

2007

Chopping Away at Chapter 11: The Softwood Lumber Agreement's Effect on the NAFTA Investor-State Dispute Resolution Mechanism

Matthew T. Simpson

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Simpson, Matthew T. "Chopping Away at Chapter 11: The Softwood Lumber Agreement's Effect on the NAFTA Investor-State Dispute Resolution Mechanism." *American University International Law Review* 22, no. 3 (2007): 479-515.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

COMMENT

CHOPPING AWAY AT CHAPTER 11: THE SOFTWOOD LUMBER AGREEMENT'S EFFECT ON THE NAFTA INVESTOR-STATE DISPUTE RESOLUTION MECHANISM

MATTHEW T. SIMPSON*

On September 12, 2006, the governments of Canada and the United States signed the Softwood Lumber Agreement 2006 ("SLA 2006"), hoping to end the longstanding dispute between the two countries on the issue of softwood lumber. Fearing liability for measures taken to give effect to the agreement, the Parties included a provision in Article XI(2) of the SLA 2006, limiting the availability of the North American Free Trade Agreement ("NAFTA") Chapter 11 dispute resolution.

This comment argues that in limiting the availability of NAFTA Chapter 11 dispute resolution, Article XI(2) of SLA 2006 effects the application of NAFTA Chapter 11 in a way that is inconsistent with customary international law. Specifically, Article XI(2) impermissibly affects the applicability of NAFTA Chapter 11 in one

* J.D. Candidate 2008, American University – Washington College of Law; M.A. International Affairs Candidate 2008, American University – School of International Service; B.A. Economics and Critical Social Studies, 2004, Hobart College. I am grateful to my editor, Alex Bennett, and to the entire staff of the American University International Law Review. This Comment benefited greatly from discussions with Prof. Padideh Ala'i, Spencer Griffith, Ian Laird, Don Mackay, John Magnus, Daniel Porter, Bill Ryan, Christopher Sands, and Michael Woods. Special thanks is owed to my faculty advisor Prof. Todd Grierson Weiler, whose encyclopedic knowledge of this topic and attachment to his blackberry were truly invaluable. The views expressed herein are mine, and do not represent the views of those mentioned above or their affiliates. Finally, I thank my family, whose love and support guide me each and every day. Email: matthewsimpson@gmail.com.

of two ways: (a) it separates provisions of Chapter 11 that are inseparable, were critical to the consent of Canada and the United States in signing NAFTA, and renders the continued performance of NAFTA unjust; or (b) it modifies Chapter 11 in a prohibited manner that limits the effective execution of the object and purpose of NAFTA.

Regardless of which interpretation of the SLA 2006's effect on NAFTA is more accurate, both are inconsistent with the Vienna Convention on the Law of Treaties ("Vienna Convention"). In recognition of these inconsistencies, this comment recommends a litigation strategy for Canadian and American lumber producers that challenges the validity of SLA 2006 Article XI(2). This comment also recommends a series of measures for the Canadian and U.S. governments designed to bring the SLA 2006 in line with customary international law, while still insulating them from liability for measures taken to implement the SLA 2006.

I. INTRODUCTION.....	481
II. BACKGROUND	484
A. NAFTA CHAPTER 11	484
1. <i>Guaranteed Access to Fair and Equitable Dispute Resolution</i>	487
2. <i>The Ability to Deny Access to NAFTA Chapter 11 Dispute Resolution</i>	489
B. THE SOFTWOOD LUMBER AGREEMENT 2006	491
C. THE VIENNA CONVENTION ON THE LAW OF TREATIES.....	493
1. <i>Article 44: Separability of Treaty Provisions</i>	494
2. <i>Article 41: Agreements to Modify Multilateral Treaties Between Certain of the Parties Only</i>	495
III. ANALYSIS	495
A. THE VIENNA CONVENTION IS THE APPROPRIATE INSTRUMENT FOR ASSESSING THE EFFECT OF THE SLA 2006 ON THE APPLICATION OF NAFTA CHAPTER 11.....	496
B. ARTICLE XI(2) OF THE SLA 2006 IS INCONSISTENT WITH THE SEPARABILITY OF PROVISIONS STANDARDS OF ARTICLE 44 OF THE VIENNA CONVENTION.....	498
1. <i>Article XI(2) of the SLA 2006 Impermissibly Separates Section B of Chapter 11 from the Remainder of NAFTA</i>	499

2. <i>NAFTA Chapter 11 Was Essential to the Consent of Canada and the United States to Sign NAFTA</i>	502
3. <i>Separating NAFTA Chapter 11 Rights from Its Remedies Renders the Continued Performance of NAFTA Unjust</i>	505
C. ARTICLE XI(2) OF THE SLA 2006 IS INCONSISTENT WITH THE STANDARDS FOR THE MODIFICATION OF A TREATY AS STATED IN ARTICLE 41(1) OF THE VIENNA CONVENTION	506
1. <i>NAFTA Chapter 11 Prohibits the Modification of its Provisions as Called for in Article XI(2) of the SLA 2006</i>	507
2. <i>Article XI(2) of the SLA 2006 Limits the Effective Execution of the Object and Purpose of NAFTA</i>	509
IV. RECOMMENDATIONS	510
A. INVESTORS SHOULD FORCE A NAFTA TRIBUNAL TO DECIDE THE VALIDITY OF ARTICLE XI(2) IN A JURISDICTIONAL HEARING.....	511
B. CANADA AND THE UNITED STATES SHOULD REMOVE ARTICLE XI(2) FROM THE SLA 2006.....	513
C. CANADA AND THE UNITED STATES, WITH THE SUPPORT OF MEXICO, SHOULD AMEND THEIR NAFTA RESERVATIONS TO INCLUDE MATTERS RELATED TO THE SLA OR THE SOFTWOOD LUMBER INDUSTRY	513
V. CONCLUSION.....	514

I. INTRODUCTION

On September 12, 2006, the governments of Canada and the United States signed the Softwood Lumber Agreement 2006 (“SLA 2006”).¹ Designed to provide temporary relief from the legal and

1. The Softwood Lumber Agreement 2006, U.S.-Can., Sept. 12, 2006, (amended Oct. 12, 2006) [hereinafter SLA 2006], available at http://www.ustr.gov/assets/world_regions/americas/canada/asset_upload_file847_9896.pdf; see Press Release, Dep’t of Foreign Affairs and Int’l Trade Can., Minister Emerson and United States Trade Representative Schwab Sign Softwood Lumber Agreement (Sept. 12, 2006), http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=384359&language=E&docnumber=99 [hereinafter Emerson & Schwab Press Release] (highlighting the broad support for the SLA 2006, including both Canadian and U.S. national governments, the Canadian provinces that are major

political battles that raged for decades over softwood lumber,² the SLA 2006 regulates Canadian exports and limits existing and future litigation on matters related to the dispute for a seven-year period.³ The primary means of accomplishing this limitation is Annex 2A of the SLA 2006, the Settlement of Claims Agreement.⁴ In addition to Annex 2A, however, Article XI(2) of the SLA 2006 also suspends

soft-wood producers, and an “overwhelming” majority of Canadian softwood lumber producers); Press Release, Office of the United States Trade Representative, U.S. Trade Representative Susan C. Schwab Announces Entry into Force of United States-Canada Softwood Lumber Agreement (Oct. 12, 2006), http://ustr.gov/Document_Library/Press_Releases/2006/October/United_States_Trade_Representative_Susan_C_Schwab_Announces_Entry_into_Force_of_United_States-Canada_Softwood_Lumber_Agreement.html (touting U.S. Trade Representative Susan Schwab’s comments that the SLA 2006 will limit the uncertainties in the softwood lumber market that result from intense litigation and benefit both consumers and producers of softwood lumber). The SLA 2006 was amended October 12, 2006 by Amendments to the Softwood Lumber Agreement Between the Government of the United States and the Government of Canada, *available at* http://www.ustr.gov/assets/world_regions/americas/canada/asset_upload_file667_9897.pdf. However, those amendments do not affect the arguments and analysis of this article.

2. See Mary Y. Pierson, *Recent Developments in United States - Canada Softwood Lumber*, 25 LAW & POL’Y INT’L BUS. 1187, 1187–91 (1994) (describing the events that shaped and defined the first thirty years of the softwood lumber dispute); Dep’t of Foreign Affairs and Int’l Trade Can., *Softwood Lumber: Canada-United States Softwood Lumber Trade Relations (1982–2006)*, <http://www.dfait-maeci.gc.ca/trade/eicb/softwood/chrono-en.asp> (last visited Oct. 27, 2006) (reviewing the most recent twenty-four years of the softwood lumber dispute chronologically, including the outcomes of the primary investigations and NAFTA claims); Kimberly Noble, *An Industry at War*, GLOBE & MAIL (Toronto), Nov. 16, 1991, at B18 (referring to comments of Patricia Carney, former Canadian Minister of International Trade, that the softwood lumber dispute “is the longest and messiest trade war Canada and the United States have ever had”).

3. See SLA 2006, *supra* note 1, art. XVIII (providing for a seven-year duration of the SLA 2006 with the option of extending for an additional two years); see also Emerson & Schwab Press Release, *supra* note 1 (espousing the virtues, from the Canadian perspective, of the SLA 2006, including predictable market access, guaranteed repayment of more than 4.4 billion dollars in duties, flexibility for provincial and regional forestry policies, and the end of costly litigation); *U.S., Can. Ink Softwood Lumber Agreement*, CAL TRADE REPORT, Sept. 13, 2006, at Front Page, <http://www.caltraderreport.com/eWebPages/front-page-1158201865.html> (noting the agreement of both the United States and Canada to suspend all litigation relating to the softwood lumber dispute).

4. See SLA 2006, *supra* note 1, Annex 2A (mandating that the United States and Canada suspend litigation in all covered actions, preventing their resurrection, and limiting the filing of new claims).

access to the North American Free Trade Agreement (“NAFTA”) Chapter 11 dispute resolution mechanism for any claim related to a government measure that is necessary to give effect to or implement the SLA 2006.⁵

In limiting the availability of NAFTA Chapter 11, SLA 2006 Article XI(2) effects the application of NAFTA in one of two ways. First, Article XI(2) effectively separates the provisions of Chapter 11 from the remainder of NAFTA. This comment argues that such a separation and the resulting effect on the application of NAFTA is inconsistent with the norms of customary international law, specifically Article 44 of the Vienna Convention on the Law of Treaties (“Vienna Convention”). Second, Article XI(2) effectively modifies NAFTA Chapter 11 and its applicability to certain investors. This comment argues that such a modification to the application of NAFTA is also inconsistent with the norms of customary international law, specifically Article 41(1) of the Vienna Convention.

Part II(A) of this comment highlights investors’ right to access NAFTA Chapter 11 dispute resolution, and a NAFTA Party’s limited ability to deny such access. Part II(B) addresses the SLA 2006, providing background information on the agreement and Article XI(2). Part II(C) discusses the Vienna Convention and its standards governing the permissibility of international treaty provision separation and modification. Part III then assesses the effect of the SLA 2006 on the application of NAFTA Chapter 11. First, Part III(A) justifies the use of the Vienna Convention as the proper instrument for assessing this effect. Next, Part III(B) addresses the first interpretation of that effect, that Article XI(2) separates elements of Chapter 11 from the remainder of NAFTA. Part III(B) then highlights the inconsistencies between this separation and customary international law standards for the separation of a provision from a multilateral treaty, as set forth in Article 44 of the Vienna Convention. Finally, Part III(C) addresses the second interpretation, that Article XI(2) effectively modifies the application of NAFTA,

5. *See id.* art. XI(2) (preventing any claim under Section B of NAFTA Chapter 11 against either Canada or the United States, by investors of the United States or Canada, in respect of any matter or measure relating to the SLA 2006, and obliging the governments of Canada and the United States to notify their respective NAFTA Secretariats of this limitation).

and highlights the inconsistencies between this modification and customary international law standards for the modification of a multilateral treaty, as set forth in Article 41(1) of the Vienna Convention. In light of these inconsistencies, Part IV lists a series of recommendations directed to both the Parties of the SLA 2006 and the investors it affects.

