1-1-2001

Investor-State Disputes under NAFTA: The Empire Strikes Back

Charles H. Brower II
University of Mississippi, charles.brower@wayne.edu

Investor-State Disputes Under NAFTA: The Empire Strikes Back

CHARLES H. BROWER II*

This Article examines the growing opposition to arbitration of investor-state disputes involving challenges to regulatory measures under Chapter 11 of NAFTA. The NAFTA Parties apparently seek to restore national sovereignty over such matters by subjecting these awards to heightened review by municipal courts at the seat of arbitration, effectively giving Canadian, Mexican, and United States courts the final authority to interpret Chapter 11. When successful, this practice violates both the letter of Chapter 11 and the intent of the NAFTA Parties to place investor-state disputes within the deferential legal framework of international commercial arbitration. Although the NAFTA Parties may, escape liability for such unlawful conduct, they threaten to undermine the past century's efforts to promote robust principles of state responsibility for economic injuries to aliens. Furthermore, routine derogation from the principle of voluntary acceptance of authoritative decisions rendered at the international level by impartial bodies charged with supervision of treaty compliance bodes ill for the development of the rule of law in international economic relations.

* Croft Assistant Professor of International Law and Jessie D. Puckett, Jr. Lecturer in Law, University of Mississippi School of Law. The author gratefully acknowledges the financial support of Dean Samuel M. Davis and the Lamar Order.

I. INTRODUCTION

Once described as an "overwhelmingly positive" investment regime,[1] Chapter 11 of the North American Free Trade Agreement (NAFTA)[2] has become a lightning rod for opponents of globalization and the intrusion of international law into domestic affairs.[3] The growing resistance to Chapter 11 emanates from over one dozen claims brought by NAFTA investors against Canada, Mexico, and the United States (collectively, the "NAFTA Parties").[4] Heard by panels

1. Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA L. & BUS. REV. AM. 82, 115 (1996).

2. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605, 639–49 [hereinafter NAFTA].

3. *See, e.g.*, William Greider, *Sovereign Corporations*, THE NATION, Apr. 30, 2001, at 5 (describing Chapter 11 as "the smoking gun in the intensifying argument over whether globalization trumps national sovereignty"); Bruce Stokes, *Talk About Unintended Consequences!*, NAT'L J., May 26, 2001, at 1592 (referring to Chapter 11 as "the new cause célèbre among free-trade critics").

4. *See* Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 28 PEPP. L. REV. (forthcoming 2001) (manuscript on file with author); Daniel M. Price, *Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 113 (2000). Because many of the submissions in Chapter 11 proceedings are confidential, writers frequently cannot obtain sufficient information about the existence or nature of pending disputes. *See* HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT (1999), *available at* http://www.iisd.org/trade/Chapter11.htm; Kevin Banks, *NAFTA's Article 1110—Can Regulation Be Expropriation?*, 5 NAFTA L. & BUS. REV. AM. 499, 501 (1999); Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L L. REV. 1321, 1342–43 (2000); Sabrina Safrin et al., *International Legal Developments in Review (Public International Law/Environmental Law)*, 34 INT'L LAW. 707, 725 (2000); J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 487 (1999); Julia Ferguson, Note and Comment, *California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA*, 11 COLO. J. INT'L ENVTL L. & POL'Y 499, 506, 513 (2000); Stephen L. Kass, *Regulatory Takings Reopened: Surprising, Potentially Significant, Context Is NAFTA Chapter 11*, N.Y.L.J., Sept. 11, 2000, at S2. The Freedom of Information Act (FOIA) should provide access to relevant documents within the possession, custody, or control of the Department of Justice (which is handling Loewen

of three arbitrators, these claims seek billions of dollars in damages and challenge a variety of regulatory measures, including measures that ostensibly protect public health, safety, and the environment; establish import and export controls; and implement treaties.[5] A few claims even attack the legitimacy of important governmental services, including the judicial systems of Massachusetts and Mississippi, which proud citizens might characterize as models for the rest of the world.[6] These developments horrify Canadian and U.S. publicists, who denounce the "aggressive"[7] use of investor-state arbitration as an

---

Group, Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3 (1998), *available at* http://www.naftaclaims.com (last visited Oct. 20, 2001)) and the State Department (which is handling all other Chapter 11 claims). In response to the author's FOIA request of October 5, 2000, the Department of Justice provided documents on the *Loewen* case and waived copying and search fees. The State Department's regulations indicate that it "shall" waive or reduce search and copying fees, provided that "[d]isclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requester." 22 C.F.R. § 171.15 (2001). Surprisingly, the State Department initially denied the author's October 5, 2000 request for a fee waiver on the grounds that disclosure would not serve the public interest. Following an administrative appeal, the State Department agreed in principle to some fee reduction during the summer of 2001. As of this writing, the author and the State Department have not agreed on the amount or nature of the fee reduction. Therefore, the author has not received any responsive documents from the State Department. Under the circumstances, the author has endeavored to provide accurate information, but recognizes that it may not be complete.

Readers interested in Chapter 11 proceedings may find partial collections of primary documents on the Internet *at* http://www.appletonlaw.com; http://www.dfait-maeci.gc.ca/tna-nac/naftae.asp; http://www.iisd.org/trade/investment_regime.htm; http://www.methanex.com/investorcentre/MTBE.htm; http://www.naftaclaims.com; http://www.peacelaw.com; http://www.worldbank.org/icsid/index.html.

5. Brower, *supra* note 4, at 9.

6. *See id.* at 6, 8–9. In two cases, Canadian investors have claimed that state court proceedings in Massachusetts and Mississippi either caused or contributed to violations of Articles 1102 (national treatment), 1105 (minimum standard of treatment), and 1110 (measures tantamount to expropriation). *See* Mondev Int'l Ltd. v. United States, Notice of Arbitration, at paras. 127–33, 138–39, 141–48, 150, http://www.naftaclaims.com; *see also* Loewen Group, Inc., Notice of Claim at 2–3. In another case, United Parcel Service of America, Inc. claims that the operations of Canada Post (Canada's national mail service) violate Articles 1102 (national treatment) and 1105 (minimum standard of treatment), and result in the unlawful use of a letter-mail monopoly to cross-subsidize non-monopolized businesses. *See* United Parcel Serv. of Am., Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement at paras. 5–16, 19, 25–31, http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp.

7. MANN & VON MOLTKE, *supra* note 4, at 4; Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L.J. 387, 405–06 (2000); David Runnalls & Howard Mann, *Still Time to Fix Flawed Trade Rule*, WINNIPEG FREE PRESS, Apr. 30, 2001, at A11. *See also* Wagner, *supra* note 4, at 466; Daniel R. Loritz, Comment, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, 22 LOY. L.A. INT'L & COMP. L. REV. 533, 554 (2000).

"offensive" weapon[8] that has "chilled"[9] the exercise of regulatory authority and caused an "alarming" loss of sovereignty.[10]

To counteract this perceived threat, writers have proposed a retreat from liberal access to investor-state arbitration,[11] adoption of binding interpretive statements to limit the substantive obligations of Chapter 11,[12] or establishment of a permanent appellate body to review decisions of Chapter 11 tribunals.[13] The governments of Canada and Mexico, having suffered the imposition of liability in three Chapter 11 disputes, recently contrived a more potent device for the restoration of national sovereignty: *de novo* (or at least heightened) review of awards in annulment proceedings conducted by municipal courts at the seat of arbitration.[14] If successfully deployed,

---

8. MANN & VON MOLTKE, *supra* note 4, at 5; Mann, *supra* note 7, at 405; Ferguson, *supra* note 4, at 503; Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 153 (1999); Runnalls & Mann, *supra* note 7, at A11; Stokes, *supra* note 3, at 5.

9. *See* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) (separate opinion of Bryan Schwartz) at para. 203, http://www.appletonlaw.com/4b2myers.htm; Mann, *supra* note 7, at 406; Justin Byrne, Note, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L. J. 415, 432 (2000); Ferguson, *supra* note 4, at 500; Ganguly, *supra* note 8, at 119; Loritz, *supra* note 7, at 546. *See also* Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 467, 471 (1998) (observing that "[e]nvironmental organizations are concerned about a chilling effect on governmental protection of the environment, resulting from investor claims that environmental regulation amounts to expropriation").

10. Ganguly, *supra* note 8, at 126. *See also S.D. Myers* at paras. 12, 86; Banks, *supra* note 4, at 499 (1999); David A. Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 ENVTL. L. REP. 10646 (June 2001), *available at* WL 31 ELR 10646; Lawrence L. Herman, *Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 121, 123, 134 (1998); Pierre Sauve, *Canada, Free Trade, and the Diminishing Returns of Hemispheric Regionalism*, 4 UCLA J. INT'L L. & FOREIGN AFF. 237, 244 (1999–2000); Julie A. Soloway, *Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy*, 8 MINN. J. GLOBAL TRADE 55, 88 (1999); Byrne, *supra* note 9, at 430; Loritz, *supra* note 7, at 546–47.

11. MANN & VON MOLTKE, *supra* note 4, at 57; Herman, *supra* note 10, at 135–37; Wagner, *supra* note 4, at 467–68; Ferguson, *supra* note 4, at 518–19; Ganguly, *supra* note 8, at 166.

12. MANN & VON MOLTKE, *supra* note 4, at 7–8, 19–20, 36, 47–48; Gantz, *supra* note 10; Herman, *supra* note 10, at 136; Julie Soloway, *NAFTA's Chapter 11: The Challenge of Private Party Participation*, 16 J. INT'L ARB. 1, 14 (1999); Ferguson, *supra* note 4, at 517–18.

13. *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, 308 (2000); William S. Dodge, *International Decision*, 95 AM. J. INT'L L. 186, 191–92 (2001).

14. *See* Petitioner's Outline of Argument (Feb. 5, 2001), In re Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States (B.C. Sup. Ct. 2001) [hereinafter Mexico's Outline of Argument] (on file with author); Outline of Argument of Intervenor Attorney General of Canada (Feb. 16, 2001), *In re* Arbitration

this instrument would essentially give courts in Canada, Mexico, and the United States the final authority to interpret and apply Chapter 11's substantive obligations.

Presiding over a recent annulment action, the Supreme Court of British Columbia seems to have rejected in theory—but accepted in practice—the judicial role advocated by Canada and Mexico.[15] The Federal Court of Canada will soon have to address similar arguments made by Canada in another annulment proceeding.[16] Before long, the same issues may reach Canada's appellate courts and the courts of the United States, which is the seat of a number of investor-state arbitrations under Chapter 11.[17] In short, North American courts face an onslaught of litigation requiring consideration of the proper judicial role in annulment proceedings relating to Chapter 11 awards.

This article analyzes the propriety of heightened judicial review of Chapter 11 awards and concludes that such review constitutes an independent violation of Chapter 11. Although heightened review might not, for technical and political reasons, subject the NAFTA Parties to additional claims for liability, it undermines the principle of voluntary compliance with authoritative decisions rendered at the international level by impartial bodies charged with the supervision of treaty compliance. Thus, heightened review impairs the development of the rule of law in international economic relations. To provide a framework for this discussion, Part II reviews the purpose and structure of Chapter 11, including its

---

Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States (B.C. Sup. Ct. 2001) [hereinafter Canada's Outline of Argument], *available at* http://www.dfait-maeci.gc.ca/tna-nac/canada_submission-e.pdf. A Canadian press report suggests that these events mark an "escalation" of attempts by NAFTA Parties to limit the use of Chapter 11. *Canada Wins Right to Contest NAFTA Suit*, GLOBE & MAIL, Feb. 17, 2001, at B5.

15. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, United Mexican States v. Metalclad Corp. (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf.

16. *See* Notice of Application (Feb. 8, 2001), *In re* Arbitration Under Chapter 11 of NAFTA Between S.D. Myers, Inc. & Gov't of Canada, http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp [hereinafter *SD Myers Notice of Application*].

17. Publicly available documents confirm that at least three Chapter 11 arbitrations currently have their seats in the United States. *See* ADF Group, Inc. v. United States, Procedural Order No. 2 Concerning the Place of Arbitration (July 11, 2001) at para. 22, http://www.naftaclaims.com; Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001) at para. 53, http://www.naftaclaims.com; Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 5, 2001) at para. 19, http://www.naftaclaims.com. The author believes that additional Chapter 11 arbitrations have their seat in the United States, but cannot confirm this through publicly available documents.

provisions on judicial supervision of arbitral awards. Part III introduces *Metalclad Corp. v. Mexico*, which presented the first opportunity for Mexico and Canada to request heightened judicial review of a Chapter 11 award. Part IV criticizes the arguments of Mexico and Canada, as well as the partial annulment of the *Metalclad* award by the Supreme Court of British Columbia. Specifically, Part IV(A) argues that the NAFTA Parties intended to place Chapter 11 disputes within the basic legal framework for international commercial arbitration, which does not contemplate extensive review of awards. Part IV(B) explains that a good-faith interpretation of Chapter 11's architecture does not permit extensive review of the merits by municipal courts. Finally, Part V addresses the consequences of heightened judicial review in violation of Chapter 11, both for the NAFTA Parties and for the development of international economic law.

II. PURPOSE AND STRUCTURE OF CHAPTER 11

In ratifying NAFTA, Canada, Mexico and the United States resolved to "ensure a predictable commercial framework for business planning and investment,"[18] "increase substantially investment opportunities in the[ir] territories,"[19] and "create effective procedures for . . . the resolution of disputes."[20] Chapter 11 implements these objectives by identifying the standards for treatment of investors and establishing procedures for arbitration of investor-state disputes.[21]

For example, Section A of Chapter 11 permits expropriation and measures tantamount to expropriation only for a public purpose, on a nondiscriminatory basis, in accordance with due process of law and the minimum standard of treatment under Chapter 11, and upon prompt payment of fair market value (plus interest) in freely-transferable funds.[22] In addition, Section A prohibits certain performance requirements, including requirements to export a given level or percentage of goods or services, or to achieve a given level or percentage of domestic content.[23] Furthermore, Section A requires NAFTA Parties to treat each others' investors in accordance with the

18. NAFTA, *supra* note 2, at 297.

19. *Id.* art. 102(1)(c), at 297.

20. *Id.* art. 102(1)(e), at 297.

