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Foreign-Investor Protection and the Environment: A NAFTA Chapter 11 Update

by Robert Meltz

Imagine you run a Canadian company that mines precious metals. Your company owns a U.S. subsidiary that holds unpatented mining claims on federal lands known as the California Desert Conservation Area.[1] You're optimistic that the U.S. government will approve your proposal to build and operate an open-pit, cyanide gold mine there because the Secretary of the Interior, Gale Norton, has just rescinded the denial of her predecessor, Bruce Babbitt—though she hasn't granted approval as yet.

But you have a second hurdle. In December 2002, the California State Mining and Geology Board, at the urging of Gov. Gray Davis, adopted an emergency regulation requiring the backfilling of all mining pits, followed by grading to restore approximate original contour. A few months later, the governor signed into law a bill making these requirements permanent, stating that it "essentially stops" your mine. Indeed, the new law is limited to projects located within a mile of a Native American sacred site, which just happens to describe your proposed project. You believe that the backfilling and contouring requirements are extraordinary for metallic mineral mines, and that they completely destroy the value of your mining claims.

You seek legal redress. But you reject the usual course: a "taking" action under the California or federal constitution against the state of California.[2] Counsel has advised that it may be easier to get compensation under the North American Free Trade Agreement (NAFTA)[3] pursuant to the binding arbitration it offers for "investor-state" disputes. You give the go-ahead for such a NAFTA claim, bypassing the domestic courts entirely. The claim asserts that the United States, by the actions of California, violated NAFTA's guarantee of "fair and equitable treatment" and its prohibition against direct or indirect expropriation without compensation.

The above tale, a real-life one now captioned *Glamis Gold Ltd. v. United States*,[4] has played out many times before. In 26 instances, and at an accelerating pace, investors in the three NAFTA signatories (United States, Canada, and Mexico) have invoked the investor-state dispute resolution mechanism in NAFTA Chapter 11 to seek compensation from one of the other two signatories.[5] Several of these claims have involved environmental restrictions of one sort or another, and two of those have involved environmental restrictions in the United States.[6]

Notwithstanding the growing number of filings, the corpus of final arbitral awards under Chapter 11 remains a thin one. Given the meager record, this Article eschews the bold theorizing and broad conclusions that many NAFTA observers have issued, and confines itself to objective updating and some modest concerns at the end. Time will tell whether this approach was overcautious.

Part I of this Article gives general background for understanding the context of NAFTA Chapter 11 claims. Part II reviews the arbitration procedure set in motion when an investor from a NAFTA signatory country files a Chapter 11 claim. Parts III and IV then summarize the debate over the two NAFTA Chapter 11 substantive protections generating much of the heat: Article 1105(1), calling for "fair and equitable treatment" of foreign investors, and Article 1110, setting the prerequisites for expropriation of investments. Part

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1. This is not an unusual situation. U.S. companies that are foreign-owned, principally by Canadians, own 21% of the mining-claim acreage in the contiguous United States. Environmental Working Group, Who Owns the West? (2004), *available at* http://www.ewg.org. Though the General Mining Law restricts mining claims on federal lands to U.S. citizens, 30 U.S.C. §22, this requirement is held to be met by domestic corporations owned by foreign persons.
2. We leave aside the federal preemption issue—whether California's backfilling and original contour requirements may apply to mining claims on federal land.
3. North American Free Trade Agreement, *reprinted in* H. Doc. No. 103-159, vol. 1, at 712 et seq.; 32 I.L.M. 289 (1993) (chs. 1-9), 32 I.L.M. 605 (1993) (chs. 10-22). The North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182 enacted Dec. 8, 1993, is primarily codified at 19 U.S.C. §§3301-3473.
4. Notice of Arbitration filed December 9, 2003.
5. The breakdown is as follows: 11 against the United States, 5 against Canada, and 10 against Mexico.
6. The two NAFTA Chapter 11 claims involving environmental restrictions in the United States are Glamis Gold Ltd. v. United States and Methanex Corp. v. United States, both summarized in Part V of this Article.

V offers summaries of the environmentally based NAFTA claims filed so far, and some of the nonenvironmental ones also. Finally, Part VI offers some general concerns, concluding that it is premature as yet to praise or condemn the accreted jurisprudence of the NAFTA Chapter 11 panels. Nonetheless, a mechanism operating with little case law precedent as yet, but touching on important public policy areas, must be closely watched.

I. General Background

Beginning in 1962, over 1,800 bilateral investment treaties have been negotiated throughout the world, the large majority after 1990.[7] The United States itself is a Party to 45, and several more may soon be under negotiation.[8] The purpose of these agreements is to protect foreign investment in the host country, and—important here—to provide in many cases a binding arbitration mechanism for resolving disputes between investor and host country.[9] Almost always, U.S. bilateral investment treaties have been with developing countries or emerging economies, which invested minimally in the United States. Thus, there was little occasion for foreign-investor claims against the United States.

No longer. Since 1994 when NAFTA took effect, its foreign-investor protections and arbitration mechanism, which closely track the modern bilateral investment treaties, have been available for use against the United States by countries (Mexico, and especially Canada) that invest heavily in the United States. NAFTA, that is, has created not only the *legal possibility* of foreign-investor claims against the United States, as many of the bilateral investment treaties do, but the *actual occurrence* of them as well. The tables are now turned.

The occurrence of NAFTA Chapter 11 claims against the United States has sparked a vigorous and multifaceted debate in this country—by legal commentators,[10] mass media, nongovernmental organizations, the U.S. Congress, and even state governments. Is there any precise content to the substantive obligations imposed on the signatory nations by Chapter 11? Are there infringement of sovereignty issues, as when NAFTA arbitration panels review decisions of U.S. courts?[11] Is there a constitutional problem with the arbitration panels that wield judicial authority under NAFTA without the pay and tenure safeguards that ensure the independence of Article III judges?[12] Should panel proceedings be required to be open to the public, given their importance for larger public policy issues in the respondent nation? Should panel decisions be reviewable by domestic courts on the merits?

Most significant for present purposes, might Chapter 11 claims by foreign investors, and the prospect of large damages awards, chill the enforcement of legitimate government regulations enacted in the public interest, such as those protecting the environment?[13] This issue received little attention during the negotiations leading to NAFTA's adoption, and the first few years thereafter.[14] Underscoring this question is the worry that Chapter 11 may confer greater rights on foreign investors in this country than are available to U.S. investors under domestic law. This concern in connection with the expropriation provisions in the proposed Multilateral Agreement on Investment[15] reportedly helped scuttle the agreement, the negotiating text of which "originally incorporated a compensation requirement identical to that of NAFTA."[16] While the United States has won each of the two finally decided NAFTA Chapter 11 claims against it, and a third decision whose completeness is now in issue,[17] some observers argue that the hour is still early and that one or two of those wins were in easy cases.

Other voices contend to the contrary that such concerns are overblown. They take heart from the unbroken U.S. winning streak. NAFTA panels to date, they say, "took a reasoned, cautious, careful approach to the applicable law under the NAFTA's investment chapter and the role of

7. The number exceeds 2,000 if regional investment treaties are included.

8. Seven of the 45 treaties have not yet entered into force. For a description of the U.S. bilateral investment treaty program and a listing of the treaties, go to http://www.state.gov/e/eb/rls/fs/22422.htm. *See also* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201 (1988).

9. An earlier generation of agreements protecting foreign investors, the bilateral Treaties of Friendship, Commerce, and Navigation entered into by the United States up until 1966, contained no mechanism by which the investor individually could assert claims against the host country. *See generally* Kenneth J.Vandevelde, U.S. Investment Treaties: Policy and Practice 14-19, 22 (1992).

10. More recently published articles not mentioned elsewhere herein are: Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 30 Vand. J. Transnat'l L. 37 (2003); Jack J. Coe Jr., *Taking Stock of NAFTA in Its Tenth Year*, 36 Vand. J. Transnat'l L. 1381 (2003); Sanford E. Gaines, *The Unexpected Story of NAFTA Chapter 11, in* Greening NAFTA 173 (David L. Markell & John H. Knox eds., 2003); Jenny Harbine, *NAFTA Chapter 11 Arbitration: Deciding the Price of Free Trade*, 29 Ecology L.Q. 371 (2002); Matthew C. Porterfield, *International Expropriation and Federalism*, 23 Stan. Envtl. L.J. 23 (2004); Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 Hous. J. Int'l L. 301 (2003); Madaline Stone, *NAFTA Article 1110: Environmental Friend or Foe?*, 15 Geo. Int'l Envtl. L. Rev. 763 (2003).

Recent books are NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Todd J. Weiler ed., 2004), and Whose Rights?: The NAFTA Chapter 11 Debate (Laura Ritchie Dawson ed., 2002).

