state-private proceedings («mixed arbitration») and commercial arbitration exclusively among private parties.¹²¹

D. Limiting the Scope of Investment Arbitration

1. *Compromises to Reconcile Competing Goals*

NAFTA's drafters recognized that they were combining a trade agreement with an investment treaty, and that arbitration of investment disputes might have a disruptive effect on other NAFTA commitments, including trade in goods and procurement. Moreover, there was recognition that investment arbitration posed special problems with respect to vital national prerogatives in tax and financial services.

Multiple compromises were made to reconcile NAFTA's competing goals. For example, inconsistencies between Chapter 11 and other NAFTA chapters are resolved in favor of the latter,¹²² and investment is limited by a definition indicating what «investment means» rather than what «investment includes.»¹²³ Excluded from the definition of investment are loans to state enterprises and money claims arising solely from contracts for the sale of goods or services or the extension of commercial credit.¹²⁴ The creation of intellectual property rights will generally not give rise to rights to compensation claims for expropriation,¹²⁵ and non-discriminatory measures of general application will not be considered

¹²⁰ See William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act 3, sc. 4 («for 'tis the sport to have the engineer/Hoist with his own petard»), in which the Prince of Denmark makes plans to catch the conspirators in his father's murder.

¹²¹ For a comparison of stricter and more flexible approaches to long-term cross-border contracts, see generally Nagla Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (1995).

¹²² NAFTA, *supra* note 1, art. 1112, 32 I.L.M. at 642.

¹²³ *Id.* art. 1139, at 647.

¹²⁴ *Id.* art. 1139, at 647.

¹²⁵ Article 1110 does not apply to the creation or limitation of intellectual property rights to the extent consistent with Chapter XVII, which addresses intellectual property explicitly. *Id.* art. 1110, at 641.

tantamount to the expropriation of a loan or debt security merely because they impose an increased cost that causes debtor default.¹²⁶

Of special interest are the limitations on investment arbitration that implicate tax and finance, two areas of particular sensitivity to economic sovereignty. As discussed below, member states have the right in certain circumstances to block or to modify Chapter 11 arbitration in both of these domains.

2. Expropriation Through Fiscal Measures

a. Distinguishing Abusive Taxation

Few areas illustrate the complex interaction of arbitration and sovereignty concerns more sharply than taxation. The power to raise revenue by forced levies is an attribute of sovereignty that is less negotiable than others.¹²⁷ Yet uncompensated nationalization often takes the form of excessive fiscal measures, designed either to force the foreign owner to abandon an investment by taxing away its economic value, or to subject an investor's competitors to a more favorable tax regime. While escaping precise definition, such subtler forms of expropriation can arbitrarily deprive an investor of wealth as effectively as explicit nationalization.

Such «creeping expropriation» does not lend itself to surface-level analysis. Distinctions must be made between normal and excessive taxation, a task that implicates culturally influenced notions of the «right» level of tax.¹²⁸ From one perspective, taxation constitutes a form of asset seizure (echoed in the American catch phrase «the power to tax is the power to destroy»)¹²⁹ in which fiscal authorities take money from its current owner (the taxpayer) and give it to someone else (the state).

¹²⁶ Id. art. 1110(8), at 642.

¹²⁷ One remembers that it was a tax revolt that forced King John of England to sign the Magna Charta in 1215. And few scholars challenge Lord Mansfield's «Revenue Rule» preventing enforcement of foreign tax judgments. See *Holman v. Johnson*, 98 Engl. Rep. 1120, 1121 (K.B. 1775). For later articulations of this principle, see *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996); *HM Queen v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979).

¹²⁸ Justice Holmes distinguished between a penalty intended as a «discouragement» to behavior and a tax that «may be part of an encouragement [to actions] when seen in its organic connection with the whole.» *Compañía General de Tabaco de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927).

¹²⁹ The phrase originated in *McCulloch v. Maryland*, in which the United States Supreme Court struck down a state tax on a federally chartered bank. 17 U.S. (4Wheat.) 316, 327 (1819).

The competing characterizations of tax may be distinctions without a difference, however. Fiscal measures inevitably involve an element of expropriation. The only question is whether they are «normal» taxes or are the type of punitive measure intended to confiscate foreign investment.

The problematic nature of using arbitration to settle claims that taxation constitutes «creeping expropriation» was foreseen when NAFTA was drafted. The Chapter 11 dispute resolution process would be misused and corrupted if «ordinary» fiscal measures gave rise to expropriation claims. Consequently, the fiscal administrations of host and investor countries have been given the task of making a preliminary cut between normal and abnormal taxes.

If an alleged expropriation is accomplished through «taxation measures,» the competent fiscal authorities of the relevant states may veto the investor's right to arbitrate.¹³⁰ At the time of advising the host state of its intention to commence arbitration, the investor must also submit the tax measure to the appropriate fiscal authorities. The investor may proceed to arbitration only if the competent authorities «do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation.»¹³¹

This awkwardly drafted «negative deadlock» provision gives the competent authorities six months to decide the question, failing which the investor may proceed to arbitration.¹³² In attempting to distinguish normal from exces-

¹³⁰ NAFTA Article 2103(6) states that Article 1110 provisions concerning expropriation «shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim [for investment dispute resolution], where it has been determined pursuant to this paragraph that the measure is not an expropriation.» NAFTA, *supra* note 1, art. 2103(6), 32 I.L.M. at 700. Thus far, at least one case (the Feldman Karpa claim against Mexico) implicated tax measures. The competent authorities agreed that one of the three measures was not an expropriation, and thus the arbitration did not go forward on that question. As to two other measures, however, there was no agreement, and thus for those issues the arbitration proceeded. See *Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), <http://www.naftaclaims.com>.