II. BACKGROUND

Before assessing the SLA 2006's effect on the application of NAFTA Chapter 11, it is necessary to consider the unique obligations imposed on NAFTA Parties through the establishment of investor-state dispute resolution in NAFTA Chapter 11.

A. NAFTA CHAPTER 11

Investor-to-state dispute resolution mechanisms are relatively rare in multilateral agreements,⁶ with NAFTA Chapter 11 as the pioneer

6. In addition to NAFTA, only three other multilateral agreements contain some degree of investor-to-state dispute resolution. First, The Energy Charter Treaty ("ECT") has an investor-to-state mechanism procedurally similar to Chapter 11, but substantively limited to certain areas of investment. *See* The Energy Charter Treaty, art. 26, Dec. 17, 1994, 2080 U.N.T.S. 100, 121; *see also* Jan Linehan, *Investment, Trade and Transit: Dispute Settlement under the Energy Charter Treaty*, 15 ICSID NEWS 1, 4 (1998), available at <http://worldbank.com/icsid/news/n-15-2-4.htm> (giving an overview of The Energy Charter Treaty and the available mechanisms of investor-to-state dispute resolution); A.F.M. Maniruzzaman, *Energy Charter Treaty Arbitration (Investor State) in the Asia-Pacific Context: An Overview*, 4 INT'L ENERGY L. & TAXATION REV. 101, 101 (2004) (noting that Parties to the ECT must abide by the process if an investor initiates arbitration for an alleged breach of any of the Charter's Part III obligations of The Energy Charter Treaty); Craig S. Bamberger et. al, *Energy Charter Treaty in 2000: in a New Phase*, 18 J. ENERGY NAT. RESOURCES L. 331, 334 (2000) (discussing the compulsory nature of The Energy Charter Treaty's Article 26 investor-to-state dispute resolution mechanism). The ECT Parties, however, do not consent to the submission of a dispute already dealt with in another forum, or measures related to the fulfillment of the treaty. *See* Lawrence L. Herman, *NAFTA and the ECT: Divergent Approaches with a Core of Harmony*, 15 J. ENERGY NAT. RESOURCES L. 129, 149 (1997) (suggesting that Article 26 appears to prevent Parties from "side-tracking" the dispute from the courts to international arbitration once the domestic proceeding begins). Other than any "previously agreed upon dispute settlement procedure," each contracting party "unconditional[ly] consent[s] to the submission of an investment dispute to international arbitration or conciliation in accordance with the provisions of this

in the field.⁷ NAFTA negotiators designed Chapter 11 as a mechanism to encourage a stable and predictable environment for investment. Towards this end, Chapter 11 includes substantial protections for investors and private-party access to fair and

Article.” The Energy Charter Treaty, *supra*, art. 26 ¶¶ 2(b), 3(a), 2080 U.N.T.S at 121.

The second instance of an investor-state dispute resolution mechanism in a multilateral agreement is the Association of Southeast Asian Nations (“ASEAN”) Agreement. The ASEAN Agreement includes a protocol that, like The Energy Charter Treaty, is less exhaustive than NAFTA Chapter 11. *See* Agreement For the Promotion And Protection of Investments, Brunei-Indon.-Malay.-Phil.-Sing.-Thail., art. X, Dec. 15 1987, 27 I.L.M 612, 614 (1988). Though it makes national treatment voluntary, requiring the consent of two of the Contracting Parties, as in NAFTA Chapter 11 and The Energy Charter Treaty, investors are guaranteed the right of access to dispute resolution, aside from the enumerated exceptions. *Id.* arts. 4(4), 5, 27 I.L.M. at 613.

The third instance of an investor-state mechanism in a multilateral agreement is the Protocol of Colonia, which attaches an investor-to-state dispute mechanism to the Southern Common Market (Mercado Común del Sur, or “Mercosur”), but as of yet remains unratified. *See* Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in Mercosur (Investment within Member Countries), Arg.-Braz.-Para.-Uru., art. 9, Jan. 17, 1994, available at <http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp> (last visited Oct. 27, 2006) [hereinafter Protocol of Colonia]; Thomas Andrew O’Keefe, *Dispute Resolution in Mercosur*, <http://www.sice.oas.org/geograph/south/okifdis.doc> (last visited Jan. 21, 2007) (noting that the Protocol of Colonia is not in effect pending the ratification of Brazil, Paraguay, and Uruguay). Article 9, Section 2 of the Protocol of Colonia provides an investor-to-state dispute resolution mechanism addressing issues of expropriation and national treatment. Protocol of Colonia, *supra*, art. 9 § 2.

7. *See* Donald M. McRae, *Introduction*, in WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE 1 (Laura Ritchie Dawson ed., 2002) (highlighting that although many of the provisions of NAFTA Chapter 11 existed elsewhere in investment regimes, NAFTA was the first to bring each together within a single multilateral agreement); *see also* Todd Weiler, *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT’L ARB. 187, 188 (2000) (observing that NAFTA Chapter 11 was the first investment agreement concluded between both developed and less-developed countries); David R. Haigh, *The Management and Resolution of Cross Border Disputes As Canada/U.S. Enter The 21st Century: Chapter 11 – Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 115, 130 (2000) (providing a historical analysis of NAFTA Chapter 11 as the first time Canada or the United States agreed to investor-to-state arbitration between themselves).

equitable dispute resolution for breach of Party obligations.⁸ As such, Section A of Chapter 11 imposes obligations on NAFTA Parties,⁹ including assuring the investor's right to receive "treatment no less favorable" than that accorded to domestic investors or investors of any other party,¹⁰ a minimum standard of treatment in accordance with international law,¹¹ and protection from direct or indirect expropriation or nationalization.¹² Section B of Chapter 11 then provides the mechanism for fair and equitable dispute settlement

8. See generally *McRae*, *supra* note 7, at 1 (discussing the content of NAFTA Chapter 11 and the relationship of the Parties' obligations to the dispute settlement mechanism).

9. See *id.* (presenting the "obligations" undertaken by the NAFTA Parties and the resulting protections for investors). Many observers suggest that NAFTA Chapter 11 affords protections of such a substantial and inalienable character that they are justifiably labeled rights. See *infra* note 24 (providing several examples of the argument that NAFTA Chapter 11 protections are rights). Others, however, argue that the protections are not in fact vested rights, but rather impermanent protections NAFTA Parties afford at their discretion. See *McRae*, *supra* note 7, at 1-2 (discussing the controversy over the amount of protection the provisions of NAFTA Chapter 11 give investors). To the latter group, NAFTA is a treaty between sovereign States and as such, private parties undertake no obligations, nor do they acquire rights under Chapter 11. It is only the Parties that must comply with the obligations in Chapter 11 Section A, and only the Parties that are liable to damage awards under Section B. The investment protections in Chapter 11 are thus not rights, but protections that the NAFTA Parties afford at their discretion, capable of being rescinded at any time. Regardless of which argument is more compelling, the analysis that follows does not turn on the permanency of the protection or characterization of the affected clause. Rather, the tests for Vienna Convention Articles 41 and 44 require an independent analysis of the nature of the clause in question, its relationship to the treaty as a whole, and its importance at the time of signing. Whether the clause conveys to investors "temporary protection," afforded at the discretion of the NAFTA Parties, or more permanent, inalienable "rights" of protection is thus not dispositive for the present analysis.

10. See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102, Dec. 17, 1992, 32 I.L.M. 296, 639 (1993) [hereinafter NAFTA]; see also *id.* art. 1103, 32 I.L.M. at 639 (providing investors of another NAFTA Party with a right to "treatment no less than favorable than" the treatment the host country affords to investors of a non-NAFTA state).

11. See *id.* art. 1105, 32 I.L.M. at 639-40 (requiring that investors receive fair and equitable treatment, full protection and security, and treatment in accordance with international law).

12. See *id.* art. 1110, 32 I.L.M. at 641-42 (protecting investors and their investments from expropriation or nationalization, except when the expropriation is for a public purpose, is non-discriminatory, affords the investor fair and equitable treatment in accordance with due process of law, and includes compensation for the investor's loss).

should a NAFTA Party violate its Section A obligations.¹³ NAFTA negotiators thus designed Chapter 11 as a powerful protection for investors exposed to potentially variable and hostile judicial and economic environments throughout North America.¹⁴

1. Guaranteed Access to Fair and Equitable Dispute Resolution

Section B of NAFTA Chapter 11 guarantees investors equal access to fair and equitable resolution of claims arising from a violation of their Section A protections.¹⁵ Within Section B, Article

13. See *id.* art. 1115, 32 I.L.M. at 642 (establishing “a mechanism for the settlement of investment disputes that assures both equal treatment among investors” and “due process before an impartial tribunal”); see also *id.* arts. 1120–38, 32 I.L.M. at 643–47 (defining the right of investors to bring a claim, the technical requirements of the claim, the procedural process of the submission and consideration of the claim, and the finality and enforcement of the claim).

14. See discussion *infra* Part III(B)(2) (discussing the importance of NAFTA Chapter 11 to the consent of the United States and Canada to sign NAFTA).

15. See NAFTA, *supra* note 10, art. 1120, 32 I.L.M. at 643 (providing investors with the opportunity to arbitrate claims arising from an alleged violation of NAFTA Chapter 11 Section A); see also *id.* arts. 1102, 1103, 1105, 1110, 32 I.L.M. at 639–40 (declaring the protections afforded to investors and their investments, notably, the right to fair and equitable treatment). See Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT’L L. 141, 148 (2002) (discussing critics’ characterization of NAFTA Chapter 11 as a “Bill of Rights for transnational corporations,” that confers on corporations the right to sue governments for “enacting bona fide, non-discriminatory” regulations). Though not a positive characterization of NAFTA Chapter 11, Tollefson’s comments nonetheless highlight the view that NAFTA Chapter 11 conveys broad and powerful rights to investors. See *id.* 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, 305 (2000) (highlighting the right of private parties to seek recourse through arbitration and noting that investors may bring a claim under either of three arbitration frameworks including the International Centre for the Settlement of Investment Disputes (“ICSID”), the ICSID Additional Facility, and the United Nations Commission on International Trade Law (“UNCITRAL”)); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 247 (2006) (highlighting the proliferation of investment arbitration agreements generally, NAFTA Chapter 11 specifically, and the broad rights they convey to foreign investors (referencing Daphne Eviatar, *A Toxic Trade-off*, WASH. POST, Aug. 14, 2005, at B01)); see also The Sierra Club, *The Problem with NAFTA’s Chapter 11 Investor Suit Rules Has Not Been Fixed in CAFTA*, http://www.sierraclub.org/trade/cafta/chapter_11_rules.pdf (last visited Dec. 26, 2006) (arguing against the incorporation of broad NAFTA Chapter 11 rights into

1121 declares the Parties' unequivocal consent to arbitration and Articles 1135 and 1136 provide available remedies and enforcement mechanisms.¹⁶

The protection of a fair and equitable investor-state dispute resolution mechanism is paramount for three reasons. First, it protects the investor's interest in their investment through the enforcement of the rights provided to them in NAFTA.¹⁷ Second, the dispute resolution process depoliticizes the investment dispute and reduces investment risk, thereby encouraging cross-border investment.¹⁸ Finally, the right to arbitrate a claim empowers investors, making them an active constraint on government action.¹⁹ The right to fair and equitable arbitration of investment disputes is thus essential to accomplishing the NAFTA goal of creating a stable

the Central American Free Trade Agreement); Letter from the Participating Organizations in the International POPs Elimination Network (IPEN), to Pierre Pettigrew, Minister of Int'l Trade, Gov't of Canada, et al., (Jan. 22, 2002), available at http://www.ciel.org/Chemicals/IPEN_Canada_Govt.html (protesting the use of the broad Chapter 11 rights to subvert environmental regulation of toxic substances). *But see* McRae, *supra* note 7, at 1–2 (suggesting there is lack of clarity over the extended scope of protections that NAFTA Chapter 11 conveys to investors).