11. *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557 (2003); Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations*, 21 Yale J. Int'l L. 395 (1996). The issue even made the front page of the *New York Times*: Adam Liptak, *NAFTA Tribunals Stir U.S. Worries: Obscure Courts Reviewing American Judgments*, N.Y. Times, Apr. 18, 2004, at A1.

12. *See generally* John D. Echeverria, *Who Will Decide for Us?*, Legal Times, Mar. 8, 2004.

13. *See generally* David A. Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 ELR 10646 (June 2001); J. Martin Wagner, *International Investment, Expropriation, and Environmental Protection*, 29 Golden Gate U. L. Rev. 465 (1999); Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment (International Institute for Sustainable Development, Working Paper, 1999).

14. Mann & von Moltke, *supra* note 13, at 3.

15. Negotiated under the auspices of the Organization for Economic Cooperation and Development.

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

17. *See* Loewen Group v. United States. According to the claimants, the arbitral decision on the merits in June 2003 overlooked the fact that there was a claim by Loewen Group's founder in his individual capacity. Two months later, the United States asked the arbitral panel for a supplementary decision clarifying the disposition of the individual claim.

investor-State tribunals"—not the expansive readings of Chapter 11 or the ubiquitous court of last resort role that some feared.[18] Moreover, granting foreign investors greater protection than is available to locals (if, in fact, that is what NAFTA does), and a dispute-resolution mechanism to back it up, may be justifiable as a quid pro quo for obtaining an acceptable degree of protection abroad for U.S. investors. Nor, they argue, should the United States give up on the time-tested mechanism of international arbitration simply because it is now on the receiving end of investor claims.[19]

The Chapter 11 claims filed so far have alleged violations of the following substantive obligations imposed on the United States, Canada, and Mexico by that chapter—

> Article 1102: National Treatment. Each NAFTA Party must "accord to investors of another [P]arty treatment no less favorable than that it accords, in like circumstances, to its own investors . . . ."
>
> Article 1103: Most-Favored-Nation Treatment. Each Party must afford investors of another Party, and their investments, "treatment no less favorable than that it accords, in like circumstances" to investors and investments of investors of any other Party, or of a non-Party.
>
> Article 1104: Standard of Treatment. Each Party must afford investors of another Party, and their investments, "the better of the treatment required by Articles 1102 and 1103."
>
> Article 1105(1): Minimum Standard of Treatment. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
>
> Article 1106: Performance Requirements. No Party may impose specified requirements on the investments of investors of a Party or non-Party, including "to export a given level or percentage of goods or services" or "to achieve a given level or percentage of domestic content."
>
> Article 1110: Expropriation and Compensation.
>
> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . . , except (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . . .

These Chapter 11 obligations mirror those in many bilateral investment treaties.

Of the Chapter 11 provisions listed, Articles 1105 and 1110 have garnered far and away the most attention. The ambiguity of key phrases in those provisions—"fair and equitable treatment" in Article 1105, and "indirectly . . . expropriate" in Article 1110—plays into the fear of some, and the hope of others, that foreign investors in the United States may use Chapter 11 arbitration to obtain more favorable rulings than are available under U.S. law to native investors. In our opening chronicle of the Glamis Gold Ltd. claim under Chapter 11, the mention of counsel's preference for a Chapter 11 claim over a domestic filing was based on reports that Glamis "acknowledges that it is preparing the Chapter 11 complaint because it is easier than trying to get compensation through the U.S. courts."[20]

Further heightening Chapter 11's importance is its "enormously broad" definition of "investment"[21]—the threshold term defining *what* is protected by Chapter 11's substantive guarantees. An "investment" may take the form of: (1) an "enterprise" (defined to mean "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association")[22]; (2) equity securities and certain debt securities of an enterprise; (3) certain loans to enterprises; (4) an interest in an enterprise that entitles the owner to share in its income or profits, or in its assets on dissolution; (5) property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; or (6) interests arising from the commitment of capital or other resources to economic activity. This expansive coverage ensures that NAFTA claims will continue to fuel a debate over whether Chapter 11 protections exceed domestic-law guarantees.

A. Bipartisan Trade Promotion Authority (TPA) Act

Though this Article hones in on NAFTA, we cannot neglect future trade agreements entirely. This brings up the TPA,[23] enacted August 6, 2002, which governs the negotiation of U.S. free trade agreements after that date.[24] More precisely, the TPA governs the negotiation of those free trade agreements as to which the president wishes to use the "fast track" congressional approval mechanism in the Act, under which Congress may make no amendments to the agreement but only vote up or down. Foreign governments prefer to negotiate trade agreements under such a no-amendments approval mechanism because otherwise Congress is likely to seek changes, presumably to the U.S. benefit, before approving the agreement.

The TPA sets out "principal trade-agreement negotiating objectives" for the United States in the area of foreign investment, among many others. Important here, several of the foreign-investment objectives directly respond to criticisms leveled at NAFTA Chapter 11 over the years, seeking to ensure that its perceived flaws are not replicated in later free trade agreements. A prominent example is the TPA in-

18. Prepared statement of Barton Legum, Chief, NAFTA Arbitration Div., Office of the Legal Adviser, U.S. Dep't of State, at 2003 International Trade Update (Washington, D.C., Jan. 30, 2004) (on file with the author). *See also* Gary Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties—A Threat to Democracy or the Dog That Didn't Bark?*, 18 ICSID Rev.-F.I.L.J. 1 (2003).

19. *See, e.g.*, Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale J. Int'l L. 365 (2003); Daniel M. Price, *NAFTA Chapter 11—Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 Can.-U.S. L.J. 107 (Supp. 2001). While with the Office of the U.S. Trade Representative, Daniel Price served as negotiator of NAFTA Chapter 11.

20. Inside U.S. Trade, Aug. 8, 2003.

21. Art. 1139. The "enormously broad" characterization is from Price, *supra* note 19.

22. Art. 201(1).

23. Pub. L. No. 107-210, tit. XXI; 19 U.S.C. §§3801-3813.

24. Being prospective only, the TPA does not direct the renegotiation of any NAFTA provisions.
The TPA expires in mid-2005, unless extended two years to mid-2007. TPA §2103; 19 U.S.C. §3803.

struction that U.S. trade negotiators ensure in future trade agreements "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than [U.S.] investors in the United States. . . ."[25] This "no greater rights" goal was included largely to address concerns that foreign investors in this country may (once the nascent case law develops further) receive more favorable treatment for their NAFTA indirect-expropriation claims than do Americans investing here under domestic "regulatory takings" law.[26]

While "no greater rights" guards against divergence from U.S. law on the high side, other TPA provisions will work to minimize divergence in either direction. The Act instructs U.S. trade negotiators to pursue standards for both expropriation and fair and equitable treatment that are "consistent with United States legal principles and practice."[27] As to the latter, fair and equitable treatment, the TPA declares that pertinent U.S. legal principles include due process.

Other TPA provisions seeking to ameliorate perceived defects in Chapter 11 call for improving investor-state dispute resolution in future trade agreements by eliminating frivolous claims, enhancing opportunities for public input into the formulation of government positions, providing for an appellate body "to provide coherence to the interpretation of investment provisions in trade agreements," creating greater transparency, e.g., by making all hearings public, and accepting amicus curiae submissions.[28] Plainly, many of these objectives reflect a concern that NAFTA arbitral panels decide matters impinging on important public policy realms without participation by anyone other than the claimant and the NAFTA signatories.

These TPA provisions already have shaped the investor-state dispute provisions in the first two U.S. free trade agreements—with Chile and Singapore—that have taken effect since its enactment.[29] These agreements have become the model for the next generation of foreign-investor provisions in U.S. free trade agreements—witness the foreign-investor provisions in the Central American Free Trade Agreement and U.S.-Morocco Free Trade Agreement, signed spring 2004 and now moving through the congressional approval process.[30] Given the general U.S. policy of seeking investor-state dispute resolution in U.S. free trade agreements, one should watch as well the works in progress. Recently negotiated or under negotiation by the United States are additional regional free trade agreements—the Andean Free Trade Agreement, Free Trade Area of the Americas Agreement, and U.S.-South African Customs Union Free Trade Agreement—and several bilateral free trade agreements.

In light of the status of Chile and Singapore as post-TPA prototypes, this report indicates the changes from NAFTA to those agreements in footnotes throughout Parts II, III, and IV.[31] These footnotes are effectively an article within this Article, sketching the shape of things to come. It will be interesting to see whether TPA, Chile, and Singapore cast a backward shadow as well, influencing arbitral interpretation of Chapter 11.

B. The Proposed Model Bilateral Investment Treaty

The TPA does not apply to bilateral investment treaties, which differ from free trade agreements in both scope of coverage and congressional approval route.[32] Nonetheless, one may expect that as a practical matter, the TPA provisions governing foreign-investor protections in free trade agreements will be influential in U.S. negotiation of future bilateral investment treaties. Indeed, this has already come to pass. Presently, a proposed Model Bilateral Investment Treaty (Model BIT), replacing the 1994 Model BIT, is being circulated within the executive branch. The new version incorporates all of the TPA-inspired innovations contained in Chile and Singapore. The one bilateral investment treaty now being negotiated—between the United States and Uruguay—tracks the proposed Model BIT. The United States having recently reinvigorated its bilateral investment treaty program, more such clones of the new Model BIT may be expected.

