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The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement

David A. Gantz

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DAVID A. GANTZ*

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* Professor of Law and Director, International Trade Law Program, University of Arizona, James E. Rogers College of Law, and Associate Director, National Law Center for Inter-American Free Trade; Visiting Professor of Law, George Washington University School of Law, 2003-2004. An earlier, shorter version of this article appears in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE AND FUTURE PROSPECTS 393 (Todd Weiler, ed., Transnat'l Publ. 2004).

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INTRODUCTION

A decade after the United States negotiated the North American Free Trade Agreement ("NAFTA") with Mexico and Canada, it has concluded similar agreements with Chile and Singapore, using NAFTA as a model.[1] In fact, one can reasonably argue that one of NAFTA's most enduring legacies may be in its influence on subsequent regional trade agreements concluded by the United States, including their investment provisions. NAFTA, the United States – Chile Free Trade Agreement ("Chile FTA"), and the United States – Singapore Free Trade Agreement ("Singapore FTA") each include a chapter designed to provide a high level of protection to foreign investors and investments.[2] The investment protection provisions of both new agreements are similar in some ways to NAFTA's Chapter 11 ("Chapter 11"), but also incorporate some significant changes.

The Chile FTA and Singapore FTA, while negotiated almost simultaneously, have somewhat different histories. With Chile, the initial plan was to integrate Chile into NAFTA. Intentions to negotiate Chile's addition to NAFTA were first expressed in 1994, and talks formally began in June 1995.[3] The Clinton administration

1. United States - Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, http://www.ustr.gov/new/fta/Chile/text/index.htm (last visited Feb. 11, 2004) [hereinafter Chile FTA]; United States - Singapore Free Trade Agreement, May 6, 2003, U.S.-Sing., *available at* http://www.ustr.gov/new/fta/Singapore/final/2004-01-15-final.pdf (last visited Feb. 11, 2004) [hereinafter Singapore FTA]; North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

2. NAFTA, *supra* note 1, ch. 11; Chile FTA, *supra* note 1, ch. 10; Singapore FTA, *supra* note 1, ch. 15.

3. *See* United States-Chile Free Trade Agreement Implementation Act, H.R. REP. NO. 108-224, pt. I, at 2 (2003) [hereinafter House Report] (noting that U.S.,

considered the idea of including Chile in NAFTA as late as 1997 despite the fact that President Clinton's "fast track" negotiating authority lapsed in mid-1994 and Congress failed to renew it during his presidency.[4] In 1996 and 1998, respectively, Chile concluded bilateral FTAs with Canada and Mexico.[5] In mid-1999, Chile again proposed bilateral FTA discussions, even though President Clinton still lacked fast-track negotiating authority.[6] It was not until the final six weeks of the Clinton presidency that negotiations with Chile began,[7] in part because of U.S. exporters' increasing lack of competitiveness when competing with Canadian and Mexican exports to Chile. President George W. Bush resumed negotiations with Chile almost immediately after taking office, and successfully concluded the talks two years later.[8]

Canadian, and Mexican leaders announced their intention to negotiate Chile's accession to NAFTA in December 1994); *see also Full Slate of Negotiations Underway on Chile's Entry to NAFTA*, INSIDE U.S. TRADE, Jul. 28, 1995, at 5 (indicating the initiation of July 1995 negotiations to discuss Chile's accession to NAFTA).

4. *See* Melissa Ann Miller, Note, *Will the Circle be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153, 178-79 (1996) (outlining President Clinton's unsuccessful attempts to obtain fast-track negotiating authority).

5. Tratado de Libre Comercio entre el Gobierno de la República de Chile y el Gobierno de los Estados Unidos Mexicanos, Oct. 1, 1998, http://www.sice.oas.org/trade/chmefta/indice.asp (last visited Feb. 11, 2003) [hereinafter Chile-Mexico FTA]; Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile, Dec. 5, 1996, http://www.sice.oas.org/trade/chican_e/chcatoc.asp (last visited Feb. 11, 2003) [hereinafter Canada-Chile FTA].

6. *See Chilean Minister Presses Pre-Fast Track Bilateral U.S. Trade Talks*, INSIDE U.S. TRADE, Aug. 13, 1999, at 1 (noting efforts by Chile's minister of foreign affairs to engage the United States in discussions).

7. *See Chile FTA Labor, Environment Measures in Doubt with Bush Administration Bilateral Negotiations - Chile and U.S. Officially Launch Negotiations on Free Trade Pact*, INSIDE U.S. TRADE, Dec. 15, 2000, at 8 (noting that the impending new administration caused many to doubt the Clinton administration's ability to conclude an agreement with Chile).

8. *See* Press Release, Office of the United States Trade Representative, U.S. and Chile Conclude Historic Free Trade Agreement (Dec. 11, 2002) (recognizing President Bush's role in concluding the agreement and detailing the terms of the accord), http://www.ustr.gov/releases/2002/12/02-114.htm (last visited Feb. 11, 2004).

Although there was no similar history of discussion regarding a FTA with Singapore, the Clinton administration proposed an FTA with Singapore in the waning days of the administration.[9] This was not a radical idea in light of Singapore's importance as a U.S. trading partner in the Pacific. Moreover, Singapore's relatively high level of economic development, absence of an agricultural sector, low industrial tariffs, and stable and transparent economic system would make for relatively smooth negotiations.[10] Under the leadership of U.S. Trade Representative ("USTR") Robert Zoellick, the Bush administration quickly endorsed the Singapore FTA, and energetically pursued negotiations that concluded in January 2003.[11] Both the Chile and Singapore agreements were subject to the "Trade Promotion Authority" ("TPA") or "fast track" procedures of the Trade Act of 2002.[12]

This article focuses on the U.S. experience with the implementation of investment agreements as reflected in two specific areas of jurisprudence under NAFTA Chapter 11 – "Minimum Standard of Treatment"[13] and "Expropriation."[14] The discussion will examine these issues through the prism of, and with emphasis on on directly related changes in, U.S. investment law and policy since 1992, such as the TPA provisions, and the evolution (or lack thereof) of the "customary international law" on protection of foreign investments.

While significant differences exist between the two FTAs, most of those relating to investment protection are relatively minor. The

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9. *See Congress, Business Surprised by Singapore FTA Announcement*, INSIDE U.S. TRADE, Nov. 24, 2000, at 1 (describing the goal of the Clinton administration to complete an FTA deal with Singapore before President Bush took office, and the controversy surrounding that decision).

10. *See generally* U.S. Dept. of State, *Background Note: Singapore* (detailing how Singapore has acted as a beneficial trade partner and political ally to the United States), http://www.state.gov/r/pa/ei/bgn/2798pf.htm (last visited Feb. 11, 2004).

11. *See U.S. Completes Deal with Singapore on Capital Controls, Freeing FTA*, INSIDE U.S. TRADE, Jan. 17, 2003, at 1 (describing the completion of the Singapore FTA).

12. 19 U.S.C. §§ 3801-13 (2002).

13. NAFTA, *supra* note 1, art. 1105.

14. *Id.* art. 1110.

focus of the article is thus on the Chile FTA, and how it differs from NAFTA in these areas. Where the Singapore FTA is different, those differences are noted.

NAFTA's Chapter 11 essentially serves two purposes. First, it provides a set of mandatory standards for treatment of foreign investments and investors by host countries.[15] These include national treatment, most-favored nation treatment, fair and equitable treatment and full protection and security, restrictions on performance requirements, freedom to designate senior management and boards of directors, freedom to transfer funds, and protection against direct or indirect expropriation.[16]

Second, NAFTA provides for binding arbitration of disputes between foreign investors and their host governments under the rules of the United Nations Commission on International Trade Law ("UNCITRAL"), the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID"), or the ICSID's "Additional Facility."[17] If an arbitral tribunal appointed under NAFTA concludes that the host government has violated any of its obligations under Chapter 11, the tribunal may require that government to pay compensation to the complaining foreign investor.[18]

Few are likely to object to providing just compensation to a foreign investor if there is an outright seizure of private property by a government. In the United States, for example, the Fifth Amendment

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15. *See id.* arts. 1101-14 (setting forth the scope and coverage of Chapter 11, [including standards of treatment to be adhered to by the Parties).

16. *See id.* arts. 1102, 1103, 1105-07, 1109-10 (mandating how host countries must treat foreign investments and investors). Chapter 11 also includes many reservations, art. 1108, most of which are listed on a country-by-country basis in Annexes I, II and IV of NAFTA.

17. *See id.* art. 1120 (detailing rules for submission for a Chapter 11 claim to arbitration).