16. *See* NAFTA, *supra* note 10, art. 1121, 32 I.L.M. at 643; *see also id.* art. 1135, 32 I.L.M. at 646 (permitting the tribunal to award monetary and restitution damages, as well as costs, at their discretion); *id.* art. 1136, 32 I.L.M. at 646 (calling for the enforcement of a tribunal's award and providing measures for compliance, such as the establishment of an enforcement panel under Article 2008).

17. *See* Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISP. MGMT. 1, (Feb. 2004) http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_56.htm (suggesting that investor-to-state dispute resolution is essential to all modern investment treaties, providing investors with a right to trigger international arbitration unilaterally without the espousal of the claim by their home state).

18. *See id.*

19. *See* J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, in WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE, *supra* note 7, at 50 (noting that the ability of investors to directly enforce Chapter 11 obligations makes them important constraints on government actions that are arbitrary and unfair, explicitly protectionist, or egregious). *But see* Azinian v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/2, ¶ 83 (Nov. 1, 1999), 39 I.L.M. 537, 549 (arguing that NAFTA does not provide investors with exhaustive "blanket protection" from every disappointment they have with government measures).

and predictable investment climate for North American investors.²⁰ The only way a NAFTA party may modify the operation or applicability of NAFTA Chapter 11 dispute resolution is through an amendment of the agreement, requiring the consent of all three Parties.²¹

2. *The Ability to Deny Access to NAFTA Chapter 11 Dispute Resolution*

NAFTA Chapter 11 protection extends to all government measures relating to “(a) investors of another Party; (b) investments of an investor of another Party in territory of the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.”²² The only measures not subject to Chapter 11 are those relating to investors or investments that fall within the denial of benefits clause of NAFTA Article 1113, NAFTA Chapter 14 restrictions on Financial Services, or the reservations of NAFTA Annexes I-IV or Annex 1138.2.²³

20. See NAFTA, *supra* note 10, PmbI., 32 I.L.M. at 297; see also *id.* arts. 102(1)(b),(c),(e), 32 I.L.M. at 297 (declaring the objective of NAFTA to include the promotion of “conditions of fair competition,” the increase of investment opportunities in the region, and the creation of effective procedures for the resolution of disputes).

21. See NAFTA, *supra* note 10, art. 2202, 32 I.L.M. at 702 (indicating that amendments, when the parties agree, “constitute an integral part” of NAFTA); Michael Wallace Gordon, *The Conflict of United States Sanctions Laws with Obligations Under the North American Free Trade Agreement*, 27 STETSON L. REV. 1259, 1293 (1998) (noting that Parties to NAFTA cannot unilaterally modify their obligations).

22. NAFTA, *supra* note 10, art. 1101, ¶ 1, 32 I.L.M. at 639.

23. See *id.* art. 1113 (1), 32 I.L.M. at 642 (permitting Parties to deny benefits to investors or investments not sufficiently connected to a NAFTA party); *id.* art. 1101(3), 32 I.L.M. at 639 (identifying an exception to the scope of NAFTA Chapter 11 relating to those measures dealing with the financial services sector identified in NAFTA Chapter 14); *id.* art. 1410, 32 I.L.M. at 659 (allowing NAFTA Parties, without concern for NAFTA Chapter 11 liability, to adopt measures that protect investors, depositors, and other types of market actors, maintain the safety and soundness of financial institutions, and ensure the integrity and stability of their financial system); *id.* Annexes I-IV, 32 I.L.M. at 704-61 (providing for the limitation of Chapter 11 investment protections with respect to the listed sectors, sub-sectors, or activities for which the party desires to maintain existing measures, or adopt new or more restrictive measures that do not conform with Chapter 11); *id.* Annex 1138.2, 32 I.L.M. at 649 (limiting the availability of Chapter 11 dispute resolution to certain measures relating to a review of the Investment Canada Act).

NAFTA Article 1113 provides for the denial of access to Chapter 11 dispute resolution for investors only tangentially connected to a Party.²⁴ Shell or subsidiary companies thus do not have Chapter 11 rights if they lack significant business operations or activities within the NAFTA member country.²⁵ Two NAFTA tribunals have discussed the applicability of Article 1113 generally, but as of yet, no government has sought its enforcement.²⁶

A NAFTA Party may also deny access to Chapter 11 dispute resolution to any investor bringing a claim related to one of the specific reservations listed in the NAFTA Annexes.²⁷ When

But see VanDuzer, *supra* note 19, at 59 (noting that technically a NAFTA Party may also terminate a Chapter 11 arbitration, and therefore deny the benefits of Chapter 11 investment protection, if it wins a jurisdictional challenge as a respondent, but that tribunals are reluctant to terminate arbitration proceedings on jurisdictional grounds).

24. *See* NAFTA, *supra* note 10, art. 1113(1), 32 I.L.M. at 642 (providing that a Party can deny Chapter 11 investment protections if a non-Party owns or controls the investment and if the Party denying the protections “does not maintain diplomatic relations with the non-Party,” or “adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of [Chapter 11] were accorded to the enterprise or to its investments”); *see also id.* art. 1113(2), 32 I.L.M. at 642 (providing that a Party may deny Chapter 11 investment protection to investor enterprises organized under the laws of a NAFTA Party if a non-Party has majority ownership in that enterprise and if the enterprise “has no substantial business activities in the territory” of the member Party). *Cf.* Antonella Troia, *The Helms-Burton Controversy: An Examination of the Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations Under NAFTA*, 23 BROOKLYN J. INT'L L. 603, 616 (1997) (hypothesizing that the United States could use Article 1113 to refuse to grant Canadian and Mexican investors' benefits because the investors or investments “thrive in Cuba and are thus subject to Cuban control”).

25. *See* S. Benton Cantey, Comment, *International Arbitration to Resolve Disputes under NAFTA Chapter 11: Investment*, 9 TULSA J. COMP. & INT'L L. 285, 290 (2001) (discussing the denial of benefits provision and the procedure required of Parties to exercise this right).

26. *See* Waste Mgmt., Inc. v. United Mexican States, Arbitral Award, ICSID Case No. ARB(AF)/98/2 (June 2, 2000), 40 I.L.M. 56 (discussing the full range of investment possibilities incorporated into Chapter 11, including an Article 1113 situation where the investment lacks substantial business activities in North America); Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/0011 (Aug. 30, 2006), 40 I.L.M. 36 (discussing Metalclad's argument regarding the amendment of a claim and the requirements to satisfy both NAFTA Articles 1113 and 1120).

27. *See* NAFTA, *supra* note 10, Annexes II–III, 32 I.L.M. at 748–61 (listing the reservations of all three Parties related to existing and future measures,

negotiating NAFTA, the Parties each included several reservations for denying access to Chapter 11 protection for specified groups or in certain circumstances.²⁸ Modification of the Annexes is permissible only through the amendment of NAFTA, requiring the consent of the three Parties.²⁹ Thus, in order for Parties to deny access to Chapter 11 dispute resolution, they must either show that the investor is only tangentially related to their territory,³⁰ is within a specified group or sector mentioned in the Party's reservations,³¹ or the Parties must amend the reservations to include the investor.³²

B. THE SOFTWOOD LUMBER AGREEMENT 2006

Canada and the United States signed the Softwood Lumber Agreement 2006 on September 12, 2006, and it came into force October 12, 2006.³³ The SLA 2006 calls for a seven-year break in the long-standing dispute between the two countries over the Canadian export of softwood lumber,³⁴ typically defined as easy-to-saw wood,

including reservations on the access to Chapter 11 dispute resolution in telecommunications, water transportation, and the ownership of oceanfront land).

28. See GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 202–03 (2005) (highlighting the concerns of each Party by dividing their reservations into three categories: sectoral, reciprocal, and investment review).

29. See NAFTA, *supra* note 10, art. 2202, 32 I.L.M. at 702 (“The Parties may agree on any modification of or addition to this Agreement.”).

30. See *id.* art. 1113(2), 32 I.L.M. at 642.

31. See *id.* Annexes II–III, 32 I.L.M. at 748–61.

32. See *id.* art. 2202, 32 I.L.M. at 702 (allowing the Parties to modify or add to NAFTA so long as the change is “in accordance with the applicable legal procedures of each Party”).

33. See Emerson & Schwab Press Release, *supra* note 1; Softwood Lumber Products Export Charge Act, 2006 S.C., ch. 13 (Can.) (implementing the SLA 2006 in Canada through amendment of Canadian export controls on softwood lumber).

34. See SLA 2006, *supra* note 1, art. XVIII (declaring that the SLA 2006 shall remain in force for seven years following its effective date, and granting an option to extend the agreement for an additional two years if both Parties consent); see also Letter from Susan Schwab, U.S. Trade Representative, Executive Office of the President, to The Honorable David L. Emerson, Minister for Int'l Trade Dep't of Foreign Affairs and Int'l Trade, Gov't of Can., (Sept. 12, 2006), available at <http://www.dfait-maeci.gc.ca/trade/eicb/softwood/pdfs/SchwabtoEmerson-en.pdf> (declaring the United States' desire to maintain the effectiveness of the SLA 2006 for the duration of the agreement). *But see* SLA 2006, *supra* note 1, art. XX (providing specific conditions for early termination of the SLA 2006, including a general provision permitting either Party to terminate for any reason after the

such as pine and spruce, used in home-building.³⁵ Under the agreement, American obligations include refunding over four billion dollars of countervailing duties (“CVD”) and antidumping (“AD”) cash deposits to Canadian lumber producers,³⁶ and retroactively revoking CVD and AD orders.³⁷ In return, Canada agreed to impose export measures of softwood lumber products traveling to the United States,³⁸ and to settle on-going claims relating to the dispute.³⁹ Both Parties also acted to reduce their liability should a Canadian or American investor claim that a measure taken to give effect to the SLA 2006 violated NAFTA Chapter 11.⁴⁰ To this end, they included

agreement has been in force for eighteen months, with six-month written notice).

35. *Softwood Lumber Dispute*, CBC NEWS ONLINE, Aug. 23, 2006, http://www.cbc.ca/news/background/softwood_lumber/.

36. See SLA 2006, *supra* note 1, art. IV(2) (detailing the United States’ return schedule of the deposits); *Softwood Lumber Dispute*, *supra* note 35 (indicating that the SLA 2006 “would require the United States to return about eighty percent of the five billion dollars in duties it had collected on lumber imports”).

37. See SLA 2006, *supra* note 1, art. III(1)(a) (announcing the United States’ obligation to revoke the anti-dumping and countervailing duty orders retroactively to May 22, 2002, without the possibility of reinstatement).

38. See *id.* art. VI (providing a detailed account of the rates and procedures for collection of the export measures). *But see id.* Annex 10 (listing the Canadian lumber companies excluded from the export measures).

39. See *id.* Annex 2A (providing a detailed settlement of claims agreement, listing the covered actions subject to its requirements, and the obligations of both Parties to ensure the enforcement of the suspension).