II. NAFTA Chapter 11 Arbitration Procedure

A. Initiating a Chapter 11 Claim for Arbitration

Chapter 11 comes into play when an investor from a NAFTA Party believes that another NAFTA Party (or politi-

25. TPA §2102(b)(3); 19 U.S.C. §3802(b)(3). The legislative history makes abundantly clear that this language does not apply to procedural issues, such as exhaustion of remedies and access to appellate procedures. H.R. Conf. Rep. 107-624, at 156 (2002).

26. Earlier generations of American investors confronted the "no greater rights" argument as one undercutting the rights of American investors abroad.

> In 1938, in a famous exchange between Secretary of State Hull and the Minister of Foreign Relations of Mexico, the United States insisted that the property of aliens was protected by an international standard under which expropriation was subject to limitations. . . . In contrast, the Government of Mexico insisted that international law required only that foreign nationals be treated no less favorably than were nationals. . . .

Restatement (Third) of Foreign Relations Law §712, Reporters' Note 1 (1986). These U.S. and Mexican positions, known respectively as the Hull Doctrine and the Calvo Doctrine, continue to reverberate in the international law of expropriation today—the former endorsed chiefly by capital-exporting countries, the latter by developing countries.

27. TPA §2102(b)(3)(D)-(E); 19 U.S.C. §802(b)(3)(D)-(E). *See generally* Ethan Shenkman, *Could Principles of Fifth Amendment Takings Jurisprudence Be Helpful in Analyzing Regulatory Expropriation Claims Under International Law?*, 11 N.Y.U. Envtl. L.J. 174 (2002).

28. TPA §2102(b)(3)(G)-(H); 19 U.S.C. §3802(b)(3)(G)-(H).

29. Implementing legislation was signed by the president on September 3, 2003: Pub. L. No. 108-77 (Chile); Pub. L. No. 108-78 (Singapore).

30. For the final text of these agreements, go to http://www.ustr.gov. In a departure from the pattern, the U.S.-Australian Free Trade Agreement, also signed in spring 2004, contains no investor-state dispute mechanism. The official rationale was that Australia possesses a mature legal system whose values and procedural safeguards are similar to our own, hence no supranational arbitration bypass of the domestic legal system is needed. Legislation implementing this agreement, Pub. L. No. 108-286, was signed into law on Aug. 3, 2004.

31. *See generally* John D. Echeverria, *Changes in the Investor-State Litigation Process as a Result of the Chile and Singapore Trade Agreements*, *at* http://www.georgetown.edu/gelpi/papers/investorstate.pdf.; David A. Gantz, *Contrasting Key Investment Provisions of the NAFTA With the United States-Chile FTA*, *in* NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects, *supra* note 10, at 393.

32. Bilateral investment treaties essentially cover only what is treated in the investment chapter of a free trade agreement, which addresses many other trade matters as well. Also, being treaties, bilateral investment treaties are approved by advise and two-thirds consent of the U.S. Senate, while free trade agreements follow the legislation route of bicameral passage and presidential signature.

cal subdivision thereof) has breached an obligation under that chapter, and the investor (or an enterprise of the other Party owned or controlled by the investor) has suffered loss as a result. NAFTA instructs that the investor should attempt first to negotiate a resolution.[33] Pursuit of negotiation is not mandatory, however—nor is resort to the courts under domestic law.[34] NAFTA gives the investor the right to file a claim for arbitration against the allegedly offending nation at any time,[35] as long as the investor delivers written notice of its intention to file a claim at least 90 days before filing[36] and the claim is filed more than 6 months after the events giving rise to the claim.[37] Nor need the investor obtain the permission or participation of its own government, a departure from the customary practice in international law whereby grievances of individuals against foreign governments are asserted by their governments on their behalf. Indeed, giving investors a way to circumvent the vagaries and politics of national "espousal" of individual claims is a principal purpose of investor-state mechanisms such as NAFTA's.[38]

A Chapter 11 claim is filed against the NAFTA Party, i.e., the national government, even if the allegedly offending conduct was by a political subdivision of the Party. The investor chooses from among the two available sets of arbitration rules.[39] The investor, however, must waive its right to a proceeding before any domestic agency or court as to the measure alleged to be a NAFTA breach, except for proceedings seeking "extraordinary relief" not involving monetary damages (such as an injunction).[40] Nor can the investor assert the inconsistency of a government action with NAFTA in U.S. courts. Only in an action brought by the United States may a state or local law be declared invalid on NAFTA inconsistency grounds—whether or not preceded by a NAFTA panel award declaring inconsistency.[41] Such actions by the United States are to be used only as a last resort, when cooperative efforts fail.[42]

B. After the Claim Is Filed

Following the investor's filing of a claim, the investor and the respondent nation select the Members of the arbitration tribunal. (There is no permanent, standing tribunal.) The panel generally comprises three arbitrators—one appointed by each of the disputing Parties, with the third, presiding arbitrator chosen by agreement of the Parties.[43] The disputants also select a place of arbitration.[44]

Besides the filings of the Parties, the tribunal may receive input from experts appointed by it to report back on factual issues,[45] and from NAFTA signatories other than the respondent on questions of NAFTA interpretation.[46] In addition, in a major bow to pressures for wider participation, Chapter 11 tribunals have ruled that they have the power to accept amicus briefs from outside persons,[47] and recently the ministerial-level Free Trade Commission established under NAFTA has confirmed this authority.[48] In January 2004, the panel in *Methanex Corp. v. United States* ruled that it would in fact accept such briefs, a NAFTA first that had been assiduously pursued by environmental groups.[49] However, Chapter 11 tribunals are without power to allow intervention as a Party.[50] In response to the concerns of some observers as to the lack of transparency in NAFTA arbitral

33. Art. 1118.

34. An exception was recognized in the final award in The Loewen Group, Inc. v. United States (2003). When the Chapter 11 claim is based on a *judicial* action of the respondent, the claimant first must exhaust opportunities for appellate review.

35. Arts. 1116 (claim by an investor of a Party on its own behalf), 1117 (claim by an investor of a Party on behalf of an enterprise). The principal difference between claims brought under the two articles is that with Article 1116 claims, any damages recovered are paid directly to the investor; with Article 1117 claims, damages recovered are paid to the enterprise, not the investor. To date, most arbitration claims under NAFTA Chapter 11 have been filed under Article 1117.

36. Art. 1119.

37. Art. 1120. Another time constraint ensures that claims are not filed too *late*: an investor may not make a claim if more than three years have passed from when the investor (or the enterprise) first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor (or enterprise) has incurred loss or damage. Arts. 1116, 1117.

38. *See* VANDEVELDE, *supra* note 9, at 22-25.

39. Actually, NAFTA allows the disputing investor to choose among *three* sets of rules: those under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), the ICSID Additional Facilities Rules, and the United Nations Commission on International Trade Law (UNCITRAL). Art. 1120(1). NAFTA allows use of the ICSID Convention, however, only when both the Party of the investor and the respondent nation are Parties to that convention, which Canada and Mexico are not. Art. 1120(1)(a).

40. Art. 1121(1)(b). Where an investor makes a claim on behalf of an enterprise, both the investor and the enterprise must waive the right to local proceedings. Art. 1121(2)(b).

41. North American Free Trade Agreement Implementation Act §102(b)(2)-(3); 19 U.S.C. §3312(b)(2)-(3). *See also* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 425-26 (1925) (Attorney General may sue state to enjoin actions inconsistent with U.S. treaty obligations; no statute is needed to authorize such suits).

42. North American Free Trade Agreement, Statement of Administrative Action 12, *reprinted in* H. Doc. 103-159 vol. 1, at 450 (1993).

43. Article 1123. If the disputing parties cannot agree on the presiding arbitrator, that person is appointed by the Secretary-General of the World Bank's ICSID, regardless of whether the investor has elected to use the ICSID Additional Facility or UNCITRAL rules. Art. 1124.
Arbitrators typically are drawn from the ranks of international-law academics and practitioners, and former government officials.

44. So far, the United States—in particular, Washington, D.C.—has been chosen as the place of arbitration for all claims in which the United States is a respondent. Plainly, given the farflung locations underlying these claims, NAFTA arbitrations may take place far from the site of the controversy, unlike challenges in U.S. courts to locally applicable government actions. Despite the official situs, however, there is nothing to prevent a NAFTA panel from holding hearings in the field.

45. Art. 1133.

46. Art. 1128. This provision does not authorize the tribunal to receive opinions by the nonrespondent Parties on the application of NAFTA provisions to the facts of the case.