21. Brower, *supra* note 4, at 3.

22. *See* NAFTA, *supra* note 2, art. 1110(1)–(6), at 641–42.

23. *See id.* art. 1106(1)(a)–(b), 1106(3)(b), at 640.

relative standards of national treatment and most-favored-nation (MFN) treatment.[24] Finally, Section A establishes a minimum standard of treatment, which mandates treatment in accordance with international law, including fair and equitable treatment.[25]

Section B of Chapter 11 secures these obligations by "establish[ing] a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties . . . and due process before an impartial tribunal."[26] To this end, the NAFTA Parties have consented to investor-state arbitration in accordance with the procedures set forth in Section B.[27] Their consent represents a standing offer,[28] which investors may accept by submitting disputes to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention")[29] (if the investor's home state and the disputing NAFTA Party are both states parties to that convention),[30] the Additional Facility Rules of ICSID (if *either* the investor's home state or the disputing NAFTA Party is a state party to the ICSID Convention), or the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.[31] Article 1122(2) recognizes that, when taken together, the treaty-based consent of NAFTA Parties and the submission of claims by investors satisfy the requirements for written arbitration agreements under the

24. *See id.* arts. 1102, 1103, at 639.

25. *See id.* art. 1105(1), at 639. Because Article 1105(1) creates a "minimum standard" for all treatment of investments, its express incorporation by reference into Article 1110 seems unnecessary. The overlap between many substantive provisions of Chapter 11 seems to reflect a belt-and-suspenders approach to investor protection.

26. *Id.* art. 1115, at 642.

27. *See id.* art. 1122(1), at 644.

28. Mexico's Outline of Argument, *supra* note 14, at para. 224; J. Christopher Thomas, *Investor-State Arbitration Under NAFTA Chapter 11*, 1999 CAN. Y.B. INT'L L. 99, 113. Mr. Thomas has served as counsel to Mexico in at least three Chapter 11 proceedings, including Metalclad Corp. v. United Mexican States.

29. The Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. *See* NAFTA, *supra* note 2, art. 1139, at 647. Presently, the United States is a state party to the ICSID Convention, but Canada and Mexico are not. *See* Ethyl Corp. v. Canada, Decision Regarding the Place of Arbitration (Nov. 28, 1997), *reprinted in* 38 I.L.M. 702, 703 n.5 (1999).

30. *See* NAFTA, *supra* note 2, art. 1120(1), at 643.

31. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 31/98, U.N. Commission on International Trade Law, 31st Sess., Supp. No. 17 at Ch. V, Sect. C, U.N. Doc. A/31/17 (1976). *See* NAFTA, *supra* note 2, art. 1120(1), at 643.

ICSID Convention, the New York Convention,[32] and the Inter-American Convention.[33]

Following submission of a claim, the arbitration rules selected by the investor govern the proceedings except to the extent modified by Section B of Chapter 11.[34] Section B modifies the arbitration rules by creating a limited right of audience for non-disputing NAFTA Parties, identifying the proper law for Chapter 11 disputes, and imposing strict limits on the form of interim and final relief that Chapter 11 tribunals may award. Thus, Articles 1127 and 1129 entitle non-disputing NAFTA Parties to receive copies of all pleadings, evidence and written arguments.[35] Article 1128 also grants non-disputing NAFTA Parties the right to make submissions to Chapter 11 tribunals regarding the interpretation of NAFTA.[36] Article 1131(1) requires tribunals to render decisions in accordance with NAFTA and other "applicable rules of international law."[37] Tribunals must also apply interpretations of NAFTA made by the Free Trade Commission (*i.e.*, the three NAFTA Parties acting in concert through cabinet-level representatives).[38] Although tribunals may order interim relief to preserve their own jurisdiction and the rights of the parties, they cannot order attachments or enjoin the application of the measures alleged to constitute a breach of Section A.[39] In their final awards, tribunals may only grant compensatory damages plus interest, restitution of property (subject to the NAFTA Party's right to pay monetary damages in lieu of restitution), and the costs of arbitration.[40]

---

32. The "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. *See* NAFTA, *supra* note 2, art. 1139, at 647.

33. The "Inter-American Convention" means the Inter-American Convention on Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448 (1990), O.A.S. Treaty Series no. 42, *reprinted in* 14 I.L.M. 336 (1975). *See* NAFTA, *supra* note 2, art. 1139, at 647.

34. *See* NAFTA, *supra* note 2, art. 1120(2), at 643.

35. *See id.* arts. 1127, 1129, at 645.

36. *See id.* art. 1128, at 645.

37. *Id.* art. 1131(1), at 645.

38. *See id.* art. 1131(2), at 645.

39. *See id.* art. 1134, at 646; Pope & Talbot Inc. v. Canada, Ruling by Tribunal on Claimants' Motion for Interim Measures (Jan. 7, 2000), http://www.appletonlaw.com/4b3P&T.htm; Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393, 416 (2000); Brower, *supra* note 4; Richard G. Dearden, *Arbitration of Expropriation Disputes Between an Investor and the State Under the North American Free Trade Agreement*, 29 J. WORLD TRADE 113, 127 (Feb. 1995); Thomas, *supra* note 28, at 122.

40. *See* NAFTA, *supra* note 2, art. 1135(1), at 646. Chapter 11 tribunals cannot order NAFTA Parties to pay punitive damages. *Id.* art. 1135(3), at 646.

With respect to the binding effect, judicial supervision and enforcement of Chapter 11 awards, Article 1136 establishes four principles. First, awards "have no binding force *except* between the disputing parties and in respect of the particular case."[41] Second, prevailing parties may not seek enforcement of awards rendered under the Additional Facility or UNCITRAL Rules until either (1) three months have passed without the losing party having initiated a proceeding to revise, set aside, or annul the award, or (2) a court has dismissed or allowed such a proceeding and there is no further appeal.[42] This provision, by implication, recognizes the right of losing parties to seek revision or annulment of Chapter 11 awards by municipal courts at the seat of arbitration.[43] Third, investors may seek enforcement of awards under the ICSID Convention, the New York Convention, or the Inter-American Convention.[44] For the purposes of the New York Convention and the Inter-American Convention, Chapter 11 proceedings "shall be considered to arise out of a commercial relationship."[45] Fourth, if a NAFTA Party fails to comply with the final award of a Chapter 11 tribunal, the investor's home state may request the formation of a dispute resolution panel under the state-to-state remedial provisions of Chapter 20.[46] In so doing, the complaining NAFTA Party may seek (1) a determination that the failure to comply with the award is "inconsistent with" the responding NAFTA Party's obligations, and (2) a recommendation that the responding NAFTA Party comply with the award.[47]

III. THE EMPIRE STRIKES BACK

In responding to the first wave of Chapter 11 claims, the NAFTA Parties enjoyed considerable success in fending off liability. Thus, in two cases, tribunals rendered final or partial-final awards against the investors.[48] In a third case, a tribunal dismissed the claim

41. *Id.* art. 1136(1), at 646 (emphasis added).

42. *See id.* art. 1136(3), at 646.

43. Alvarez, *supra* note 39, at 418; Thomas, *supra* note 28, at 109 & n.34.

44. *See* NAFTA, *supra* note 2, art. 1136(6), at 646.

45. *Id.* art. 1136(7), at 646.

46. *See id.* art. 1136(5), at 646.

47. *See id.*

48. *See* Azinian v. Mexico, Award, ICSID Case No. ARB(AF)/97/2 (1999), at paras. 93–124, *available at* http://www.worldbank.org/icsid/cases/awards.htm (denying a claim that Mexico violated Article 1110 (expropriation) and also finding *proprio motu* that Mexico complied with its obligations under Article 1105 (minimum standard of treatment)); Pope &

on jurisdictional grounds.[49] Three more cases ended either in the abandonment or settlement of claims for relatively modest amounts.[50] More recently, however, Chapter 11 tribunals sitting in Canada issued final or partial-final awards against the respondents in *Metalclad Corp. v. Mexico*,[51] *S.D. Myers, Inc. v. Canada*,[52] and *Pope & Talbot, Inc. v. Canada*.[53]

In *Metalclad*, local authorities in Guadalcazar, Mexico denied a construction permit for the investor's hazardous waste facility, even though the competent federal authorities had already granted all necessary environmental approvals.[54] In reaching their decision, the local authorities gave the investor no notice, provided no opportunity to be heard, and identified no construction defects in the facility.[55] Later, the outgoing governor of the State of San Luis Potosi decreed the site to be part of an ecological preserve.[56] The tribunal unanimously held that these two actions permanently barred operation

---

Talbot v. Canada, Interim Award (June 26, 2000) at paras. 64–80, 96–105, http://www.appletonlaw.com/ 4b3P&T.htm (denying claims that Canadian export regulations violated Articles 1106 (performance requirements) and 1110 (expropriation)).

In a subsequent award, the *Pope & Talbot* tribunal also denied numerous claims that Canadian export regulations violated Articles 1102 (national treatment) and 1105 (minimum standard of treatment). Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 83–104, 119–55, 182–85, http://www.appletonlaw.com/4b3P&T.htm. Although the tribunal found that the Canadian government violated Article 1105 by conducting a vindictive audit procedure during the arbitration proceedings, *see id.* at paras. 156–81, the Canadian government "welcomed" the award as a "decisive[]" and "overall" victory. *See* Dep't of Foreign Aff. and Int'l Trade, *News Release: Canada Wins NAFTA Chapter 11 Dispute* (Apr. 10, 2001), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104070.htm. *See also* Gantz, *supra* note 10, (describing the violation of Article 1105 as "relatively minor[] and peripheral").

49. *See* Waste Management, Inc. v. Mexico, Award, ICSID Case No. ARB(AF)/98/2 (2000), *available at* http://www.worldbank.org/icsid/cases/awards.htm.

50. *See* Brower, *supra* note 4, at 22 (discussing the settlement of Ethyl Corporation's $251 million claim against Canada for $13 million); Soloway, *supra* note 12, at 12 (indicating that two investors did not pursue their Chapter 11 claims).

51. *See* Metalclad Corp. v. Mexico, Award, ICSID Case No. ARB(AF)/97/1 (2000), *available at* http://www. pearcelaw.com/metalclad.html.

52. *See* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) (separate opinion of Bryan Schwartz), http://www.appletonlaw.com/4b2myers.htm.

53. *See Pope & Talbot, Award on the Merits of Phase 2.* As noted above, the *Pope & Talbot* tribunal ruled in Canada's favor on virtually all points, but found one minor violation of Article 1105 (minimum standard of treatment) relating to Canada's behavior during the pendency of the arbitration.

54. Metalclad v. Mexico at paras. 52, 78, 80, 85–90.

55. *Id.* at para. 91.

56. *Id.* at paras. 109–10.

of the facility and, therefore, constituted an indirect expropriation and a measure tantamount to expropriation, respectively.[57]

The investor claimed that the actions of local authorities in Guadalcazar also violated Article 1105, which requires NAFTA Parties to treat each others' investors in accordance with "international law," including "fair and equitable treatment." Attempts to interpret these two phrases have generated considerable debate. Construed according to its ordinary meaning, the phrase "international law" refers to all sources of international law, including treaty obligations.[58] According to this view, Article 1105 would permit NAFTA investors to file claims against NAFTA Parties based *inter alia* on the adoption or maintenance of measures that (1) relate to investors of other NAFTA Parties (or their investments), (2) cause loss or damage to those investors (or their investments), and (3) violate a treaty obligation owed to the investors or their home states.[59]

---

57. *Id.* at paras. 107, 109, 111.

58. *See* Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 (identifying the sources of international law); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (stating that "international law" includes rules established by "customary law," "international agreement," or "general principles common to the major legal systems of the world"). *See also* Clyde C. Pearce & Jack Coe, Jr., *Arbitration Under NAFTA Chapter 11: Some Pragmatic Reflections upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311, 314 n.10 (2000) (suggesting that the phrase "international law" refers to treaty text, customary international law, and general principles of law); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 344 (1997) (quoting Article 10 of the Energy Charter Treaty, which requires treatment in accordance with "international law, including treaty obligations").

In construing Article 1131(1) (governing law), Mexico's counsel in the *Metalclad* annulment proceedings claims that the phrase "international law" embraces all sources of international law, including treaties, customary international law, general principles of law, as well as municipal judicial decisions and writings of the most highly qualified publicists. *See* Thomas, *supra* note 28, at 106. He offers no reason to believe that the same words might bear a different meaning in the context of Article 1105.

59. *See* Pearce & Coe, *supra* note 58, at 314 n.10 (2000) (arguing that the phrase "international law" refers *inter alia* to treaty text); *see also* Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491, 502, 562–63 & n.498 (1998) (describing the use of similar language in the draft Multilateral Agreement on Investment and suggesting that it could incorporate the obligations of WTO agreements).

Others reach a similar result by using external treaty provisions to inform the requirements of "fair and equitable treatment." *See* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) (separate opinion of Bryan Schwartz) at para. 264, http://www.appletonlaw.com/4b2myers.htm; Brower, *supra* note 4, at 13; *see* Dodge, *supra* note 13; *see also* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 472–73 (1995) (stating, in the context of international investment law, that treaty violations clearly constitute actionable violations of fairness); Sacerdoti, *supra* note 58, at 341 n.143, 344 n.150 (defining "fair and equitable treatment" to include "respect for international law").

Others take the position that the phrase "international law" only refers to customary international law.[60] According to certain proponents of this view, Article 1105(1) only prohibits host states from engaging in egregious, outrageous or shocking conduct.[61] In a recent article, a sitting Chapter 11 arbitrator offers a third understanding of Article 1105, which would require compliance with customary international law plus the provisions of NAFTA to the extent that they provide additional protection.[62]

Attempts to define "fair and equitable treatment" have encountered similar difficulties. Although the phrase has become a

---

Even if Article 1105 only incorporates customary international law, one could still reach a similar conclusion because the breach of treaty obligations, especially by municipal courts, may constitute a "denial of justice" under customary international law. *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 158 (Feb. 5, 1970) (separate opinion of Judge Tanaka) (explaining that the "judgment of a municipal court which gives rise to the responsibility of a State by a denial of justice does have an international character when, for instance, a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law or applies a rule of domestic law which is itself contrary to international law"); *see also* Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 278–79 (1978) (indicating that municipal court decisions that are "clearly incompatible with a rule of international law" may attract liability under the law of state responsibility).