40. See *id.* art. XI(2) (precluding the availability of Chapter 11 dispute resolution for all measures relating to the implementation of the SLA 2006). The desire of the Canadian and U.S. governments to insulate themselves from litigation relating to the implementation of the SLA 2006 may stem from the Canadian experience with the implementation of The Softwood Lumber Agreement, U.S.-Can., (1996), available at <http://www.dfait-maeci.gc.ca/trade/eicb/softwood/pdfs/treaty-e.pdf> [hereinafter SLA 1996]. In 2000, a NAFTA Chapter 11 tribunal decided the case of *Pope & Talbot Inc. v. Canada*, 41 I.L.M. 1347 (UNCITRAL, Nov. 26, 2002). As part of the SLA 1996, the Canadian government imposed an export quota system on softwood lumber exported from certain provinces within Canada, requiring export permits for all lumber exporters in Ontario, Quebec, British Columbia, and Alberta. SLA 1996, *supra* note 1, art. II. In *Pope & Talbot Inc.*, an American-owned lumber producer operating in British Columbia alleged that quota requirements allocated among producers favored lumber producers in other provinces, including Quebec. See Statement of Claim of *Pope & Talbot Inc.* at 16–17, *Pope & Talbot, Inc. v. Canada*, (UNCITRAL, Nov. 26, 2002), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc3.pdf> (illustrating how differently British Columbia and Quebec softwood lumber exports were treated under SLA 1996); Todd Weiler, *Saving Oscar Chin: Non-Discrimination in International Investment*

Article XI(2) in the SLA 2006, which limits the availability of Chapter 11 dispute resolution for Canadian and American investors with potential claims against either Party for a measure taken to give effect to the SLA 2006.⁴¹

C. THE VIENNA CONVENTION ON THE LAW OF TREATIES

Traditionally, international treaties were indivisible entities such that the separation or modification of one provision weakened the integrity of the whole.⁴² In the 1960's, however, the Vienna Convention on the Law of Treaties changed this paradigm.⁴³ In doing so, it established a series of interpretive customs for agreements that

Law, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 566–67 (Todd Weiler ed., 2005) (synthesizing the arguments in the claim to a simple national treatment analysis). In its decision, the tribunal noted the existence of a difference in treatment, as Pope & Talbot's competitors in Canada shipped their product to the United States paying lower, or no export fees, while Pope & Talbot paid substantial fees. *See* Order re: Motion to Dismiss on Grounds of Article 1101, January 26, 2000, *available at* <http://www.appletonlaw.com> (follow "cases" hyperlink; then follow "Pope & Talbot" hyperlink; then follow "page 2"; then follow "Award on Canada's Preliminary Motion to Dismiss Claim on Measures Relating to Investment" hyperlink); Weiler, *supra*, at 570–72 (placing the difference of treatment in Pope & Talbot in the context of other Chapter 11 cases). Thus, fear that Canadian or U.S. lumber producers might bring a similar claim under the SLA 2006 may have provided impetus for the inclusion of Article XI(2)(2) protection in the SLA 2006.

41. *See* SLA 2006, *supra* note 1, art. XI(2) (providing that Canadian and American investors cannot bring a claim under Section B of Chapter 11 of NAFTA in respect to any matter or measure relating to the SLA 2006).

42. *See, e.g.*, ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* 703 (John C. Rolfe trans., Oceana Publications 1933) (1612) (arguing that the failure to keep part of an agreement invalidates the whole agreement, because all parts of an agreement are made in the context of the others, and all contracts are indivisible); *see also* IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 166 (2d ed. 1984) (explaining that separation of an element or provision of a treaty was only traditionally permissible in the event of a breach of the treaty by another party).

43. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Aerial Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12, 57 (June 21) (dissenting opinion of Judge Al-Khasawneh) (noting that the Vienna Convention "opened the door for the principle of separability of treaty provisions, albeit in suitably guarded terms and subject to cumulative conditions"); SINCLAIR, *supra* note 42, at 166 (observing that Article 44 of the Vienna Convention arguably extends the separability of a provision beyond the limited situation of a breach of the treaty).

amend multilateral treaties and provide for the separability of provisions from a treaty.⁴⁴

1. Article 44: Separability of Treaty Provisions

The Vienna Convention permits the separation of provisions of a treaty in response to a fundamental change of circumstances.⁴⁵ Signatories cannot, however, “pick and choose” remedies, but must act in accordance with Article 44(3) requirements.⁴⁶ Article 44(3) limits the separability of provisions from the remainder of the treaty to only those situations that satisfy three conditions.⁴⁷ To separate a provision from a treaty the Party must show that: (1) the provision is in fact “separable from the remainder of the treaty;”⁴⁸ (2) acceptance of the provision did not provide “an essential basis of the consent of a Party” to bind itself to the obligations of the treaty;⁴⁹ and (3) “continued performance of the remainder of the treaty would not be

44. See Vienna Convention, *supra* note 43, art. 44, 1155 U.N.T.S. at 343 (establishing a series of requirements for the permissible separation of a provision of a treaty); *id.* art. 41, 1155 U.N.T.S. at 342 (establishing a series of requirements for the permissible modification of a treaty through an agreement between less than all of the Parties to the treaty); discussion *infra* note 60 (describing the authority of the Vienna Convention as the preeminent authority for treaty interpretation in both Canada and the United States).

45. See Elisabeth Zoller, *The “Corporate Will” of the United Nations and the Rights of the Minority*, 81 AM. J. INT'L L. 610, 628 (1987) (noting that signatories to treaties may suspend in part a treaty if a change in conditions affects only a particular set of provisions).

46. See Vienna Convention, *supra* note 43, art. 44(3), 1155 U.N.T.S. at 343 (providing a series of requirements for the separability of provisions from a treaty); see also Zoller, *supra* note 45, at 628 (referencing Francesco Capotorti, *L'extinction et la Suspension des Traités*, 134 RECUEIL DES COURS 417, 548 (1971 III) (suggesting that Article 44 does not convey a total right to separability)); *id.* at 629 (referencing IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 166 (1984) (cautioning that despite opening the door for the possibility of the separation of provisions, the principle of the integrity of the treaty still overwhelmingly prevails)).

47. See Vienna Convention, *supra* note 43, art. 44(3), 1155 U.N.T.S. at 343.

48. See *id.* art. 44(3)(a), 1155 U.N.T.S. at 343; see also Ronald B. Hurdle & Walter J. Champion Jr., *The Life and Times of Napoleon Beazley: The Effect (If Any) of the International Covenant on Civil and Political Rights on Texas' 17 & Up Execution Standard*, 28 T. MARSHALL L. REV. 1, 22 (2002) (noting, in another context, that separability implies the ability to disassociate an element of a treaty or provision from the remainder, and can include the disassociation of two elements within the same provision, such as specific reservations listed within a provision).

49. See Vienna Convention, *supra* note 43, art. 44(3)(b), 1155 U.N.T.S. at 343.

unjust.”⁵⁰ The three requirements are cumulative, and failure to satisfy one invalidates the separation.⁵¹

2. *Article 41: Agreements to Modify Multilateral Treaties Between Certain of the Parties Only*

The Vienna Convention permits two or more Parties to a multilateral treaty to conclude an agreement to modify the treaty between only themselves, if the treaty provides for such modification, or does not disallow such modification.⁵² If such a modification is not expressly provided for, Parties also may conclude an agreement to modify a treaty if: the treaty does not prohibit the modification;⁵³ the modification does not interfere with the other Parties’ enjoyment of the agreement or the performance of their obligations;⁵⁴ and if the modification does not limit “the effective execution of the object and purpose of the treaty as a whole.”⁵⁵ Again, the requirements are cumulative, and failure to satisfy one invalidates the modification.⁵⁶

III. ANALYSIS

In limiting the availability of NAFTA Chapter 11, the SLA 2006 effects the application of NAFTA. Two interpretations are possible for the nature of this effect. First, Article XI(2), by limiting the availability of Chapter 11 dispute resolution and distinguishing between different investors and investments, separates provisions of NAFTA Chapter 11 from each other and the treaty as a whole.⁵⁷ Second, the SLA 2006, due to Article XI(2) limitations on Chapter 11 dispute resolution, is an agreement that effectively modifies

50. *See id.* art. 44(3)(c), 1155 U.N.T.S. at 343.

51. *See id.* art. 44(3), 1155 U.N.T.S. at 343 (using the conjunction “and” to convey the “if and only if” nature of the proposition).

52. *See id.* art. 41(1)(a), 1155 U.N.T.S. at 342.

53. *See id.*, art. 41(1)(b), 1155 U.N.T.S. at 342.

54. *See id.* art. 41(1)(b)(i), 1155 U.N.T.S. at 342; *see also id.* art. 41(2), 1155 U.N.T.S. at 342 (requiring the Parties amending the treaty to notify the other Parties to the treaty of the intention to conclude the modifying agreement).

55. *See id.* art. 41(1)(b)(ii), 1155 U.N.T.S. at 342.

56. *See id.* art. 41(1)(b), 1155 U.N.T.S. at 342 (using the conjunction “and” to convey the “if and only if” nature of the proposition).

57. *See discussion infra* Part III(B) (arguing the separation of provisions called for in the SLA 2006 is impermissible under the Vienna Convention).

NAFTA and the applicability of its provisions.⁵⁸ Before proceeding with the analysis of these interpretations it is necessary to emphasize why the Vienna Convention is the appropriate instrument for assessing the effect of the SLA 2006 on the application of NAFTA.

A. THE VIENNA CONVENTION IS THE APPROPRIATE INSTRUMENT FOR ASSESSING THE EFFECT OF THE SLA 2006 ON THE APPLICATION OF NAFTA CHAPTER 11

Canada is a Party to the Vienna Convention,⁵⁹ and the United States, as a signatory, agrees that it is a correct statement of customary international law.⁶⁰ In both countries, however, NAFTA

58. See discussion *infra* Part III(C) (arguing the modification of the application of NAFTA Chapter 11 called for in the SLA 2006 is impermissible under the Vienna Convention).

59. See *Vienna Convention on the Law of Treaties*, 1980 CAN. T.S. No. 37 (giving effect to Canada's commitment to the Vienna Convention).

60. See United States President, Message from the President Transmitting the Vienna Convention on the Law of Treaties to Congress, S. EXEC. DOC. L., 92d Cong., 1st Sess. 1 (1971) (suggesting that the Vienna Convention is the authoritative guide to treaty law and practice); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW, Introductory Note, at 2 (III-2) (1987) (discussing when the Vienna Convention is consistent with the United States' interpretation of international customary law and suggesting that in the instances of a discrepancy between the two, the difference is subtle, and more a matter of emphasis or degree); *Ethyl Corp. v. Canada*, Award on Jurisdiction, ¶ 52, 38 I.L.M. 708, 723 (NAFTA/UNCITRAL, June 24, 1998) (stating that the United States accepts the Vienna Convention as the correct statement of international customary law); see also John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 892 (1999) (noting that the Restatement (Third) on Foreign Relations Law accepts the Vienna Convention as effectively codifying the customary international law governing international agreements and therefore provides the basis for the foreign relations law of the United States, despite the fact that the United States did not ratify the Vienna Convention); Amanda Atkinson, *NAFTA, Public Health, and Environmental Issues in Border States*, 9 NAT. RESOURCES & ENV'T 23, 25 (1994) (referencing a Canada-United States Free Trade Agreement dispute resolution decision on the sale of Durham wheat from Canada and its discussion on the U.S. consent to the application of the Vienna Convention's principles of treaty interpretation to resolve the dispute); Michael J. Kelly, *Clinton's Decision Commits America*, LANSING ST. J., Feb. 22, 2001, at 8A (identifying the U.S. State Department's acknowledgment of the Vienna Convention as essentially a codification of existing customary law and that as a result, the United States follows its provisions); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994) (suggesting that the United States views the Vienna Convention as codifying the international law of treaties); *Day v. Trans World Airlines, Inc.*,

and the SLA 2006 are executive agreements, not treaties, effective through domestic implementing legislative actions that incorporate the obligations of the agreement into applicable domestic laws.⁶¹ Despite the seeming disparity between executive agreements and official treaties, the Vienna Convention remains a valid source of customary international law to interpret and apply NAFTA.