47. The rulings came in Methanex Corp. v. United States and United Parcel Service of Am. v. Canada, and were limited to proceedings under the UNCITRAL arbitration rules.

48. Statement of the Free Trade Commission on Nondisputing Party Participation (Oct. 7, 2003), *at* http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf.
The Free Trade Commission consists of the three trade ministers of the NAFTA signatories and is charged with, among other things, resolving questions of NAFTA interpretation. Art. 2001(1). Its interpretations are binding on Chapter 11 tribunals. Art. 1131(2). Its "statements," however, are mere guidance.

49. Briefs were accepted on the U.S. side from Earthjustice on behalf of Bluewater Network, Communities for a Better Environment, and the Center for International Environmental Law, and on the Canadian side from the International Institute for Sustainable Development.

50. *See, e.g.*, United Parcel Service v. Canada Award on Jurisdiction (2002). Both the Chile and Singapore agreements authorize arbitral panels to accept and consider amicus briefs, but are silent as to intervention.

proceedings, the Free Trade Commission instructed arbitral panels to make public all documents submitted to, or issued by, them, subject to limited redaction.[51] But there is still no obligation to allow public access to panel proceedings, unless both Parties agree.[52] Presently simmering as well is the issue whether the NAFTA signatories will continue to deny Chapter 11 disputants access to documents generated during the negotiation of Chapter 11 a decade ago.

The arbitral tribunal must decide the issues "in accordance with [NAFTA] and applicable rules of international law."[53] Amplifying on "in accordance with [NAFTA]," the trade agreement states that the Parties shall interpret its provisions in light of its objectives, including "facilitat[ing] the cross-border movement of goods and services" and "increas[ing] substantially investment opportunities in the territories of the Parties."[54] There is no *stare decisis* as in American law; previous decisions of NAFTA tribunals are binding only as between the disputing Parties and with respect to the particular case.[55] Unsurprisingly, however, Parties and tribunal Members routinely cite and distinguish prior awards, and well-reasoned awards often prove influential.

C. The Final Award and Afterwards

If the tribunal decides for the investor, it may award only compensation (compensatory damages, interest, and costs, but not punitive damages) or restitution of property.[56] Injunctive relief is not available. Unlike World Trade Organization dispute panels, NAFTA arbitration tribunals cannot recommend that signatories change their laws or policies. *A fortiori*, NAFTA does not compel such changes.[57]

In the event of a compensation award based on the action of a nation's *political subdivisions*, the obligation to pay nonetheless accrues to the national government—which, after all, was the respondent. It is beyond NAFTA's concern whether the respondent nation may or should seek reimbursement from its political component; that is solely a domestic matter. The United States has yet to enact any such reimbursement mechanism. By contrast, U.S. law does speak to how inconsistency with NAFTA affects the *validity* of a state law, as noted above.[58]

What if either claimant or respondent is unsatisfied with the tribunal's decision? NAFTA creates no appellate body,[59] but claimant or respondent can seek limited relief in the domestic courts of the country chosen as the place of arbitration. Review is under either the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[60] (commonly called the New York Convention) or the arbitration statute of the place of arbitration. By either avenue, the grounds for review usually are much narrower than with judicial review in domestic courts. Under Article V of the convention, a Party nation may refuse recognition and enforcement of the decision on proof to a court that the decision deals with a matter beyond the scope of the submission to arbitration, is contrary to the public policy of that country, or offends other Article V provisions. Under the Federal Arbitration Act, grounds for a district court to set aside the arbitral decision include that the arbitrators were manifestly partial or guilty of misconduct, or "exceeded their powers."[61] Neither of these avenues for review allows the court to second-guess the arbitral tribunal on the merits.

Which of the disputants pays the tribunal's expenses hinges on the arbitration rules elected by the claimant at the outset. Under the ICSID (Additional Facility) rules, no preference between the disputants is stated.[62] Each of the three cases against the United States decided so far were conducted under those rules, and in each case the tribunals decided to have each Party bear one-half of the tribunal's costs. By contrast, under the United Nations Commission on International Trade Law rules, arbitration costs are "in principle" to be borne by the unsuccessful Party, though the arbitral tribunal may apportion between the Parties if circumstances warrant.[63]

III. Fair and Equitable Treatment

NAFTA Article 1105, titled "minimum standard of treatment," instructs in section 1 that

> [e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including *fair and equitable treatment* and full protection and security.[64]

The concept of fair and equitable treatment ranks among the most diffuse in international law. It dates back to negotiating efforts at multilateral investment treaties after World War II, and is included, with some variation, in the vast majority of

51. Note of Interpretation of Certain Chapter 11 Provisions (July 31, 2001). This is the only note of interpretation the Free Trade Commission has rendered so far.

52. The recent merits hearing in Methanex Corp. v. United States, held in June 2004, was open to the public—indeed, was broadcast live. Reflecting the TPA mandate, the transparency of investor-state arbitrations is extensively addressed in the Chile and Singapore agreements. A wide variety of documents related to the arbitration are to be made available to the public, and hearings are to be open to the public—with exceptions for confidential or privileged information.

53. Art. 1131(1).

54. Art. 102.

55. Art. 1136.

56. Art. 1135. An award of restitution of property must provide that the respondent nation may pay monetary damages in lieu of restitution. *Id*.

57. By contrast, when a NAFTA *Party* challenges another Party's measure (under the general dispute settlement provisions of NAFTA), an arbitral panel's ruling against the measure "shall" "[w]herever possible" result in the respondent party's nonimplementation or removal of the measure. Art. 2108(2).

58. *See supra* notes 41-42 and accompanying text.

59. The TPA establishes as a principal negotiating objective of the United States the creation of just such an appellate body. 19 U.S.C. §3802(b)(3)(G)(iv). Accordingly, the Chile and Singapore agreements obligate the Parties to "consider" within three years whether to establish a bilateral appellate body. More recently, the Central American Free Trade Agreement, signed May 2004, seems to concede the need for a more expeditious mandate. The agreement requires that within three months of entering into force, the Free Trade Commission (a ministerial-level body similar to NAFTA's Free Trade Commission) must create a Negotiating Group to develop an appellate body "or similar mechanism." The Negotiating Group is to supply the Free Trade Commission with a proposal within a year of its establishment.

60. 21 U.S.T. 2517, T.I.A.S. 6997. This treaty entered into force for the United States on December 29, 1970.

61. 9 U.S.C. §10(a).

62. *See* ICSID (Additional Facility) Arbitration Rules, art. 58.

63. UNCITRAL Arbitration Rules, art. 40(1).

64. Art. 1105 (emphasis added).

recent bilateral investment treaties. A key purpose is to guarantee the foreign investor a minimum standard of treatment not contingent on domestic law in the event that national treatment (in NAFTA, Article 1102) and most-favored-nation treatment (in NAFTA, Article 1103) by the host country are not adequate.[65] But what constitutes fair and equitable treatment? Notwithstanding the ubiquity of the phrase, there is little case law or other authoritative interpretation. What little exists is quite recent.[66] As one commentator states:

> The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of nondiscrimination and proportionality in the treatment of foreign investors.[67]

For NAFTA purposes, the most important clarification of the fair and equitable standard is that by the Free Trade Commission, issued July 31, 2001. This clarification was issued in response to "what [the NAFTA Parties] apparently feared was a growing propensity of arbitral tribunals to interpret Article 1105 expansively,"[68] which had resulted in two tribunal awards against respondent governments.[69] Today, nine Chapter 11 claims (environmental or otherwise) have produced final arbitral decisions as to fair and equitable treatment, of which four (two before the Free Trade Commission interpretation; two after) found violations.[70] Quoting the relevant part of the Free Trade Commission's statement in full:

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.[71]
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

With a single exception, the Free Trade Commission document has been accepted by all Chapter 11 panels to consider the issue as a proper "interpretation" of NAFTA, binding on future NAFTA panel decisions.[72] The Free Trade Commission's interpretation resolves a long-standing debate as to whether "fair and equitable treatment" equates with the minimum standard of international law or rather states an independent, self-contained standard.[73] Under NAFTA at any rate, it does the former—and no more; the tribunal may not set out its own idiosyncratic standard. The Free Trade Commission's interpretation also means of necessity that a customary international law minimum standard of treatment of aliens actually exists with regard to investments.[74]

At the same time, the Free Trade Commission's interpretation gives no hint as to the substantive content of the relevant customary international law to which it refers. To be sure, the arbitral decisions rendered under NAFTA Chapter 11 shed a bit more light, but not much. The decisions tell us the following: (1) the customary international law that is the touchstone for Article 1105(1) is the customary international law of today, not that of long ago, reflecting among other things the explosion in bilateral investment treaties since the 1960s; (2) what is unfair and inequitable need not equate with the outrageous or egregious, nor does it require bad faith or malicious intent; (3) what is unfair and inequitable cannot be judged in the abstract, but rather depends on the facts of each case; and (4) something more than illegality or lack of authority under the domestic law of the Party is required.[75]

65. *See, e.g.,* United Nations Conference on Trade and Development, Fair and Equitable Treatment 16 (1999).