60. *See* Máximo Romero Jiménez, *Considerations of NAFTA Chapter 11*, 2 CHI. J. INT'L L. 243, 244 (2001); Price, *supra* note 4, at 111; *see also* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES 78 (1992) (interpreting similar language in BITs as "serv[ing] simply to incorporate customary international law by reference").

One should, however, take great care in reading commentary on this issue. Although two writers indicate that the phrase "international law" incorporates "customary" principles or standards "of international law [that] exist external to the treaty," they do not say that the phrase incorporates "principles or standards of customary international law." *See* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 124 (1986); Gloria Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 311 (1994). The difference in word order may be highly significant because one of those authors (a former Assistant Legal Adviser with responsibility for the U.S. BIT program) specifically notes that the "customary standards of international law" include all of the "usual sources of international law" described in Article 38 of the Statute of the International Court of Justice. Gudgeon, *supra*, at 124 n.70. As explained above, Article 38 identifies treaties, customary law, and general principles of law as the usual sources of international law. *See supra* note 58 and accompanying text.

61. *See* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 108–09, 118 (recounting Canada's arguments to this effect); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 527–28 (5th ed. 1998) (stating that "the treatment of an alien in order to constitute an international delinquency should amount to an outrage"). As noted above, however, this limited understanding of customary international law seems dubious at best because the violation of a treaty by municipal authorities may constitute a "denial of justice" under customary international law. *See supra* note 59.

62. Gantz, *supra* note 10.

familiar term in bilateral investment treaties (BITs),[63] virtually no case law addressed its meaning before the advent of Chapter 11 disputes.[64] Furthermore, the thin commentary on "fair and equitable treatment" has yet to produce a consistent theme. Some authorities indicate that the term prohibits discriminatory and arbitrary treatment.[65] Other writers suggest that fairness in the context of international investment law forbids the unconscionable frustration of reasonable expectations, for example by breaching treaty obligations.[66] Construing the phrase even more expansively, one highly respected writer (Dr. F.A. Mann) states that unfair and inequitable treatment may include measures that "are not plainly illegal in the accepted sense of international law."[67] Because fair and equitable treatment would be "distinct . . . from . . . principles of international law,"[68] this view might suggest an open-ended mandate to second-guess the governmental decisions of NAFTA Parties.[69]

---

63. *See* PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 625 (1995); Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties, in* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENTS 221, 233 (1993); F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 243; *Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investments*, 31 I.L.M. 1368, 1373 (1992); Sacerdoti, *supra* note 58, at 345; K.P. Sauvant & V. Aranda, *The International Legal Framework for Transnational Corporations, in* TRANSNATIONAL CORPORATIONS 83, 96 (A.A. Fatouros ed., 1994); John A. Westberg & Bertrand P. Marchais, *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists, in* SHIHATA, *supra*, at 337, 353.

64. Mann, *supra* note 63, at 243; Westberg & Marchais, *supra* note 63, at 353. Two writers assert that the Iran-United States Claims Tribunal addressed the standard of "fair and equitable treatment" in Rankin v. Iran, 17 IRAN-U.S. CL. TRIB. REP. 135 (1987). *See* Westberg & Marchais, *supra* note 63, at 353–54. The conclusion seems dubious.

65. *See* Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT'L L.J. 246, 286 n.201 (1996); A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment*, 8 J. TRANSNAT'L L. & POL'Y 57, 76 (1998) (quoting MUCHLINSKI, *supra* note 63, at 625); Sandrino, *supra* note 60, at 311.

66. FRANCK, *supra* note 59, at 473. *See also* Sacerdoti, *supra* note 58, at 341 n.143 (construing "fair and equitable treatment" to require "respect for international law"); *cf.* Brower, *supra* note 4, at 8 (suggesting that the claimant in Methanex Corp. v. United States had attempted to use "fair and equitable treatment" to incorporate WTO norms).

67. Mann, *supra* note 63, at 243. *See also* VANDEVELDE, *supra* note 60, at 76 (suggesting that the obligation of "fair and equitable treatment" covers situations "where other substantive provisions of international and national law provide no protection").

68. Gudgeon, *supra* note 60, at 125. *See also* Mann, *supra* note 63, at 244.

69. In its latest award, the *Pope & Talbot* tribunal adopted Dr. Mann's definition of "fair and equitable treatment," but declined "to substitute its judgment . . . for Canada's" and denied almost all challenges to Canadian export regulations because they represented a "reasonable response to the circumstances." *See* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 121, 123, 125, 128, 155, 185. This suggests that

These debates about the interpretation of "international law" and "fair and equitable treatment" border on the absurd, albeit for different reasons. Because "international law" has a clearly established meaning,[70] current disagreements about the scope of that phrase reflect an attempt to create ambiguity where none exists. Conversely, the debates about "fair and equitable treatment" constitute a futile effort to reduce a general concept to a precise statement of legal obligation. Proponents of this effort seem oblivious to the fact that the inclusion of "fair and equitable treatment" in Article 1105(1) represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes.[71]

Dr. Mann's views do not necessarily invite open-ended scrutiny of measures adopted or maintained by host states.

70. *See supra* note 58 and accompanying text.

71. When treaty drafters intentionally use ambiguous phrases to gloss over differences, they effectively grant the competent judicial body a quasi-legislative power to formulate specific rules of conduct. *See* GEORG SCHWARZENBERGER, INTERNATIONAL LAW 495 (3d ed. 1957). The phrase "fair and equitable treatment" evidently falls within this category of treaty provisions. *See* J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (3d ed. 1998) ("When an arbitrator is asked by the parties to have regard to equitable considerations . . . he . . . begins to assume the role of a legislator, creating law for the case in hand."); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 41 (1988) ("It is in the nature of a very general concept like fair and equitable treatment that there can be no precise definition. What is fair and what is equitable may largely be a matter of interpretation in each individual case."); VANDEVELDE, *supra* note 60, at 76 ("The phrase is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the disputes provisions."); *see also* C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 426, 767 (1964) (explaining that "equity . . . is . . . largely a matter of adapting principles to circumstances," and arguing that "equitable concepts . . . should play an important part in adapting principles to circumstances in a world in which the law is constantly confronted with new problems and new needs").

In July 2001, the Free Trade Commission (*i.e.*, cabinet-level representatives of the NAFTA Parties) adopted the first Notes of Interpretation of Certain Chapter 11 Provisions, which purport *inter alia* to make the following three interpretations of Article 1105(1). *See* Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, § B, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp. First, the Notes of Interpretation provide that "Article 1105(1) prescribes the *customary* international law minimum standard of treatment as the minimum standard of treatment" required by Chapter 11. *Id.* § B(1) (emphasis added). Second, "[t]he concept[] of 'fair and equitable treatment' . . . do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." *Id.* § B(2). Third, "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." *Id.* § B(3).

The NAFTA Parties state that the Notes of Interpretation "clarify" the meaning of Article 1105(1) and indicate that the Notes of Interpretation bind all sitting and future Chapter 11 tribunals. *See id.*, Preamble (stating that the Notes of Interpretation "clarify" Article 1105); *NAFTA Trade Ministers Clarify Chapter 11 Investment Provision*, 18 INT'L

Consistent with the author's understanding of the provision, it should come as no surprise that, in deciding the investor's claim under Article 1105, the *Metalclad* tribunal made no explicit attempt to define unfair and inequitable treatment. At the outset of its decision, however, it held that the investment did not receive "fair and equitable treatment *in accordance with international law*."[72] By

---

TRADE REP. (BNA) 1234 (Aug. 2, 2001) (indicating that the U.S. Trade Representative expects the Notes of Interpretation to "apply to all future and pending cases"). The Notes of Interpretation, however, resolve few (if any) debates about the meaning of Article 1105(1). Without trying to undertake a comprehensive analysis, one should immediately perceive three facts that will prevent the Notes of Interpretation from settling existing disagreements. First, it is not clear that the Notes of Interpretation have any binding force. While Article 1131(2) authorizes cabinet-level representatives to adopt binding "interpretations" of NAFTA's provisions, Article 2202 governs "amendments" of NAFTA's provisions. According to Article 2202, the NAFTA Parties may agree on any "modification of or addition to" NAFTA, but such amendments become "an integral part" of NAFTA only upon approval by the NAFTA Parties "in accordance with the applicable legal procedures of each Party." In other words, NAFTA draws a fundamental distinction between interpretation and modification: cabinet-level officials have the authority to resolve ambiguities, but not the power to modify obligations without submitting the proposed text for domestic political approval. If, as the author believes, the Free Trade Commission's purported "interpretation" of Article 1105 actually constitutes a "modification," it represents an *ultra vires*, attempted amendment that has no binding force.

Even if the Notes of Interpretation have some binding force, one must seriously doubt the U.S. contention that they are binding on Chapter 11 tribunals in existing disputes. Although Article 1131(2) of NAFTA does not specifically prohibit retroactive application of interpretive statements, Article 1131(1) requires Chapter 11 tribunals to "decide the issues in dispute in accordance with . . . applicable rules of international law." Because those rules include the principle that "no one may be the judge of his own cause," it seems highly unlikely that a Chapter 11 tribunal would construe Article 1131(1) as authorizing the use of interpretive statements by NAFTA Parties to resolve substantive issues in pending disputes. *See* RESTATEMENT, *supra* note 58, at § 102 cmt.l (identifying the rule that no one may be judge in his own cause as a general principle that has achieved the status of international law).

Assuming that the Notes of Interpretation constitute a binding interpretation of Article 1105(1), NAFTA investors may still argue that Article 1103 entitles them to a level of "fair and equitable treatment" that exceeds the requirements of customary international law. Article 1103 requires the NAFTA Parties to give NAFTA investors and their investments treatment no less favorable than given to investors and investments of countries that have concluded BITs with NAFTA Parties. NAFTA, *supra* note 2, art. 1103, 32 I.L.M. at 639. The "fair and equitable treatment" provisions of BITs, in turn, have been construed to exceed the requirements of customary international law. *See* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 110–13. Thus, whatever the meaning of Article 1105(1), NAFTA investors may use Article 1103 to bring claims based on the more generous standards of BITs, and Chapter 11 tribunals may interpret the BITs without regard to the Free Trade Commission's Notes of Interpretation. *See id.* at para. 117 (concluding that a limited interpretation of Article 1105 would not prevent claims for the denial of "fair and equitable treatment" under the broader interpretations of BITs); *see also* NAFTA, *supra* note 2, art. 1131(2), 32 I.L.M. at 645 (authorizing the Free Trade Commission to make binding interpretations only "of *this Agreement*").

72. Metalclad Corp. v. Mexico, Award, ICSID Case No. ARB(AF)/97/1 (2000), *available at* http://www. pearcelaw.com/metalclad.html at para. 74.

linking "fair and equitable treatment" to the requirements of "international law," the tribunal avoided the potentially open-ended construction favored by Dr. Mann. Instead, the tribunal took an approach that requires an assessment of fairness and equity in relation to a fixed reference point, namely the obligations created by international law.[73]

The tribunal therefore turned its attention to the principles established by NAFTA. Prominent among these, the tribunal found several references to transparency.[74] The tribunal noted that the NAFTA Parties agreed to "ensure a predictable commercial framework for business planning and investment" and to "ensure that [their] laws, regulations, procedures and administrative rulings . . . are promptly . . . made available in such a manner as to enable interested persons . . . to become acquainted with them."[75] From these principles, the tribunal concluded that NAFTA Parties have the obligation to make sure that all legal requirements affecting investment are capable of being readily known.[76] According to the tribunal, "[t]here should be no room for doubt or uncertainty on such matters."[77] Once a NAFTA Party "become[s] aware of any scope for misunderstanding or confusion," it must "ensure that the correct position is promptly determined and clearly stated."[78]

In the tribunal's view, Mexico violated these obligations by neglecting to establish clear rules on the need for—or procedures for obtaining—local construction permits.[79] In addition, the failure of

73. In other words, one may distinguish between a mandate to decide cases based on "principles of international law, justice and equity" and mandates to decide cases "'in accordance with the principles of justice and equity' without reference to international law or even 'upon a basis of absolute equity.'" JENKS, *supra* note 71, at 335. In the first situation, the tribunal may "take equitable considerations into account in finding the law." MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 530 (1934). In the latter situations, the tribunal need not consider the limitations of existing law and may render decisions that directly contradict existing law. *See id.* at 530–31.

74. Metalclad v. Mexico at para. 76.

75. *Id.* at para. 71 (quoting the Preamble to and Article 1802(1) of NAFTA, respectively).

76. *Id.* at para. 76.

77. *See id.*

78. *Id.* This holding is consistent with a highly respected academic writer's conclusion that "fair and equitable treatment" requires "all rules and practices affecting an investor's interest [to] be transparent[] [and] predictable." *See* Sacerdoti, *supra* note 58, at 344 n.150; *see also* Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 423–24 (2001) (concluding that "fair and equitable treatment" requires host states to deal "transparently in their relations with foreigners").

79. Metalclad Corp. v. Mexico, Award, ICSID Case No. ARB(AF)/97/1 (2000), *available at* http://www. pearcelaw.com/metalclad.html at para. 88.

Guadalcazar's authorities to give the investor notice of a town meeting that resulted in the denial of its request for a construction permit, to provide an opportunity to be heard, or to identify any relevant considerations for the denying the permit demonstrated the lack of a transparent or predictable framework for business planning and investment.[80] Having identified three breaches of Chapter 11, however, the tribunal only awarded $16,685,000 (plus post-award interest), representing a modest fraction of the investor's $115,000,000 claim.[81]

In *S.D. Myers, Inc. v. Canada*, a different tribunal unanimously held that Canada violated Article 1102 (national treatment) by prohibiting the export of PCBs and PCB wastes to the United States for remediation.[82] According to the tribunal, Canada adopted the export ban not to protect public safety or the environment, but to shelter its own PCB-remediation industry from U.S. competition.[83] A majority of the tribunal also ruled that this denial of national treatment violated the investor's right to fair and equitable treatment.[84] In so doing, the *S.D. Myers* tribunal adopted an analysis similar to—but more explicitly deferential to NAFTA Parties than—the reasoning employed by the *Metalclad* tribunal. For example, the *S.D. Myers* tribunal specifically recognized the absence of an "open-ended mandate to second-guess" the controversial policy choices of NAFTA Parties.[85] Furthermore, it construed the phrase "fair and equitable treatment" in conjunction with the words "in accordance with international law."[86] Interpreted this way, Article 1105 only prohibits unjust or arbitrary treatment that is "unacceptable from the international perspective."[87] Finally, the tribunal acknowledged its obligation to consider the "high measure of deference that international law generally extends to . . . domestic authorities to regulate matters within their . . . borders."[88]

---

80. *Id.* at paras. 91–93, 99.