NAFTA Article 102(2) requires that those interpreting and applying NAFTA do so in accordance with applicable rules of international law.⁶² As a result, when NAFTA Chapter 11 tribunals are in need of an appropriate expression of customary international law to interpret Chapter 11, the tribunals widely reference the Vienna Convention to clarify ambiguities.⁶³ Though no Chapter 11 tribunals

528 F.2d 31, 33 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (utilizing Article 31 of the Vienna Convention to interpret an agreement in a U.S. Court of Appeals); *Iran v. U.S.*, 5 Iran-U.S. Cl. Trib. Rep. 251, 259 (1984) (providing an example of when U.S. courts look to the Vienna Convention for guidance on the interpretation of a treaty).

61. *See* 19 U.S.C. § 3311 (2006) (indicating NAFTA's entry into force in the United States); North American Free Trade Agreement Implementation Act, 1993 S.C., ch. 44 (Can.) (modifying Canadian domestic laws in accordance with the obligations of NAFTA); Softwood Lumber Products Export Charge Act, 2006 S.C., ch. 13 (Can.) (implementing Canadian obligations with respect to export controls under the SLA 2006); SLA 2006, *supra* note 1, Annex 3 (providing draft language for the U.S. Department of Commerce's revocation of the antidumping duty order and termination of all reviews on certain softwood lumber from Canada pursuant to the SLA 2006, and instructing the U.S. Customs and Border Patrol to cease collecting deposits and immediately terminate the suspension of liquidation for all shipments of certain softwood lumber from Canada, imported for consumption, on or after May 22, 2002).

62. *See* NAFTA, *supra* note 10, art. 102(2), 32 I.L.M. at 297.

63. *See* *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3): Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 2 *ASPER REV. INT'L BUS. & TRADE L.* 451, 462 (2002) (highlighting the wide use of the Vienna Convention in interpreting NAFTA and labeling it the primary guide for such interpretation); *Pope & Talbot v. Canada*, Interim Award, 40 I.L.M. 258 (NAFTA/UNCITRAL, June 26, 2000) (adopting a broad interpretation of the expression 'investment' in Article 1110, relying on Article 31 of the Vienna Convention's "ordinary meaning" rule); *Mondev v. United States*, Award, ICSID Case No. ARB(AF)/99/2, ¶ 43 (Oct. 11, 2002), 42 I.L.M. 85, 94 (applying Articles 31–33 of the Vienna Convention as the appropriate standard for international customary law); *Ethyl Corp.*, *supra* note 60, ¶¶ 55–56, n.18, 38 I.L.M. at 723 (applying Article 1131 in considering both the language of NAFTA and the language of the Vienna Convention, and rejecting the argument for a strict construction of the applicability of Section B of Chapter 11); *see also* NAFTA, *supra* note 10, art. 1131, 32 I.L.M.

reference either Vienna Convention Article 44 or 41 specifically,⁶⁴ the consistent use of other Articles of the Vienna Convention for the interpretation of NAFTA, as well as the World Trade Organization's use of the Vienna Convention for the application of its provisions,⁶⁵ suggests that it is an appropriate instrument for assessing the effect of the SLA 2006 on the application of NAFTA.⁶⁶ Having established the authority of the Vienna Convention, the analysis now turns to the effect of Article XI(2) of the SLA 2006 on the application of NAFTA Chapter 11.

B. ARTICLE XI(2) OF THE SLA 2006 IS INCONSISTENT WITH THE SEPARABILITY OF PROVISIONS STANDARDS OF ARTICLE 44 OF THE VIENNA CONVENTION

The first possible interpretation of SLA 2006 Article XI(2)'s effect on NAFTA is that it separates NAFTA Chapter 11 Section B from the remainder of the Chapter. An analysis of the three cumulative

at 645 (declaring the responsibility of Chapter 11 tribunals to decide the issues in dispute in accordance with the applicable rules of international law); David A. Gantz, *International Decision: Pope & Talbot, Inc. v. Can.*, 97 AM. J. INT'L L. 937, 940-41 (David D. Caron ed., 2003) (discussing the Tribunal's reliance on the Vienna Convention as a reflection of customary international law in the *Pope & Talbot Inc.* case). Cf. *Kasikili/Sedudu Island (Bots./Namib.)*, 1999 I.C.J. 1045, 1059-1060 (demonstrating the International Court of Justice's reliance on the Vienna Convention for an accurate reflection of customary international law and its application).

64. See generally NAFTA Claims, <http://www.naftaclaims.com> (last visited Jan. 26, 2007) (providing an exhaustive list of all NAFTA Chapter 11 disputes and most decisions and filings).

65. See Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶¶ 9.182-9.183, WT/DS34/R (May 31, 1999) (using Article 41(1) of the Vienna Convention to affirm Turkey's obligations to the European Community under the World Trade Organization ("WTO") agreement); see also Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 254, 254 n.120 (2004) (acknowledging the ability of a WTO Panel to employ defenses set forth in the Southern African Development Community ("SADC") framework, so long as the subsequent derogation from WTO norms is not inconsistent with Article 41(1) of the Vienna Convention on the application of the WTO to non-SADC members).

66. Cf. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 929 n.519 (1995) (employing Article 46 of the Vienna Convention in the context of NAFTA to suggest that an agreement's violation of domestic laws does not invalidate the agreement internationally).

standards of Article 44 of the Vienna Convention demonstrates that this separation is inconsistent with customary international law.⁶⁷ First, Chapter 11 Section B is inseparable from the remainder of Chapter 11. Second, NAFTA Chapter 11 was essential to the consent of Canada and the United States to sign NAFTA. Finally, the Article XI(2) separation makes the continued performance of NAFTA unjust.

1. Article XI(2) of the SLA 2006 Impermissibly Separates Section B of Chapter 11 from the Remainder of NAFTA

The first element of the Vienna Convention Article 44 test is whether the application of Chapter 11 Section B is separable from the remainder of Chapter 11.⁶⁸ In its application, Article XI(2) limits access to Section B of Chapter 11 for a specific group of investors and investments.⁶⁹ This separation is impermissible for three reasons.

First, Article XI(2) impermissibly separates Section B of Chapter 11 from Section A.⁷⁰ Section A affords investors with a potentially valid Chapter 11 claim against a measure taken to give effect to the SLA 2006 protection of their investment, but the separation of Section B removes the means to do so.⁷¹ This effect, of creating a

67. See Vienna Convention, *supra* note 43, art. 44(3), 1155 U.N.T.S. at 343 (identifying the requirements for the permissible separation of a provision from the remainder of a treaty); see also *id.* art. 44(1), 1155 U.N.T.S. at 343 (allowing the separation of a provision from a treaty if the treaty so provides, or the parties otherwise agree). In the case of the SLA 2006, however, there is no indication that Mexico formally consented to the modifications in question. Should Mexico convey such agreement, the SLA 2006 will likely satisfy the Article 44 test for separability of treaty provisions.

68. See Vienna Convention, *supra* note 43, art. 44(3)(a), 1155 U.N.T.S. at 343.

69. See SLA 2006, *supra* note 1, art. XI(2) (providing for the suspension of Chapter 11 Section B for any matter or measure relating to implementation of the SLA 2006).

70. See *id.* art. XI(2) (allowing suspension only for matters concerning the "operation and application" of Chapter 11 Section B, with no reference to the rights under Section A).

71. Compare NAFTA, *supra* note 10, arts. 1102, 1103, 1105, 1110, 32 I.L.M. at 639, 642 (granting investors the right to receive treatment no less favorable than that accorded to domestic investors or investors of any other Party, a minimum standard of treatment in accordance with international law, and protection from direct or indirect expropriation or nationalization), with SLA 2006, *supra* note 1, art. XI(2) (suspending the application of Chapter 11 dispute resolution for any matter or measure relating to SLA 2006's implementation). *But see* NAFTA, *supra*

right with no remedy, violates a fundamental maxim of equity,⁷² and diminishes the stability and predictability of the investment environment in North America. As such, it offends one of the fundamental objectives of NAFTA,⁷³ and undermines the integrity of the agreement. Thus, the two provisions are inseparable.

Second, the SLA 2006 separates Chapter 11 Section B only for those claims relating to measures necessary to give effect to or implement the SLA 2006.⁷⁴ This separation creates a distinction between investors with a Chapter 11 claim related to the SLA 2006, and investors whose claim does not so relate. According to NAFTA Article 1115, one of the purposes of the Chapter 11 dispute resolution mechanism is to ensure equal treatment among investors of the Parties.⁷⁵ The Article XI(2) distinction, however, divides

note 10, art. 2004, 32 I.L.M. at 694 (extending the jurisdiction of the NAFTA Chapter 20 dispute resolution mechanism to the settlement of all disputes except for Chapter 19 matters). Theoretically, therefore, a Party may bring a claim relating to Chapter 11 Section A violations using the Chapter 20 mechanism. *See* Cross-Border Trucking Services (U.S. v. Mex.), Arbitral Panel Established Pursuant to Chapter 20 of the NAFTA, Final Report of the Panel, Secretariat No. USA-Mex-98-2008-01 (Feb. 6, 2001), <http://naftaclaims.com/Disputes/USA/USTrucking/USTruckingChapter20.pdf> (providing the first and only precedent for using NAFTA Chapter 20 dispute resolution for alleged violations of Chapter 11 protections). Despite this theoretical possibility, strong policy arguments exist, mainly those underlying the creation of the Chapter 11 Section B dispute resolution mechanism in the first place, in favor of maintaining an investor's right to bring a claim against the state. *Id.*

72. *See, e.g.*, WILLIAM BLACKSTONE, 3 COMMENTARIES *23 (1783) (“a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded”); *see also* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992) (recognizing the longstanding principle in the United States judicial system that courts have the power to award remedies for a breach of a right); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

73. *See* NAFTA, *supra* note 10, Pmb1., 32 I.L.M. at 297 (identifying the goal of creating a predictable framework for investment); *id.* art. 102(1), 32 I.L.M. at 297 (listing NAFTA's objectives, which include substantially increasing investment opportunities in the Parties' territories and creating effective procedures for resolving disputes); *see also* VanDuzer, *supra* note 19, at 48–49 (arguing that an effective rules-based system requires the support of a credible enforcement mechanism).

74. *See* SLA 2006, *supra* note 1, art. XI(2).