66. *See generally* J.C. Thomas, *Reflections on Article 1105 of NAFTA*, 17 Foreign Investment L.J. (ICSID) 21, 22 (2002) (Article 1105(1) is "the most hotly disputed of all Chapter Eleven obligations").

67. Peter Muchlinski, Multinational Enterprises and the Law 625 (1995).

68. Alan C. Swan, *NAFTA Article 1105: Regulatory Reform and the Search for Good Governance*, paper delivered at Symposium on the Emerging Law of Foreign Investment, presented by the D.C. Bar International Law Section, Jan. 8, 2003 (on file with author).

69. S.D. Meyers, Inc. v. Canada Partial Award (2000); Metalclad Corp. v. United Mexican States Final Award (2000).

70. Note 69, *supra*, lists the "before" decisions. The two "after" decisions are Pope & Talbot, Inc. v. Canada (2002), and The Loewen Group, Inc. v. United States (2003). In *The Loewen Group*, discussion of fair and equitable treatment was explicitly dicta.

71. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law §102(2) (1986). It is to be contrasted with other sources of international law—namely, international agreements and "general principles common to the major legal systems of the world." *Id*. *See also* Statute of the International Court of Justice art. 38, 59 Stat. 1055, 1060, 1976 U.N.Y.B. 1052, 1055 (identifying "international custom, as evidence of a general practice accepted as law" as one of four sources of international law).

72. Article 1131(2) says that an "interpretation" of NAFTA by the Free Trade Commission is binding. The panel in Pope & Talbot, Inc. v. Canada, however, concluded that the Free Trade Commission document was not an interpretation, but rather an "amendment," which, under Article 2202, must be adopted by a different procedure than was used by the Free Trade Commission. This conclusion was explicitly dictum, however. Award in Respect of Damages (2002).

73. *See* Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 59-60 (ICSID 1995).

74. In the Chile and Singapore agreements, the provisions regarding "minimum standard of treatment" are changed relative to NAFTA Article 1105(1) to reflect each component of the Free Trade Commission interpretation. Thus, the new agreements make explicit: (1) the minimum standard of treatment is "in accordance with customary international law"; (2) fair and equitable treatment does not require treatment beyond what is required by customary international law; and (3) breach of another provision of the agreement, or of a separate international agreement, does not establish a breach of minimum standard of treatment.

75. The most recent Chapter 11 final award, in Waste Management, Inc. v. United Mexican States, reviews the fair and equitable treatment explications of prior Chapter 11 tribunals. ¶¶ 89-99 (2004). The award containing the fullest explication of fair and equitable treatment is that in Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, issued May 29, 2003, interpreting the concept in the Mexico-Spain bilateral investment treaty. *See* http://www.worldbank.org/icsid. The tribunal's opening observation was that fair and equitable treatment requires treatment of foreign in-

With specific regard to *judicial* actions of the respondent Party, the decisions say that the test is whether, having regard to accepted standards in the administration of justice, the court's decision was "clearly improper and discreditable."[76] A court's refusal to follow and apply earlier case law is not necessarily unreasonable. But a decision that is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice under international law. All three NAFTA signatories have urged at various times that the threshold for "fair and equitable" be set high.

The paucity of substantive content in "fair and equitable" is an issue partly because unlike the international law of indirect expropriation, there is for "fair and equitable" no precise counterpart in American law to consult for guidance. The development of the indirect-expropriation concept in international law may, particularly under the TPA mandate for post-NAFTA agreements, take some cue from U.S. regulatory takings law. In contrast, while "fair and equitable" clearly offers a parallel to due process principles in the United States (noted in the TPA), it may implicate a host of other principles as well. Nor is due process law, or at least substantive due process law, a model of clarity either.

IV. Indirect Expropriation

International law has long protected foreign-owned property not only from direct expropriation (seizure or formal appropriation), but from "indirect expropriation" as well.[77] In an indirect-expropriation claim, the property owner claims that mere government regulation or other conduct, in the absence of seizure or formal appropriation, has had an adverse effect tantamount to expropriating the property—notwithstanding that title to the property remains with the owner and the respondent government disclaims any expropriative intent.[78] No claim is made that such conduct exceeds government police powers, only that compensation should be paid. The importance of NAFTA Chapter 11 is that it has spawned a significant number of indirect-expropriation claims, including, for the first time, several against the United States.

The filing of these indirect-expropriation claims under Chapter 11 likely draws some impetus from their domestic-law first cousin, regulatory takings claims under the Fifth Amendment's Takings Clause[79]—the invoking of which has expanded considerably in recent decades. The two concepts share a fundamental premise: that government regulation may in some cases so severely affect the economic use of private property as to be tantamount to something—"expropriation" in international law, "physical taking" or "occupation" in U.S. law—that courts have long agreed clearly deserves compensation. This equating of severe regulation with physical takings and occupations debuted in U.S. law in a 1922 U.S. Supreme Court decision,[80] and has been a staple of the Court's decisions since the late 1970s. With the arrival of the NAFTA indirect-expropriation claims in the 1990s, the equating of the two is gaining wider attention internationally.[81]

NAFTA Article 1110 states:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a nondiscriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.[82]

Though the NAFTA negotiators considered whether to adopt a bright-line rule differentiating noncompensable from compensable regulation, the effort was abandoned as futile.[83] As a result, the phrases "indirectly . . . expropriate" and "measure tantamount to . . . expropriation" are not defined,[84] nor their relationship explained. NAFTA states only

vestments "that does not affect the basic expectations that were taken into account by the foreign investor to make the investment." *Id.* ¶ 154. It then enumerated three specific investor expectations that are protected.

76. *See, e.g.*, Waste Management, Inc. v. United Mexican States, ¶ 95 (2004) (quoting Mondev Int'l Ltd. v. United States Final Award, ¶ 127 (2002)). Reflecting the TPA mandate, the Chile and Singapore agreements state that "fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . .".

77. *See, e.g.*, Restatement (Third) of Foreign Relations Law §712, cmt. g, and Reporters' Note 6 (1987); Burns H. Weston, *"Constructive Takings" Under International Law: A Modest Foray Into the Problem of "Creeping Expropriation,"* 16 Va. J. Int'l L. 103 (1976); G.C. Christie, *What Constitutes a Taking Under International Law?*, 1962 British Y.B. Int'l L. 307.

78. In addition to "indirect expropriation," the terms "constructive takings" and "disguised" appropriation often appear. The related term "creeping expropriation" is defined by the *Restatement* as "taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned," and denotes sequential actions whose cumulative effect is an indirect expropriation. Restatement, *supra* note 77, §712, Reporters' Note 7.

79. The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." The law of regulatory takings is the body of standards developed by U.S. courts for determining when a regulatory interference with the use of private property is so severe or irrational as to effect a "taking" of that property, requiring just compensation under the clause. *See generally* Robert Meltz et al., The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation (1999).

80. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

81. *See generally* Stephen L. Kass, *Regulatory Takings Debate Reopened: Surprising, Potentially Significant, Context Is NAFTA Chapter 11*, N.Y. L.J., §2, Sept. 11, 2000.

82. "[P]aragraphs 2 through 6" specify that compensation shall be equal to the fair market value of the expropriated investment immediately before the expropriation took place, shall not reflect any change in value due to the intended expropriation, and shall include interest from the date of expropriation to the date of payment.

83. Price, *supra* note 19, at 6.

84. By contrast, the Chile and Singapore agreements do offer a loose definition of indirect expropriation in interpretive annexes. That definition tracks almost verbatim the prevailing regulatory takings test articulated by the Court in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 8 ELR 20528 (1978). Presumably, this close tracking is due to the TPA's "no greater rights" and "consistent with [U.S.] legal principles" mandates. *See supra* notes 25-27 and accompanying text.

Regrettably, the *Penn Central* standard remains ill-defined. Moreover, there is no guarantee that panels convened under Chile/Singapore will look to U.S. case law in interpreting the *Penn Central*-inspired indirect-expropriation definition in those agreements. The standard is ultimately one of customary international law. *See infra* note 85. Still, the Chile and Singapore annexes provide considerable guidance—all of it apparently intended to make it more difficult relative to NAFTA to win indirect expropriation claims. First, indirect expropriation is confined to actions of a Party that have "an effect

that arbitral tribunals are to resolve investor-state disputes "in accordance with this Agreement and applicable rules of international law."[85] The U.S. executive branch has continued to debate internally the meaning of "indirect expropriation," but it has not pursued a formal clarification by the Free Trade Commission, as it did with Article 1105.