81. *Id.* at paras. 114–15, 131.

82. S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) (separate opinion of Bryan Schwartz) at paras. 238–57, http://www.appletonlaw.com/4b2myers.htm. PCB stands for "polychlorinated biphenyl," and refers to a family of highly toxic compounds.

83. *Id.* at paras. 194–95.

84. *Id.* at paras. 258–69.

85. *Id.* at para. 261.

86. *Id.* at para. 262.

87. *Id.* at para. 263.

88. *Id.* Put more simply, it appears that the tribunal would generally consider a violation of international investment law to constitute a sufficient (but not necessary) showing of unfair and inequitable treatment. This leaves open the possibility that state

Notwithstanding this explicitly deferential framework, a majority of the tribunal observed that claimants can generally establish unfair and inequitable treatment by demonstrating the breach of a rule of international law specifically designed to protect investors.[89] Hence, the majority's ruling that Canada's violation of Article 1102 (national treatment) established a denial of fair and equitable treatment.[90] In a separate opinion, one member of the majority indicated that Canada might also have violated Article 1105 by failing to give the investor notice of the proposal to ban exports of PCBs, granting its Canadian competitors privileged access to decision-makers, and not responding to the investor's communications regarding the ban.[91] According to this separate opinion, Canada's actions seemed incompatible with principles of procedural fairness and transparency established by Article 1802 of NAFTA and other widely accepted treaties, including the WTO agreements and BITs.[92] The separate opinion declined, however, to make a conclusive determination regarding additional violations because the pleadings did not specifically address the issue.[93]

In *Pope & Talbot, Inc. v. Canada*, the investor challenged Canadian regulations requiring permits for—and payment of fees on—certain softwood lumber exports to the United States. According to the investor, the regulations constituted a performance requirement,[94] a measure tantamount to expropriation,[95] and a denial of national treatment and fair and equitable treatment.[96] Although the

---

conduct might be "unacceptable from the international perspective" without violating international law. For example, a technically proper, but abusive, exercise of treaty rights might constitute unfair and inequitable treatment. *See* Price, *supra* note 78, at 423–24 (2001) (indicating that "fair and equitable" treatment requires adherence to the principle of good faith).

89. *See* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) (separate opinion of Bryan Schwartz) at para. 264, http://www.appletonlaw.com/4b2myers.htm.

90. *See id.* at para. 266. Several publicists agree that "fair and equitable treatment" incorporates the more specific rule of nondiscrimination (*i.e.*, national treatment). *See* MUCHLINSKI, *supra* note 63, at 625; Laing, *supra* note 65, at 286 n.201 (1996); Sacerdoti, *supra* note 58, at 344 n.150, 346; Sandrino, *supra* note 60, at 311.

91. *Id.* (separate opinion of Bryan Schwartz) at paras. 241, 246–47, 252.

92. *Id.* at paras. 249–50, 253–55, 257.

93. *Id.* at paras. 253, 258.

94. *See* Pope & Talbot, Inc. v. Canada, Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement at 22–23, http://www.appletonlaw.com/ 4b3P&T.htm.

95. *See id.* at 23–27.

96. *See id.* at 20–22. *Pope & Talbot* initially asserted that the measures also violated the principle of MFN treatment, but later withdrew that part of its claim. Pope & Talbot v. Canada, Interim Award (June 26, 2000) at para. 14.

tribunal rejected all challenges to the regulations *per se*,[97] it held that the Canadian government violated Article 1105 by initiating a vindictive regulatory audit, in which it accused the investor of unspecified "errors" and "discrepancies," unjustifiably hinted at criminal misconduct, and threatened dire consequences.[98] In so doing, however, the tribunal declined to adopt either the claimant's or Canada's definition of fair and equitable treatment, each of which required some connection to international law.[99] Instead, the tribunal adopted the views of Dr. Mann,[100] which it saw as more consistent with NAFTA's goal of creating an "hospitable" investment climate.[101] Although Canada's softwood lumber regulations generally provided such an environment, the "verification review episode" did not.[102]

In the wake of these developments, Mexico petitioned the Supreme Court of British Columbia to annul the *Metalclad* award, and the Attorney General of Canada intervened to support Mexico's petition.[103] Canada has also requested its Federal Court to annul the partial-final award rendered by the *S.D. Myers* tribunal.[104] Because

97. *See id.*

98. *See* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 163, 166–68, 171, 173–76, 178–81.

99. According to the investor, fair and equitable treatment requires compliance with customary international law, treaty law, general principles of law, principles of good faith, the World Bank's guidelines on foreign direct investment, and domestic principles on the exercise of regulatory authority. *See id.* at para. 109. The Canadian government, by contrast, argued that fair and equitable treatment represents a principle of customary international law that only prohibits "egregious" or "shocking" governmental misconduct. *Id.*

100. *See id.* at paras. 110–11 & 118 n.5.

101. *See id.* at para. 116.

102. *See id.* at para. 185.

103. *See* Mexico's Outline of Argument, *supra* note 14; Canada's Outline of Argument, *supra* note 14.

104. *See S.D. Myers Notice of Application*, *supra* note 16. Because the *S.D. Myers* tribunal rendered its award against the Canadian government, Canada's federal arbitration statute (based on the UNCITRAL Model Law) governs the annulment proceedings. *See infra* notes 107, 129–30 and accompanying text. Because this legislation defines "commercial arbitration" to include Chapter 11 awards, the Canadian government cannot seek heightened review on the grounds that the Chapter 11 proceedings constitute a form of noncommercial arbitration. Nevertheless, one of Canada's attorneys in the *S.D. Myers* proceedings (Joseph de Pencier) argued in the *Metalclad* annulment proceedings that the court could adopt a heightened standard of review regardless of the applicable arbitration statute. *See infra* notes 131–34 and accompanying text. According to Mr. de Pencier, the "NAFTA architecture" establishes that the awards of Chapter 11 tribunals "are not . . . worthy of judicial deference." *See infra* notes 135–42, 201 and accompanying text. He seems poised to make a similar argument for heightened review in the *S.D. Myers* annulment proceedings, since the annulment application charges the tribunal with misinterpreting the definitions of "investor of a Party" and "investment" under Chapter 11, the phrase "in like circumstances" under Article 1102 (national treatment), and the nature of the obligations created by Article 1105

Article 1136(3) specifically contemplates annulment proceedings, their initiation may be unremarkable.[105] Mexico and Canada have adopted the unusual position, however, that municipal courts may exercise *de novo* (or at least heightened) review of Chapter 11 awards because they do not arise out of "commercial" relationships and, therefore, do not benefit from the deferential legal framework that applies to international commercial arbitration.[106] In addition, Canada has argued that the "NAFTA architecture indicates that awards of Chapter 11 tribunals . . . are not . . . worthy of judicial deference."[107] This represents an effort to use heightened judicial review to reclaim control over Chapter 11 proceedings, thereby transforming municipal courts into the final arbiters of investor-state disputes.

According to Mexico, one of two laws must govern annulment proceedings relating to Chapter 11 awards rendered against Mexico or the United States by tribunals having their seat in British Columbia: the International Commercial Arbitration Act (ICAA) or the Commercial Arbitration Act (CAA).[108] The ICAA enacts the UNCITRAL Model Law (Model Law) in British Columbia and applies to international *commercial* arbitration.[109] Like the Model Law, the ICAA derives its annulment provisions from Article V of the New York Convention.[110] As a result, it does not permit judicial

(minimum standard of treatment). *See S.D. Myers Notice of Application*, *supra* note 16, at paras. 5, 7, 9, 10.

It remains to be seen if Canada will seek annulment of the *Pope & Talbot* Phase-2 Award. The Canadian government might arguably see the adoption of Dr. Mann's views as an open-ended invitation to second-guess its policy choices. *See* Gantz, *supra* note 10 (describing the *Pope & Talbot* ruling as "troubling," "expansive," "possibly erroneous," and an example of "questionable legal reasoning" that "raises the most serious questions about the future" of Chapter 11). This characterization seems inconsistent with the tribunal's refusal to "substitute its own judgment . . . for Canada's" and its characterization of the challenged measures as a "reasonable response to the circumstances." *See infra* note 236 and accompanying text. Thus, Canada seems unlikely to seek annulment, although the damages ultimately awarded for the "verification review episode" may affect its decision.

105. *See* Gantz, *supra* note 10 (claiming that "the practice of challenging adverse decisions (*S.D. Myers* and *Metalclad*) in national courts . . . is understandable, given the tendency of government lawyers, like all attorneys, to resort to all available remedies").

106. *See* Mexico's Outline of Argument, *supra* note 14, at paras. 118–86; Canada's Outline of Argument, *supra* note 14, at paras. 4–30.

107. Canada's Outline of Argument, *supra* note 14, at paras. 25–30.

108. *See* Mexico's Outline of Argument, *supra* note 14, at para. 118. For awards rendered against Canada, the federal Commercial Arbitration Act would apply. *See id.* at para. 144. That statute explicitly defines "commercial arbitration" to include Chapter 11 proceedings against the Canadian government. *See id.*

109. *See id.* at paras. 122, 126–27.

110. *See id.* at para. 123.

review of awards for legal error;[111] it only permits annulment for serious defects in jurisdiction or procedure that damage the integrity of arbitration as an institution, such as excess of jurisdiction or insufficient notice.[112] Furthermore, courts applying the ICAA have adopted a "powerful presumption" that the arbitrators acted within their jurisdiction.[113] The CAA, by contrast, applies to arbitrations not falling within the ICAA.[114] The CAA permits review for legal error, as well as serious defects in jurisdiction and procedure.[115]

According to Mexico, Chapter 11 arbitrations arise out of noncommercial relationships and, therefore, fall outside of the ICAA.[116] Mexico, for example, identified three characteristics that supposedly distinguish the *Metalclad* dispute from international commercial arbitration, which Mexico defined as the adjudication of private economic rights in the context of exchange transactions.[117] First, as an international trade agreement, the NAFTA represents public law affecting the NAFTA Parties as sovereign states (as opposed to private commercial law).[118] Second, Chapter 11 claimants do not exercise private commercial rights, but step into the shoes of their home states and exercise the treaty rights of their home states.[119] Third, in the particular dispute, Mexican authorities and the investor stood in a relationship not between commercial equals but "between government and the governed, between legislator and the subject of legislation."[120] To support its views, Mexico quoted the United States' argument in another Chapter 11 arbitration to the effect

111. *See id.* at para. 172.

112. *See id.* at para. 168.

113. *See id.* at paras. 177, 180. U.S. courts apply a similar presumption. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 976 (2d Cir. 1974); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 708–09 (2d ed. 2001).

114. *See* Mexico's Outline of Argument, *supra* note 14, at paras. 153–54.

115. *See id.* at paras. 157–59. Under the CAA, the applicant must obtain leave of the court for appeals on questions of law. Courts have the discretion to grant leave if (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice, (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or (c) the point of law is of general or public importance. *See id.* at paras. 158–60.

116. *See id.* at paras. 118–86.

117. *See id.* at paras. 131, 134.

118. *See id.* at para. 131.

119. *See id.* at paras. 72–73; *In re* Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States (B.C. Sup. Ct. 2001), Transcript of Proceedings (Feb. 19, 2001) at 61, *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#Metalclad.

120. *See* Mexico's Outline of Argument, *supra* note 14, at para. 145.

that claims involving the use of international law to challenge public regulatory law "could not easily lend [themselves] to being characterized as commercial."[121] Thus, according to Mexico, the *Metalclad* award lay outside the ICAA's embrace and within the scope of the CAA, which permits *de novo* judicial review on questions of law.[122]

In the event that the *Metalclad* award fell within the scope of the ICAA, Mexico submitted that the same considerations justified the adoption of a heightened standard of review.[123] Mexico recognized that courts have interpreted the ICAA to create a "powerful presumption" that "private commercial tribunals" have not exceeded their jurisdiction because their awards "do not have any public policy ramifications."[124] Mexico argued, however, that the presumption does not apply to "mixed arbitration between . . . investor[s] and . . . sovereign State[s] regarding alleged breaches of a trilateral trade agreement"[125] because "incorrect or unreasonable decisions . . . have significant public policy ramifications" on issues of general concern, including public health and the environment.[126]

In their arguments, Mexico and Canada both acknowledged that Article 1136(7) provides that claims "submitted to arbitration under . . . Section [B] shall be considered to arise out of a commercial relationship or transaction for purposes of . . . the New York Convention and . . . the Inter-American Convention."[127] Even so, they observed that those treaties only apply to the *enforcement* of awards.[128] Since neither treaty governs *annulment* proceedings, Article 1136(7) was not relevant.[129] Mexico further recognized that Canada's federal arbitration statute defines "commercial arbitration" to include Chapter 11 claims, but noted that the federal statute only applies to claims brought against the Canadian government.[130] Because Mexico was the respondent in *Metalclad*, the federal law's definition of "commercial arbitration" did not apply.[131]

121. *Id.* at para. 147 (quoting U.S. submissions in Methanex Corp. v. United States).

122. *See id.* at paras. 126–28.

123. *See id.* at paras. 178–86.

124. *See id.* at paras. 180, 184–85.

125. *See id.* at paras. 177, 179–81.

126. *See id.* at paras. 184–85.

127. *See id.* at para. 135; Canada's Outline of Argument, *supra* note 14, at para. 16.

128. *See id.*

129. *See* Mexico's Outline of Argument, *supra* note 14, at para. 135.

130. *See id.* at para. 144.