75. *See* NAFTA, *supra* note 10, art. 1115, 32 I.L.M. at 642; *see also* discussion *supra* Part II(A) (discussing the underlying purposes of NAFTA Chapter 11); Charles H. Brower, II, *Emerging Dilemmas in International Economic Arbitration*:

investors with a potential claim against the governments of Canada or the United States into two groups. This distinction thus renders equal treatment of investors impossible and Chapter 11 Section B inseparable.⁷⁶

Finally, Article XI(2) treats Canadian and American investors differently than those of Mexico, as it limits only Canadian and American investors' access to Chapter 11 dispute resolution.⁷⁷ Consequently, Mexican investors with potential Chapter 11 claims against Canada or the United States relating to measures taken to implement the SLA 2006, may continue to access Chapter 11 dispute resolution, while Canadian and American investors cannot.⁷⁸ Article XI(2) thus makes another distinction that privileges one group of claimants over another, and violates the fair and equitable treatment of investors.⁷⁹ NAFTA Parties may not distinguish between Canadian, American, and Mexican investors under NAFTA Chapter 11. The Article XI(2) separation of Chapter 11 Section B is thus impermissible.⁸⁰

Mitsubishi, Investor-State Arbitration, and the Law of State Immunity, 20 AM. U. INT'L L. REV. 907, n. 38 (2005) (stressing the importance of equality of Parties in NAFTA litigation and international law in general); Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 77 (2003) (acknowledging equality of treatment as the most fundamental principle of procedural justice common to NAFTA Chapter 11, the rules of arbitration, and international law); Charles H. Brower II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 87 (2000) (suggesting that equal treatment is a commonly accepted requirement of international procedural justice); John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1179 (1999) (positing that equal treatment is a fundamental principle of international justice).

76. Compare NAFTA, *supra* note 10, art. 1115, 32 I.L.M. at 642 (establishing a mechanism for dispute settlement that assures equal treatment of investors and their claims against all measures, in accordance with international principles of due process and reciprocity), with SLA 2006, *supra* note 1, art. XI(2) (suspending the application of Chapter 11 dispute resolution only for claims related to measures taken to give effect or implement the SLA 2006).

77. See SLA 2006, *supra* note 1, art. XI(2) (providing that Canadian and American investors cannot bring a claim under Section B of NAFTA against a party to the SLA 2006).

78. See *id.* art. XI(2). Though the SLA 2006 is an agreement between Canada and the United States, it is conceivable that measures taken to give effect to the agreement may affect a Mexican investor in either Canada or the United States.

79. See *supra* note 73.

80. See *supra* note 76.

Taken individually, each of the three distinctions establishes a compelling argument that SLA 2006 Article XI(2) fails the first requirement of the Vienna Convention Article 44 test for the separability of provisions.⁸¹ Taken together, the Article XI(2) separations supports the argument that SLA 2006 impermissibly separates elements of NAFTA Chapter 11.

2. NAFTA Chapter 11 Was Essential to the Consent of Canada and the United States to Sign NAFTA

The second element of the Vienna Convention Article 44 test is whether the separated provision was essential to the consent of a Party to sign the treaty.⁸² Indeed, NAFTA Chapter 11 was essential for the consent of both Canada and the United States to sign NAFTA, and therefore Article XI(2) fails this test.

American negotiators insisted on Chapter 11, recognizing its power to liberalize Mexican investment policies, protect American investors from expropriation, and depoliticize investment disputes in North America.⁸³ Canada also insisted upon the Chapter 11

81. The requirements for the separation of a provision under Article 44 of the Vienna Convention are cumulative. Therefore, the analysis could stop here with the SLA 2006 failing the first requirement. However, to counter any doubt that the SLA 2006 is inconsistent with the Vienna Convention Article 44, this article also discusses the second and third requirements of Article 44.

82. See Vienna Convention, *supra* note 43, art. 44(3)(b), 1155 U.N.T.S. at 343 (preventing the separation of a provision that was essential to the consent of one of the Parties to the agreement); see also discussion *supra* Part II(C)(1) (discussing the requirements of Article 44 of the Vienna Convention).

83. See discussion *supra* Part II(A)(1); Charles H. Bower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 47 (2001) (discussing why U.S. NAFTA negotiators insisted on Chapter 11 investment protection); Tollefson, *supra* note 15, at 148 (positing that the United States insisted upon the inclusion of Chapter 11 investment protections due to concerns about the unstable and unpredictable investment environment in Mexico); Charles N. Brower & Lee A. Steven, *NAFTA Chapter 11: Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 194 (2001) (reporting that the United States "lobbied hard" to include Chapter 11 protection in NAFTA); see also HUFBAUER & SCHOTT, *supra* note 28, at 200 (suggesting that Mexico's adherence to NAFTA Chapter 11 was critical to assure Canada and the United States of its commitment to implementing NAFTA reforms in light of Canadian and American concerns over the 1982 nationalization of Mexican banks and subsequent judicial controversy); UNITED STATES GENERAL ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES: REPORT TO CONGRESS, GAO/GGD-

investment protections to consolidate its gains in the Canada-United States Free Trade Agreement.⁸⁴ For Canadians, reducing the American tendency towards bilateral investment agreements, which threatened to establish the United States as the “hub of a rimless wheel,” arguably was the most important reason Canada signed a free trade agreement that included Mexico.⁸⁵ Anchoring investment in a predictable, rules-based system such as NAFTA Chapter 11, thus was essential to Canada’s consent to sign NAFTA.⁸⁶

Fear that Canadian and American investors would not receive fair treatment in Mexican courts also motivated both governments’ insistence on Chapter 11. Mexico, like many other Latin American countries, was a proponent of the Calvo Doctrine, and, prior to NAFTA, essentially left foreign investors to the mercy of domestic

93-137B at 19 (Sept. 1993) (noting that the United States wanted Chapter 11 to liberalize Mexican restrictions on investment and guarantee legal protections for U.S. investors); Maureen Appel Molot, *Chapter 11: An Evolving Regime, in WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE*, *supra* note 7, at 176 (noting that the NAFTA Chapter 11 investment protection was a crucial American demand during the NAFTA talks based on concerns over politically motivated expropriations of United States investments in Mexico). *But see* Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT’L & COMP. L. REV. 303, 306 (2000) (arguing that the United States Congress would not have signed off on, let alone insisted upon, NAFTA Chapter 11 if Congress had anticipated Chapter 11’s ability to address domestic regulatory processes beyond the generally accepted scope of review under the Technical Barriers provisions and the Sanitary and Phytosanitary rules).

84. *See generally* HUFBAUER & SCHOTT, *supra* note 28, at 200, 202 (indicating that Canada hoped to preserve its dispute settlement gains from its Free Trade agreement with the U.S. into NAFTA and that many of these were incorporated into Chapter 11). *But see* VanDuzer, *supra* note 19, at 49 (citing Canadian media reports that quote former Canadian Trade Minister Pierre Pettigrew “as saying that he would not sign another trade agreement with a process equivalent to Chapter 11”).

85. *See* Ronald J. Wonnacott, *Canada and the United States-Mexico Free Trade Negotiations*, C.D. HOWE INST. COMMENTARY, No. 21, at 3 (Toronto 1990) (suggesting that the effects of trade diversion would put Canada at a disadvantage in a “hub and spoke” alternative to NAFTA); *see also* Christopher Wilkie, *The Origins of NAFTA Investment Provisions: Economic Policy Considerations, in WHOSE RIGHTS? THE NAFTA CHAPTER 11 DEBATE*, *supra* note 7, at 19 (suggesting that some Canadians feared U.S. bilateral arrangements could undermine the entire multilateral process).

86. *See* Wilkie, *supra* note 85, at 19–20 (discussing the importance for middle power States like Canada to insist on rules-based systems for trade and investment).

courts.⁸⁷ Canada and the United States insisted on Chapter 11 to break Mexico's traditional political thinking and move the country closer to the standards of its northern neighbors.⁸⁸ Chapter 11 was thus essential to the consent of both the United States and Canada to sign NAFTA. As a result, Article XI(2) impermissibly separates an essential provision, thereby failing the second test of the Article 44 separability analysis.

An anticipated criticism of this analysis of Article 44(3)(b) is that Article 44(3)(b) considers the consent of the "other Party or Parties" to the treaty, which in the present NAFTA analysis is Mexico.⁸⁹ Critics may argue that under this interpretation, Chapter 11 was not essential for Mexico's consent and therefore the SLA 2006 is not inconsistent with Article 44(3)(b).⁹⁰ This argument, however, fails to consider the plain meaning of Article 44. Read literally, Article 44(1) of the Vienna Convention says "[a] right of a party,"⁹¹ thus considering the separability of provisions in the context of a single actor. This interpretation of Article 44(3)(b) is consistent with Article 31(1) of the Vienna Convention, which requires the plain meaning interpretation of a treaty in light of its object and purpose.⁹² The

87. See *id.* at 27–28 (quoting Mexican Official Records General Assembly, 2315th meeting, (Dec. 12, 1974), 1377–78, ¶ 162) (noting that for over a century, the Mexican government argued that investment regimes are an internal legal order and that states should not tolerate supranational bodies interfering in the procedural and compensatory systems of sovereign nations)). See generally Don Wallace, Jr., *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas*, 89 AM. J. INT'L L. 668, 669 (1995) (book review) (discussing the Mexican adherence to the Calvo Doctrine, a foreign policy paradigm holding that the location of the investment determines the appropriate jurisdiction in international investment disputes).

88. See Wallace, *supra* note 87, at 669 (discussing the effects of Chapter 11, including Mexico's shift away from the Calvo Doctrine).

89. Mexico is the only NAFTA Party not also a Party to the SLA 2006.

90. See *supra* text accompanying notes 87, 88 (suggesting that Canada and the United States provided the impetus for Chapter 11, in fear of an unreliable Mexican judiciary and economic climate).

91. Vienna Convention, *supra* note 43, art. 44(1), 1155 U.N.T.S. at 342.

92. See *id.* art. 31(1), 1155 U.N.T.S. at 340 (requiring that Parties interpret treaties in good faith, in accordance with the ordinary meaning of the terms in their context, and in light of the treaty's object and purpose); see also Jan Linehan, *The Law of Treaties*, in PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 110 (Sam Blay et al. eds., 1997) (suggesting that the Vienna Convention did not intend to provide an escape clause for states when their treaty obligations became more burdensome than they intended).

“other Parties” who are the subject of the Article 44(3)(b) analysis, therefore, are all other Parties to the original treaty, regardless of whether they are also responsible for the separation in question themselves. Canada is thus a relevant “other party” when conducting the analysis of the U.S. responsibility for the SLA 2006’s separation of NAFTA Chapter 11, while the United States is a relevant “other party” when conducting the same analysis of Canadian responsibility. The proper analysis considers the right of both Canada and the United States to separate a provision individually. As a result, both Canada and the United States, by their involvement in the SLA 2006, violate Article 44 (1) of the Vienna Convention by impermissibly separating provisions of NAFTA that were essential to the consent of another NAFTA Party.

3. Separating NAFTA Chapter 11 Rights from Its Remedies Renders the Continued Performance of NAFTA Unjust

The final test of Article 44 of the Vienna Convention is whether the continued performance of the remainder of the treaty, in light of the separation, is unjust.⁹³ As discussed in Part III(A)(1) above, removing a previously granted remedy from its right violates fundamental maxims of equity and breaches the legitimate expectations of investors under NAFTA Article 1105.⁹⁴ NAFTA tribunals in both *S.D. Myers, Inc. v. Canada* and *Metalclad Corp. v. United Mexican States* discussed the investor’s legitimate expectation in their investments’ protection and available remedies in the event of a breach.⁹⁵ The NAFTA tribunal in *ADF Group Inc. and*

93. See Vienna Convention, *supra* note 43, art. 44(3)(c), 1155 U.N.T.S. at 343 (limiting the separation of a provision from a treaty where the continued performance of the treaty is unjust).

94. See generally Ian S. Laird, *NAFTA Chapter 11: Betrayal, Shock and Outrage – Recent Developments in NAFTA Article 1105*, 3 ASPER REV. INT’L BUS. & TRADE L. 185, 186 (2003) (noting that Article 1105 provides investors with the expectation that they will receive no worse than the minimum standard of treatment offered under international law).