18. *See id.* arts. 1110(2), 1116(1), & 1117(1). Only the provision relating to expropriation, Article 1110(2), specifies how compensation is to be calculated). For other violations of the obligations of Section A of Chapter 11, Articles 1116(1) and 1117(1) refer only to "loss or damage by reason of, or arising out of, that breach [of Section A or, in limited circumstances, of Articles 1502 and 1503 on monopolies and state enterprises]." *Id.* arts. 1116(1), 1117(1).

would require just compensation.[19] Rather, the concern is over various types of indirect expropriation, particularly in situations in which a government could be required to compensate a foreign investor because an otherwise valid governmental regulation significantly reduces the value of the investor's property or property rights.[20] If such a right of compensation were established, the result could have a chilling effect on the willingness of governments to take regulatory actions necessary for the health and public welfare of their citizens, including environmental regulatory actions.[21]

Similarly, relatively few would argue against an international requirement for compensation when a government takes truly outrageous acts against business interests, including flagrant denials of due process or otherwise arbitrary actions.[22] However, there is considerable disagreement as to how serious or shocking a government's action must be before it should be subject to international protection.[23] All of us in our daily lives must cope with

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19. *See* U.S. CONST. amend. V ("[n]o person shall be... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."). One could also argue that an international agreement which provides foreign investors with greater rights against the United States or state governments in investment disputes than are afforded U.S. nationals under the U.S. Constitution would itself raise equal protection concerns. *Id.* amend. XIV, § 1. Of course, under the U.S. constitutional system, the law on indirect takings is unclear. *See, e.g.*, Marisa Yee, *The Future of Environmental Regulation after Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 85, 89 (2002) (examining the breadth and complexities of "takings" jurisprudence and commentary in the United States).

20. *See* Don Henry, Editorial, *Free-trade Clause Would Be a Dangerous Weakening of the Law*, SYDNEY MORNING HERALD, Oct. 27, 2003, at 15 (suggesting that an FTA with the United States could restrict Australia from in regulating the use of property in the public interest), 2003 WL 66059983.

21. *See* Stefan Baumgarten, *Canadian Group to Fight Methanex on NAFTA MTBE Spat*, CHEM. NEWS & INTELLIGENCE, Feb. 4, 2004 (discussing increasing concerns by environmental groups that Chapter 11 serves as a business tool for corporations).

22. *See* Senate Report on the Bipartisan Trade Promotion Act of 2002, Feb. 28, 2002, 107th Cong., 2d Sess., at 15 (indicating the desirability of incorporating in free trade agreements U.S. concepts of due process and safeguards against arbitrary or discriminatory measures).

23. *Compare Trade in Services and E-Commerce: Hearing Before the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy*

occasionally unreasonable or arbitrary actions by governments, but, in most cases, if there is no significant violation of due process, we would not immediately think that an international law norm had been breached.

Nevertheless, NAFTA was a brave new world for the three governments. As one senior U.S. government official has commented:

> The United States, and for that matter Canada and Mexico, took a very big step into the unknown when they signed on to Chapter 11. The NAFTA Parties have waived sovereign immunity from claims to an extent far greater than they have consented to the jurisdiction, for example, of the International Court of Justice. They have agreed to be answerable to private claimants before arbitral tribunals that are subject to only very limited review. Even though the United States has been party to a fair number of BITs, which have arrangements resembling Chapter 11, we have never done so with states that have so much investment in our territory.[24]

The NAFTA investment protection provisions have produced a significant volume of litigation in ten years. At least twelve Chapter 11 actions brought by foreign investors against NAFTA host governments have resulted in decisions on the merits or other dispositive, or partially dispositive, opinions, and another twenty or so are in various stages of proceedings.[25] A handful – *Metalclad v.*

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and Commerce Comm., 108th Cong. 3 (2003) (statement of David Waskow, International Policy Analyst and Trade Policy Coordinator of Friends of the Earth) (noting that only the most egregious and rare governmental action should amount to expropriation under any free trade agreement), *with* Mark Friedman & Gaetan Verhoosel, *Arbitrating over BIT Claims; Under Bilateral Investment Treaties, More Investors Are Taking Action against Foreign States*, 26 NAT'L L.J. 15, 17 (2003) (encouraging international commercial entities to vigorously pursue available investment dispute settlement mechanisms).

24. Mark Clodfelter, *U.S. State Department Participation in International Economic Dispute Resolution*, 42 S. TEX. L. REV. 1273, 1283 (2001).

25. Metalclad Corp. v. United Mexican States, 40 I.L.M. 36 (2001) (ICSID (W. Bank) Aug. 30, 2000); Pope & Talbot, Inc. v. Canada, 41 I.L.M. 1347 (NAFTA Arb. Trib. (Nov. 26, 2002)); Ethyl Corp. v. Canada, 38 I.L.M. 708 (1999) (NAFTA Arb. Trib. (June 24, 1998)); Waste Mgmt., Inc. v. United Mexican States, 40 I.L.M. 56 (2001) (ICSID (W. Bank) June 2, 2000); Methanex Corp. v. United States, (NAFTA Arb. Trib. (Aug. 7, 2002)), *available at* http://www.state.gov/documents/organization/12613.pdf (last visited Mar. 11, 2003); S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1484-85 (NAFTA Arb. Trib.

United Mexican States, Loewen v. United States, Pope & Talbot v. Canada, S.D. Myers v. Canada, and *Methanex v. United States* – are generating considerable attention among the NAFTA member governments, the foreign investment bar, and non-governmental organizations that are concerned with environmental protection, alleged erosion of national sovereignty or other problems, real or imagined. These cases, in particular, have influenced U.S. government views and are reflected in the revised investment protection language found in the Chile FTA and Singapore FTA. Only four cases – *Metalclad, S.D. Myers, Pope & Talbot,* and *Feldman v. United Mexican States* – have resulted in monetary damages awards against Canada or Mexico,[26] and no monetary damages have been awarded to date against the United States. Another group of cases – *Azinian v. United Mexican States, UPS v. Canada, Mondev v. United States, ADF, and Loewen* – has resulted in dismissals of all allegations against the respondent governments.[27]

(Nov. 13, 2000)); Azinian v. United Mexican States, 39 I.L.M. 537 (2000) (ICSID (W. Bank) Nov. 1, 1999); Mondev v. United States, 42 I.L.M. 85 (2003) (ICSID (W. Bank) Oct. 11, 2002); ADF Group, Inc. v. United States, (ICSID (W. Bank) Jan. 9, 2003), *available at* http://www.worldbank.org/icsid/cases/ADF-award.pdf (last visited Mar. 10, 2003); UPS v. Canada, (ICSID (W. Bank) Nov. 22, 2003), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf (last visited Mar. 10, 2003); Feldman v. United Mexican States, 42 I.L.M. 625 (2003) (ICSID (W. Bank) Dec. 16, 2002); Loewen Group, Inc. v. United States, 42 I.L.M. 811 (ICSID (W. Bank) June 26, 2003). Based on the best information available, approximately thirty-two Chapter 11 actions have been filed, including those which may be dormant. *See* NAFTALAW, *The Disputes: Pleadings, Orders & Awards* (providing a list of all public NAFTA dispute cases), *at* http://www.naftaclaims.com (last visited Mar. 21, 2004).

26. *See Metalclad*, 40 I.L.M. at 54 (ordering Mexico to pay Metalclad $16,685,000); *S.D. Myers*, 40 I.L.M. at 1444 (holding that Canada must compensate S.D. Myers); *Pope & Talbot*, 41 I.L.M. at 1362 (requiring Canada to pay the investor $461,566, which includes both principal plus interest); *Feldman*, 42 I.L.M. at 669 (ordering Mexico to pay the claimant 9,464,627.50 Mexican pesos, plus interest).

27. *See Azinian*, 391 I.L.M. at 556 (deciding in favor of Mexico); *Mondev*, 42 I.L.M. at 115 (dismissing the investor's claims); *ADF Group,* para. 194 (ICSID (W. Bank) Jan. 9, 2003) (rejecting all claims); *Loewen Group*, 42 I.L.M. at 850 (finding that it lacked jurisdiction and dismissing the claims); *UPS*, para. 134 (ICSID (W. Bank) Nov. 22, 2003) (accepting Canada's principal jurisdictional objection).

Business interests wish to preserve the broad NAFTA protections, no doubt in part because a weakening of the NAFTA language by interpretation or subsequent agreement could have implications for U.S. investor rights under the various bilateral investment treaties ("BITs") concluded by the United States during the past several decades. However, environmental groups, among other members of civil society, have sought exceptions to protect environmental and health policies from challenge under Chapter 11.[28]

The three NAFTA governments have reacted, both to public pressures and to their actual or anticipated losses in NAFTA litigation, by seeking to narrow the scope of liability. The governments have issued an "Interpretation" of Article 1105 of NAFTA that essentially directs NAFTA arbitral panels to narrow the scope of "fair and equitable treatment" to what customary international law provides.[29] The governments have also sought, with mixed success, to narrow the definition of "investment" and "investor," and to require a closer nexus between the governmental action and the foreign investor.[30] Furthermore, they have argued that

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28. *See Administration Works on Investment Position for Singapore FTA*, INSIDE U.S. TRADE, Dec. 15, 2000, at 2 (reporting that environmental groups pushed for modifications to traditional investments provisions that do not make exceptions for environmental and other health and safety policies).