131. *See id.*

In its submissions as intervenor, Canada did not comment on the law applicable to the annulment proceedings.[132] Regardless of the applicable law, Canada urged the rejection of precedent established in the field of "private commercial arbitration" and the adoption of a "pragmatic and functional approach" to formulating an appropriate standard of review.[133] Like Mexico, Canada argued that the deferential judicial review of private commercial awards depends on the involvement of "parties bound by contract law in narrow commercial disputes dealing with private law issues."[134] By contrast, the "inherently . . . public nature" of Chapter 11 arbitrations justified the development of a new standard of review.[135] Furthermore, the "NAFTA architecture" supposedly establishes that the awards of Chapter 11 tribunals "are not . . . worthy of judicial deference."[136] For instance, the Canadian government observed that Chapter 11 tribunals "do not exhibit the features of . . . specialized or expert administrative tribunal[s]."[137] Chapter 11 tribunals are appointed *ad hoc* and for single cases.[138] Unlike WTO dispute resolution panels, Chapter 11 tribunals do not enjoy the support of a permanent secretariat.[139] In addition, tribunals must follow the Free Trade Commission's official interpretations of Chapter 11.[140] Also, Chapter 11 awards do not constitute precedent and have no binding force beyond the particular dispute.[141] Finally, in resolving individual disputes, Chapter 11 tribunals can award damages or restitution, but cannot strike down or grant extraordinary relief from the impugned measure.[142] According to Canada, these characteristics indicate that Chapter 11 tribunals do not merit judicial deference.[143]

Responding to these arguments, the Supreme Court of British Columbia first addressed the issue of the applicable law.[144] In so

132. *See* Canada's Outline of Argument, *supra* note 14, at para. 4.

133. *See id.* at paras. 2, 19.

134. *See id.* at para. 23.

135. *See id.* at paras. 5, 25.

136. *See id.*

137. *See id.* at para. 25.

138. *See id.*

139. *See id.*

140. *See id.* at para. 26.

141. *See id.*

142. *See id.* at para. 27.

143. *See id.* at para. 30.

144. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 15, at paras. 39–49.

doing, it observed that the ICAA specifically permits reference to the Model Law's commentary in order to resolve interpretive questions.[145] That commentary, in turn, calls for a "wide interpretation" of commercial arbitration, which it defines to include arbitration arising out of investment relationships.[146] Although Mexico's exercise of regulatory authority precipitated the *Metalclad* dispute, the court held that it was merely incidental to the claimant's investment relationship with Mexico.[147] To further support this conclusion, the court noted that Chapter 11 only applies to "investment disputes," as opposed to regulatory disputes.[148] Consequently, Chapter 11 proceedings fall within the definition of "commercial" arbitration and, thus, the scope of the ICAA.[149]

The court then recognized that the ICAA permits annulment for serious defects of procedure or jurisdiction and violations of public policy, but not legal error.[150] Although the court declined to adopt Canada's "pragmatic and functional" approach as an independent standard of review, the court stated that its underlying principles might "be of assistance in applying" the ICAA.[151] Perhaps for this reason, the court never expressly acknowledged any obligation to apply the customarily "powerful presumption" that arbitral tribunals have acted within their jurisdiction.[152] The notable omission of this presumption from the court's analysis seems to have opened the door to *de novo* review.[153]

Turning to the merits of the annulment petition, the court held that Chapter 11 generally permits the arbitration of claims alleging violations of Section A, but not other provisions of NAFTA.[154] With respect to Article 1105, the court ruled that one must measure fairness and equity by reference to customary international law, as opposed to treaty law or any other benchmark.[155] Having adopted this

145. *See id.* at para. 42.

146. *See id.* at paras. 41, 43.

147. *See id.* at para. 46.

148. *See id.* at para. 45.

149. *See id.* at para. 49.

150. *See id.* at paras. 50–51.

151. *See id.* at para. 54

152. *See supra* note 112 and accompanying text.

153. *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 761 (observing that the failure to give awards a presumption of validity exposes them to de novo review in annulment proceedings).

154. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 15, at para. 59.

155. *See id.* at paras. 62–65.

interpretation of Article 1105, the court then ruled that the tribunal exceeded its jurisdiction by grounding its determination of unjust and inequitable treatment in a purported violation of Article 1802 (transparency).[156]

Although the investor credibly argued that the tribunal had merely interpreted Article 1105 to include a minimum standard of transparency (and therefore had not exceeded its jurisdiction to apply Article 1105),[157] the court disagreed.[158] Furthermore, while the court mentioned the theoretical possibility of judicial deference to arbitrators' interpretations of Article 1105,[159] it observed that it would have reached the same conclusion under a much broader interpretation of that Article.[160] Whatever the reach of Article 1105, the court held that it does not embrace principles of transparency; therefore, any decision incorporating such principles constitutes an excess of jurisdiction.[161] Additionally, although the court understood the tribunal as having interpreted Article 102(1) to include transparency among the "objectives" that inform all of NAFTA's provisions, the court described the tribunal's conclusion as an "incorrect" understanding of Article 102(1).[162]

Turning to the findings on expropriation, the court held that the tribunal's excess of jurisdiction "infected" its conclusion that the denial of the construction permit constituted an indirect

156. *See id.* at paras. 66–71.

157. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 976 (2d Cir. 1974) (applying "a powerful presumption" that the tribunal acted within its powers and deferring to the tribunal's interpretation of contractual provisions that allegedly limited its jurisdiction). Some of the most highly respected writers (including one negotiator of Chapter 11) would agree with the tribunal's interpretation of "fair and equitable treatment" to include the principle of transparency. *See* Price, *supra* note 78, at 424 ("The fair and equitable treatment standard is closely aligned with, and overlaps, certain fundamental principles of international law—including transparency . . . from which other, more specific legal rules emanate."); Sacerdoti, *supra* note 58, at 344 n.150 ("[F]air and equitable treatment . . . requires that all rules and practices affecting an investor's interest be transparent, predictable and non discriminatory. This standard refers implicitly to . . . transparency of investment conditions and respect of international law.").

One might likewise have sustained the award on the grounds that the tribunal interpreted "fair and equitable treatment" as an intentionally vague term that creates a quasi-legislative authority to formulate the specific rules (such as transparency) necessary to achieve the treaty's object and purpose in particular disputes. *See supra* note 71 and accompanying text.

158. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 15, at paras. 66, 68.

159. *See id.* at paras. 68–69.

160. *See id.* at para. 74.

161. *See id.* at paras. 72, 74.

162. *See id.* at para. 71.

expropriation.[163] Although the tribunal's first finding of expropriation also relied on a comparison to *Biloune v. Ghana Invs. Ctr.*[164] (which did not involve the concept of transparency), the court ruled that "substantial [factual] differences" rendered that case an inappropriate precedent for equating the denial of a construction permit with expropriation.[165] This analysis appears to represent *de novo* review of the tribunal's application of precedent.

Thus, while the Supreme Court of British Columbia ultimately upheld the tribunal's second finding of expropriation based on the ecological decree,[166] its partial annulment of the *Metalclad* award seems to rest on at least four elements of heightened review. First, the court appears not to have applied the powerful presumption that the tribunal acted within its jurisdiction,[167] which arguably could have sustained the argument that the tribunal merely interpreted Article 1105 to include principles of transparency. Second, the court implied that it could not accept such a broad interpretation of Article 1105 because principles of transparency do not fall within the embrace of Chapter 11. Third, the court overruled the tribunal's interpretation of Article 102(1), which would have included transparency among NAFTA's animating principles. Fourth, although the court could have sustained the tribunal's first finding of expropriation based on its interpretation of *Biloune*, the court rejected its interpretation of that case. Although the Supreme Court of British Columbia formally eschewed the principle of heightened review, one may hardly characterize its decision as a model of deference.[168]

163. *See id.* at paras. 78–79.

164. 95 I.L.R. 183 (1990).

165. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 15, at para. 80.

166. *See id.* at para. 105.

167. *See supra* notes 152–53 and accompanying text.

168. *See Questions Remain After B.C. Supreme Court Upholds Metalclad Victory in Mexico Case: Q&A with NAFTA Legal Expert Todd Weiler*, MEX. FORECAST, May 15, 2001, at 2, 6, *available at* http://www.naftaclaims.com (observing that the court paid lip service to the principle of judicial deference, but arguing that the court actually "substituted" its own opinions for that of the tribunal, and concluding that this example of heightened review "should concern anyone looking to enforce an international arbitral award in British Columbia").

IV. ARGUMENTS ABOUT INTENT, ARCHITECTURE, AND HEIGHTENED REVIEW

As noted above, the arguments for heightened judicial review of Chapter 11 awards rest on two potential foundations. First, the allegedly noncommercial nature of the underlying relationships might remove Chapter 11 disputes from the deferential framework that applies to international commercial arbitration. Although the Supreme Court of British Columbia rejected this view, Part IV(A) suggests that the court incorrectly based its decision on the "nature" of Chapter 11 disputes and should, instead, have considered the intent of the NAFTA Parties. Second, NAFTA's "architecture" might indicate that Chapter 11 tribunals do not merit judicial deference. Although one may detect this view in the substance (if not the rhetoric) of the court's decision, Part IV(B) argues that Chapter 11's structure prohibits—and eliminates the need for—heightened judicial review.

A. The Role of Nature and Intent in Defining "Commercial" Arbitration.

In characterizing Chapter 11 disputes as commercial or noncommercial, Mexico, Canada and the Supreme Court of British Columbia all examined the "nature" of the underlying relationships.[169] This approach assumes that the underlying relationships have attributes that one may clearly identify as commercial or noncommercial. As explained below, this assumption seems untenable because relationships between investors and host states have both commercial and noncommercial aspects, making any determination of their true "nature" impossible, or at least highly subjective. Therefore, the proper inquiry should focus on the evident intent of the NAFTA Parties to subject Chapter 11 proceedings to the deferential legal framework of international commercial arbitration.[170]

169. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, supra note 15, at paras. 41, 43–46; Mexico's Outline of Argument, *supra* note 14, at paras. 129–31, 145–52; Canada's Outline of Argument, *supra* note 14, at paras. 5–7.

170. *See* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 107, 126–27 (1990) (trying to determine whether the Iran-United States Claims Tribunal fell within the model of interstate arbitration or the model of international commercial arbitration, recognizing that "the choice suggested as most likely by the circumstances may not be the choice in fact adopted by the parties," and concluding that "the issue is not whether an

In trying to establish the noncommercial character of Chapter 11 disputes, Mexico argued that the claims do not involve business relationships but the exercise of public rights granted to sovereign states by international agreement.[171] Thus, in making Chapter 11 claims, investors do not assert their own (private) rights, but essentially "step into the shoes" and "assert the rights" of their home states under international law.[172] Although Chapter 11 disputes certainly have public policy ramifications, four juridical facts contradict Mexico's description of Chapter 11 proceedings. First, the initiation of Chapter 11 proceedings by investors does not preclude their home states from simultaneously pursuing claims under the state-to-state remedial provisions of Chapter 20.[173] If NAFTA investors merely stepped into the shoes of their host states, it seems unlikely that NAFTA would tolerate such parallel proceedings. Second, Chapter 11 and Chapter 20 establish different rules of procedure,[174] numbers of panelists,[175] qualifications of panelists,[176] procedures for rendering decisions,[177] and methods of enforcing decisions.[178]Thus, whereas Chapter 11 disputes follow the template

---

arbitration has [an interstate or commercial] character," but whether "the parties intended" disputes to fall within the model of commercial arbitration).

171. *See* Mexico's Outline of Argument, *supra* note 14, at para. 131.

172. *See* Transcript of Proceedings, *supra* note 119, at 61.

173. *See* NAFTA, *supra* note 2, art. 1115, at 642 (stating that the investor-state arbitration procedures established by Section B do not "prejudice . . . the rights and obligations of the [NAFTA] Parties under Chapter Twenty"). *See also* Thomas, *supra* note 28, at 105 n.21.

174. *Compare* NAFTA, *supra* note 2, art. 1120, at 643 (permitting the submission of investor-state disputes to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID, or the UNCITRAL Arbitration Rules, as modified by Section B of Chapter 11), *with* art. 2012(1)-(2), at 696 (requiring the Free Trade Commission to adopt Model Rules of Procedure for state-to-state disputes).

175. *Compare* NAFTA, *supra* note 2, art. 1123, at 644 (providing for investor-state arbitration before panels of three arbitrators), *with* art. 2011(1)-(2), at 696 (requiring panels of five individuals for state-to-state disputes).

176. *Compare id.*, art. 1124(3)-(4), at 644 (indicating that, if the parties cannot agree on a presiding arbitrator in investor-state arbitration, the Secretary-General of ICSID should appoint someone who is "experienced in international law and investment matters"), *with* arts. 2009(2), 2010(1), 2011(1), at 696 (citing the additional qualifications of objectivity, reliability, sound judgment, independence, and compliance with a code of conduct established by the Free Trade Commission for state-to-state arbitrations, and requiring parties to appoint panelists having the nationality of the opposing state).

177. *Compare id.*, art 1135, at 646 (contemplating only "final awards" in investor-state disputes), *with* arts. 2016–17, at 697 (requiring panels to issue both "initial" and "final reports").

178. *Compare id.*, art. 1136(6), at 646 (providing for enforcement of Chapter 11 awards in municipal courts under the ICSID Convention, the New York Convention, or the Inter-American Convention), *with* arts. 2018–19, at 697–98 (calling for voluntary implementation

established for commercial arbitration, Chapter 20 disputes follow a pattern more familiar to interstate arbitration. [179] Because these "procedural" differences represent a change in venue that may have outcome-determinative effects,[180] it seems disingenuous to argue that Chapter 11 claimants merely step into the shoes of their home states. Third, while Chapter 11 awards may require payment of compensatory damages, Chapter 20 decisions only offer prospective relief from treaty violations.[181] Fourth, consistent with prevailing norms of state-to-state adjudication, Chapter 20 does not subject the decisions of panels to any form of review by municipal courts. If NAFTA investors merely stepped into the shoes of their home states, Chapter 11 probably would not contemplate *any* supervisory role for municipal courts.[182] Because Chapter 11 provides for annulment of awards by municipal courts (a hallmark of private commercial arbitration), one must reject the assertion that Chapter 11 simply permits investors to assert the public rights of their home states.