¹³¹ It is uncertain whether an investor's disregard of reference to the competent authorities (either in bad faith or due to an innocent misunderstanding) would provide an opportunity for *sua sponte* intervention by tax authorities. Whether or not permitted, state intervention would not seem mandated. Rather, without an opinion from the relevant fiscal authorities, an expropriation claim would lie beyond the arbitrators' jurisdiction.

¹³² The English language version contains a slight ambiguity, providing for arbitration to go forward «[i]f the competent authorities do not agree to consider the issue or, having agreed

sive taxation, fiscal authorities inevitably can be expected to rely on culturally influenced notions of tax.¹³³

NAFTA does not suggest that tax matters cannot be arbitrated. Rather, the treaty says that fiscal authorities in host and investor states together may block the arbitral proceedings by agreeing «that the [tax] measure is not an expropriation.»¹³⁴ Thus if the United States is accused of expropriating a Canadian investor's property, investment arbitration would be barred only if both the U.S. Department of the Treasury and the Canadian Department of Finance concluded that no expropriation had taken place.¹³⁵ Presumably the Canadian authorities would hesitate to acquiesce to the plundering of its citizens merely because such theft was dressed in fiscal garb. Thus the capital exporter's government is given a protective role, in that refusal to join the veto authorizes arbitration.

The tax veto by its terms applies only to claims of improper expropriation under NAFTA Article 1110. By contrast, claims for breaches of other host state duties, such as «fair and equitable treatment,» might possibly escape the jurisdiction of the respective national fiscal authorities.

to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral [by the investor].» NAFTA, *supra* note 1, art. 2103(6), 32 I.L.M. at 700. To interpret the six month limit as applying only to competent authorities who agreed to hear the matter (as contrasted to ignoring or refusing to consider the investor's request), would make little sense in this context.

¹³³ For example, Americans can be expected to look to the U.S. tax system, based on the same approach used to characterize «income tax» for purposes of the foreign tax credit. See, e.g., Treas. Reg. § 1.901-2(a) (1983); *Bank of America Nat'l Trust & Savings Ass'n v. United States*, 459 F.2d 513, 515 (Ct. Cl. 1972) («It is now settled that the question of whether a foreign tax is an 'income tax' ... must be decided under criteria established by our revenue laws and court decisions, and that the foreign tax must be the substantial equivalent of an income tax as the term is understood in the United States.»).

¹³⁴ The text of NAFTA Article 2103(6) does not make clear whether a «tax veto» requires unanimity of all three competent authorities or only from the tax administrations of the investor and host state. In practice only the latter two administrations would be directly concerned, although the third country might argue for inclusion on the theory that such decisions have policy implications affecting all NAFTA members.

¹³⁵ See NAFTA, *supra* note 1, Annex 2103(6), 32 I.L.M. at 702. The competent authority for the United States would be the Assistant Secretary of the Treasury (Tax Policy), for Canada it would be the Assistant Deputy Minister for Tax Policy, and for Mexico it would be the Deputy Minister of Revenue of the Secretaría de Hacienda y Crédito Público (Ministry of Finance and Public Credit).

b. Impact of NAFTA Concerns on Tax Treaty Arbitration

Before moving on, it is worth noting that the perception of arbitration as an abdication of sovereignty will likely affect attempts to eliminate another barrier to cross-border investment arbitration: asymmetrical transfer pricing adjustments by national tax authorities. When two countries disagree on how to interpret an income tax treaty, the task of resolving the difference falls either to national court actions or to joint efforts by the tax administrations to work out differences on a voluntary basis. Neither alternative is satisfactory. Judicial proceedings lack political neutrality and yield inconsistent results. And the process for «mutual agreement» among competent fiscal authorities is fraught with delays and uncertainty.

The problem is particularly acute when the tax treatment of a company in one country (in the form of deductions, for example) does not accord with that of an affiliate in the other (where items of income might be included). The lack of fiscal symmetry creates an economic double taxation that distorts cross-border capital flows.

In response, scholars and non-governmental organizations have suggested arbitration as a means to address income tax treaty disputes.¹³⁶ To date, however, income tax treaty arbitration remains more aspiration than reality.¹³⁷ While some treaties include language raising the prospect of arbitration, these provisions operate only if the two countries agree after a controversy arises. Such provisions have never been implemented, due to the contracting states' inability to reach accord when a dispute actually occurs. Only the new Austro-German treaty imposes a duty to arbitrate treaty differences without further negotiation.

¹³⁶ See, e.g., Gustaf Lindencrona & Nils Mattsson, *Arbitration in Taxation* (1981); Paul R. McDaniel, *NAFTA and Formulary Apportionment*, in *Essays on International Taxation* 293 (H. Alpert & K. van Raad eds., 1993); Jean-Marie Henckaerts, *EC Arbitration Convention for Transfer Pricing Disputes*, 10 *J. Int'l Arb.* 111 (1993); William W. Park, *Finality and Fairness in Tax Arbitration*, 11 *J. Int'l Arb.* 19 (1994); William W. Park, *Income Tax Treaty Arbitration*, 31 *Tax Mgm't Int'l J.* 219 (2002).

¹³⁷ One practitioner has remarked a bit whimsically that ever since 1981, tax arbitration is «an idea whose time is about to come.» David R. Tillinghast, *Choice of Issues to be Submitted to Arbitration Under Income Tax Conventions*, in *Essays on International Taxation*, supra note 136, at 349.