29. *See* NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS 2 (2001) (clarifying that Article 1105 embodies the customary international law standard for determining possible violations of "fair and equitable treatment" and "full protection and security"), *available at* http://www.naftaclaims.com/Papers/July%2031%202001%20NAFTA%20FTC%20Statement.pdf (last visited Feb. 12, 2004) [hereinafter INTERPRETATION].

30. *See* David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 671-74 (2001) (noting that the initial action against the United States in *Methanex* was dismissed in August 2002 by the tribunal on the grounds that the California action of banning the gasoline additive MTBE was not a measure relating to Methanex). The tribunal "decide[d] that the phrase 'relating to' in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends." Methanex Corp. v. United States, para. 147 (NAFTA Arb. Trib. (Aug. 7, 2002)), *available at* http://www.state.gov/documents/organization/12613.pdf (last visited Mar. 11, 2003) A second amended complaint was subsequently filed and that proceeding is pending before a NAFTA tribunal. *See NAFTA Arbitral Tribunal: Methanex Corporation v. United States (Preliminary Award on Jurisdiction), (August 7,*

NAFTA's expropriation provisions should not be applied in "partial taking" situations, such as when reasonable government regulation, including environmental regulation, has the effect of reducing the value of a foreign investor's property interests.[31] Environmental groups have been particularly critical of Chapter 11, arguing, not always accurately, that investor protection provisions have been used repeatedly to challenge the host country's environmental laws and administrative decisions.[32] The U.S. Congress, reflecting the concerns of a number of members, and reacting in part to public pressure,[33] enacted TPA legislation as requested by President Bush. In the process, Congress, with the ultimate concurrence of the President, effectively directed that the investment protection provisions of future trade agreements negotiated under TPA, including those under negotiation with Chile and Singapore, comply with certain stated objectives.[34]

At first glance, fixing some of NAFTA's perceived problems in new agreements does not seem particularly difficult, assuming the governments that are parties to the new trade agreements are willing to concur; however, the NAFTA governments are in a "Catch-22"

2002), INT'L LAW IN BRIEF, Feb. 14, 2003 (noting that the Tribunal found that Methanex must file related evidentiary materials, as well as an amended pleading before it would make a "definitive ruling on jurisdiction"), *at* http://www.asil.org/ilib/ilib0603.htm#J3 (last visited Mar. 13, 2004).

31. *See infra* note 221 and accompanying text (discussing the tribunals' dealings with partial takings).

32. *See, e.g.*, Peter Menyasz, *NAFTA Chapter 11 Provisions Said to Threaten Environmental Protection Rights*, 16 INT'L TRADE REP. 1146 (1999) (quoting a report issued by the International Institute for Sustainable Development criticizing the investor-state dispute provisions in Chapter 11).

33. *See, e.g.*, Letter from Max Baucus, U.S. Senator, to Robert Zoellick, U.S. Trade Representative (Mar. 26, 2002) (arguing that TPA objectives must be investment agreements that balance protection of U.S. investors abroad with preserving the regulatory authority of U.S. governmental entities), http://www.insidetrade.com/secure/dsply_nl_txt.asp?f=wto2001.ask&dh=7417773 4&q=baucus (last visited Feb. 14, 2004); Press Release, Sierra Club, Oppose H.R. 3005, the Trade Promotion Authority Act of 2001 (Oct. 16, 2001) [hereinafter Sierra Club] (voicing opposition to House legislation including language allowing investment provisions similar to NAFTA Chapter 11 in future trade agreements), http://www.sierraclub.org/trade/fasttrack/12groups.asp (last visited Feb. 14, 2004).

34. *See* 19 U.S.C. § 3802(b)(3) (2002) (setting forth specific trade negotiating objectives for foreign investment).

situation. Narrowing the scope of the investment protection provisions in NAFTA or in future agreements may relieve the United States, Canada, and Mexico from liability when they are respondents under those provisions.[35] Too much success in this endeavor, however, could jeopardize the NAFTA governments' protections provided to U.S., Canadian, and European foreign investors under the hundreds of BITs negotiated during the past twenty-five years.[36] Given the common practice of both private investors and governments in citing prior investment tribunal decisions that appear to favor them, it is inevitable that ICSID and other tribunals interpreting similar provisions of these BITs will consider and sometimes follow the NAFTA cases. Thus, a victory by the United States or Canada in narrowing these protections in a particular NAFTA proceeding may well be a defeat for their own foreign investors in other cases. This possibility could seriously undermine the BIT program and more than half a century of efforts to protect U.S. and Canadian investors abroad.

It is also possible that some tribunals will rely upon of the language of the new agreements concluded subsequently to NAFTA, particularly annexes or side letters that are to be used to interpret provisions in the new agreements that are similar to those in NAFTA,[37] as an aid to interpreting the Chapter 11 mechanism. Nor is it clear whether the creative and fertile legal minds that have generated so much litigation under NAFTA Chapter 11, particularly between Canadian investors and the United States, and vice versa, will apply their efforts to cases involving the United States, Chile, Singapore, and many other nations whose FTAs and BITs with the United States contain the new language. In fairness, occasional rather outrageous actions against the interests of foreign investors by the

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35. *See* Courtney C. Kirkman, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 392 (2002) (arguing that interpreting the NAFTA "fair and equitable treatment" requirement too broadly risks legitimate state regulatory efforts).

36. *See id.* (asserting that a "balance must be struck" between investor protection and respect for state regulatory measures).

37. *See* Chile FTA, *supra* note 1, Annexes 10A, 10D; Singapore FTA, *supra* note 1, side letters of May 6, 2003 (specifying the parties' common interpretation of certain provisions).

NAFTA governments or certain of their states or provinces from time to time, have also encouraged increased use of Chapter 11.

While negotiating the Chile FTA and Singapore FTA, the U.S. government is, or was, the Respondent in nine proceedings brought under Chapter 11, one of the most significant of which, *Methanex*, remains pending. Three others, *ADF Group Inc., Mondev,* and *Loewen* were pending during most of the period in which the Chile and Singapore negotiations took place, even though they are now resolved. Thus, these agreements present significant ways of assessing the evolution of U.S. government thinking on how to achieve an appropriate balance between investor protection and other valid government regulation, and other aspects of the evolving U.S. views. This is true even though it may be several years or more before there is an investment dispute brought under the provisions of these two agreements. While the Singapore and Chile investment provisions are applicable to investments existing at the time the FTA enters into force, like NAFTA, they apply only to government *actions* that take place after the FTA entered into force.[38]

The changes, however, are by no means limited to Chile and Singapore. Since December 2003, the United States has concluded free trade agreements containing similar language with the nations of Central America (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica), the Dominican Republic, and Morocco.[39] Others are

38. *See* Chile FTA, *supra* note 1, art. 10.1; Singapore FTA, *supra* note 1, art. 15.1 (explaining that the scope of the agreements does not extend to investments that ended before the agreement entered into force). A NAFTA Tribunal has confirmed that Chapter 11 applies only to government actions or omissions after January 1, 1994. *See* Feldman v. United Mexican States, Interim Decision on Preliminary Issues, 40 I.L.M. 615, 623 (ICSID (W. Bank) Dec. 6, 2000) (noting, however, that a "permanent course of action by Respondent which started before January 1, 1994 and went on after that date . . . is subject to the Tribunal's Jurisdiction").

39. *See* Press Release, Office of the U.S. Trade Representative, U.S. & Central American Countries Conclude Historic Fee Trade Agreement (Dec. 17, 2003) (announcing the creation of the Central American Free Trade Agreement between the United States, El Salvador, Guatemala, Honduras, and Nicaragua), *available at* http://www.ustr.gov/releases/2003/12/03-82.pdf (last visited Apr. 23, 2004); Press Release, Office of the U.S. Trade Representative, U.S. and Costa Rica Reach Agreement on Free Trade (Jan. 25, 2004) (addressing the conclusion of negotiations for Costa Rica to join CAFTA), *available at* http://www.ustr.gov/releases/2004/01/04-04.pdf (last visited Apr. 23, 2004); Press

underway or planned with Colombia, Ecuador, Bolivia, and Panama in this hemisphere, and with Bahrain, Thailand, and the nations of the South African Customs Union, and perhaps others.[40]

Also, in February 2004, the State Department finally promulgated the 2004 Update of U.S. Model Bilateral Investment Treaty ("2004 Model BIT") (in draft), which is designed to replace the Model BIT of 1994 and "provide a consistent approach between the investment chapters of U.S. free trade agreements and future BITs."[41] Thus, the changes embodied for the first time in the Chile and Singapore FTAs could, within a few years, govern the investment relations between the United States and numerous other nations. These new FTAs and BITs are all, or virtually all, with capital importing developing countries, so that the likelihood of *their* investors suing the United States is quite low.