One must equally reject Mexico's and Canada's claims that the public policy ramifications of Chapter 11 disputes remove them from the scope of international commercial arbitration.[183] Observers of long-standing debates about arbitrability will understand that international commercial arbitrations frequently involve complex issues of public regulatory law that affect society at large.[184] Although a few jurists contend that arbitrators lack the competence to

---

of panel reports in state-to-state disputes, but providing for suspension of treaty benefits in the event of non-implementation).

179. Over a decade ago, Professor David Caron wrote an influential article about the proper characterization of the Iran-United States Claims Tribunal, which arguably exhibited traits of both commercial arbitration and interstate arbitration. Professor Caron found the adoption of the UNCITRAL Arbitration Rules to be "very significant" evidence of an intent to subject the tribunal to the model of commercial arbitration. He also observed that "[o]ther tribunals have regarded the parties' choice of procedural rules as an indication of intent." Caron, *supra* note 170, at 138.

180. *See* Charles H. Brower II, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, 12 EMORY INT'L L. REV. 1571, 1578–79 & n.35 (1998). *See also* Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 34 & n.153 (2000).

181. *Compare* NAFTA, *supra* note 2, art. 1135, at 646 (authorizing awards of monetary damages or restitution), *with* arts. 2018(2), 2019(1), at 697–98 (contemplating non-implementation or removal of non-conforming measures).

182. *Cf.* Caron, *supra* note 170, at 131 (indicating that if parties adopt the model of interstate arbitration, they probably intend to subject the awards to review "under the *international* legal system") (emphasis added).

183. *See* Mexico's Outline of Argument, *supra* note 14, at paras. 145–52; Canada's Outline of Argument, *supra* note 14, at paras. 5–7.

184. *See* BORN, *supra* note 113, at 283 (stating that "most public law claims are capable of being arbitrated").

resolve such disputes,[185] the prevailing view holds that "concerns of international comity" and "respect for the capacities of... transnational tribunals" justify the arbitration of complex, international disputes involving public regulatory law.[186] Likewise, observers have long discredited the notion that states may invoke domestic laws and policies to disown their arbitration agreements.[187]

In Chapter 11 claims, however, the clash between commercial and noncommercial regulatory interests becomes more pronounced because every claim involves a private investor's challenge of state action. Therefore, Chapter 11 represents an attempt to create a balanced regime for managing disputes that have significant commercial and noncommercial elements.[188] Under these circumstances, identification of the "true nature" of Chapter 11 disputes as essentially commercial or noncommercial seems impossible, at least on the basis of objective criteria.[189] Because the characteristics of Chapter 11 disputes do not provide a reliable basis for classification as commercial or noncommercial, analysis should focus on the intent of NAFTA Parties to subject Chapter 11 proceedings to the legal framework customarily applied to international commercial arbitration.[190] In this regard, it bears

185. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 658–66, 105 S. Ct. 3346, 3370–74 (1985) (Stevens, J. dissenting).

186. *Id.* at 629.

187. *See* BORN, *supra* note 113, at 238 ("In general, neither arbitral tribunals nor national courts have allowed sovereign states to rely on their own laws to disown their arbitration agreements."); Dodge, *supra* note 13, at 191 n.57 (arguing that NAFTA Parties, having submitted to Chapter 11, cannot resist enforcement of awards the grounds that they violate public policy). Even if individuals lack the capacity to waive public rights, the NAFTA Parties surely do not. *Cf.* BORN, *supra* note 113, at 245, 253 (observing that historical justifications for nonarbitrability rest on the idea that certain claims involve "public values" that transcend the interests of individual plaintiffs).

188. *See* Alvarez, *supra* note 39, at 407, 430; Brower, *supra* note 4, at 41; David R. Haigh, *Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 115, 132 (2000).

189. *Cf.* BORN, *supra* note 113, at 150 (observing that courts have struggled to define commercial activities for purposes of foreign sovereign immunity and indicating that "[s]imilar debates may arise" with respect to arbitration); ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 53 (1981) (recognizing that in the field of sovereign immunity it can be difficult to distinguish between commercial and noncommercial transactions, and explaining the term "'commercial' may be understood differently in various countries").

190. *See* Caron, *supra* note 170, at 107, 126–27 (arguing that where circumstances do not provide a reliable guide for identifying the legal (*i.e.*, commercial or noncommercial) character of an arbitration, analysis should focus on identifying the legal system that the parties intended to govern the validity of the arbitration). *Cf.* Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27 (authorizing recourse to supplementary means of treaty interpretation when textual analysis yields an ambiguous result). Alternatively, Article 32 of the Vienna Convention recognizes

repeating that NAFTA's objectives include the enlargement of investment opportunities and the creation of a "predictable *commercial* framework for business planning and investment."[191] To achieve this goal, Chapter 11 creates a bargain between host states and investors: "The terms of this bargain are that those who respond to the invitation from the host country to invest their . . . resources . . . may be assured that the basic standards of fairness spelled out in Section A of Chapter 11 will be fully observed by the host government."[192]

The bargain also includes the assurance that investors may enforce standards of fairness through investor-state arbitration, which bypasses the municipal courts of host states.[193]

Thus, Chapter 11 alters the traditional, hierarchical relationship between foreign investors and host states in two ways. First, it prohibits certain exercises of sovereignty at the expense of foreign investors. Second, it creates a mechanism for resolving investment disputes that places foreign investors and their host states on a more equal footing.[194] Because investors do not have to rely on the mercy of their host states or their home states for protection, Chapter 11 redistributes bargaining power in a manner more reminiscent of relationships between commercial actors. As one U.S. negotiator of Chapter 11 explained, the point of this exercise is to remove investment disputes from "the political realm and put them more into the realm of *commercial arbitration.*"[195]

Consistent with this goal, the NAFTA Parties agreed to consider claims submitted to arbitration under Chapter 11 "to arise

---

the propriety of examining intent to confirm the court's interpretation of Chapter 11 as a form of commercial arbitration.

191. NAFTA, *supra* note 2, Preamble, at 297.

192. Haigh, *supra* note 188, at 128.

193. *See* Thomas, *supra* note 28, at 113 (describing investor-state arbitration as a bargain made available to investors by NAFTA Parties). *See also* Mexico's Outline of Argument, *supra* note 14, at para. 229 (stating that the purposes of Chapter 11 include "remov[al] [of] damages claims from the domestic courts of the State of the investment at the instance of the investor").

194. *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, 196 (2001); *see also* Greider, *supra* note 3 (indicating that Chapter 11 permits investors "to challenge governments as 'an open class of legal equals'").

195. Price, *supra* note 4, at 112. *See also* Alvarez, *supra* note 39, at 393–94 (indicating that Chapter 11 "provides guaranteed access to international *commercial* arbitration") (emphasis added); William W. Park, *Arbitration and the FISC: NAFTA's 'Tax Veto'*, 2 CHI. J. INT'L L. 231, 232 (2001) (explaining that Chapter 11 "endorses the long tradition of arbitral dispute resolution underpinning much modern international business law").

out of a commercial relationship or transaction" for the purposes of the New York Convention and the Inter-American Convention,[196] which govern the enforcement of arbitration agreements and awards. While these instruments technically do not govern annulment proceedings, the NAFTA Parties surely did not expect their courts to place Chapter 11 disputes within a commercial framework when enforcing arbitration agreements, transfer them to a noncommercial framework when deciding whether to annul awards, and retransfer them to a commercial framework when enforcing valid awards.[197] In fact, state practice suggests the opposite, it being recalled that Canadian federal law defines "commercial arbitration" to include Chapter 11 proceedings brought against Canada.[198] It may be true that the federal law only applies to claims brought against Canada,[199] but one struggles to understand why claims against Mexico or the United States would require different treatment.

In short, the relationships that give rise to Chapter 11 disputes defy easy characterization as "commercial" or "noncommercial." Therefore, one must interpret Chapter 11 in light of the NAFTA Parties' undertakings to "ensure a predictable *commercial* framework for business planning and investment"[200] and to put investors and host states on a more equal footing.[201] These objectives, as implemented by NAFTA and explained by its drafters, reflect an intent to place Chapter 11 disputes within the deferential legal framework of commercial arbitration for all purposes, including annulment proceedings.

B. The Architecture of Chapter 11

Regardless of the characterization of investor-state disputes as commercial or noncommercial, Canada submits that the following elements of NAFTA's "architecture" demonstrate that Chapter 11 tribunals do not merit deference or protection by a high standard of review:

196. NAFTA, *supra* note 2, art. 1136(7), at 646.

197. *See* Alvarez, *supra* note 39, at 418 (concluding that, in Chapter 11 annulment proceedings before municipal courts, "the applicable grounds will be contained in the relevant international *commercial* arbitration legislation") (emphasis added).

198. *See supra* notes 108, 130–31 and accompanying text.

199. *See id.*

200. *See* NAFTA, *supra* note 2, Preamble, at 297.

201. *See supra* note 194 and accompanying text.

> NAFTA Chapter Eleven Tribunals do not exhibit the features of a specialised or expert administrative tribunal. Chapter Eleven Tribunals are currently appointed *ad hoc* and for single cases. There is no Chapter Eleven secretariat or in-house specialists or other institutional hallmark of expertise or special authority. This contrasts with the standing secretariat of the World Trade Organization supporting its dispute settlement panels or the staff supporting permanent domestic administrative tribunals.
>
> Moreover, Tribunals can also be subject to binding interpretations of provisions of the NAFTA by the Commission (of the Parties' trade ministers): NAFTA Article 1131(2).
>
> Chapter Eleven tribunals *only* have the power to make an award of monetary damages or restitution: NAFTA Article 1135. They cannot strike down the impugned measure or issue any form of injunctive, declaratory or other extraordinary relief: NAFTA Article 1121. A Chapter Eleven tribunal's authority to order interim measures of protection is likewise limited: NAFTA Article 1134.[202]

As noted above, these arguments appear to have influenced the Supreme Court of British Columbia's decision to grant partial annulment of the *Metalclad* award. After agreeing that the principles underlying Canada's "pragmatic and functional approach" might be "of assistance" in applying the ICAA,[203] the court neglected to accord the tribunal the customary presumption of jurisdictional propriety and appeared to review some of the tribunal's legal conclusions *de novo*.[204]

Consideration of NAFTA's architecture should start not with mechanical provisions, but with first principles. These include the general objectives of NAFTA (creation of "*effective* procedures for the . . . resolution of disputes"),[205] as well as the specific objectives of Chapter 11 (establishment of a "mechanism for the *settlement* of investment disputes that assures both *equal treatment* among

202. Canada's Outline of Argument, *supra* note 14, at paras. 25–27.

203. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 15, at para. 54.

204. *See supra* notes 152–53, 157–65 and accompanying text.

205. NAFTA, *supra* note 2, art. 102(1)(e), at 297.

investors of the Parties . . . and due process before an *impartial* tribunal").[206] One must also recall that the NAFTA Parties have consented to *binding* arbitration of investor-state disputes,[207] (subject to *revision* or *annulment* but not *appeal*).[208] Having consented to binding arbitration, the NAFTA Parties cannot frustrate that obligation by condoning extensive judicial review.[209]

Furthermore, although the Canadian government may not have been the respondent in the *Metalclad* arbitration, it can hardly claim the status of a disinterested third party. To the contrary, Canada submitted arguments to the *Metalclad* tribunal in accordance with

206. *Id.*, art. 1115, at 642.

207. *See id.* art. 1136(1), at 646; Alvarez, *supra* note 39, at 395.

208. In international practice, "revision" differs from appeal in that it requires discovery of "decisive" new facts that were unknown to the tribunal and the party seeking revision. J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 242 (1959). Also, revision does not permit the reweighing of facts or law. *See id.*

In modern international practice, courts may use "annulment" to rectify gross procedural injustices (such as excess of jurisdiction or denial of the right of audience), but not mistakes of law. *See* BORN, *supra* note 108, at 708–09; JOHN COLLIER & VAUGHN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 259 (1999); W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 502–03 (3d ed. 2000); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 434 (3d ed. 1999); Caron, *supra* note 170, at 115; Pearce & Coe, *supra* note 58, at 340; *see also* Park, *supra* note 195, at 235 ("Courts should exercise . . . control . . . over the arbitration's basic procedural integrity (looking at matters such as bias, excess of authority and due process), but should not second guess the arbitrator on the substantive merits of the dispute.").

In the past, some observers identified "essential error" as a ground for annulment. *See* SIMPSON & FOX, *supra*, at 257. *But see* JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 98 (1929) (expressing the view that "no authority" believes that an award "may be attacked because of erroneous appreciation either of the facts or of the law applicable to them"). One may attribute this practice to the need for judicial control over arbitrators who, at that time, often had no legal training. *See* REDFERN & HUNTER, *supra*, at 436 n.13. Even this practice did not, however, permit annulment based on routine errors of fact or law. *See* SIMPSON & FOX, *supra*, at 256–57.

By contrast, an "appeal" suggests the opportunity to reexamine "any aspect of the decision with full opportunity accorded to the parties to argue." W. MICHAEL REISMAN, NULLITY AND REVISION 212 (1971).

209. *See* Iran v. United States, paras. 63, 69, 1998 WL 1157733 (holding that the submission to "final and binding" arbitration "rules out the possibility of readjudication of the merits of [the award] by a municipal court"); M&C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 847 (6th Cir. 1996) (indicating that an agreement on the finality of an award precludes de novo review of the merits); CRAIG ET AL., *supra* note 208, at 501 ("[P]arties to arbitration seek a reasonable measure of finality. On signing the arbitration agreement, the business managers do not expect that after a dispute has been decided by the arbitrator it will be tried yet again on the substantive merits before a judge."); MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS 124 (1944) ("If the parties to an agreement desire action falling short of a binding decision, the proceeding will lack one of the chief characteristics of judicial process.").

Article 1128 of NAFTA[210] and has taken an active role as intervenor in the annulment proceedings.[211] Canada has also filed its own petition for annulment of the *S.D. Myers* award and appears likely to propound similar arguments in those proceedings.[212] Under these circumstances it seems unlikely that Canadian courts represent the "impartial tribunal" charged with consideration of the merits under Article 1115.[213]

Article 1115 also seeks to provide equal treatment to the investors of different NAFTA Parties by removing their claims from the eccentricities of municipal legal systems and submitting them to the more generic process of international commercial arbitration.[214] Extensive litigation in municipal courts following arbitration would both undermine that goal and frustrate the undertaking to create *effective* mechanisms for dispute resolution.[215]

Finally, the requirement that claimants waive their rights to "initiate or continue ... *any proceedings* with respect to the [challenged] measure" in the municipal courts of NAFTA Parties[216] presumably disables them from requesting heightened judicial review of the merits after the close of arbitral proceedings.[217] Because equal treatment of disputing parties constitutes an "overriding principle" of Chapter 11 arbitration,[218] one must conclude that the NAFTA Parties

210. Metalclad Corp. v. Mexico, Award, ICSID Case No. ARB(AF)/97/1 (2000), *available at* http://www. pearcelaw.com/metalclad.html at para. 24.