95. See *S.D. Myers, Inc. v. Canada*, ¶ 264, 40 I.L.M. 1408 (NAFTA/UNCITRAL, Nov. 13, 2000) (establishing that the investor has a legitimate expectation of fair and equitable treatment based on Article 1105); *Metalclad Corp.*, *supra* note 35, 40 I.L.M. 36 (finding that Mexico’s failure to ensure a transparent and predictable framework for investment was inconsistent with fair and equitable treatment); see also Laird, *supra* note 94, at 199 (suggesting that the *Myers* and *Metalclad* tribunals acknowledged the investors legitimate

United States also affirmed the importance of access to NAFTA Chapter 11 dispute resolution when it suggested that government measures inconsistent with an investor's legitimate expectations may violate NAFTA Article 1105's fair and equitable treatment requirement.⁹⁶ An investor's legitimate expectation in the protection of his investment is thus a fundamental precept of the application of NAFTA.⁹⁷ In limiting the availability of this protection to certain claims, Article XI(2) makes the equal treatment of all investors impossible, and renders NAFTA's continued application as a whole unjust.

In sum, the separation called for in Article XI(2) of the SLA 2006 (1) is inconsistent with the customary international law as defined in the Vienna Convention; (2) attempts to separate inseparable provisions which were essential to the consent of Canada and the United States to sign NAFTA; and (3) renders the continued application of NAFTA as a whole unjust. Article XI(2) therefore fails all three of the Vienna Convention Article 44 requirements on the separability of treaty provisions.

C. ARTICLE XI(2) OF THE SLA 2006 IS INCONSISTENT WITH THE STANDARDS FOR THE MODIFICATION OF A TREATY AS STATED IN ARTICLE 41(1) OF THE VIENNA CONVENTION

The second interpretation of the SLA 2006 Article XI(2)'s effect on NAFTA is that it modifies the application of Chapter 11. Vienna Convention Article 41(1) permits such a modification if, among other requirements, the treaty does not prohibit the modification,⁹⁸ and the modification does not limit the effective execution of the

expectations in establishing and operating an investment).

96. See *ADF Group, Inc. and United States*, Award, ¶ 189–90, ICSID Case No. ARB(AF)/00/1 (Jan. 9, 2003) (enumerating certain government actions that may violate the Article 1105 fair and equitable treatment provision, including the violation of an investor's legitimate expectation where that investor relies on government misrepresentations regarding prior judicial or administrative rulings).

97. See Laird, *supra* note 94, at 214 (highlighting the conclusions of several Chapter 11 panels that NAFTA Parties have an obligation to honor the legitimate expectations of investors, and suggesting that these conclusions are consistent with the objective outlined in NAFTA's Preamble of "a predictable commercial framework for business planning and investment").

98. See Vienna Convention, *supra* note 43, art. 41(1)(b), 1155 U.N.T.S. at 342.

treaty's object and purpose.⁹⁹ SLA 2006 Article XI(2)'s modification of NAFTA is inconsistent with both of these conditions.¹⁰⁰ First, NAFTA Chapter 11 prohibits the SLA 2006's modification of its applicability. Second, Article XI(2)'s modifications of Chapter 11 impermissibly interferes with NAFTA's object and purpose.

1. NAFTA Chapter 11 Prohibits the Modification of its Provisions as Called for in Article XI(2) of the SLA 2006

NAFTA Chapter 11 is a negative-list provision, protecting investors in every sector except those it explicitly exempts.¹⁰¹ To this

99. *See id.* art. 41(1)(b)(ii), 1155 U.N.T.S. at 342.

100. Like Article 44, the conditions in Article 41(1)(b) are cumulative. *See id.* art. 41(1)(b), 1155 U.N.T.S. at 342 (listing two conditions the modification must satisfy in order to comply with Article 41). Failure to satisfy one of the conditions is sufficient to demonstrate inconsistencies between the modifying agreement and the Vienna Convention.

101. *See* HUFBAUER & SCHOTT, *supra* note 28, at 202 (noting that a distinctive feature of NAFTA Chapter 11 is its negative-list approach to reservations such that the Parties must specify the industries not covered in the relevant provisions); Bradley Condon, *Smoke and Mirrors: A Comparative Analysis of WTO and NAFTA Provisions Affecting the International Expansion of Insurance Firms in North America*, 8 CONN. INS. L.J. 97, 103 (2001) (suggesting that NAFTA's negative-list approach serves to prevent the Parties from taking future measures that violate Chapter 11 except where included in a reservation); Jurgen Kurtz, *A General Investment Agreement in the WTO? Lessons From Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 735 (2002) (arguing that NAFTA's negative-list approach to investment services provides investors with unparalleled protection from government measures and that Chapter 11 dispute resolution applies to all sectors not accounted for in NAFTA Annexes); Louis F. Del Duca & Vanessa P. Sciarra, *Developing Cross-Border Practice Rules: Challenges and Opportunities for Legal Education*, 21 FORDHAM INT'L L.J. 1109, 1116 (1998) (noting that under the negative-list approach all sectors are presumptively within the scope of the agreement and highlighting the efforts of each government to bargain for the exclusion of certain sectors); Harry G. Broadman, *International Trade and Investment in Services: A Comparative Analysis of the NAFTA*, 27 INT'L LAW. 623, 640 (1993) (providing that unless a services sector is explicitly excluded from or otherwise made subject to reservations of NAFTA, the sector is automatically subject to the Chapter 11 rules); Foreign Trade Association [FTA], *FTA Position Regarding the WTO Investment Agreement* (2003) (on file with author) (espousing the virtue that investment in a free trade agreement must follow the principle that "anything not forbidden is allowed"). *Cf.* Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257, 290 n.304 (1994) (arguing that the existence of a provision permitting the President one year

end, all three NAFTA Parties included reservations on the applicability of Chapter 11 in the original language of the agreement.¹⁰² Notably, Canada reserved the right to limit the applicability of the Chapter 11 dispute resolution mechanism for certain measures taken in relation to a review of specified investments under the Investment Canada Act.¹⁰³ Other than this one reservation, however, none of the countries included a reservation on the right to withhold the applicability of Chapter 11 dispute resolution for any other sector.¹⁰⁴ Further, none of the Parties reserved the right to withhold Chapter 11 protection for any sector related to the subject matter of the SLA 2006 or any group of investors dealing with softwood lumber.¹⁰⁵

The well-established presumption *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) guides the conclusion that the Chapter 11 negotiators intentionally did not include the limitations on the applicability of Chapter 11 dispute resolution called for in Article XI(2).¹⁰⁶ The absence of any

following NAFTA's effective date to make clerical adjustments to the agreement permits the presumption that the U.S. President would otherwise lack the authority to do so).

102. See Jacqueline Granados, *Investor Protection and Foreign Investment Under NAFTA Chapter 11: Prospects for the Western Hemisphere Under Chapter 17 of the FTAA*, 13 *CARDOZO J. INT'L & COMP. L.* 189, 195 (2005) (noting that Mexico opted to maintain reservations in sensitive sectors of its economy under NAFTA's negative-list approach); Gustavo Vega C. & Gilbert R. Winham, *The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and U.S. Trade and Investment Relations*, 28 *OHIO N.U.L. REV.* 651, 677 (2002) (noting that all three countries chose to exercise their right to reservations, with Canada and Mexico exempting their review process for acquisitions of domestic firms of a prescribed size, and the United States maintaining "a broad right to block takeovers that might threaten national security"). See generally NAFTA, *supra* note 10, Annexes I–IV, 32 *I.L.M.* 704–62 (listing the reservations of each country relating the applicability of Chapter 11 investment rights and dispute resolution for existing measures, future measures, and activities of the state).

103. See NAFTA, *supra* note 10, Annex 1138.2, 32 *I.L.M.* at 649.

104. See also *id.* Annexes I–IV, 32 *I.L.M.* at 704–62 (describing multiple reservations in several different sectors including "Aboriginal Affairs," oceanfront land, communications, air and water transportation, and others, but none relating to softwood lumber).

105. See also *id.* (listing sectors included in the reservations); Vega & Winham, *supra* note 114, at 677 (noting that NAFTA permitted "all sector reservations" that may apply to a particular group of investors).

106. Cf. *Tokios Tokelos v. Ukraine*, Decision on Jurisdiction, ¶ 52 ICSID Case No. ARB/02/18 (May 8, 2000) (deciding that the presence of alternative methods

reservation on access to Chapter 11 dispute resolution for softwood lumber investors, and the lack of a right to modify Chapter 11 other than through treaty amendment, thus permits the reasonable conclusion that NAFTA prohibits the SLA 2006's modification of the applicability of Chapter 11 dispute resolution. Article XI(2) is therefore inconsistent with the first test of the modification of provisions standards of Article 41(1) of the Vienna Convention.

2. *Article XI(2) of the SLA 2006 Limits the Effective Execution of the Object and Purpose of NAFTA*

Article 41(1) of the Vienna Convention prohibits treaty modification if the modification limits the effective execution of the object and purpose of the treaty as a whole.¹⁰⁷ With respect to NAFTA, the Chapter 11 investment protections, including the guaranteed right to dispute resolution, are fundamental to the NAFTA objective of increasing secure investment opportunities.¹⁰⁸ Article XI(2), in modifying the availability of Section B of NAFTA, limits certain investors' legitimate expectation of protection of their rights, an expectation that is a fundamental purpose and objective of

of defining corporate nationality to extend the benefits of a Bilateral Investment Treaty ("BIT") does not permit the Respondent to use similar methods to deny the benefits of the BIT, but rather that the presumption was that Contracting Parties intentionally supplied the alternative definition to extend benefits, and therefore, it is reasonable to presume that the Contracting Parties intentionally did not include alternative definitions in the provision permitting the denial of benefits).

107. See Vienna Convention, *supra* note 43, art. 41(1)(b)(ii), 115 U.N.T.S. at 342.

108. See NAFTA, *supra* note 10, art. 102, 32 I.L.M. at 297; *id.* Pmbl., 32 I.L.M. at 297; see also discussion *supra* Part II(A) (highlighting the importance of investment protection to the object and purpose of NAFTA); Allen Z. Hertz, *Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN-U.S. L.J. 261, 295 (1997) (noting that no element of NAFTA is more important than its investment protection instrument); *S.D. Myers*, *supra* note 95, 38 I.L.M. 1408; *Ethyl Corp.*, *supra* note 60, ¶ 56, 38 I.L.M. at 723; *Metalclad Corp.*, *supra* note 26, ¶¶ 71, 75, 40 I.L.M. 36 (noting that investment protection was a fundamental objective of NAFTA and referencing the NAFTA preamble to illustrate that as a result the Parties committed to ensuring a predictable framework for investment); *Pope & Talbot, Inc. v. Canada, Final Merits Award*, ¶ 115, (UNCITRAL, Apr. 10, 2001), available at http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf (affirming that NAFTA was a continent-wide endeavor aimed at substantially increasing investment opportunities).

NAFTA.¹⁰⁹ Any effort to limit the availability of the dispute resolution mechanism, unless provided for in one of the reservations or executed through a permissible amendment to NAFTA, thus limits the effective execution of the agreement as a whole and is inconsistent with Article 41(1)(b)(ii) of the Vienna Convention.