To remedy this, the International Chamber of Commerce¹³⁸ has issued a policy paper suggesting arbitration to resolve inconsistent tax treaty applications.¹³⁹ The International Fiscal Association (IFA) has also sponsored a study on the topic.¹⁴⁰ Furthermore, colloquia on arbitration have been organized by both the Tax Council Policy Institute¹⁴¹ and the American Society of International Law.¹⁴²

3. Financial Services

NAFTA provisions on financial services generally trump conflicting stipulations in Chapter 11.¹⁴³ Under Chapter 14, the host state can invoke prudential concerns related to protection of depositors, financial markets, and the maintenance of safe and sound financial institutions.¹⁴⁴ Upon the request of a member state, arbitrators must refer the matter to the NAFTA Financial Services Committee («Committee») for a decision on the validity of defenses to an investor's claim. The decision is binding on the tribunal.¹⁴⁵

¹³⁸ Int'l Chamber of Commerce Commission on Taxation, Arbitration in International Tax Matters, Doc. No. 180/438 (3 May 2000), http://www.iccwbo.org/home/statements_rules/statements/2000/arbitration_tax.asp; ICC Commission on Taxation, Arbitration in International Tax Matters, Draft Bilateral Convention Article, Doc. No. 180/455 Rev. (Sept. 10, 2001).

¹³⁹ *Id.*

¹⁴⁰ International Fiscal Association, IFA Congress Seminar Series, Resolution of Tax Treaty Conflicts by Arbitration, 18e (1993).

¹⁴¹ Symposium, The Future of International Transfer Pricing: Practical and Policy Opportunities, 10 *Geo. Mason L. Rev.* (forthcoming May 2003).

¹⁴² American Society of International Law, 97th Annual Meeting, Panel on Arbitration of Disputes Under Income Tax Treaties (Apr. 3, 2003).

¹⁴³ Article 1101(3) provides that Chapter 11 «does not apply to measures adopted or maintained by a [NAFTA country] to the extent that they are covered by Chapter 14 (Financial Services).» NAFTA, *supra* note 1, 32 I.L.M. at 639. Under Article 1401(2), the «minimum standard of treatment» provisions (Article 1105) do not apply to investment in financial services. *Id.*, 32 I.L.M. at 657.

¹⁴⁴ Pursuant to Article 1410(1)(a), none of the investment protections prevent a NAFTA Party from adopting reasonable measures for prudential reasons such as «protection of investors, depositors ... financial market participants ... the maintenance of the safety [and] soundness ... of financial institutions, and ensuring the integrity and stability of a [country's] financial system,» nor from taking non-discriminatory measure of general application in pursuit of monetary and credit or exchange rate policies. *Id.*, 32 I.L.M. at 659.

¹⁴⁵ See *id.* art. 1415(2), 32 I.L.M. at 661. The various committees to which a matter can be referred are listed in Annex 2001.2(A), 32 I.L.M. at 698. The term «Tribunal» carries over

If the Committee makes no decision within sixty days, NAFTA's institutional (state-to-state) dispute resolution provisions allow either the host state or the investor's country to request the convening of an arbitral panel.¹⁴⁶ Like the Committee's decision, the panel's report binds the Tribunal. If no request for such dispute resolution has been made within ten days of the expiration of the sixty days for panel action, the arbitral tribunal may proceed to adjudicate the claim.

V. Old Problems, New Perspectives

A. International Commercial Decision-making

Most of the current questions about investment arbitration did not originate with NAFTA. Rather, the perceived novelty of the issues derives from the new roles in which Canada and the United States find themselves. Changing hats from a capital exporter's fedora to a host state's sombrero, each country has come to a new appreciation of the predicaments experienced by capital importers.¹⁴⁷ They now articulate variations on themes long advanced by Latin American and African countries forced to arbitrate disputes over natural resources, the environment, and other vital elements of national life.

The debate is essentially about control of the dispute resolution process: not just what standards apply to matters such as expropriation, but who—courts or arbitrators—decides questions with a direct effect on the economic interests of both the investor and the host state. The substantive norms governing expropriation and treatment of aliens remain basically unchanged, in that international law has long held states liable for injury to aliens. The unique

the Chapter 11 taxonomy for the body of arbitrators deciding a particular dispute. Compare *id.* art. 1126, 32 I.L.M. at 644, with art. 1415(2), 32 I.L.M. at 661.

¹⁴⁶ See *id.* arts. 1415(3), 2008-22, 32 I.L.M. at 661, 695-98. Such an arbitral panel is to be constituted in accordance with Article 1414 (see Article 1415(3)), chosen from a special financial services roster to render a decision.

¹⁴⁷ See generally Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* (2d ed. 1995); M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2000).

aspect of NAFTA lies in its creation of a private right of action by which foreign investors bypass the political hurdles to obtaining the diplomatic protection of their home country.

To some observers, NAFTA arbitral tribunals appear as courts of appeal on vital regulatory matters that discriminate against foreign investment or constitute illegal takings of alien-owned property. In fact, however, Chapter 11 tribunals' power of review extends only to government measures that violate the NAFTA treaty obligations.¹⁴⁸

Consequently, member states worry about the possibility that arbitrators may decide differently than would national judges. In some instances, this means that foreign claimants will receive better treatment than domestic courts give similarly situated local claimants. Such differences should not be surprising. Business managers have traditionally favored arbitration in overseas transactions precisely because an arbitrator may see things more dispassionately than a host state judge. Moreover, investors from industrialized countries have long insisted on fair dealing for themselves, regardless of how poorly a host state might treat its own people.

Anti-NAFTA concerns rest in part on what has traditionally been considered a strong point of international arbitration: the general predisposition of those chosen to arbitrate international disputes. Experienced commercial arbitrators generally will see their mandate as giving effect to the parties' shared *ex ante* expectations, finding the facts, and applying the law in the most dispassionate and correct fashion possible. Quite understandably, arbitrators do not normally see themselves as guardians of the public interest.¹⁴⁹

¹⁴⁸ In a Chapter 11 arbitration brought by American investors against Mexico, the arbitral Tribunal noted: The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty.... Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end. *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), para. 99, 14 *Icsid Rev.—Foreign Inv. L.J.* 538, 568 (1999).