211. *See supra* notes 103, 127, 132–43 and accompanying text.

212. *See supra* note 104 and accompanying text.

213. Brower & Steven, *supra* note 194, at 196 (explaining that "the fundamental reason that... investment treaties have opted for international adjudication is that domestic courts are often in fact, and, just as important, usually perceived to be biased against alien investors").

214. *See* NAFTA, *supra* note 2, art. 1115, at 642 (establishing a "mechanism for the settlement of investment disputes that assures... equal treatment among investors of the Parties in accordance with the principle of international reciprocity"); Pope & Talbot, Inc. v. Canada, Decision by Tribunal (Sept. 6, 2000) at para. 1.5 (identifying equality of treatment as an "overriding principle" in NAFTA arbitrations conducted under the UNCITRAL Rules), http://www.appletonlaw.com/4b3P&T.htm.

215. *See* REDFERN & HUNTER, *supra* note 208, at 417–18 ("By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is... final and binding. It is not intended to be... the first step on a ladder of appeals through national courts."); *see also* Caron, *supra* note 170, at 125 ("In negotiating arbitration clauses, companies and states are seeking an alternative to the local courts. This alternative can be truly acceptable only if it provides an effective remedy.").

216. NAFTA, *supra* note 2, art. 1121(1)-(2), at 643 (emphasis added).

217. The Article 1121 waiver does not, however, preclude investors from commencing revision or annulment proceedings based on gross procedural irregularities, as opposed to errors of fact and law. *See* Gantz, *supra* note 10.

218. *See* Pope & Talbot, Inc., Decision by Tribunal at para. 1.5.

similarly lack the capacity to seek heightened judicial review of awards.

Thus, Chapter 11's basic structure does not permit extensive judicial review of awards. Furthermore, it virtually eliminates the need for such review. Although Canada doubts the expertise of Chapter 11 tribunals,[219] disputing parties will certainly appoint arbitrators who have experience in international law and investment matters. In *Metalclad*, for example, the parties selected Sir Elihu Lauterpacht as the presiding arbitrator. Sir Elihu has served as Judge *Ad Hoc* on the International Court of Justice (ICJ), President of the World Bank Administrative Tribunal, arbitrator in numerous international disputes, as well as counsel in several proceedings before the ICJ, the European Commission for Human Rights, and the Iran-United States Claims Tribunal.[220] As its party-appointed arbitrator, the claimant selected Benjamin R. Civiletti, a former Attorney General of the United States who has appeared before the ICJ and served on another Chapter 11 tribunal.[221] Mexico appointed José Luis Siqueiros, a Mexican law professor, who has been a member of the Organization of American States' Inter-American Juridical Committee,[222] the International Council for Commercial Arbitration (ICCA),[223] and the NAFTA Advisory Committee on Private Commercial Disputes.[224] One suspects that the relevant expertise of the *Metalclad* arbitrators noticeably exceeds that of their counterparts on the North American bench.[225]

---

219. *See supra* note 202 and accompanying text.

220. *See* Curriculum Vitae of Sir Elihu Lauterpacht CBE, QC, *at* http://www.20essexst.com/barristers/ lauterpacht.html.

221. *See* Curriculum Vitae of Benjamin R. Civiletti, *at* http://www.venable.com. *See also* Gantz, *supra* note 10.

222. *See* Jonathan T. Fried, *The Inter-American Juridical Committee and International Law*, 94 AM. SOC'Y INT'L L. PROC. 208, 208 (2000).

223. *See* José Luis Siqueiros, *Mexican Arbitration—The New Statute*, 30 TEX. INT'L L.J. 227, 227 n.[††] (1995).

224. *See Advisory Committee on NAFTA Established*, MEALY'S INT'L ARB. REP., Nov. 1994, at 13.

225. *See* Brower & Steven, *supra* note 194, at 201 ("The arbitrators participating in these cases are highly competent members of academia and the international bar, with experience and expertise in the relevant areas of law exceeding that of the vast majority of the domestic judiciary in each of the three NAFTA countries."); Gantz, *supra* note 10 (referring to Civiletti, Lauterpacht, and Siqueiros as "some of the best known and most highly respected lawyers in North America (or elsewhere)"); *see also* Brower & Steven, *supra* note 194, at 196 ("[D]omestic courts often do not have the legal expertise and experience to free themselves from the confines of their own domestic regimes so as to give proper attention and respect to international law . . ."); Brower, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, *supra* note 180, at 62 (observing that "a municipal judge sitting by herself would find it difficult to step out of her own legal tradition and to

One must take an equally suspicious view of assertions that Chapter 11 tribunals, unlike WTO dispute-settlement panels, lack the support of a permanent secretariat. To begin with, several claims are proceeding under the Additional Facility Rules, pursuant to which the ICSID Secretariat renders administrative and logistical support to the tribunals.[226] Furthermore, although Chapter 11 tribunals do not have the benefit of a permanent legal staff, they have something much better. Since all NAFTA Parties have the right to submit arguments to Chapter 11 tribunals regarding interpretation of NAFTA,[227] the tribunals often receive briefings from all three NAFTA Parties. This right of participation ensures that tribunals will be fully prepared to resolve difficult interpretive questions. In any event, it adequately compensates for the lack of a permanent secretariat.

The right of participation also makes it unlikely that Chapter 11 tribunals will adopt unreasonable legal positions.[228] Because the NAFTA Parties have the collective authority to formulate binding interpretations of Chapter 11,[229] one may assume that tribunals will give the most serious consideration to arguments propounded vigorously and unanimously by the NAFTA Parties. Even if a Chapter 11 tribunal were to commit an interpretive blunder, the NAFTA Parties could restore doctrinal integrity through collective action.[230] This mechanism eliminates the need for unilateral

---

identify . . . general principles [of law] common to major legal systems," and explaining that "[a] panel of three experienced arbitrators from different countries would be better suited to the task").

226. Pearce & Coe, *supra* note 58, at 321; David J. St. Louis, *The Anatomy of a Chapter Eleven Arbitration: Affidavits, Affiant, and Burdens of Proof*, 23 HASTINGS INT'L & COMP. L. REV. 345, 352 (2000) (remarks of Joseph de Pencier, counsel to Canada in the *Metalclad* and *S.D. Myers* annulment proceedings); Thomas, *supra* note 28, at 121.

227. *See* NAFTA, *supra* note 2, art. 1128, at 645; Thomas, *supra* note 28, at 103.

228. Pearce & Coe, *supra* note 58, at 338 (indicating that submissions under Article 1128 "may provide an important check upon fanciful theories of recovery or treaty interpretations proffered by only one NAFTA Party").

229. *See* NAFTA, *supra* note 2, art. 1131(2), at 645.

230. In recent publications, lawyers for Canada and the United States have issued thinly-veiled warnings that the failure of tribunals to heed the unanimous views of NAFTA Parties could trigger the adoption of binding interpretive statements—or worse. *See* Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 HASTINGS INT'L & COMP. L. REV. 409, 415 (2000) ("It remains to be seen whether the tribunal in *S.D. Myers* will accept this tri-lateral position [that Article 1110 does not expand the liability for expropriation beyond the scope already imposed by customary international law], or whether the NAFTA Parties will have to enshrine it in an Article 1131(2) binding interpretation."); *see also* Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183, 190 (2001) ("Tribunals should reconsider their reluctance to credit [the insistence of NAFTA Parties on strict] compliance with the [procedural] terms of Section B. . . . State Parties are likely to continue urging narrow construction of the Chapter, and are justified in so doing. . . . [J]udicious

adjustment of Chapter 11 jurisprudence by the courts of individual NAFTA Parties. Furthermore, such unilateral review would probably conflict with the good-faith performance of the undertaking to formulate doctrinal adjustments through a collective decision-making process.

To be sure, interpretive statements only have prospective effect and, therefore, provide no relief from erroneous legal decisions in particular cases. Nevertheless, the possibility of discrete blunders represents an inherent risk of arbitration, which the NAFTA Parties assumed when consenting to Chapter 11.[231] In addition, the NAFTA Parties have minimized that risk by prohibiting injunctive relief and punitive damages.[232] Under these circumstances, Chapter 11 awards cannot prevent the application of important public regulatory measures and should not expose NAFTA Parties to disproportionate liability. Furthermore, if the *Metalclad* award provides any indication of future behavior, one might predict that tribunals will not be overly generous in awarding compensatory damages.[233]

Finally, one should mention the deference that tribunals have shown to the NAFTA Parties when deciding the merits of Chapter 11 claims. In the very first award on the merits of a Chapter 11 claim, the tribunal recognized that it did not serve an appellate function and had no authority to set aside domestic court judgments for a lack of persuasive force.[234] Another tribunal acknowledged that it did not possess a mandate to "second-guess" the policy choices of NAFTA

---

construction . . . of Chapter 11 will ensure that it survives to inform the next generation of dispute settlement agreements.").

As noted above, cabinet-level representatives of NAFTA Parties purported to adopt the first set of Notes of Interpretation in July 2001, but there are serious questions regarding the validity and effect of their provisions. *See* Notes of Interpretation of Certain Chapter 11 Provisions, *supra* note 71.

231. Thomas, *supra* note 28, at 136 ("There is always the chance . . . that the tribunal will interpret a legal obligation in a way that the drafters did not anticipate. This is a fact of life."). *See also* Philip J. McConnaughay, *The Risks and Virtues Of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 494 (1999) (observing that the characteristics of international commercial arbitration make it unlikely to yield legally correct outcomes with flawless predictably); *cf.* Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, *supra* note 113, (enforcing an arbitral award despite obvious legal errors).

232. *See* NAFTA, *supra* note 2, arts. 1134, 1135, at 646.

233. As noted above, the tribunal awarded the investor only $16,685,000 (plus post-award interest), representing a modest fraction of its $115,000,000 claim. *See supra* note 81 and accompanying text.

234. Azinian v. Mexico, Award, ICSID Case No. ARB(AF)/97/2 (1999) at paras. 84, 99.

Parties.[235] As noted above, the award also established the principle that tribunals must consider the "high measure of deference that international law generally extends to . . . domestic authorities to regulate matters within their . . . borders."[236] Most recently, a third tribunal declined to "substitute its judgment for . . . Canada's" or to impose liability for regulatory actions that constituted "reasonable" or "rational" responses to challenges faced by the Canadian government.[237] These holdings demonstrate that tribunals do not want to interfere with legitimate efforts to regulate in the public interest, have recognized the limited scope of their powers, and have resisted the temptation to undertake open-ended examinations of governmental actions.[238] While it may be premature to draw definitive conclusions, Chapter 11 tribunals show no sign of engaging in behavior that might warrant extensive judicial review.[239] Thus, even if one could overcome the legal obstacles, one struggles to identify a convincing policy justification for subjecting the decisions of Chapter 11 tribunals to heightened review.

V. LEGAL AND PRACTICAL CONSEQUENCES OF UNILATERAL REVIEW

If, as concluded above, heightened judicial review of the *Metalclad* award represents an independent violation of Chapter 11, one would anticipate the visitation of adverse consequences upon Canada for its unlawful conduct. For technical and political reasons, however, Canada seems likely to escape the imposition of liability for this transgression. In fact, the NAFTA Parties theoretically might adopt a general policy of subjecting Chapter 11 awards to heightened review without suffering immediate legal consequences. These circumstances may tend to support the image of heightened review as a cost-free instrument for defending the regulatory sovereignty of NAFTA Parties. That description seems untenable, however, because the reinvigoration of sovereignty would inhibit development of the rule of law in international economic relations.

---

235. S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) (separate opinion of Bryan Schwartz) at para. 261, http://www.appletonlaw.com/4b2myers.htm.

236. *Id.* at para. 263.

237. Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 78, 93, 102, 123, 125, 128, 155.

238. *See* Brower, *supra* note 4, at 38.

239. *Id.* at 42.

To the extent that they violate Section A of Chapter 11, judicial decisions can provide the basis for the assertion of claims directly by investors under Chapter 11.[240] Thus, one might assume that the investor in *Metalclad* could initiate a new arbitration against Canada for the losses caused by heightened judicial review of the *Metalclad* award.[241] The *Metalclad* claimant could not bring such a claim against Canada, however, because Chapter 11 only provides remedies to *investors* of one NAFTA Party having (or seeking to make) *investments* in a second NAFTA Party for measures relating to their investments *in the second NAFTA Party*.[242] Investments do not include "any . . . claims to money[] that do not involve" interests in enterprises, equity securities of enterprises, certain debt securities of enterprises, certain loans to enterprises, rights to share in the profits or assets of enterprises, property acquired for business purposes, or interests arising from the commitment of capital or other resources to economic activity on the territory of another NAFTA Party.[243] Since the *Metalclad* claimant has an investment in Mexico (but not Canada), the award would not constitute a claim to money involving one of the enumerated interests in Canada. As a result, judicial review does not constitute a measure relating to an investor or an investment in Canada. Therefore, the *Metalclad* claimant lacks standing under Chapter 11 to challenge excessive judicial review by the Supreme Court of British Columbia. Similarly situated investors would encounter the same lack of standing to challenge heightened review of Chapter 11 awards by courts outside of their host states.

On the other hand, some investors would have standing under Chapter 11 to challenge heightened review of Chapter 11 awards. For example, in *S.D. Myers*, a U.S. company submitted a claim against Canada alleging various breaches of Section A with respect to its investment in a Canadian enterprise.[244] The tribunal selected Toronto as the seat of arbitration. After the tribunal issued a partial-final award on the merits against it, Canada initiated annulment proceedings in the Federal Court of Canada.[245] If that court were to engage in extensive review of the merits, the investor would have

240. Loewen v. US, supra note 6, at para. 49, 52–55, 60 (holding that judicial decisions can be "measures" subject to challenge under Chapter 11).