Release, Office of the U.S. Trade Representative, U.S. and Morocco Conclude Free Trade Agreement (Mar. 2, 2004) (discussing the role of a U.S.-Morocco FTA in leading the way for a Middle East Free Trade Area by 2013), *available at* http://www.ustr.gov/releases/2004/03/04-15.pdf (last visited Apr. 23, 2004); Press Release, Office of the U.S. Trade Representative, U.S. & Dominican Republic Conclude Talks Integrating the Dominican Republic into the Central American Free Trade Agreement (Mar. 15, 2004) (publicizing the addition of the Dominican Republic to CAFTA), *available at* http://www.ustr.gov/releases/2004/03/04-19.pdf (last visited Apr. 23, 2004).

40. *See Status of U.S. Trade Agreement Negotiations*, 21 INT'L TRADE REP. 168 (2004) (listing the current and planned trade negotiations and the next steps in the processes), http://pubs.bna.com/ip/BNA/ITR.NSF/f6e265388fc7082185256b57005bfe23/6629884d0c5d1db685256e22007a91f1?OpenDocument (last visited Apr. 24, 2004). The recent FTA with Australia is the only one concluded in recent years that departs significantly from the Chile FTA model, in that the Australia FTA does not include binding international arbitration for investor – host state disputes, although it includes most of the new language relating to customary international law and to regulatory takings. *See* Press Release, Office of the U.S. Trade Representative, U.S. and Australia Complete Free Trade Agreement (Feb. 8, 2004) (announcing the finalization of the U.S.-Australia Free FTA), *available at* http://www.ustr.gov/releases/2004/02/04-08.pdf (last visited Apr. 23, 2004).

41. *See* Press Release, U.S. Department of State, Update of U.S. Bilateral Investment Treaty ("BIT") (Feb. 5, 2004) (linking to updated draft language of the U.S. BIT), http://www.state.gov/e/eb/rls/prsrl/28923.htm (last visited Apr. 23, 2004). The model BIT technically remains under revision, a process which has been going on for several years. *See* Telephone Interview with David Weiner, Esq., Office of the U.S. Trade Representative (Apr. 25, 2003) (remarking that no additional BITs will be negotiated by the United States until the new model BIT language has been cleared through the interagency process).

Part I of this article briefly reviews the genesis of NAFTA Chapter 11, and focuses on the fruits of the BIT program that have resulted in more than forty treaties between the United States and various developing countries since 1980.[42] Part II discusses the investment protection provisions of NAFTA with emphasis on those provisions that have proven to be most difficult for NAFTA arbitrators to apply and interpret: Article 1105, the "Minimum Standard of Treatment," and Article 1110, "Expropriation." Part III discusses the investment objectives of the TPA that reflect broader congressional and public concerns over certain aspects of NAFTA.

With this background, Parts IV and V analyze the NAFTA language and parallel articles in the Chile FTA, and focus on the two substantive areas in which there have been the most significant changes: fair and equitable treatment and expropriation. In the context of Article 1105 and fair and equitable treatment, Parts IV and V also discuss the important issue of mandatory interpretations of NAFTA and the other agreements. The NAFTA governments have sought to defend against application of these concepts to themselves, through an official "Interpretation" under Article 1131(2) and their expressed views on the proper scope and application of these provisions.[43] Notwithstanding NAFTA's directive that a tribunal under Chapter 11 shall decide the issues in dispute in accordance with the agreement and with applicable rules of international law, there has been, and continues to be, considerable disagreement over the meaning of the phrase "international law" as it applies to such concepts as "fair and equitable treatment" and "indirect expropriation," as discussed in detail in Parts IV and V of this article.

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42. *See* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105 (1986) (asserting that the principal purpose of the BIT program was to provide a mechanism for protecting U.S. investments in third world countries from unfair treatment and discrimination); *see also* U.S. Dept. of State, *U.S. Bilateral Investment Treaty Program* [hereinafter U.S. Bilateral Investment Treaty Program] (providing a list of all of the countries that have BITs with the United States), *at* http://www.state.gov/e/eb/rls/fs/22422.htm (last visited Feb. 10, 2004).

43. *See id.* art. 1131(2) (explaining that an interpretation by the Commission of a provision of NAFTA shall be binding on a tribunal established under Chapter 11).

In each instance, the article focuses first on the case law, the TPA and other relevant factors, and then discusses the Chile FTA changes in language. The article also discusses briefly, in Part IV, the investment provisions of the FTAA, and the investment provisions of the Canada-Chile FTA of 1996. However, this is not intended to be a comprehensive analysis of all of the respective investment provisions of NAFTA and the two newer FTAs.

Part VI briefly discusses some of the other significant changes in the Chile FTA language compared to NAFTA, particularly in areas related to transparency. Finally, Part VII speculates on the extent to which the changes as reflected in the Chile FTA and Singapore FTA might affect the results in any foreign investment disputes to which they may apply.

I. THE GENESIS OF NAFTA, CHAPTER 11

The investment provisions of NAFTA are evolutionary rather than revolutionary. Most of the key language regarding the definition of investment and investors,[44] national treatment,[45] fair and equitable treatment,[46] expropriation,[47] and the requirement for binding international arbitration of investment disputes,[48] is based generally on the more than forty U.S. BITs concluded beginning in the early 1980s,[49] the investment provisions of the U.S.-Canada FTA ("Canada FTA"),[50] or both. Perhaps the most significant aspect of the U.S. BIT

44. NAFTA, *supra* note 1, art. 1139.

45. *Id.* art. 1102.

46. *Id.* art. 1105.

47. *Id.* art. 1110.

48. *Id.* ch. 11.

49. *See* U.S. Bilateral Investment Treaty Program, *supra* note 42 (describing the framework of the U.S. Bilateral Treaty Program). BITs include a commitment to treat investments of other parties as favorably as it treats domestic investments, creates limits on the expropriation of investments, and gives U.S. investors the right to submit an investment dispute with the treaty partner's government to international arbitration. *Id.*

50. *See* Canada-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter Canada FTA] (stating as objectives the elimination of barriers to trade, facilitation of conditions of fair competition within the free trade area, and significantly liberalizing the conditions for investment within the free trade area).

program is that prior to the Canada FTA and NAFTA, all of the BITs entered into by the United States were with developing countries, and the Canada FTA incorporated neither the "fair and equitable" treatment language nor binding international arbitration. The only significant post-NAFTA departure from that developing country oriented practice to date has been in the inclusion of investment provisions in the FTA with Singapore, a nation that by most statistical measures is generally at the same level of development as Canada.[51] The recently concluded U.S. – Australia FTA is consistent with this practice, in that while it contains a list of investor rights, there are no provisions providing for arbitration of investor-state disputes.[52]

This issue is important because the BITs, like Chapter 11 of NAFTA, Chapter 15 of the Singapore FTA, and Chapter 10 of the Chile FTA, are all fully reciprocal with regard to the basic obligations.[53] However, it has been quite obvious from the outset of the BIT program through today that the principal purpose of these provisions was to protect U.S. investment in foreign countries.[54] The

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51. The countries are quite similar in terms of literacy rates (Canada, 99%; Singapore, 93%), life expectancy(Canada, 77 years male, 82 years, female; Singapore, 77 years male, 81 years, female) and per capita gross domestic product (Canada, $3,423, Singapore, $21,255). *See* U.S. Dept. of State, *Background Note: Singapore*, *at* http://www.state.gov/r/pa/ei/bgn/2798.htm (last visited Mar. 11, 2004); U.S. Dept. of State, *Background Note: Canada*, *at* http://www.state.gov/r/pa/ei/bgn/2089.htm (last visited Mar. 11, 2004).

52. *See* U.S. – Australia Free Trade Agreement (unsigned), Arts. 11.3-11.10 (containing a usual list of investor protections, but no obligation to arbitrate), *available at* http://www.ustr.gov/new/fta/Australia/text/text11.pdf (last visited Apr. 23, 2004). Apparently, the omission of binding arbitration was at the request of Australia, not the United States. *See U.S., Australia FTA Falls Short on U.S. Investment Demands,* INSIDE U.S. TRADE, Feb. 13, 2004, at 1 ("The free-trade agreement reached by the U.S. and Australia . . . fails to provide U.S. investors with the same legal protections contained in previous trade deals completed by the Bush Administration.").

53. *See* NAFTA, *supra* note 1, ch. 11; Chile FTA, *supra* note 1, ch. 10; Singapore FTA, *supra* note 1, ch. 15 (illustrating that all investment provisions apply equally to the other party or parties). In NAFTA, as in all subsequent FTA investment chapters, there are extensive country-specific reservations to national treatment and other obligations. *See, e.g.*, NAFTA Annexes I, II, and IV.

54. *See* Gudgeon, *supra* note 42, at 105 (observing that the BIT program had the additional goal of encouraging investment treatment consistent with U.S. and international standards).