¹⁴⁹ This does not mean, however, that an arbitrator can ignore mandatory public norms (*lois de police*) imposed by the place of contract performance. See Pierre Mayer, *Les Lois de Police Étrangères*, 108 *J. Droit Int'l* 277 (1981); Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law*, 17 *Arb. Int'l* 235, 247 (2001) (noting that «the

In the context of NAFTA Chapter 11, these arbitral virtues may at some point be affected by the more public dimensions of the controverted investments.

Ironically, NAFTA Chapter 11 gives ingenious lawyers the opportunity to present on an international level the type of «due process» and «equal protection» arguments that in some ways are analogous to the principles invoked in the South of the United States during the Civil Rights Era. Forty years ago, however, federal courts were invoking such principles to set aside rules that worked against African Americans. Now it is the Canadians who charge discrimination by state courts, and in an ironic role reversal, the federal government has become the champion of states' rights.

Concerns expressed by opponents of NAFTA also overlap with many misgivings raised in the so-called «globalization» debate, which has attracted so much attention through protests at international trade meetings from Seattle to Genoa. Not all observers today accept Ricardo's theory of comparative advantage, or share the assumption that cross-border trade and investment (the circulatory system of globalization) bring the world a net benefit. In particular such criticism is likely to be made by groups that in former times might have endorsed either socialism or the «New International Economic Order.»¹⁵⁰ Such opposition was partly responsible for collapse of the OECD-sponsored Multilateral Agreement on Investment (MAI).¹⁵¹

Members of the U.S. Congress commend trading partners who accept international arbitration as a potential tool to address foreign trade violatio-

relationship linking an arbitrator to the law is much more complex than the relationship that ties judges to it»); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *Arb. Int'l* 274 (1986). See generally Abul F.M. Maniruzzaman, *Internationalization of Foreign Investment Agreements: Some Fundamental Issues of International Law*, 1 *J. World Investment* 293 (2000); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 *Am. U. Int'l L. Rev.* 659 (1999); Abul F.M. Maniruzzaman, *International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview*, *J. Int'l Arb.*, Sept. 1990, at 53-64.

¹⁵⁰ See Park, *supra* note 9, at 1330 (discussing the Charter of Economic Rights and Duties of States).

¹⁵¹ See Edward Graham, *Regulatory Takings, Supranational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations*, 31 *Cornell Int'l L.J.* 599 (1998). In France, opposition to globalization under the slogan «L'AMI c'est l'ennemi» («MAI is the enemy») is built on the double entendre of AMI (the French acronym for MAI as well as the word for friend).

ns.¹⁵² Yet when the U.S. is on the receiving end of a request for arbitration, protests are heard about «American laws being overridden» by NAFTA tribunals.¹⁵³ American legislators warn against «sacrificing state and local laws at the altar of ill-defined international investor rights,»¹⁵⁴ and suggest that under NAFTA, «the rights of an investor come before the rights to enact a chemical ban to prevent cancer.»¹⁵⁵

B. Playing by the Same Rules

Opposition to NAFTA by special interest groups within the United States has resulted in a retreat from the traditional level of American governmental support for binding arbitration as a means to protect foreign investment. This policy shift is highly problematic, and ultimately will cause significant harm to American interests abroad.

Arguments that a federal government is not responsible for acts of state authorities toward foreigners (as in the context of Methanex, Loewen, and Mondev) are not convincing. The United States has long presumed that foreign governments must repair damage caused by political subdivisions.¹⁵⁶ Indeed, the complaints by the American investor in Metalclad arose from actions by a Mexican municipality, and in Calmark from actions before a Mexican state court.¹⁵⁷ Within

¹⁵² See 134 Cong. Rec. 26930-32 (1988). Senator Jesse Helms, an arch-opponent of restrictions on American powers, urged the United States to withhold economic aid from Costa Rica until it agreed to arbitrate an expropriation dispute with an American citizen named J. Royal Parker. See also 146 Cong. Rec. H3031 (2000) (concerning Turkey's agreement to arbitrate investment disputes with foreigners).

¹⁵³ See 145 Cong. Rec. H7368 (1999) (statement by Rep. Shows) (addressing the Kucinich Amendment, *supra* note 101).

¹⁵⁴ *Id.* (statement by Rep. Tierney).

¹⁵⁵ *Id.* (statement of Rep. Bonior). In the same debate Representative Ros-Lehtinen asked rhetorically: «Are my colleagues to allow families' health and that of our children, our friends and neighbors to be threatened because of foreign bureaucrats?» *Id.* at H7370.

¹⁵⁶ See Ian Brownlie, *supra* note 7, at 451, n.107 (5th ed. 1998) (giving examples of arbitrations in which federal states have been held responsible for acts of their constituent units, including *Thomas H. Youmans (United States) v. United Mexican States*, 4 R.I.A.A. 110 (1926), *Francisco Mallén (United Mexican States) v. United States*, 4 R.I.A.A. 173 (1927), and *Estate of Hyacinthe Pellat (France) v. United Mexican States*, 5 R.I.A.A. 534 (1929).

¹⁵⁷ See discussion *supra* Part III.B.2; see also *Calmark Commercial Development, Inc. v. United Mexican States*, Notice of Intent to Commence Arbitration (Jan. 11, 2002), <http://www.naftaclaims.com>.

the United States itself, notions of federal responsibility for local misdeeds have a long history.¹⁵⁸

With delicate irony, a foreign claimant in at least one NAFTA case against the United States has noted the inconsistency between current American attitudes toward investment protection and longstanding efforts by the United States to promote «full protection and security» for the foreign assets of its nationals. In *Loewen*, the United States advocated narrower interpretations of the concept of governmental «measure» and more restrictive rules concerning «denial of justice» and exhaustion of local remedies rules. The Canadian investor's Reply Memorial pointed out that as far back as 1818, the United States, in a letter from Secretary of State (later President) John Quincy Adams to the Spanish Minister, had declared that «no principle of the law of nations [is] more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power.»¹⁵⁹

Cynics might say that one should not be surprised at double standards. Selective application of procedural standards, however, can have profoundly disconcerting consequences for wealth creation and economic cooperation. American legal principles tend to be exported. Thus the United States should take special pains to project the qualities of fair play and evenhandedness that promote undistorted participation in the global marketplace. In today's heterogeneous world, cross-border investment will be chilled without a willingness of all countries to accept arbitration. Sauce for the goose ought to be sauce for the gander.¹⁶⁰ Promotion of procedural inequality can only backfire, injuring the long-term commercial interests of investor states.