The question, yet again, is whether NAFTA arbitral panels will interpret the agreement in rough conformity with U.S. law, in this case that on regulatory takings. Or will the panels head off in some other direction, and if so, what? If that new direction is more investor-friendly than U.S. law, might Article 1110 inhibit federal and state regulators seeking to apply legitimate environmental, public health and safety, and land use restrictions? Despite the vintage of indirect expropriation as a concept, the reported case law is sparse, and what little exists is not clearly relevant to interpretation of the NAFTA standard owing in large part to the very different circumstances, e.g., application of environmental laws, to which NAFTA is being applied.[86] The U.S. Department of State's position is that international expropriation law and U.S. takings law are not that different, at least as to result, and the *Restatement (Third) of Foreign Relations Law* agrees.[87]

NAFTA tribunal awards to date have provided only minimal elaboration on what constitutes an indirect expropriation. One decision said that the concept includes "incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."[88] Another clarified that legitimate police-power regulation can constitute indirect expropriation, even if nondiscriminatory, though the deprivation must be "substantial."[89] "Significant" and "substantial," of course, have a wide range of possible meanings.

A comparison of Article 1110 text and U.S. regulatory takings law suggests some areas of potential divergence, depending on how the still-embryonic Article 1110 case law develops. First, a takings claim under the Fifth Amendment's Takings Clause requires as a prerequisite a harm to "property." Under the terms of NAFTA Chapter 11, a claim depends instead on harm to an "investment," broadly defined in Chapter 11 to include some interests not generally viewed as property in U.S. law.[90] The significance of this textual divergence may be minimized if tribunals ultimately adopt the U.S. position that Chapter 11's silence notwithstanding, the claimant must have a property right in the investment in order for the claim to be cognizable.[91]

Second, U.S. takings law firmly embraces the concept of the "relevant parcel," under which a court must analyze a regulatory taking claim by reference to the plaintiff's entire physical parcel, the entire bundle of rights held therein, and the entire span of time covered by the property interest in question.[92] In short, a court must look at not only what the property owner lost, but what he/she still has. NAFTA decisions have yet to make any broad pronouncements in this realm, though some awards suggest that the right to sell in a specific market may be considered property separate from the remainder of plaintiff's interests in the business.[93]

Third, one component of the U.S. regulatory takings test is the degree to which the government has interfered with the "reasonable investment-backed expectations" of the property owner.[94] Certain circumstances routinely have been viewed by U.S. courts as undercutting the reasonableness of such expectations—for example, the claimant's decision to enter voluntarily a highly regulated field,[95] or to buy a parcel of land *after* a regulatory scheme is in place.[96] NAFTA tribunals, on the other hand, have yet to speak extensively to the relevance of the reasonableness of the claimant's expectations.

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equivalent to direct expropriation." Second, it is made explicit that "adverse economic impact on the value of an investment, standing alone, does not establish that an indirect expropriation has occurred." And third, it is declared that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party . . . to protect legitimate public welfare objectives, such as public health, safety, or the environment, do not constitute indirect expropriations."

Finally, Chile/Singapore delete any mention of measures "tantamount to" expropriation, eliminating the confusion over whether this phrase in NAFTA Article 1110 means something different from "indirectly expropriate."

85. Article 1131(1). The Chile and Singapore agreements add the word "customary," saying that the concept of expropriation in those agreements takes its cue from "customary international law." One may well ask, of course, how the agreements can set forth *two* definitions of indirect expropriation: customary international law and the *Penn Central* standard in the previous footnote. Possibly the agreements' drafters believed that the two definitions are similar, or hoped they will converge in the future.

86. The largest body of international decisions addressing indirect expropriation comes from the Iran-U.S. Claims Tribunal (IUCT). These decisions would seem to offer guidance to NAFTA Chapter 11 panels, but there are at least two obstacles:

> First, the IUCT's jurisdiction extends to "expropriations or other measures affecting property rights," a standard that goes well beyond the NAFTA expropriation provision. [Second,] the factual scenarios underlying the IUCT claims are vastly different from those that NAFTA and similar contemporary tribunals are likely to face.

Been and Beauvais, *supra* note 16, at 57-58.

87. "In general, the line in international law [regarding indirect expropriation] is similar to that drawn in [U.S.] jurisprudence for purposes of the Fifth and Fourteenth Amendments to the Constitution in determining whether there has been a taking requiring compensation." Restatement (Third) of Foreign Relations Law §712 (1987), Reporters' Note 6.

88. Metalclad Corp. v. United Mexican States Award, ¶ 103 (2000), *partially overturned on jurisdictional grounds*, 89 Brit. Col. L.R. 3d 359 (2001).

89. Pope & Talbot v. United States Award, ¶¶ 99, 102 (2000).

90. The Chile and Singapore free trade agreements, by contrast, specify that an action by a Party cannot be an expropriation unless it conflicts with a "property right or property interest" in an investment. This is a major evolution from NAFTA and "would appear designed to exclude from coverage some trade-based claims, perhaps including those which were the subject of NAFTA claims in *Pope & Talbot* and *S.D. Meyers*, or situations in which the relationship between the alleged taking and the effect on the claimant is very indirect, as in *Methanex*. . . ." Gantz, *supra* note 31, at 422.

91. *See, e.g.*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, Methanex Corp. v. United States (filed Nov. 13, 2000).

92. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326-332, 32 ELR 20627 (2002).

93. *See, e.g.*, Pope & Talbot v. United States Award, ¶ 96 (2000).

94. *Tahoe-Sierra*, 535 U.S. at 336; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 8 ELR 20528 (1978).

95. Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993); Branch v. United States, 69 F.3d 1571, 1581 (Fed. Cir. 1995).

96. *Tahoe-Sierra*, 535 U.S. at 336 (endorsing concurrence by Justice Sandra Day O'Connor in Palazzolo v. Rhode Island, 533 U.S. 606, 636, 32 ELR 20516 (2001)); Rith Energy, Inc. v. United States, 270 F.3d 1347, 31 ELR 20603 (Fed. Cir. 2001).

Six of the filed Chapter 11 claims have produced final arbitral decisions as to indirect or "tantamount to" expropriation claims. Only one (*Metalclad*) found a taking, however, making expropriation claims a much less successful effort than fair and equitable treatment claims.

V. Claims Under NAFTA Chapter 11

The following discussion outlines all environmental claims filed under NAFTA Chapter 11 since its inception, whether or not finally decided. *Ethyl Corporation*, an environmental claim against Canada, was the very first Chapter 11 claim to be filed, in 1997. Some of the key nonenvironmental Chapter 11 claims are listed also.

As one would expect, the pattern of which country's investors seek arbitration against which other country has tended to follow the flow of capital investment. All claims against the United States have been filed by Canadian claimants; all claims against Canada by U.S. citizens; and all claims against Mexico, except one, have been filed by U.S. citizens.

A. Claims Against the United States

There have been two final dispositions of NAFTA Chapter 11 claims against the United States, *Mondev International* and *ADF Group*, and a third, *The Loewen Group*, whose finality is currently being arbitrated. In all three, the final or possibly final decisions have been in the government's favor.

1. *Glamis Gold Ltd.*

The facts underlying this Canadian company's claim are set out in the opening paragraphs of this Article. Glamis' claim, in sum, is that regulatory actions of the state of California effectively prohibited Glamis' U.S. subsidiary from proceeding with its proposal to operate a cyanide-based, gold surface mine on federal lands in that state. Glamis filed in 2003, seeking $50 million for alleged violations of NAFTA Articles 1105 and 1110. The Article 1110 claim asserts an indirect expropriation of its subsidiary's property rights in unpatented mining claims and related mill sites. Proceedings are in early stages.

2. *Methanex Corp.*

Methanex Corp., a Canadian firm, produces methanol. Two-thirds of the methanol produced is employed in the production of chemical intermediates used for a wide range of products such as plywood, particle board, and foams. One-third is destined for the fuel sector—largely for use in methyl tertiary butyl ether (MTBE). MTBE is added to gasoline to boost octane and to meet federal oxygenate requirements for reformulated gasoline, use of which is mandated by the 1990 Clean Air Act Amendments in the nation's worst ozone nonattainment areas. Asserting that MTBE was contaminating drinking water supplies in California, the governor ordered a phaseout of MTBE in gasoline sold there by December 31, 2002, later delayed by a year. On January 1, 2004, the ban took effect. In banning MTBE, California was hardly unique—19 states have now banned or restricted the use of MTBE in gasoline.[97] Notwithstanding, much of the debate over state MTBE regulation centers on California, which consumed about 32% of the nation's MTBE.

Methanex's NAFTA claim, filed in 1999, claims that California's action violates Articles 1105 and 1110 with regard to its indirectly wholly owned U.S. companies, which sell methanol for MTBE in California. It contends that the state-recited environmental concerns are a sham—that the phaseout was motivated largely by a desire to favor an MTBE competitor, ethanol, generally manufactured from biomass feedstocks (such as corn) produced in the United States. The claim seeks $970 million, based on profits Methanex allegedly will lose once California's ban takes effect.