U.S. government created the BIT program to protect U.S. foreign investment and to encourage standards compatible with U.S. policies and international law.[55] The U.S. State Department's current official guidance on BITs confirms that the BIT program's objectives are to protect U.S. investment abroad, encourage market-oriented domestic policies, and support international legal standards.[56]

By providing a dispute settlement mechanism allowing U.S. companies to seek arbitration of investment disputes by an independent body outside of Mexico, NAFTA did not depart significantly from the BITs. As the Statement of Administrative Action observed, "NAFTA provides a historic investor-state dispute settlement mechanism, so that individual U.S. companies no longer face an unbalanced environment in an investment dispute with the Mexican government but can seek arbitration outside Mexico by an independent body."[57] There is no mention in either the BIT or the NAFTA context of providing foreign investors in the United States with a superior level or protection for their investments, even though all of the BITs, as well as NAFTA, are reciprocal, and the United States has been the respondent in at least eight actions brought under Chapter 11.[58]

Today, Canada and Singapore are the exceptions, the only developed countries that have entered into full investment protection agreements with the United States.[59] Having BIT-type provisions in the Chile FTA are the norm, given the fact that Chile is still

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55. *See id.* at 111.

56. See U.S. Bilateral Investment Treaty Program, *supra* note 42 (emphasizing the United States' interest in having foreign countries adopt liberal policies on the treatment of foreign investment and the U.S. government's support of regional initiatives on investment liberalization).

57. North American Free Trade Agreement, Text of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. DOC. NO. 103-159, at 685 (1993).

58. *See* The Disputes: Pleadings, Orders & Awards, *supra* note 25 (listing several disputes brought against the United States government under Chapter 11). These include disputes brought forth by Loewen, Methanex, Mondev, Tembec Corp., Kennex, Dorman, Canfor, Corp., and ADF Group. *Id.*

59. *See* U.S. Bilateral Investment Treaty Program, *supra* note 42.

considered a developing country by most indicators.[60] Of course, a few years ago, the United States came close to having BIT-type language applicable to disputes among all major developed countries through the Multilateral Agreement on Investment ("MAI").[61] Although never ratified or concluded, the MAI would have required that similar investment protection rules apply not only to Canada, but to all other members of the Organization for Economic Cooperation and Development ("OECD").[62] The negotiations for this agreement failed in large part because of some of the same concerns that are now being raised with regard to Chapter 11.[63] Those U.S. and Canadian government officials who are currently concerned that Chapter 11 provides excessively broad protection to foreign investors could have faced the nightmare prospect of dealing with numerous investment claims, not only between the United States and Canada, but relating to the billions of dollars of North American, European, and Japanese investment in each others' nations.[64]

The focus on developing countries helps to explain the breadth of NAFTA Chapter 11 concepts, such as the definition of "investment" and the use of the somewhat vague concepts of "fair and equitable

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60. *See* U.S. Dept. of State, *Background Note: Chile* (indicating that Chile is relatively highly-developed with regard to literacy (95.8%) and life expectancy (76-79 years overall), but Chile's per capita GDP is only $4,200), *at* http://www.state.gov/r/pa/ei/bgn/1981.htm (last visited Mar. 11, 2004).

61. *See* Organization for Economic Cooperation and Development, *Multilateral Agreement on Investment, Documentation from the Negotiations: Introduction* (providing documentation from the MAI negotiations launched in 1995), *at* http://www.oecd.org/daf/mai/intro.htm (last visited Feb. 10, 2004).

62. *See id.* (explaining that the objective of the Multilateral Agreement on Investment ("MAI") was to provide a broad, multilateral framework for investment, open to all OECD members); *see also* Organization for Economic Cooperation and Development, *About OECD* (listing the current thirty member countries in the OECD), *at* http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited Apr. 6, 2004).

63. *See* Gantz, *supra* note 30, at 653.

64. *See* United Nations Commission on Trade and Economic Development, Division on Investment, Technology and Enterprise, *Foreign Direct Investment Statistics* (finding that about $1200 billion in foreign direct investment flowed into developed countries in 2000, while only $200 billion flowed into developing countries), *at* http://www.unctad.org/en/subsites/dite/fdistats_files/fdistats.htm (last visited Feb. 10, 2004).

treatment" and "tantamount to expropriation."[65] Such language reflects U.S. and investor distrust of the legal systems of developing countries after many decades of expropriation disputes, and a belief that governments and courts in many developing countries do not provide the basic guarantees that citizens and businesses of highly developed countries take for granted.[66]

During the NAFTA negotiations, relatively little thought was given to how BIT-type provisions would affect investor-state relations between Canada and the United States, the two developed countries involved in the agreement. Their well-developed legal systems with independent judiciaries provide a relatively high level of protection for investors, whether foreign or domestic, against arbitrary actions by the governments, legislatures, and courts.[67] Moreover, the trade and bilateral investment relationship between Canada and the United States is one of the most extensive in the world, with more than $1.4 billion of trade per day between the two nations.[68] In addition, the United States is Canada's largest investor at $142.8 billion, while the $92 billion Canada invests in the United States ranks third.[69] With large cadres of well-educated, aggressive, and creative attorneys, regulatory actions that may be motivated by environmental concerns or protectionist pressures, and legislatures and courts that may take actions that are arbitrary, discriminatory, and unreasonable, it is perhaps not surprising that roughly sixty percent of the NAFTA Chapter 11 dispute filings to date have been

65. NAFTA, *supra* note 1, arts. 1105, 1110.

66. *See* Gantz, *supra* note 30, at 678-79 (contending that frequently, under international law, a nation is forced to accord aliens broader and more liberal treatment than it accords its own citizens due to differences in the country's basic guarantees). These guarantees include procedural and substantive due process, and courts that are independent of the executive branch and free from corruption. *Id.*

67. *See Background Note: Canada*, *supra* note 51 (confirming that Canada's legal system consists of a judicial branch that is separate from the executive and the legislative branches).

68. *See id.* (noting the staggering volume of trade between the United States and Canada). The vast activities in which the two countries participate, including law enforcement cooperation, environmental cooperation, and free trade, have set the standard by which many other countries measure their own progress. *Id.*

69. *Id.*

by U.S. investors against Canada, or Canadian investors against the United States.[70]

II. NAFTA'S PROTECTIONS FOR FOREIGN INVESTORS

NAFTA is an international agreement that requires its parties to "interpret and apply the provisions of this Agreement in light of its objectives . . . and in accordance with applicable rules of international law."[71] In addition, tribunals convened under Chapter 11 are directed "to decide disputed issues in accordance with both NAFTA this Agreement and applicable rules of international law."[72] There is no provision in Chapter 11 suggesting that the national laws of NAFTA parties are to be applied, and in practice, NAFTA tribunals have analyzed and interpreted national laws and domestic cases only when such analysis was germane to determining whether one of the Parties violated applicable rules of NAFTA or international law.[73]

Several jurisdiction and process issues have also become significant under NAFTA. First, the coverage of Chapter 11 is limited in that it only applies to measures that relate to an investor or

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70. *See* The Disputes: Pleadings, Orders & Awards, *supra* note 25 (indicating that, of thirty-two dispute filings, fourteen have been against Mexico, nine against Canada, and nine against the United States).

71. NAFTA, *supra* note 1, art. 102(2).

72. *Id.* art. 1131(1).

73. *See, e.g.*, Feldman v. United Mexican States, 42 I.L.M. 625 (2003) (ICSID (W. Bank) Dec. 16, 2002) (discussing a claim brought by U.S. national against the Mexican government under NAFTA's provisions concerning the taxation of the export of cigarettes). Mexican courts were reviewing certain matters solely under Mexican law which at the same time were also under review before the tribunal, in the latter instance with regard to their consistency or inconsistency with NAFTA requirements. *Id.* at 637-38. The Vienna Convention on the Law of Treaties requires that international agreements "be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 25 I.L.M. 543, 562. Under Article 32 of the Vienna Convention, parties can refer to supplementary means of interpretation, when interpretation "leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable." *Id.* art. 32.

investment of another Party.[74] It is unclear how significant the connection between the government action and the investor must be. However, because the Free Trade Commission ("Commission") may make binding determinations as to how NAFTA tribunals interpret Chapter 11 provisions, the meaning of Chapter 11 is, at least to some degree, dynamic.[75] However, only one such "interpretation" has been issued by the NAFTA parties to date, and it immediately sparked controversy because of charges that the action was an attempt not to interpret, but to amend, the treaty.[76]

Of course, the interpretation approach will only work if the NAFTA Parties first agree to make an interpretation and then agree as to what the interpretation should say. Drafting and issuing an interpretation is difficult both politically and legally, and it is unlikely that all interested parties, including government officials, Congress, the business community, environmental and other groups will ever be fully satisfied. Moreover, as one Canadian official has noted, "the clarification process is not a means of changing the obligations of the agreement, but is rather a reaffirmation of the objective of specific provisions and reflects the intent of the parties to the Agreement. It is not a vehicle to change obligations of the agreement."[77] Furthermore, it remains to be seen whether a tribunal could determine that a directive from the Free Trade Commission is *ultra vires*, whether interpretations are retroactive and apply to

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74. *See* NAFTA, *supra* note 1, art. 1101 (setting forth the somewhat ambiguous concept that any measures complained of under NAFTA must "relate to" an investor or investment of another party).