¹⁵⁸ In support of the so-called alienage jurisdiction of federal courts (covering disputes between aliens and American citizens), Alexander Hamilton argued that the «peace of the Whole ought not to be left at the disposal of a Part.» Hamilton asserted, «The Union will undoubtedly be answerable to foreign powers for the conduct of its members.» See *The Federalist* No. 18, at 476 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961).

¹⁵⁹ Letter to Mr. de Onis, Spanish Minister (1818), reprinted in John Bassett Moore, 4 *Int'l L. Digest* § 535 (1906). See generally *Loewen Group & Raymond L. Loewen v. United States*, Joint Reply of Claimant, June 8 2001, paras. 305-08, <http://www.naftaclaims.com> (noting numerous pronouncements by the United States in claims against Brazil, Mexico, Colombia, Iran, and Zaire emphasizing the affirmative obligation of the host state to ensure the property of American nationals «full protection and security»).

¹⁶⁰ The French would say, «on ne peut pas faire deux poids et deux mesures» (one cannot have two sets of weights and measures).

As a practical matter, the nature of anti-NAFTA rhetoric often captures popular sentiment more easily than the sound arguments against distortion of cross-border capital flows. The lobby that invokes «pure air and water» and «sovereignty» has a message with a more urgent ring than the theme of international economic cooperation, notwithstanding the unfortunate aggregate consequences that flow from measures that discourage transnational wealth creation.

C. The Free Trade Commission Notes of Interpretation

Initially the NAFTA countries had expected that the ebb and flow of arbitral wisdom would create a body of case law providing sound investment protection. However, NAFTA also included a safety valve that permitted member countries to interpret Chapter 11 through the Free Trade Commission.¹⁶¹

During the summer of 2001, the NAFTA Free Trade Commission issued Notes of Interpretation related to several matters currently sub judice in Chapter 11 cases. Under the Notes of Interpretation, the requirements of NAFTA Article 1105 were restated to indicate that a breach of another NAFTA provision or a separate international agreement will not in itself establish that «fair and equitable treatment» has been denied.¹⁶² Moreover, the Notes of Interpretation limit the meaning of international law to «customary» minimum standards,¹⁶³ thus preventing recourse to other sources of international law that

¹⁶¹ NAFTA, *supra* note 1, art. 1131(2), 32 I.L.M. at 645 («An interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under [Chapter 11 Section B].»).

¹⁶² See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, Part B, reprinted in 13 World Trade & Arbitration Materials 139 (Dec. 2001). In addition, the Notes of Interpretation address the criticism that Chapter 11 arbitration is not «transparent.» Under the heading «Access to Documents,» the Notes provide that «Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration.» *Id.* at 139. In this context, it is worth noting that for decades before NAFTA, expropriation claims against developing countries had been arbitrated in confidential proceedings under ICSID, UNCITRAL, and ICC Rules without complaint from the industrialized investor nations.

¹⁶³ The Free Trade Commission stated *inter alia* that Article 1105 «prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of

might either impose or relax restrictions on host state treatment of foreign investors.¹⁶⁴

To some, these Notes of Interpretation constitute de facto modification of NAFTA that departs from the original meaning of Chapter 11, and thus require approval pursuant to Article 2202 in accordance with «applicable legal procedures of each Party.»¹⁶⁵ One award has suggested that Notes of Interpretation which fail to respect the text of NAFTA would not be binding on arbitrators deciding Chapter 11 disputes.¹⁶⁶

To date no satisfactory way has been found to resolve the potential conflict between the requirements for amendment under Article 2202 and the provisions of Article 1131 that permit Free Trade Commission interpretations. If the requirement of proper approval for amendments is to make any sense, some limits must exist on the power of the Commission to change the meaning of the established text.

The conflict does not yield to easy analysis.¹⁶⁷ On the one hand, arbitrator disregard of Commission interpretations could result in different results by different tribunals, thus reducing the consistency and efficiency of investment arbitration. On the other hand, the Commission's de facto amendment of NAFTA would imperil the stability and predictability of the investor protection regime so laboriously negotiated in 1994.

treatment to be afforded to investments of investors of another Party» and that neither «fair and equitable treatment» nor «full protection and security» require «treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.» *Id.* at 140.

¹⁶⁴ For example, a Multilateral Agreement on Investment (reached in the future within the OECD or the WTO) might define concepts such as «regulatory taking» in a way different from customary international law. A WTO standards agreement might also become an issue. However, while such an agreement might constitute international law, it is unlikely that it would relate to investor protection in the context of NAFTA.

¹⁶⁵ NAFTA, *supra* note 1, art. 2202, 32 I.L.M. at 702.

¹⁶⁶ See *Pope & Talbot, Inc. v. Canada, Award in Respect of Damages* (May 31, 2001), 41 I.L.M. 1347 (2002) (ordering Canada to pay \$461,556 plus interest in damages). The Award states, «[W]ere the Tribunal required to make a determination whether the [NAFTA Free Trade] Commission's action is an interpretation or an amendment, it would choose the latter.» *Id.* para. 47, at 1356. The Tribunal continued, however, that such a determination was «not required» and thus its analysis «proceeded on the basis that the Commission's action was an 'interpretation.»