In 2002, the arbitral tribunal ordered Methanex to submit a new pleading alleging facts that more specifically relate California's action (the MTBE phaseout) to Methanex in particular. This order was prompted by NAFTA Article 1101, which requires that challenged measures be those "relating to" investors of another Party—in effect, a NAFTA "proximate cause" requirement. Methanex's new pleading was filed November 2002, and the merits hearing was in June 2004.

3. Nonenvironmental Claims

In *Mondev International, Ltd. v. United States*, a Canadian firm embarked upon a commercial real estate development in Boston, through a Massachusetts limited partnership it owned. Allegedly contrary to the partnership's agreement with the city, the city refused to allow it to exercise its option to acquire a critical parcel of land. The city's motivation, according to Mondev, was political. The partnership ultimately lost in the Massachusetts Supreme Court. Mondev filed its NAFTA claim in 1999, asserting that due to the actions of the city, its redevelopment agency, and the Massachusetts high court, the United States had violated Articles 1102, 1105, and 1110. It sought $50 million. In 2002, the arbitration panel rejected all of Mondev's claims.

In *The Loewen Group, Inc. v. United States*, suit was filed in a Mississippi state court against The Loewen Group, a Canadian funeral home operator. The plaintiff was a local competitor of Loewen, whose claim involved various contract disputes. The state jury verdict against Loewen was for $500 million, including $400 million punitive damages, and the trial judge entered judgment on the verdict. Both the trial court and the Mississippi Supreme Court refused to reduce the $625 million bond required under state law to obtain a stay of execution pending appeal. According to Loewen, this forced it to abandon its appeal of the judgment and to settle an $8 million case for $175 million. Loewen's NAFTA claim, filed in 1998, alleged violations of Articles 1102, 1105, and 1110 based on the large verdict, the trial court's refusal to vacate it, and the refusal to reduce the bond amount.[98] It sought $725 million. Loewen argued that the state-court verdict was the product of a trial "in-

97. James E. McCarthy, Congressional Research Service, Clean Air Act Issues in the 108th Congress 3 (IB 10107, updated June 23, 2004).

98. This was the first claim against the United States filed under Chapter 11. *The Loewen Group* was defended initially by the U.S. Department of Justice (DOJ), eventually by the DOJ and U.S. Department of State jointly. All subsequently filed NAFTA Chapter 11 claims against the United States are or were defended solely by the Department of State.

fected by repeated appeals to the jury's anti-Canadian, racial, and class biases."

In 2003, the arbitral panel dismissed Loewen's claims for lack of jurisdiction. Loewen had, since the filing of its NAFTA claim, emerged from bankruptcy reorganization as a U.S. corporation. NAFTA, however, cannot be invoked between an investor and its own national government. In addition, where a claim is based on judicial action, as here, there must be final action by the Party's judicial system. Loewen, however, had failed to petition the Court. In dicta, the panel reached the merits, branding the state-court trial "a miscarriage of justice . . ." and violative of fair and equitable treatment under Article 1105. Such remarks suggest that had it not been for jurisdictional technicalities, the panel would have afforded compensation for the conduct of the Mississippi courts. Currently pending is the question whether the 2003 panel dismissal resolved the Loewen claim in its entirety, or whether the individual claim brought by the company's founder is still live.

In *ADF Group, Inc. v. United States*, a Canadian corporation that designs and erects structural steel, claimed damages for alleged injuries from the federal Surface Transportation Assistance Act of 1982. The Act and regulations require that federally funded state highway projects use only domestically produced steel. ADF asserted violations of Articles 1102, 1103, 1105, and 1106, and sought $90 million. On January 9, 2003, the arbitral panel dismissed all of ADF's claims. Because the domestic content requirement constituted procurement, it concluded, the company was exempt from Articles 1102, 1103, and 1106 pursuant to Article 1108. Nor had an Article 1105 violation been shown.

Canfor Corp. v. United States involves a Canadian forest products company that exports softwood to the United States. All of its softwood lumber destined for the United States is purchased by Canfor Wood Products, its wholly owned subsidiary in the United States. Canfor Corporation asserts losses allegedly suffered as a result of certain U.S. antidumping, countervailing duty, and material injury determinations on softwood lumber. As a result of those determinations, its U.S. subsidiary is required to pay increased duties on softwood lumber products exported to the United States. Canfor's claim asserts that the United States, through these determinations, breached Articles 1102, 1103, 1105, and 1110. It seeks damages of not less than $250 million.

Three other Chapter 11 claims involving the softwood lumber trade between Canada and the United States have been filed, including *Pope & Talbot, Inc. v. Canada* discussed below.

B. Claims Against Canada

1. *S.D. Myers, Inc. v. Canada*[99]

S.D. Myers, a U.S. company, recycles polychorinated biphenyl (PCB)-contaminated waste. The company, on its own and through its Canadian affiliate, sought to treat PCB waste from Canadian holders of such waste, including schools, universities, hospitals, and electric utilities. In 1995, the U.S. Environmental Protection Agency (EPA) issued an "enforcement discretion" permitting S.D. Myers to import PCBs into the United States on certain conditions. Having anticipated this development, however, two Canadian operators of hazardous waste facilities previously had met with the Canadian Minister of the Environment, arguing that EPA's action threatened them with serious economic harm. The day following EPA's action, Canada adopted a temporary ban between November 1995 and February 1997 on the export of PCB waste, forcing S.D. Myers' customers to have their waste handled at higher prices by a Canadian competitor. (In June 1997, months after Canada lifted the export ban, a U.S. court ruled that EPA lacked authority under the Toxic Substances Control Act for its general rule allowing import of PCB waste into the United States.[100] Since then, import of private PCB waste into the United States has, for the most part, been unlawful as a matter of *U.S.* law.)

S.D. Myers argued that the Canadian ban treated its Canadian affiliate differently than Canadian waste disposal companies. Its Chapter 11 claim, under Articles 1102, 1105, 1106, and 1110, was filed in 1998 and sought $20 million.

In the initial liability phase, the NAFTA tribunal found in 2000 that the Canadian ban breached Articles 1102 and 1105, since "there was no legitimate environmental reason for introducing the ban."[101] Rather, it found, Canada had closed its border to protect the market share of Canadian competitors from U.S.-based competition. The ban did not breach Article 1110, however, since it only delayed S.D. Myers' entry into the Canadian market by 18 months. In 2002, the tribunal issued a damages award against Canada, requiring it to pay S.D. Myers $CAN 6.05 million plus interest for discrimination against the company. Because Canada voluntarily withdrew the export ban in 1997 before the NAFTA claim was filed, the award will have no effect on existing law.

In 2001, Canada applied to a Canadian federal court to set aside the tribunal's liability and damages awards on the grounds, among others, that elements of the ruling exceeded the tribunal's jurisdiction and were contrary to the public policy of Canada. Environmental groups[102] motioned unsuccessfully to intervene. In 2004, the court rejected all of Canada's arguments.[103]

2. *Ethyl Corp. v. Canada*

Canada banned interprovincial and international sale of methylcylopentadienal manganese tricarbonyl (MMT), a gasoline octane enhancer suspected of adverse health effects. The only MMT supplier in Canada was a subsidiary of U.S.-based Ethyl Corporation, which in 1997 filed under Chapter 11 alleging that the ban violated Articles 1102, 1106, and 1110. Ultimately Canada suspended the ban and agreed to pay Ethyl about $13 million to compensate it for legal fees and other inconveniences. Possibly contributing to Canada's willingness to settle was the success of a challenge to the MMT ban filed by four Canadian provinces

99. *See generally* Brian T. Hodges, *Where the Grass Is Always Greener: Foreign Investor Actions Against Environmental Regulations Under NAFTA's Chapter 11*, S.D. Myers, Inc. v. Canada, 14 Geo. Int'l. Envtl. L. Rev. 367 (2001).

100. Sierra Club v. EPA, 118 F.3d 1324, 27 ELR 21347 (9th Cir. 1997).

101. Partial Award ¶ 195 (2000).

102. Greenpeace and Sierra Club of Canada.

103. Canada (Attorney General) v. S.D. Myers, Inc., 5 C.E.L.R. 3d 166 (F.C. Trial Div. 2004).

with a domestic arbitration panel, which found the ban to be arbitrary.

3. Nonenvironmental Claims

Pope & Talbot involves Canadian participation in the Canada-U.S. Softwood Lumber Agreement. An Oregon-based company filed a claim in 1998 asserting such participation violated Articles 1102, 1103, 1105, 1106, and 1110 by allocating fee-free export permits under the agreement in a way that placed the sawmills of its Canadian subsidiary at a competitive disadvantage in exporting lumber to the United States. It initially sought damages over $507 million. In 2000, the tribunal dismissed the investor's claims under Articles 1106 and 1110. In 2001, a second arbitral decision rejected the Article 1102 claim and one of the Article 1105 claims. As to another Article 1105 claim, regarding the treatment of the subsidiary in the verification review process, the tribunal held in 2002 that Canada had breached Article 1105 and awarded $461,566 in damages and interest.