75. *See id.* art. 2001(1) (establishing that the Free Trade Commission is comprised of one cabinet-level representative from each country).

76. *See* INTERPRETATION, *supra* note 29. This interpretation was extensively criticized in *Pope & Talbot*, where the tribunal suggested that the interpretation was a disguised amendment. *See* Pope & Talbot, Inc. v. Canada, 41 I.L.M. 1347, 1356 (NAFTA Arb. Trib. (Nov. 26, 2002)) (indicating that the tribunal would have concluded that the action was an amendment if it were required to do so to decide the case, but such a determination was not required).

77. Stephen Brereton, Investor Protection in the NAFTA and Beyond: Private Interest and Public Purposes, Remarks at the University of Toronto Center for International Studies 13 (May 3, 2002) (on file with author). Mr. Brereton is the Director of the Investment Trade Policy Division of the Canadian Ministry of Foreign Affairs and International Trade. *Id.*

presently pending cases, and whether interpretations apply to future cases that have yet to be filed.

Also, the customary international rules on treaty interpretation, which provide for treaties to be interpreted in good faith and in light of the treaty's object and purpose may affect the "interpretation" by a tribunal.[78] Additionally, these rules recognize that parties attempting to interpret treaty provisions may look to the preamble, text, annexes, agreements in connection with the treaty's conclusion, and "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[79] Thus, both the agreed terms and interpretations are likely to affect arbitrators' efforts to interpret and apply Chapter 11.

Although Chapter 11 contains provisions relating to most-favored-nation treatment, performance requirements, nationality of senior management, and financial transfers, the most important and controversial provisions relate to national treatment, free and equitable treatment, protection against expropriation, and binding investor-host arbitration.[80] Thus, the national treatment/non-discrimination provision—Article 1102(1)—requires that each NAFTA "Party shall accord to investors of another Party treatment no less favorable that it accords, in like circumstances, to its own investors, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[81]

The obligation applies to states and provinces, as well as to the federal governments, and to investors—the companies and firms—not just to the investment.[82] There are a variety of exceptions,

78. *See* Vienna Convention on the Law of Treaties, *supra* note 73, and discussion therein.

79. *Id.* art. 31(3)(a).

80. NAFTA, *supra* note 1, arts. 1102-03, 1105-07, 1109-10.

81. *Id.* art. 1102(1). As between national treatment and most-favored nation treatment, the investor and investment receive the more favorable of the two. *Id.*, art. 1104.

82. *See id.* art. 1102(3) (extending the national treatment requirement to sub-national states and provinces of the parties).

principally those found in Annex IV,[83] but also many listed in Annexes I and II.[84] The essence of a national treatment obligation is that a host government must treat foreign investors in the same manner as its own national investors.[85] However, in some instances, the treatment afforded, both to domestic investors and to foreigners, is seriously deficient, especially with regard to national administrative actions, police protection, or access to courts.[86] As a result, NAFTA, in language similar, but not identical, to that found in most of the U.S. BITs, imposed certain minimum standards. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[87]

As the title to Article 1105 suggests, there is a "minimum standard of treatment" for foreign investors.[88] By connecting the "fair and equitable treatment" and "full protection and security" concepts with "international law" in Article 1105, the drafters presumably intended that those asserting a denial of fair and equitable treatment would have to demonstrate that the denial was a violation of international law.[89] There is no general requirement of a denial of justice, such as evidence of gross misconduct on the part of a state or its institutions

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83. *See id.* Annex IV (articulating exceptions to the most favored treatment provisions laid out in art. 1102(3)).

84. *See id.* Annexes I, II (incorporating various reservations which provide more favorable treatment for nationals than for foreigners). These annexes are titled "Reservations for Existing Measures" and "Reservations for Future Measures," respectively. *Id.*

85. *See id.* art. 1102 (requiring equal treatment for foreign and domestic investors, investments, and states or provinces).

86. *See, e.g.*, Metalclad Corp. v. Mexico, 40 I.L.M. 36, 50 (ICSID (W. Bank) Aug. 30, 2000 (finding a denial of fair and equitable treatment under art. 1105 without any determination of discrimination between claimant and Mexican nationals under article 1102).

87. *See* NAFTA, *supra* note 1, art. 1105(1).

88. *Id.* art. 1105.

89. *See* Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, in* 165 THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 174 (Judith H. Bello et al., eds. 1994) (commenting on NAFTA's incorporation of customary international law principles in Article 1105).

that goes beyond an erroneous or even unjust administrative decision, as a condition of bringing a claim under Chapter 11.[90] However, one NAFTA tribunal has opined that, despite the absence of an exhaustion of remedies requirement in NAFTA, no violation of "fair and equitable treatment" based on a denial of justice by a court can occur under NAFTA or under customary international law unless there has been an exhaustion of local legal remedies or a showing that such exhaustion would have been fruitless.[91]

However, the precise meaning of "fair and equitable treatment" is never articulated in NAFTA itself. Article 1105 is not mentioned in the U.S. Statement of Administrative Action accompanying the agreement to Congress in 1993, and is mentioned only in passing in what is probably the most authoritative contemporary analysis of Chapter 11.[92] Only the Canadian Statement on Implementation of NAFTA explained that Article 1105(1) "provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law."[93]

In the past, national treatment and fair and equitable treatment have not been the most important protections for foreign investors. Rather, the focus had been on protection against nationalization or expropriation. However, situations in which a host country's police force or army marches into a foreign-owned factory or mine and

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90. *See* NAFTA, *supra* note 1, art. 1121. (requiring only that the investor surrender the right to initiate or continue national court proceedings and to agree to be bound by the arbitration).

91. *See* discussion *infra* Part IV (relating the *Loewen* tribunal's refusal to find a denial of justice where there had been no appeal from a Mississippi trial court either to higher courts in Mississippi or to the U.S. Supreme Court).

92. *See* Price & Christy, *supra* note 89, at 174 (mentioning "fair and equitable treatment" in the limited context of a discussion of customary international law).

93. Dep't of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, CANADA GAZETTE, Jan. 1, 1994, at 149; *see also* NAFTA FREE TRADE COMMISSION, CLARIFICATIONS RELATED TO NAFTA CHAPTER 11 (July 31, 2001) (declaring seven years later that concepts of "fair and equitable treatment" and "full protection and security" do not require national measures to go beyond what is required by customary international law), *available at* http://www.ustr.gov/regions/whemisphere/nafta-chapter11.PDF (last visited Feb. 12, 2004).

seizes it are relatively rare today, even in developing countries.[94] Accordingly, the nationalization and expropriation provisions in NAFTA afford coverage for indirect or "creeping" expropriation:

> No Party may *directly or indirectly* nationalize or expropriate an investment of an investor of another Party in its territory or *take a measure tantamount to nationalization or expropriation* of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.[95]

While this NAFTA language is slightly more explicit than the language in some earlier versions, the "tantamount to nationalization" and other clauses similar to NAFTA Article 1110 are also found in the U.S.-Argentine Foreign Investment Treaty of 1991, the Canada FTA, and the 1994 U.S. model BIT.[96]

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94. *See* David A. Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474, 476 (1977) (discussing the Velasco government's abrupt expropriation of the multinational Marcona Mining Company).

95. NAFTA, art. 1110(1) (emphasis added). NAFTA provides for compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . that compensation be paid without delay and be fully realizable," that compensation include interest in a hard currency, and that compensation be freely transferable. *Id.* art. 1110(2)-(6).

96. *See* Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., art. IV(1), S. TREATY DOC. NO. 103-2 (stating that measures tantamount to expropriation or nationalization are not allowed unless for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate, and effective compensation; and in accordance with due process of law and the general principles of treatment provided in Article II(2) of the treaty), http://170.110.214.18/tcc/data/commerce_html/TCC_Documents/ArgentinaInvestment.html (last visited Apr. 23, 2004); *see also* Canada FTA, *supra* note 50, art. 1605 (recognizing indirect expropriation and measures tantamount to an expropriation); U.S. Dept. of Commerce, *The 1994 U.S. Prototype Bilateral Investment Treaty*, art. III [hereinafter 1994 U.S. Model BIT] (restricting expropriation or nationalization through direct or indirect means), http://www.osec.doc.gov/ogc/occic/modelbit.html (last visited Apr. 24, 2004).

The similarities in these clauses reflect a relatively settled view of customary international law on expropriation, at least among the United States and other capital exporting countries.[97] However, even under relatively well-recognized customary international law principles, it is by no means clear when governmental action that interferes with broadly defined property rights constitutes an illegal, compensable taking.[98] In determining whether a compensable expropriation occurred or whether a government has simply exercised its right as a sovereign to regulate, Chapter 11 tribunals rely upon such key terms as "unreasonably interferes with," "unduly delays," and "bona fide" from the Restatement and the "customary international law" or "tantamount to expropriation" from NAFTA Article 1110. Therefore these tribunals do, and likely will continue to, analyze and apply Article 1110 on a case-by-case basis. One can reasonably expect tribunals appointed under the Chile, Singapore and the growing number of future FTAs and BITs with similar language to do the same.