¹⁶⁷ Presumably, attempts to address potential conflicts would require recourse to the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

VI. Conclusion

Until recently, the world of investment arbitration knew fairly clear lines between host and investor states. Nations such as Libya and Mexico were the respondent host states, while the United States and Canada were the countries of the investor claimants. Today, however, the United States and Canada under NAFTA have tasted the flavor of being respondent host states in investment arbitrations, with concomitant negative side-effects for economic self-governance.

Traditionally the United States promoted arbitration on behalf of American investors abroad. However, NAFTA Chapter 11 has now made the country the object of attack in unwanted arbitrations brought by Canada. One consequence has been that media, environmentalists, politicians, and consumer advocates have called into question whether investment arbitration is compatible with sovereignty. More significantly, discontent with NAFTA has led to provisions in the Trade Act of 2002 aimed at restricting the type of arbitration provisions normally included in investment treaties.

As with any dispute resolution system, some elements of NAFTA investment arbitration may be open to improvement. Clarification and adjustment may be in order. However, it would be fundamentally unsound to call into question the use of neutral binding arbitration itself as the preferred means for resolving cross-border investment disputes. Overly general critiques of investment arbitration risk doing more harm than good, in the end backfiring to injure both the long- and short-term national interests. Assertions of «sovereignty» may end up being slippery and unhelpful abstractions,¹⁶⁸ serving simply as a justification for the exercise of unfettered government power.¹⁶⁹

¹⁶⁸ Taken from the Latin *super*, meaning «above,» sovereignty reflects a power said to be above others, a formulation used in various languages: *au dessus des autres* (French); *die höchste Staatsgewalt* (German); or *por encima de los demás* (Spanish). Historians sometimes talk of «Westphalian» sovereignty, derived from the 1648 Treaty of Westphalia ending the Thirty Years' War in a way that granted substantial autonomy to local princes. Other uses of sovereignty include reference to autonomy of political subdivision on certain matters and recognition of one state by another. See generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in *Democratic Governance and International Law* 239 (G. Fox and B. Roth eds., 2000) (exploring the sovereignty of populations in contrast to that of rulers); Stephen D. Krasner, *Globalization and Sovereignty*, in *States and Sovereignty in the Global Economy* (D. Smith et al. eds., 1999).

¹⁶⁹ One scholar has referred to sovereignty as «the unique character of governments»: [A]s students of international law learn early in their pupillage, the fundamental problems of

On occasion, the enhancement of national welfare through treaties facilitating economic cooperation will mean that domestic law must yield to international obligation. And at times arbitrators interpreting treaty provisions may render decisions with which national officials or special interest groups may disagree. Indeed, it would be quite startling if such were not the case, since treaties and arbitration by their nature supplement national legislative and adjudicatory jurisdiction. However, an occasional «wrong» decision is a small price for promoting aggregate gain to the public good through the type of broad cross-border investment fostered by arbitration, particularly during much of the last half century under the New York and Washington Conventions.¹⁷⁰

law and society are usually insoluble and the most and the best one can expect are short-term experiments in solutions and accommodations, whose durability depends on many unpredictably variable factors. The unique character of governments is one of those predictably unpredictable variables. W. Michael Reisman, *International Arbitration and Sovereignty*, 18 *Arb. Int'l* 231, at 237 (2002).

¹⁷⁰ See generally Jagdish Bhagwati & T.N. Srinivasan, *Lectures on International Trade* 160 (1983); Campbell R. McConnell & Stanley L. Brue, *Economics: Principles, Problems, and Policies* 743 (13th ed. 1996); Konrad von Moltke, *An International Investment Regime? Issues of Sustainability* (2000) (reviewing the debate over the centrality of investment to the development process); Max J. Wasserman et al., *Modern International Economics* 382 (1971); Jagdish Bhagwati & T.N. Srinivasan, *Trade and Poverty in the Poor Countries*, 92 *Am. Econ. Rev.* 180, 183 (2002); Paul A. Samuelson, *The Gains from International Trade Once Again*, 72 *Econ. J.* 820 (1962), reprinted in Jagdish Bhagwati, *International Trade* 171, 181-82 (1969); Patricia Auger & Michael Gasiorek, *Welfare Implications of Trade Liberalization between the Southern Mediterranean and the E.U.* 22 (University of Sussex at Brighton, Discussion Paper No. 80, 2001), <http://www.sussex.ac.uk/Units/economics/dp/dp.htm>; Jagdish Bhagwati, *Economic Freedom: Prosperity and Social Progress*, Address at the Conference on Economic Freedom and Development in (Tokyo, Japan 1999) at 67, at <http://www.columbia.edu/~jb38/papers.htm>; Nicholas Stern, *Globalization and Poverty*, Address at the Institute of Economic and Social Research, Faculty of Economics, University of Indonesia 2000, at 9-10, at <http://www1.worldbank.org/economicpolicy/globalization/documents/Globalization-Indonesia%20Speech.pdf>; Press Release, Richard Blackhurst & Adrian Otten, *WTO Report: Trade and Foreign Direct Investment*, Oct. 9, 1996, http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (examining the interaction of trade and foreign direct investment); Kala Krishna et al., *Trade, Investment and Growth: Nexus, Analysis, and Prognosis*, (Nat'l Bureau of Econ. Research, Working Paper No. 6861, 1998), <http://papers.nber.org/papers/w6861.pdf> (examining patterns of causation between income, export, import, and investment growth for developing countries); Robert E. Lipsey, *The Role of Foreign Direct Investment in International Capital Flows*, (Nat'l Bureau of Econ. Research, Working Paper No. 7094, 1999), <http://papers.nber.org/papers/w7094.pdf> (examining volatility and dependability of direct investment flows).

If investment arbitration is to fulfill its promise, however, some mechanism must be found to promote greater sensitivity to vital host state interests. Otherwise, investor/government arbitration may fall prey to public pressure arising from a backlash against investor victories in some of the more visible NAFTA arbitrations.¹⁷¹ In the larger picture, arbitration's wisdom may have to accommodate political reality.