241. See Iran v. US, supra note 208 (granting an Iranian claim for damages based on a U.S. violation of the Algiers Accords, namely judicial review of the merits of an award previously issued by the tribunal).

242. NAFTA, supra note 2, art. 1101(1), at 639.

243. *See id.* art. 1139, at 647.

244. *See supra* notes 82–84 and accompanying text.

245. *See supra* note 104 and accompanying text.

standing to raise a new Chapter 11 claim because the judicial decision would constitute a measure relating to a claim to money having one of the enumerated interests in a Canadian enterprise.[246] Similarly situated investors would likewise have standing under Chapter 11 to challenge heightened review of Chapter 11 awards by courts sitting in their host states.

If they overcome the problem of standing investors will, however, face additional difficulties in prosecuting new Chapter 11 claims that seek redress for heightened review of Chapter 11 awards. Heightened judicial review arguably violates the obligation to create a mechanism for the *settlement* of investment disputes that assures due process before an *impartial* tribunal and results in a *binding* award not subject to *appeal*.[247] It may also violate the undertaking to correct doctrinal errors through collective action by the Free Trade Commission.[248] Yet, the NAFTA Parties would surely point out that Chapter 11 only permits investor-state arbitration of claims alleging violations of Section A, whereas the foregoing obligations appear in Section B.[249] Anticipating such objections, investors might use the vocabulary of Section A to plead claims challenging heightened review. Thus, they might characterize heightened review as a denial of justice, which violates the minimum standard of treatment under customary international law and, therefore, Article 1105.[250] They might also describe heightened review as the violation of treaty provisions designed to protect investors and, therefore, a denial of the fair and equitable treatment required by Article 1105.[251] Finally, if investors could establish that the relevant court system has shown greater deference to awards rendered to domestic investors or investors from third countries, they might also establish the incompatibility of heightened review with the principles of national treatment or MFN treatment.[252]

Because previous Chapter 11 tribunals have interpreted the phrase "fair and equitable treatment" to incorporate treaty obligations

246. *See* NAFTA, *supra* note 2, art. 1101(1), at 639 ("This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) investments of investors of another Party in the territory of the Party. . . .").

247. *See supra* notes 205–13 and accompanying text.

248. *See supra* text following note 230.

249. *See* NAFTA, *supra* note 2, arts. 1116(1), 1117(1), at 642–43.

250. *See supra* note 59 and accompanying text.

251. *See supra* notes 59, 66, 89 and accompanying text.

252. For example, the failure to apply a customary and "powerful" presumption that the arbitrators acted within their jurisdiction might constitute a denial of national treatment or MFN treatment.

stated elsewhere with greater specificity, investors have a reasonable prospect of convincing future tribunals that heightened judicial review of Chapter 11 awards constitutes a violation of Article 1105(1). Even if a Chapter 11 tribunal reached that conclusion, however, the respondent NAFTA Party would have the right to seek annulment of the award by a municipal court at the seat of arbitration. Furthermore, if one adopts the premise that municipal courts are inclined to substitute their own opinions for the rulings of Chapter 11 tribunals, they seem highly unlikely to honor awards that condemn heightened review. In short, because Chapter 11 awards always remain subject to annulment by municipal courts, the Chapter 11 process seems to provide an ineffective tool for dealing with a widespread practice of heightened review by municipal courts.

If Chapter 11 proves to be an useless tool for counteracting heightened review, two other avenues exist in theory, but neither seems likely to provide investors with much comfort. First, the investors' states of nationality could request formation of dispute settlement panels under Chapter 20 of NAFTA to address alleged violations of Chapter 11.[253] For two reasons, however, the United States seems unlikely to espouse Metalclad's objections to heightened judicial review of Chapter 11 awards. One reason is that the United States faces at least three Chapter 11 proceedings, in which claims for damages approach $2,000,000,000 and in which the United States represents the seat of arbitration.[254] Faced with liabilities of that magnitude, the United States has little incentive to advocate principles that would circumscribe the role of its own courts in reviewing the merits of future awards.[255] Additionally, the United States has already taken the position that Chapter 11 proceedings do not arise out of commercial relationships and that the deferential legal framework for commercial arbitration generally does not apply to Chapter 11 awards.[256] In short, the United States seems unlikely to take up the issue of heightened review in a Chapter 20 claim because it has a political interest in maintaining possible avenues for challenging liability imposed by future awards. The remaining NAFTA Parties face similar inhibitions in making heightened review the subject of Chapter 20 claims.

253. *See* NAFTA, *supra* note 2, art. 1136(5), at 646; Thomas, *supra* note 28, at 136.

254. *See supra* note 17 and accompanying text.

255. Pearce & Coe, *supra* note 58, at 338 (observing that "NAFTA Parties are unlikely to endorse interpretations and theories of recovery that enlarge their own exposure to claims").

256. *See supra* note 121 and accompanying text.

If Chapter 20 also seems unlikely to provide any relief from heightened review, investors might have one final hope for overcoming the partial or complete annulment of Chapter 11 awards, namely applications for enforcement of those awards in a third country. For example, the *Metalclad* claimant could seek enforcement of its award in Mexico or the United States notwithstanding the partial annulment by Canadian courts. The New York Convention, which governs such enforcement proceedings, exhibits a distinct bias against enforcement of awards annulled at the seat of arbitration.[257] However, the New York Convention does not forbid enforcement of such awards,[258] and commentary supports the enforcement of awards annulled on the basis of eccentric national standards (such as a mistake of law), as opposed to international standards (such as excess of jurisdiction or another gross procedural defect).[259] Presumably, the outcome of the hypothetical enforcement proceedings would depend on whether the enforcement forum concentrated on the intrusive substance or the deferential rhetoric of the judgment of the Supreme Court of British Columbia. It seems unlikely, however, that the enforcement forum would have much enthusiasm for upsetting the outcome of the *Metalclad* annulment proceedings. Mexico's courts would certainly not wish to subject their government to a liability already avoided by Canadian courts. Likewise, U.S. courts would not relish the prospect of offending *both* Canada and Mexico in order to vindicate private interests that the U.S. government found insufficiently compelling to warrant action under Chapter 20 of NAFTA.

Based on the foregoing, it appears that NAFTA Parties could frequently perform heightened review of Chapter 11 awards without triggering additional claims for liability. Nevertheless, promiscuous use of this strategy would have devastating effects on the operation of NAFTA and, indeed, the development of international economic law. Canada, Mexico and the United States adopted NAFTA to ensure "a predictable . . . framework for business planning and investment."[260] The objectives of NAFTA also include the substantial increase of investment opportunities and the creation of effective procedures for resolving disputes.[261] Consistent with these objectives, arbitration should mark the end—and not the beginning—of investor-state

257. *See* New York Convention, *supra* note 32, art. V(1)(e).

258. *See* CRAIG ET AL., *supra* note 208, at 504.

259. *Id.* at 506–07.

260. NAFTA, *supra* note 2, Preamble, at 297.

261. *See id.* art. 102(1)(c) and (e), at 297.

disputes. The prospect of lengthy annulment proceedings by itself threatens to diminish investor confidence by preventing the speedy resolution of disputes with host states.[262] If municipal courts take the annulment process one step further by permitting the easy reopening of awards, they will cripple a system of neutral adjudication designed to promote the flow of capital across the borders of NAFTA Parties.[263]

Furthermore, the NAFTA Parties cannot retreat from commitments to investor-state arbitration under Chapter 11 without encouraging developing states to renege on their own commitments to their investors under BITs.[264] Conceivably, heightened judicial review of Chapter 11 awards could prompt a loss of respect for investor-state arbitration worldwide.[265] In the end, heightened review might require us to forsake a century's worth of efforts to promote the development of robust principles of state responsibility for economic injury to aliens.[266]

---

262. Brower & Steven, *supra* note 194, at 196 (explaining that "[i]nvestor confidence . . . is not furthered by requiring [extensive] domestic litigation"). *Cf.* Reisman, *supra* note 153, at 786–87 (expressing concern that the frequent use of annulment proceedings would render ICSID arbitration unattractive and raise questions about its long-term viability as a system of dispute resolution).

263. Park, *supra* note 195, at 241 ("Overly zealous intervention by governments would tear at the fabric of neutral arbitration that underpins investor confidence in cross-border capital flows."). *See also* HUDSON, *supra* note 209, at 126 (stating that the "[d]ecisions of international tribunals have seldom been subject to reconsideration on appeal by other tribunals" because the "provision for appeal would seriously undermine the authority of decisions"); REISMAN, *supra* note 208, at 185 (discussing the "debilitating effect the expectation of easy reopening of decisions" could have on the function of international tribunals); Christine Chinkin & Romana Sadurska, *The Anatomy of International Dispute Resolution*, 7 OHIO ST. J. ON DISP. RESOL. 39, 68–69 (1991) ("The finality of an arbitral award is especially significant from the perspective of dispute resolution, as it is clear that when awards are challenged, for whatever reason, the effectiveness of the process is subverted and the usefulness of arbitration becomes questionable.").

264. In the words of one observer, "[a] power is evidently not at liberty, if it wishes to maintain the respect of other nations, to change without plausible reason its attitude on questions of international law, and the arguments used on one occasion may, therefore, validly be brought up against it in another conflict." Sir John Fischer Williams, *International Law and the Property of Aliens*, 1928 BRIT. Y.B. INT'L L. 1, 6. *Cf.* Gantz, *supra* note 10, (warning that U.S. attempts to narrow the scope of Chapter 11 would create a "great" risk of "reducing the scope of American investor provisions based on the same or similar language in BITs").

265. Gantz, *supra* note 10 ("If every decision lost by a government is challenged in court . . . and if the courts entertain review on the merits, the efficacy of the Chapter 11 process will be seriously damaged, and [the NAFTA Parties] may weaken respect for [investor-state arbitration] worldwide.").

266. Price, *supra* note 4, at 113–14 (warning NAFTA Parties not to let the exigencies of defending particular Chapter 11 claims result in the sacrifice of important principles of state responsibility). *See also* Sandrino, *supra* note 60, at 265, 326 (observing that Chapter 11

More fundamentally, heightened judicial review represents a serious deviation from the trend in international economic law toward voluntary adherence to authoritative decisions rendered at the international level by impartial bodies charged with the supervision of treaty compliance.[267] If our municipal authorities assume the right to substitute their own opinions for those of Chapter 11 tribunals, we cannot expect other states to accord any greater respect to the decisions of WTO dispute settlement panels or the Appellate Body. By encouraging municipal officials to follow their own interpretations of treaty obligations, we seriously impair the character of treaty provisions as rules of law.[268] Likewise, if international tribunals cannot resolve disputes without appeal to the judgment of the interested parties themselves, we cannot expect tribunals to secure order—or the rule of law—in international economic relations.[269]

Nor can we necessarily limit the consequences of heightened review to the sphere of international economic law.[270] Although Professor José Alvarez has derisively referred to Chapter 11 as a "bizarre human rights treaty . . . for a special-interest group,"[271] the fact remains that Chapter 11 represents a notable triumph of individual rights over sovereign power. Because the treatment of sovereignty in commercial disputes often heralds the development of similar trends in other areas,[272] opponents of Chapter 11 should not

---

reflects traditional principles of state responsibility advocated by developed states since the end of the nineteenth century).

267. MERRILLS, *supra* note 71, at 198–99, 214, 218 (describing the evolution from the political resolution of trade disputes under the General Agreement on Tariffs and Trade to the model of binding adjudication under the WTO agreements, which are "intended to lay the foundations of the international economic order in the next century"); Price, *supra* note 78, at 428 (observing that voluntary acceptance of the decisions of international tribunals "underpins the international economic order").

268. *See* SIR HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 424 (1966).

269. *See id.* at 425. *See also* JENKS, *supra* note 71, at 757 (arguing that "institutional arrangements not grounded in respect for law are a masque for arbitrary power, incapable of growth into a lasting political order").

270. *See* JENKS, *supra* note 71, at 771, 776 (observing that the spirit with which municipal courts approach the decisions of international tribunals "may be of far-reaching importance for the future of the rule of law in world affairs," and explaining that the "future of international adjudication cannot be abstracted from the context of the future of international organisation generally, nor the future of international organisation from that of the whole future of society").

271. José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 307–08 (1997).

272. For example, the concept of restricted state immunity first achieved broad acceptance for claims involving the commercial (or non-sovereign) activities of foreign states. *See* JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 17–

assume that we can reinvigorate sovereignty at the expense of individual rights in economic matters without jeopardizing the capacity of international law to promote other forms of individual rights.

Even if one does not accept such dire predictions about the systemic consequences of increased judicial supervision of investor-state arbitration, one should at least heed Chief Justice Burger's prophetic warning that "the expansion of . . . business and industry will hardly be encouraged if, notwithstanding solemn [agreements], we insist on [the] parochial concept that all disputes must be resolved under our laws and in our courts."[273]

VI. CONCLUSION

The unexpected proliferation of Chapter 11 claims has generated public concern about the erosion of regulatory sovereignty, especially in Canada and the United States. Although writers have proposed a number of mechanisms to mitigate this apparent threat at the international level, the NAFTA Parties have conceived a more fiendishly clever plan for the restoration of national sovereignty: heightened review of awards in annulment proceedings conducted by municipal courts at the seat of arbitration. While this device may create frequent opportunities for the NAFTA Parties to strike back without incurring liability, its deployment bodes ill for the rule of law in international economic relations.

19 (1997). The evolution of a workable commercial activities exception to foreign sovereign immunity promoted discussion of similar exceptions for noncommercial torts, including human rights abuses. *See id.* at 19–22. Furthermore, by creating a distinction between sovereign and non-sovereign acts, the doctrine of restricted immunity arguably laid the foundation for the arrest of General Augusto Pinochet for alleged violations of the Torture Convention. *See* Michael Ratner, *The Lords' Decision in* Pinochet III, *in* THE PINOCHET PAPERS 33, 42–46 (Reed Brody & Michael Ratner eds., 2000) (describing the House of Lords' conclusion that Pinochet lacked immunity because the alleged acts of torture did not fall within the scope of his official functions as head of state).

273. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9, 92 S. Ct. 1907, 1912 (1972).