III. TRADE PROMOTION AUTHORITY AND RELATED CONSIDERATIONS

No sensible foreign government is willing to complete substantive trade negotiations with the United States in the absence of "fast-track" legislation, now TPA.[99] With TPA, Congress has limited its authority so that it may only vote yes or no on a trade agreement, and

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97. *See* Gudgeon, *supra* note 42, at 105 (commenting on the creation of BITs as tools for protecting U.S. foreign investors in accordance with U.S. policies and international law); *see also* President Ronald Reagan, Statement on International Investment Policy (Sept. 9, 1983), *reprinted in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1983, at 1246-47 (1985) (indicating that the United States "places high priority" on protecting U.S. investment from treatment inconsistent with international law).

98. *See* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 712 cmt. g (1987) (stating that a state is responsible for expropriation for action that prevents or unreasonably interferes with the effective enjoyment of property, and that a state is not responsible for actions commonly accepted as within the police power of states).

99. *See* Council of the Americas, *What is Trade Promotion Authority (TPA)?* (noting that TPA sets U.S. negotiating objectives and establishes a "fast track" timetable for the ratification of agreements), *at* http://www.americas-society.org/coa/advocacy/tpa.html (last visited Feb. 12, 2004).

cannot amend any provisions.[100] In the absence of TPA, Congress has the ability to amend the provisions of a trade agreement submitted for approval so as to make them more attractive to Congress and less attractive to the foreign government.[101] Since 1974, with few exceptions other than the period mid-1994 to 2002, Congress has provided presidents with trade negotiating authority in realization of the importance of trade to national security and economic growth.[102]

The Trade Act of 2002's "Trade Negotiation Objectives" serve to guide U.S. trade policy, and were applicable to trade agreements negotiated after August 6, 2002, which included the then ongoing Chile, Singapore, FTAA, and WTO negotiations.[103] These objectives reflect an effort to reach a compromise between two conflicting goals:

> The negotiating objective on foreign investment reflects the [Senate Finance] Committee's view that it is a priority for negotiators to seek agreements protection the rights of U.S. investors abroad and ensuring the existence of an investor-state dispute settlement mechanism. It also reflects the view that in entering into investment agreements, negotiators must seek to protect the interests of the United States as a potential defendant in investor-state dispute settlement. In other words, there ought to be a balance. Protecting the rights of U.S. investors abroad should not come at the expense of making Federal, State and local laws and regulations unduly vulnerable to challenges by foreign investors.[104]

The Senate Report also urged that future investment agreements not "confer on foreign investors in the United States a right to

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100. 19 U.S.C. § 3805(b)(2) (2002).

101. *See* Leslie Alan Glick, *World Trade After September 11, 2001: The U.S. Response*, 35 CORNELL INT'L L.J. 627, 637 (2002) (discussing Congress' opposition, on constitutional and other grounds, to TPA because of these limitations on Congressional power).

102. *See* Trade Act of 2002, H.R. CONF. REP. NO. 107-624, at 150 (2002), *reprinted in* 2002 U.S. CONG. & ADMIN. NEWS 682 (noting that the expansion of international trade is vital to U.S. world leadership).

103. 19 U.S.C. § 3802(b)(3) (2002).

104. BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2002, S. REP. NO. 107-139, at 13 (2d Sess. 2002).

compensation for expropriation that differs substantially from the right to compensation for takings that U.S. citizens already enjoy."[105]

This language reflects congressional and constituent uneasiness regarding the NAFTA mechanism, and the likelihood that NAFTA could permit arbitration tribunals to make major public policy decisions with input only from the claimant and the NAFTA governments. While business groups had urged the Bush administration during the TPA debate not to "weaken the high standards of protection for investment guaranteed in NAFTA Chapter 11 and in our bilateral investment treaties,"[106] environmental groups had just as strongly urged the Administration to reject future provisions similar to those in NAFTA.[107] The state attorneys' general took a similar position in favor of limiting the scope of investor protections.[108]

The resulting negotiating authority text reflected, *inter alia,* these concerns and compromises:

> [T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade- distorting barriers to foreign investment, *while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States*, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by–
>
> (A) reducing or eliminating exceptions to the principle of national treatment:

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105. *Id.* at 15.

106. Letter from the presidents of the U.S. Council for International Business, the Emergency Committee for American Trade, the National Foreign Trade Council and the National Association of Manufacturers, to Robert Zoellick, U.S. Trade Representative (Aug, 30, 2001) [hereinafter Letter from the presidents] (on file with author).

107. *See* Sierra Club, *supra* note 33, at 1 (imploring members of Congress not to commit the United States to the equivalent of NAFTA Chapter 11 in subsequent trade agreements).

108. *See* Letter from Bill Lockyer, California Attorney General on behalf of the National Association of Attorneys General, to Barbara Boxer and Diane Feinstein, U.S. Senators 1 (Apr. 3, 2002) (expressing concern "over the inclusion of provisions in international trade agreements granting individual foreign investors new rights to challenge and seek compensation for state, local or federal government regulatory actions as 'expropriations'") (on file with author).

* * *

(D) seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice;

(E) seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process . . . .[109]

The objectives also incorporated a number of procedural and transparency mechanisms, discussed in Part VI, *infra.*

The compromise that the TPA attempted to strike failed to fully satisfy anyone. The TPA provisions have been criticized for undermining U.S. legislation and failing to guarantee that foreign investors will be barred from receiving protection not available to U.S. firms.[110] Nevertheless, the investment provisions of the Chile FTA, which obviously was designed in significant part to comply with the TPA objectives, appear to have been satisfactory to Congress, which noted that the Chile FTA "makes improvements to the NAFTA investor-state dispute settlement model by providing more transparency, public input into the dispute settlement, mechanisms to improve the investor-state process by eliminating frivolous claims, and a place marker for a future appellate body or similar review mechanism."[111]

There is a particularly irony in the expressed desire of the Congress to assure that foreign investors in the United States receive no greater rights than those provided under U.S. domestic law. More than thirty years ago, the United States and a handful of other capital exporting nations opposed the adoption of the United Nations' Charter of Economic Rights and Duties of States because of the failure of the Charter to recognize any international law obligations. The key aspect of the Charter, in addition to "permanent sovereignty over natural resources," was the conditioning of the right of the host state to expropriate foreign property only on the payment of

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109. 19 U.S.C. § 3802(b)(3) (2002) (emphasis added).

110. *See Final Trade Package Further Weakens Limits on Investor Protections*, INSIDE U.S. TRADE, Aug. 2, 2002, at 2 (documenting various interest groups' opposition to the TPA).

111. House Report, *supra* note 3, at 3.

> appropriate compensation . . . taking into account its [the host state's] relevant laws and regulations and all circumstances the state considers pertinent . . . In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state . . . .[112]

While most would argue that U.S. takings law meets or exceeds customary international law standards, and the new FTA/BIT language contains many references to international law, this language may come back to haunt the United States if and when another waive of nationalization in developing countries occurs.

IV. FAIR AND EQUITABLE TREATMENT

Despite the admonition that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of a particular case,"[113] both parties before the tribunals, and indeed the members of the tribunals themselves, routinely cite, distinguish, agree with, or discount decisions of prior tribunals.[114] While earlier decisions are clearly not binding precedent, everyone involved considers them relevant in a manner similar to prior decisions by the Appellate Body of the WTO.[115] Clearly, decisions of arbitral tribunals are a source, albeit a subsidiary source, of international law under the Statute of the International Court of Justice ("ICJ Statute").[116] Most significantly, however, a majority of the arbitrators appointed to NAFTA tribunals are likely to be

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112. United Nations Charter of Economic Rights and Duties of States, art. 2, 14 I.L.M. 254 (1975).

113. NAFTA, *supra* note 1, art. 1136(1).

114. *See* Joseph A. Strazzeri, Note, *A Lucas Analysis of Regulatory Expropriations Under NAFTA Chapter Eleven*, 14 GEO. INT'L ENVTL. L. REV. 837, 846 (2002) (noting that the practice of arbitral tribunals has been to analyze prior decisions and interpretations despite the strict absence of de jure stare decisis in NAFTA jurisprudence).

115. *See, e.g.*, Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L. L. REV. 845, 849 (1999) (arguing that a de facto doctrine of stare decisis now exists in WTO jurisprudence).

116. *See* Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1058 (referring to "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as a "subsidiary means" of determining applicable law).

common law lawyers, and most common law lawyers are trained, from their first days in law school, to look first at case law.[117]

A. THE NAFTA CASE LAW PRIOR TO THE PARTIES' INTERPRETATION EFFORTS

It is revealing, and becomes even clearer after reviewing the cases, that a single sentence in NAFTA features "minimum standard of treatment" and "fair and equitable treatment," while commensurate provisions under Chapter 10 of the Chile FTA go on for several paragraphs. In fact, the changes under the Chile FTA are attributable in large measure to a series of NAFTA tribunal decisions, beginning with *Pope & Talbot*, *Metalclad*, and *S.D. Myers*. The changes under the Chile FTA also reflect several then-pending actions: *Methanex*, *Loewen Group*, and a number of post "Interpretation" decisions discussed in Part B.