As in other areas where law and policy interact, the devil is in the details. It is less than self-evident what exactly should be done to reduce the prospect of harsh legislative responses to NAFTA arbitration.¹⁷² Caution must remain a significant part of the process for bringing order to the resolution of investment disputes.

Governmental Notes of Interpretation of the type issued in the summer of 2001 by the three NAFTA member countries may end up helping to promote reconciliation of the arbitral process and public interest. However, allowing the Free Trade Commission to engage in de facto amendment of NAFTA would imperil the stability of investor protection, and in some instances might provoke arbitrator disregard of Commission interpretations.¹⁷³ In all events, solutions that rely on government screening of an arbitration's substantive legal merits risk doing significant damage to the fabric of cross-border economic cooperation and wealth creation.

¹⁷¹ See Michael Goldhaber, *Czech Mate*, *Am. Lawyer*, Mar. 2002, at 82. While generally positive about investment arbitration (indicating how an American investor was able to vindicate an expropriation claim against the Czech Republic), the article quotes David Rivkin of the New York firm Debevoise & Plimpton as warning of a hostile reaction should the Canadian investor win in the Loewen arbitration, discussed *supra* Part IV.A.2.

¹⁷² For one recent comment on the role of arbitration in cross-border investment, see Charles H. Brower, II, *Structure, Legitimacy and NAFTA's Investment Chapter*, *supra* note 19, urging arbitration that would be subject to «review by a standing appellate tribunal, and supervised by an accountable, transparent, and publicly accessible Free Trade Commission....» *Id.* at 93-94.

¹⁷³ See *Pope & Talbot, Award in Respect of Damages* (May 31, 2002), P 47, 41 I.L.M. 1347, 1356 (2002), discussed *supra* note 166. The process for amendment of NAFTA requires approval in accordance with «the applicable legal procedures of each Party.» See NAFTA, *supra* note 1, art. 2202, 32 I.L.M. at 702.

APPENDIX: SCORE CARD OF NAFTA PROCEEDINGS

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
CASES AGAINST CANADA					
1. Crompton Corporation	Nov. 6, 2001	\$100,000,000	The investor filed an amendment to the Notice of Intent on Sept. 19, 2002.	Articles 1102, 1105, 1106, and 1110.	Establishment of legal restrictions on the use of a chemical product for seed treatment.
2. Ethyl Corporation	Sept. 10, 1996	\$251,000,000	In July 1998 the Parties settled the case. Canada paid Ethyl \$13million. Canada withdrew the applicable prohibition to the international and provincial commerce of the MMT gasoline additive.	Articles 1102, 1106, 1110.	A statute banning imports of the gasoline additive MMT for use in unleaded gasoline.
3. Ketchum Investments Inc. & Tysan Investments Inc.	Dec. 22, 2000	CIDN \$50,000,000	According to public information this arbitration was abandoned.	Articles. 1102, 1103, 1105, 1106, and 1110.	Measures related to the establishment of export fees under the U.S.-Canada Softwood Lumber Agreement.
4. Pope & Talbot, Inc.	Dec. 24, 1998	\$507,552,400	Interim award on the merits issued June 26, 2000. The Tribunal found no breach of NAFTA articles 1106 or 1110. Award on the merits issued Apr. 10, 2001. The Tribunal found that Canada had breached NAFTA article 1105, but it rejected investor's Article 1102 claim. Award on damages issued May 31, 2002. The Tribunal ordered Canada to pay \$461,566. Award on costs issued Nov. 26, 2002. The Tribunal ordered Canada to pay \$120,200 plus interest.	Articles 1102, 1105, 1106, and 1110.	Implementation of the U.S.-Canada Softwood Lumber Agreement.

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
5. S.D. Myers	July 22, 1998	\$20,000,000	Partial award issued Nov. 13, 2000. The Tribunal found that there was a breach of NAFTA articles 1102 and 1105. Second partial award on damages issued Oct. 21, 2002. The Tribunal ordered Canada to pay CND \$6,050,000, plus interest. Final Award on costs issued on Dec. 30, 2002. The Tribunal ordered Canada to pay CND \$350,000 (costs) and CND \$500,000 (legal fees), plus interest. Canada is seeking to set aside the award. Notice of intent never made public. Arbitration never commenced.	Articles 1102, 1105, 1106, and 1110.	Ban on the export of polychlorinated biphenyl (PCB) waste.
6. Sigma, S.A.	Not available	Not available	Notice of Claim and Demand for Arbitration filed Oct. 12, 1999. According to the available information this arbitration was abandoned. The Parties settled this matter.	Not available	Not available
7. San Belt Inc.	Nov. 27, 1998	\$10,500,000,000		Articles 1102, 1105, 1110, and 1118.	Suspension of a fresh water export license arrangement by British Columbia.
8. Trammel Crow Company	Dec. 7, 2001	\$32,000,000		Article 1105.	Denied access to an open and transparent bidding process by Canada Post Corporation.
9. United Parcel Service	Jan. 19, 2000	\$160,000,000	On Nov. 22, 2002, the Tribunal issued an Award on Jurisdiction dismissing claims under NAFTA articles 1105, 1502 and 1503. The Tribunal also rejected Canada's jurisdictional challenge to the article 1102 claim and joined two other jurisdictional challenges to the merits.	Articles 1102, 1105, 1502(3)(a) and 1503(2).	Anti-competitive practices by Canada Post.