In *United Parcel Service of America v. Canada*, United Parcel Service of American (UPS) claims that Canada Post engages in anticompetitive practices by using its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly parcel services. UPS alleges violations of Articles 1102 and 1105, and seeks $160 million in damages. In 2002, the tribunal rejected the Article 1105 claim, on the ground that there is no customary international law prohibiting or regulating anticompetitive behavior.

C. Claims Against Mexico

1. *Metalclad Corp. v. United Mexican States*

In the early 1990s, Mexico issued federal permits for a Mexican company to construct a hazardous waste facility in the state of San Luis Potosi. Assertedly in reliance on representations that all necessary permits had been granted, U.S.-based Metalclad Corp. exercised its option to buy the Mexican company and its permits. Thereafter, both the state and municipality objected to the facility, citing environmental concerns and community opposition, with the result that the facility, though completed, was never opened.

In 1997, Metalclad filed a claim against Mexico, seeking $90 million. It alleged that Mexico, by permitting or tolerating the actions of its state and municipality blocking the hazardous waste facility, violated Articles 1105 and 1110. In 2000, the NAFTA panel agreed with both claims, awarding the company $16.685 million.[104]

Mexico challenged the arbitral award in the British Columbia (Canada) Supreme Court, the first occasion on which a *court* has considered a NAFTA Chapter 11 award.[105] (A British Columbia court was dictated by the disputants' choice of Vancouver as the place of arbitration.) Canada and the province of Quebec were allowed to intervene. In 2001, the court set aside the arbitral panel's finding of a violation under Article 1105, but affirmed the expropriation found under Article 1110.[106] Afterward, the Parties settled for an amount slightly smaller than conferred by the arbitral award.

2. Nonenvironmental Claims

Two Chapter 11 claims involve waste management, but the issues are nonenvironmental. In *Azinian v. United Mexican States*, a Mexican company having U.S. investors held the concession for wastewater collection and disposal in a Mexican city. The company defaulted on certain obligations under the concession agreement, which the city terminated. The U.S. investors, alleging violations of Articles 1105 and 1110, claimed $14 million. The NAFTA panel rejected the claim in 1999, ruling that the city's alleged breach of its concession agreement did not state a claim for expropriation under Article 1110. And, under the circumstances of the case, if there was no violation of Article 1110, there was none of Article 1105 either.

Waste Management, Inc. v. United Mexican States involves a 1998 claim by USA Waste Services, Inc. (now Waste Management) under Articles 1105 and 1110. The claim was that a Mexican state and municipality had granted a 15-year concession to USA Waste's Mexican subsidiary for public waste management services, but failed to comply with payment and other duties in the agreement despite full performance by the subsidiary. It also asserted that a Mexican bank that had issued an unconditional guarantee for the payment arbitrarily refused to honor its guarantee. USA Waste claimed damages of $60 million, but both claims were dismissed in 2004.

VI. So Where Are We Now?

NAFTA gave rise to environmental concerns from the very beginning. Before NAFTA could be approved by the United States, an environmental side agreement had to be negotiated,[107] explicitly preserving the right of each signatory to protect the environment—indeed, requiring that the governments strengthen and enforce their environmental laws.[108] NAFTA's Preamble and Chapter 11 itself also

104. *See* Stephen L. Kass & Jean M. McCarroll, *The Metalclad Decision Under NAFTA's Chapter 11*, N.Y. L.J., Oct. 27, 2000, at 3 (arguing that in light of *Metalclad*, the authors' previous optimism that Chapter 11 claims would not chill environmental enforcement in NAFTA countries may have been premature).

Recently, an arbitral tribunal rendered a similar decision against Mexico in a claim arising under the bilateral investment treaty between Mexico and Spain. In Tecnicas Medioambientales Tecmed S.A. v. Mexico, Case No. ARB (AF)/00/2 (May 29, 2003), the tribunal found that a Mexican agency's failure to renew a toxic waste plant's license was not based on public health concerns, but rather on opposition from local residents. Accordingly, it held that the fair and equitable treatment and "tantamount to expropriation" guarantees in the treaty had been violated, and awarded the Spanish investor $5.5 million.

105. *See generally* Chris Tollefson, Metalclad v.United Mexican States *Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 Minn. J. of Global Trade 183 (2002).

106. United Mexican States v. Metalclad Corp., 89 Brit. Col. L.R. 3d 359 (2001), *available at* http://www.worldbank.org/icsid/cases.

107. North American Agreement on Environmental Cooperation (signed September 1993), *reprinted in* Message From the President Transmitting North American Free Trade Agreements, Supplemental Agreements, and Additional Documents 5 (H.R. Doc. No. 103-160, 1993). *See* 19 U.S.C. §3472.

108. "[E]ach Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to improve those laws and regulations." North American Agreement on Environmental Cooperation, *supra* note 107, art. 3.

are replete with urgings that environmental protection not be undermined.[109]

Given these origins, it is odd that the environmental concerns particular to Chapter 11's provisions on fair and equitable treatment and expropriation were so long to emerge. As to the latter, for example, by the time NAFTA was moving toward adoption in 1992 and 1993 regulatory taking law was receiving great attention in the United States—the Court having rendered a number of high-profile takings decisions from 1987 to 1992[110] and conservatives having adopted the Takings Clause as a tool for reining in government activity, often in the form of environmental regulation. Yet as noted, the possible use of Chapter 11's indirect expropriation article, a first cousin of takings law, against environmental regulation appears to have been entirely overlooked. It was only a cluster of Chapter 11 arbitrations in the late 1990s and 2000 that brought the environmental nexus to the fore and sparked the prodigious outpouring of commentary. This cluster, reviewed in Part V, consisted of *Metalclad*, *Ethyl Corp.*, and *S.D. Myers*.

This new-found environmental concern is justified notwithstanding that each of these arbitrations involved facts suggesting that the challenged government actions turned as much on venal motives as on substantive miscalculation or excessive burden imposed. *Metalclad* is laced with not-in-my-backyard syndrome, and *Ethyl Corp*. and *S.D. Myers* strongly implicate economic protectionism. For that matter, the two environmentally oriented Chapter 11 claims now pending against the United States, *Methanex* and *Glamis Gold*, also accuse the government (California) of venal motives. Noting this pattern, some commentators have suggested that meritorious, nondiscriminatory, properly applied environmental laws have nothing to worry about from NAFTA. But the door has been opened, and it is only a matter of time until Chapter 11 cases less tainted by such distractions will arise—cases where a presumably justified and a priori reasonable environmental restriction will hang in the balance. Nor is it difficult in many instances to conjure up a claim of improper motive.

As yet, the more extreme claims of environmental observers have not been borne out. After over 10 years, the United States has yet to lose a Chapter 11 case, environmental or otherwise. And the interpretive note mechanism of the Free Trade Commission remains available to cabin any arbitral rulings outside the international law mainstream, as long as the three signatories can agree. Nor can Chapter 11 tribunals be oblivious to the fish bowl of public and legal scrutiny in which they now operate, a sharp departure from the international commercial arbitrations of yore. Still, one must be mindful that Chapter 11 arbitrations touch on important public policy questions, and do so with only minimal guidance from existing NAFTA and international law, and with only minimal judicial review. The ubiquity of Canadian and Mexican investment in the United States makes this a recurring concern. The nature of Chapter 11 claims, more oriented to lost sales or profits than comparable claims under domestic law, also allows them to be asserted in a wide range of circumstances.

Aside from questions about the *substance* of future tribunal decisions, Chapter 11 has of late spawned a debate over architectural matters. Issues as to the Article III propriety of Chapter 11 tribunals, concerns over erosion of U.S. sovereignty and the limited judicial review of ad hoc panels, and other challenges go to the very structure of the supranational dispute resolution mechanism in NAFTA and other international agreements. And there remains the question whether a dual track arbitral-panel/domestic-courts system is necessarily with every nation the best way to provide the quid pro quo for adequate treatment of U.S. investors abroad. Certainly these are all worthwhile inquiries, even those that are a bit hoary by now.

In sum, Chapter 11 deserves some latitude as a work in progress, but it also deserves our ongoing scrutiny.

109. NAFTA's preamble declares that the broad goals of the Agreement are to be achieved "consistent with environmental protection and conservation" and that the Parties resolve to "promote sustainable development" and "strengthen the development and enforcement of environmental laws and regulations." Chapter 11 devotes an article exclusively to "Environmental Measures," noting the need for investment activity to be environmentally sensitive and barring Parties from relaxing environmental and public health and safety measures to encourage investment.

110. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 17 ELR 20440 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 17 ELR 20787 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825, 17 ELR 20918 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992).