IV. RECOMMENDATIONS

In limiting the availability of NAFTA Chapter 11, the SLA 2006 either separates provisions of NAFTA Chapter 11 from each other and the treaty as a whole,¹¹⁰ or effectively modifies NAFTA and the applicability of its provisions.¹¹¹ Regardless of which interpretation is more accurate or palatable, both are inconsistent with the Vienna Convention. The first recommendation that follows from this analysis, directed to investors, advocates an aggressive litigation strategy that uses a NAFTA Chapter 11 claim to provoke a jurisdictional challenge in which the tribunal must address the merits of the SLA 2006's effect on NAFTA. The second and third recommendations, directed to the governments of Canada and the United States, advocate for the amendment of both the SLA 2006 and NAFTA, to bring the SLA 2006 in line with customary

109. It is necessary to distinguish NAFTA from other multilateral agreements that do not include private party access, such as the Agreement Establishing the World Trade Organization ("WTO"). See Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). While some argue that multilateral agreements are theoretically an aggregation of bilateral agreements between multiples states, NAFTA, in including Chapter 11 and the private right of access to dispute resolution, became much more than an aggregation of three bilateral agreements. *But see* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 547–50 (2001) (arguing the WTO is an aggregation). Thus while it may be difficult to prove that the modification of any one provision between two members of the WTO prejudices the effective execution of the object and purpose of the WTO Implementing Treaty as a whole, operating under the presumption that the WTO is simply a two-dimensional series of reciprocal rights and obligations between its members, NAFTA Chapter 11 affords rights in a third dimension, and therefore cannot be modified as if it were not. *See id.* at 549 (addressing the permissibility of WTO modification in light of Vienna Convention Article 41(1) and suggesting that the WTO is theoretically reducible to a series of reciprocal rights and obligations between member states, thereby hindering Article 41(1)(b)(ii) satisfaction).

110. *See* discussion *supra* Part III(B).

111. *See* discussion *supra* Part III(C).

international law, while retaining the litigation protection Article XI(2) provides.

A. INVESTORS SHOULD FORCE A NAFTA TRIBUNAL TO DECIDE THE VALIDITY OF ARTICLE XI(2) IN A JURISDICTIONAL HEARING

Article XI(2), as it now stands, is inconsistent with customary international law and removes the availability of NAFTA Chapter 11 dispute resolution in a discriminatory and prohibited way.¹¹² As a result, Canadian and American investors with potential claims against the governments of Canada or the United States for measures relating to the SLA 2006 would have no recourse.

On the surface, these investors have no direct remedy for the denial of their right to NAFTA Chapter 11 dispute resolution. As discussed in Part II(C), NAFTA is technically not a treaty,¹¹³ and both the Canadian and U.S. NAFTA Implementation Acts include a provision denying private-party access to enforce Party obligations.¹¹⁴ The absence of any obvious private remedy for

112. See discussion *supra* Part III(B)–(C) (analyzing the inconsistencies between Article XI(2) and the Vienna Convention).

113. See discussion *supra* Part II(C) (noting that implementation acts in both Canada and the United States give trade agreements like the SLA 2006 and NAFTA effect).

114. See 19 U.S.C. § 3312 (2006) (providing that no private party acquires any right to a cause of action under NAFTA, and that no private party may challenge any action or inaction of their government on the ground that such action or inaction is inconsistent with NAFTA); North American Free Trade Agreement Implementation Act, 1993 S.C., ch. 44 1924–25, § 6(1) (Can.) (requiring the consent of the Attorney General of Canada to bring a claim under Section B of Chapter 11 to enforce or determine any right or obligation claimed arising under NAFTA). *Cf.* Alien Tort Claims Act, 28 U.S.C. § 1350 (2006) (extending to U.S. district courts original jurisdiction over any civil action by an alien for a tort committed in violation of a U.S. treaty, but not extending that jurisdiction to agreements such as NAFTA); William S. Dodge, *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (2003), at <<http://www.state.gov/documents/organization/22094.pdf>>. NAFTA Chapter 11 Arbitral Tribunal, June 26, 2003. *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85 (2003), at <<http://www.state.gov/documents/organization/14442.pdf>>. NAFTA Chapter 11 Arbitral Tribunal, October 11, 2002, 98 AM. J. INT'L L. 155, 161 n.56 (2004) (suggesting that changing the U.S. and Canadian implementing legislation to make NAFTA enforceable in domestic courts would allow for more effective redress of Chapter 11 violations).

investors thus suggests that a more creative litigation strategy is necessary.

Those investors denied access to Chapter 11 dispute resolution under Article XI(2) of the SLA 2006 should submit a claim to arbitration under NAFTA Article 1120 in accordance with NAFTA regulations.¹¹⁵ The respondent government, having communicated its intentions to prevent such a filing to their NAFTA Secretariat,¹¹⁶ likely will respond with a jurisdictional challenge to the claim, arguing that Article XI(2) of the SLA 2006 prohibits the claim from proceeding.¹¹⁷ At this jurisdictional hearing, the investor should argue that Article XI(2) impermissibly affects the application of NAFTA,¹¹⁸ and constitutes a breach of the respondent government's NAFTA Article 1105 obligations.¹¹⁹ Faced with this claim, the Chapter 11 tribunal will have to decide the merits of Article XI(2) and its affect on the application of NAFTA to determine whether the Chapter 11 claim may proceed. Following the arguments described in Part III above, the tribunal likely will recognize the inconsistencies between Article XI(2)'s effect on the application of NAFTA Chapter 11 and the Vienna Convention, and find Article XI(2) a violation of NAFTA Article 1105.

115. See NAFTA, *supra* note 10, art. 1120, 32 I.L.M. at 643 (requiring a six month elapse from the events giving rise to the claim before the investor submits the claim to arbitration); *id.* art. 1119, 32 I.L.M. at 643 (requiring the disputing investor submit a notice of intent to submit a claim 90 days prior to submitting the claim); *id.* art. 1119, 32 I.L.M. at 643 (suggesting the disputing Parties attempt to settle the claim through negotiation or consultation).

116. See SLA 2006, *supra* note 1, art. XI(2) (indicating that the Parties will notify their NAFTA Secretariats of their intention to limit the availability of Chapter 11 dispute resolution).

117. See, e.g., UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) (providing that if the claim is brought under UNCITRAL rules, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question, but allowing the tribunal to reserve their jurisdictional ruling until its final award).

118. See discussion *supra* Part III(B) (arguing that the SLA 2006's separation of NAFTA Chapter 11 provisions impermissibly effects the application of NAFTA); discussion, *supra* Part III(C) (arguing that the modification of NAFTA Chapter 11 called for in the SLA 2006 impermissibly effects the application of NAFTA).

119. See discussion *supra* Part II(A) (discussing the investor's right to a minimum standard of treatment); NAFTA, *supra* note 10, art. 1105, 32 I.L.M. at 639 (declaring the Parties' obligation to treat investors of another party in accordance with international law, including fair and equitable treatment).

B. CANADA AND THE UNITED STATES SHOULD REMOVE ARTICLE XI(2) FROM THE SLA 2006

The governments of Canada and the United States should remove Article XI(2) from the SLA 2006 because the current Article XI(2) is inconsistent with two articles of the Vienna Convention and therefore violates customary international law.¹²⁰ Both Canada and the United States have a history of respecting the Vienna Convention's authority, and now is no time to deviate. Allowing Article XI(2) to remain sets a dangerous precedent of disregard for the Vienna Convention and other standards of customary international law, and diminishes the predictability and legitimacy of treaty interpretation. Further, as discussed in the first recommendation in Part IV(A), instead of insulating the governments of Canada and the United States from Chapter 11 liability, it opens the door for a new series of claims challenging Article XI(2), which bring with them the possibility of additional monetary damages and litigation cost.¹²¹ The two governments should therefore exercise their right to modify the SLA 2006 and remove Article XI(2).¹²²

C. CANADA AND THE UNITED STATES, WITH THE SUPPORT OF MEXICO, SHOULD AMEND THEIR NAFTA RESERVATIONS TO INCLUDE MATTERS RELATED TO THE SLA OR THE SOFTWOOD LUMBER INDUSTRY

Both Canada and the United States are aware of the *Pope & Talbot* Chapter 11 claim that resulted from the SLA 1996, and the opportunities for litigation that managed trade agreements, like the SLA 2006, create.¹²³ In recognition of their desire to insulate themselves from any responsibility to investors for their actions

120. See discussion *supra* Part III(B)–(C). But see *supra* note 67 (suggesting a possible means of satisfying the Article 44 test by securing Mexican consent to the SLA 2006 modifications of NAFTA).

121. See NAFTA, *supra* note 10, art. 1135(1)(a), 32 I.L.M. at 646 (permitting a tribunal to award monetary damages for violations of Section A rights which include the Article 1105 right to a minimum standard of treatment).

122. See SLA 2006, *supra* note 1, art. VIII (providing the Parties' right to amend the SLA 2006 in writing at any time).

123. See discussion *supra* note 40 and accompanying text (suggesting the fear of another *Pope & Talbot*-like claim against either government motivated the inclusion of Article XI(2) protection).

taken in fulfillment of the SLA 2006, Canada and the United States should invite Mexico to discuss the possible amendment of NAFTA's reservations.

First, the governments should consider amending Annex 1138.2.¹²⁴ This amendment should include a specific reservation for any measures taken to give effect to or implement the SLA 2006. The language of this amendment to Annex 1138.2 should read as follows: *A decision by Canada with respect to any matter arising under the Softwood Lumber Agreement 2006 and any measure taken by Canada that is necessary to give effect to or implement the Softwood Lumber Agreement 2006, shall not be subject to the dispute settlement provisions of Section B.* The United States should include the same language, substituting "The United States" for "Canada," under its list of reservations.

Another possible location for this amendment is NAFTA Annex II (Reservations for Future Measures).¹²⁵ The language of this amendment should read as follows: *Canada reserves the right to adopt or maintain any measure relating to the Softwood Lumber Agreement 2006 taken to give effect to or implement the Softwood Lumber Agreement 2006.* Once again, the United States should include the same language, substituting "The United States" for "Canada," under its list of reservations. Either of these amendments, in Annex 1138.2 or Annex II, effectively limits the availability of Chapter 11 dispute resolution for all measures giving effect to or implementing the SLA 2006, and would do so in a way that is not violative of NAFTA or inconsistent with customary international law.¹²⁶

V. CONCLUSION

NAFTA Chapter 11 provided investors with the protection of fair and equitable treatment in dispute resolution proceedings.¹²⁷ SLA

124. See NAFTA, *supra* note 10, Annex 1138.2., 32 I.L.M. at 649.

125. See NAFTA, *supra* note 10, Annex 2, 32 I.L.M. at 748–59.

126. Recourse to amendment every time a government measure is inconsistent with NAFTA is certainly problematic and riddled with political land-mines. The authority of a unanimous statement by the three NAFTA Parties that results from such an amendment, however, is far greater than any bilateral effort, and is more respectful of the purpose and objectives of a North American Community.

127. See discussion *supra* Part II(A).

2006, Article XI(2) demonstrably effects the application of those protections in a way that is inconsistent with customary international law.¹²⁸ In recognition of this inconsistency, this comment recommends a litigation strategy for Canadian and American lumber producers,¹²⁹ as well as a series of actions for the two governments to bring the SLA 2006 in line with customary international law, while still insulating themselves from liability for measures taken to implement the SLA 2006.¹³⁰

128. See discussion *supra* Part III(B) (arguing that the SLA 2006 impermissibly separates the application of NAFTA Chapter 11); discussion *supra* Part III(C) (suggesting that the SLA 2006 is an agreement which impermissibly modifies the application of NAFTA Chapter 11).

129. See discussion *supra* Part IV(A) (encouraging affected investors to file Chapter 11 claims and force the tribunals to address the merits of the SLA 2006 during a jurisdictional challenge).

130. See discussion *supra* Part IV(B) (advising that the governments of Canada and the United States remove Article XI(2) from the SLA 2006); see also discussion *supra* Part IV(C) (suggesting the three NAFTA Parties work together to amend NAFTA to include a reservation limiting the applicability of NAFTA Chapter 11 dispute resolution for matters relating to the SLA 2006).