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
CASES AGAINST MEXICO					
1. Adams <i>et al.</i>	Nov. 11, 2000	\$75,000,000	Notice of Arbitration filed on Feb. 16, 2001.	Article 1102, 1105, and 1110.	Expropriation and discriminatory measures taken by the Government and the Supreme Court with respect to a property in Ensenada.
2. Calmark Commercial Development Inc.	January 11, 2002	\$400,000	Not available	Articles 1105, 1109, and 1110.	Denial of justice by the courts in connection with investments for a development in Cabo San Lucas.
3. Corn Products	Not available	Not available	Arbitration in progress. Field in 2002. Documents not yet available.	Not available	Not available
4. Fireman's Fund	Nov. 30, 2000	\$50,000,000	Notice of Arbitration filed Oct. 30, 2001. Submission from Mexico on jurisdiction filed Oct. 21, 2002.	Articles 1102, 1105, 1110, and 1405.	Government action allegedly favoring acquisition of Mexican- peso-denominated debentures owned by Mexican nationals over U.S.-dollar-denominated debentures owned by Fireman's Fund.
5. Frank	Feb. 12, 2002	\$1,500,000	Notice of Arbitration filed Aug. 5, 2002.	Articles 1102, 1103, 1105, and 1110.	Expropriation of beachfront property in Baja California.
6. GAMI Investments Inc.	Oct. 1, 2001	\$55,016,808	Notice of Arbitration filed Apr. 9, 2002.	Articles 1102, 1105 and 1110.	Discriminatory and inequitable regulation of the sugar industry, and <i>de jure</i> expropriation of sugar mills.

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
7. Halchette Corporation	Not available	Not available	Not available	Not available	Not available
8. International Thunderbird Gaming Corporation	2002	Not available	Not available	Articles 1102, 1103, 1105, and 1110.	Gambling licensing. Closure of the investor's gaming facilities.
9. Karpis (Feldman)	April 1999	\$50,000,000	Interim award issued Dec. 6, 2000 (jurisdiction). Award on the merits issued Dec. 16, 2002, finding Mexico in breach of NAFTA article 1102 and ordering payment of Mx \$9,464,672.50 principal plus interest in the amount of Mx \$7,496,428.47.	Articles 1102, 1105, and 1110.	Taxation measures.
10. Metalclad Corporation	October 1996	\$90,000,000	Award on the merits issued Sept. 2, 2000 finding Mexico in breach of NAFTA articles 1105 and 1110 and ordering payment of \$16,000,000. Award partially confirmed by court in Vancouver, May 2, 2001. Supplemental reason for decision, Oct. 31, 2001.	Articles 1105 and 1110.	State action denying a permit to open and operate a hazardous waste facility in La Pedrera, San Luis Potosí.
11. Promotora Interaccional Santa Fe	Not available	Not available	Not available	Not available	Denial of construction permits for a development in Santa Fe, Mexico City.
12. Robert Azinian (Desona)	Nov. 24, 1996	\$30,000,000	Final award in favor of the Mexican government (Nov. 1, 1999).	Articles 1105 and 1110.	Termination by a municipal authority of a concession to operate a landfill and waste

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
13. Waste Management (I) (Acaverde)	February 1998	\$60,000,000	Award on jurisdiction issued on June 2, 2000. The Tribunal found that the investor had not filed a proper waiver under NAFTA article 1121.	Articles 1105 and 1110.	Payment under a concession for public waste management services in Acapulco.
14. Waste Management (II) (Acaverde)	Sept. 27, 2000	\$60,000,000	Award in favor of jurisdiction issued on June 26, 2002.	Articles 1105 and 1110.	Payment under a concession for public waste management services in Acapulco.
CASES AGAINST THE UNITED STATES					
L. ADF Group Inc.	February 2000	\$90,000,000	Submission to Arbitration filed July 19, 2000. Award issued on Jan. 9, 2003. The Tribunal found in favor of the United States on the merits.	Articles 1102, 1103, 1105, and 1106.	The Federal Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations requiring that federally-funded state highway projects use only domestically produced steel.
2. Camfor Corp.	Nov. 5, 2001	\$250,000,000	Submission to Arbitration filed July 9, 2002.	Article 1102, 1103, 1105, and 1110.	U.S. antidumping, countervailing duty, and material injury determinations with respect to imports of softwood

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
3. Doman Industries Ltd.	May 1, 2002	\$513,000,000	Not available	Articles 1102, 1103, 1104, 1105, and 1110.	lumber U.S. antidumping and quota allocation determinations (softwood lumber).
4. Kenex Ltd.	Jan. 14, 2002	\$20,000,000	Submission to Arbitration filed Aug. 2, 2002.	Articles 1102, 1103, 1105, and 1104.	The Drug Enforcement Administration's interpretation of the Controlled Substances Act as prohibiting the sale of products that cause THC tetrahydrocannabinol (THC) to enter the human body.
5. Mechanex Corporation	July 2, 1999	\$970,000,000	Partial award on admissibility and jurisdiction issued Aug. 7, 2002. Reformulated claim filed Nov. 5, 2002.	Articles 1102, 1105, and 1110.	California ban on the use or sale in California of the gasoline additive MTBE.
6. Mondelev International Limited	May 6, 1999	\$50,000,000	Submission to Arbitration filed Sept. 1, 1999. Award on the merits finding for the U.S. issued Oct. 11, 2002.	Articles 1105 and 1110.	Enactment of the Massachusetts Tort Claims Act and enforcement of the Act by the Supreme Judicial Court of Massachusetts to deny claims by investors against the Boston Redevelopment Authority.

CLAIMANT	NOTICE OF INTENT	AMOUNT IN DISPUTE (USD UNLESS OTHERWISE NOTED)	STATUS	NAFTA PROVISIONS ALLEGEDLY BREACHED	MEASURE
7. R. Loewen and Loewen Corporation	July 29, 1998	\$725,000,000	Interim award on jurisdiction issued Jan. 5, 2001.	Articles 1102, 1105, and 1110.	A Canadian corporation seeks damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts.
8. Tembec Corp.	May 4, 2002	Not available	Not available	Not available	Not available