The NAFTA Parties, particularly the United States and Canada, were justifiably distressed by the *Pope & Talbot* Tribunal's interpretation of the "fair and equitable treatment" language in NAFTA Article 1105. That tribunal, considering claims that Canada's implementation of the 1996 Softwood Lumber Agreement with the United States violated NAFTA Article 1105, initially held that the NAFTA right to "fair and equitable treatment" was in addition to, rather than limited by, the phrase "treatment in accordance with international law."[118]

In concluding that the "additive" approach was appropriate, the tribunal explicitly faulted the United States for failing to provide a rationale as to the applicability for the "limiting" approach other than

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117. *See* Jessica S. Wiltse, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1162-63 (2003) (noting that the simple fact that most of the arbitrators and lawyers involved in panel proceedings come from a common law background suggests that past decisions do, in fact, supply at least persuasive authority).

118. *See* Pope & Talbot, Award on the Merits of Phase 2, paras. 110-11 (NAFTA Arb. Trib (Apr. 10, 2001)) *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf (last visited Apr. 9, 2004). "Investors under the NAFTA are entitled to the international law minimum, *plus* the fairness elements." *Id.*

the text of Article 1105.[119] The tribunal also relied, erroneously, on language in the standard BITs, notwithstanding the fact that Article 1105 of NAFTA significantly departed from the BIT language.[120] The tribunal also noted that the international law limitation would permit foreign investors to be treated less favorably than national investors, and that such treatment would be inconsistent with the principle of national treatment.[121]

In *Metalclad*, a case involving a dispute over the establishment of a hazardous waste disposal facility, the tribunal ultimately found that the Mexican government had violated NAFTA Article 1105 by failing to provide a "transparent and predictable framework" for the investor in the latter's efforts to comply with Mexican laws regarding the placement of a hazardous waste disposal facility.[122] This finding was problematic for the NAFTA governments because there is no explicit obligation to provide transparency to investors under Section A of Article 1105. The only NAFTA obligations with respect to transparency, and they are general, are found in Chapter 18.[123]

In *S.D. Myers*, the tribunal found a violation of Article 1102's national treatment requirement on the basis of blatant and publicly documented discrimination between a hazardous waste processing

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119. *See id.* para. 114 (criticizing the United States for supporting its Article 1105 argument by simple reference to the text of the article itself, and implicitly rejecting the "when in doubt, read the statute" rule).

120. *See id.* at 52-54. As noted earlier, Article 1105 states that "[e]ach Party shall accord to investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA, *supra* note 1, art. 1105. The Model Bilateral Investment Treaty states that "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security *and* shall in no case by accorded treatment less than that required by international law." 1994 U.S. Model BIT, *supra* note 96. Thus, under the then existing BIT language a colorable argument can be made that the "fair and equitable treatment" obligation exists independently of the obligation to comply with international law. *Id.*

121. *Pope & Talbot*, at 54 (noting also that such a limited interpretation of Article 1105 would "run afoul" of Articles 1102 and 1103, which provide NAFTA investors and investments national and most-favored-nation treatment).

122. *See* Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 50 (2001) (ICSID (W. Bank) Aug. 30, 2000).

123. *See* NAFTA, *supra* note 1, ch. 18 (requiring that each party publish "its laws, regulations, procedures and . . . rulings" to any NAFTA measure to any affected person or party).

facility in Alberta, Canada and S.D. Myers' similar facility in Ohio.[124] The tribunal's general view of Article 1105 was not particularly radical and far more in accordance with the Interpretation than with the *Pope & Talbot* Tribunal. The *S.D. Myers* tribunal determined that "[a] breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[125] The governments were particularly concerned that the tribunal also found a violation of Article 1105, largely on the basis of a finding of the Article 1102 violation.[126] The tribunal justified its conclusion in part by asserting that the "minimum standard" was considered broader in scope than the national treatment obligation.[127]
As a State Department lawyer explained,

> [a]lthough we do not take a position on the outcome of either [*Metalclad* or *S.D. Myers*] . . . both of these cases interpreted Article 1105's minimum standard of treatment in a way we think is at odds with the provision. In both cases, the tribunals looked beyond customary international law for the content of the fair and equitable treatment standard.[128]

Several other early cases raising Article 1105 issues also likely influenced the U.S. negotiators of the investment provisions of the Chile FTA and Singapore FTA. In *Loewen Group*, a Mississippi state court trial, alleged to have been conducted in an intentionally prejudicial manner, resulted in a verdict against Loewen, a Canadian operator of funeral homes, for approximately $100 million in actual damages and $400 million in punitive damages, in a commercial

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124. S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1437 (NAFTA Arb. Trib. (Nov. 13, 2000).

125. *Id.* at 1438.

126. *See id.* ("[O]n the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.").

127. *Id.* The tribunal refused to rule out the possibility that there could be circumstances in which a denial of national treatment "might not offend" the minimum standard provisions. *Id.*

128. Clodfelter, *supra* note 24, at 1282.

transaction worth less than $5 million.[129] Because the claimant allegedly could not meet bonding requirements for an appeal, set at $625 million, Loewen settled the case for $175 million, "under conditions of extreme duress" and brought a Chapter 11 claim.[130] Loewen contended in part that the trial court's excessive judgment and bonding requirements were violations of NAFTA, Article 1105, and therefore Loewen was denied justice and denied fair and equitable treatment by the Mississippi courts.[131]

In partial response, the United States argued that the claimant could not show the treatment accorded to Loewen by the courts of Mississippi was "below the international minimum standard required by Article 1105."[132] The United States had contended that the fact that "the Tribunal must consider the entirety of the U.S. system of justice stems from the nature of the customary international law obligation that gives rise to State responsibility for denial of justice."[133] The form of the justice system is immaterial, and the obligation is not to provide a court system that is free from error, but only one that is "fundamentally adequate."[134]

The tribunal agreed that the Mississippi court decision was "clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[135] However, the tribunal agreed with the United States that Loewen had failed to adequately pursue available domestic remedies, preventing Loewen from prevailing on its denial of justice/denial of fair and equitable treatment under international law

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129. Loewen Group, Inc. v. United States, 42 I.L.M. 811, 812 (ICSID (W. Bank) June 26, 2003) (relating the facts of the case). Among other things, Loewen alleged that the court permitted repeated appeals to the jury's anti-Canadian, racial, and class biases. *Id.* at 817.

130. *See id.* at 812 (explaining that other options were "catastrophic or unavailable").

131. *See id.* at 816 (setting out Loewen's claim against the United States).

132. Counter-Memorial of the United States of America at 4, Loewen Group, Inc. v. United States, (ICSID (W. Bank) Mar. 30, 2001), *available at* http://www.state.gov/documents/organization/7387.pdf (last visited Mar. 19, 2004).

133. *Id.* at 124.

134. *Id.* at 126-27.

135. *Loewen Group, Inc.*, 42 I.L.M. at 833.

claims.[136] Other Article 1105 decisions are all post-Interpretation, and are thus discussed in Part B, below.

B. THE "INTERPRETATION" AND ITS IMPACT ON THE NAFTA CASE LAW

The Parties responded to their concerns in the then-pending *Pope & Talbot* and *Loewen*, and the completed *S.D. Myers* and *Metalclad* actions, by issuing their first, and to date, only "Interpretation" of Chapter 11.[137] The Interpretation of Article 1105(1) provided:

> Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[138]

Paragraph one confirms the Parties' view that "international law" in Article 1105 means "customary international law." Paragraph two was intended to effectively overrule *Pope & Talbot*, making it clear that "fair and equitable treatment" and "full protection and security" are afforded only to the extent required by customary international

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136. *See id.* at 846 (highlighting Loewen's failure to pursue the U.S. Supreme Court option). Arguably, this is all dicta, since the case was actually dismissed on the ground that when Loewen's claims in the course of bankruptcy were assigned to a Canadian corporation owned by a U.S. corporation, no jurisdiction over the claim remained under Chapter 11. *Id. at 850.* A request for a supplemental decision by the individual claimant, Robert Loewen, on his own behalf rather than on behalf of the corporation, is pending. *See* Article 58 Submissions as to Raymond L. Loewen's Article 116 Claim, Sep. 19, 2003, http://www.naftalaw.org (visited Apr. 26, 2004).

137. *See* NAFTA, *supra* note 1, art. 1131(2) (providing that "[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section").

138. INTERPRETATION, *supra* note 29.

law.[139] Paragraph three sought to instruct tribunals tempted to follow the *S.D. Myers* ruling that the claimant would have to establish independently a violation of Article 1105, rather than piggybacking on an Article 1102, national treatment violation, and to exclude possible NAFTA tribunal jurisdiction over violations of separate international agreements.[140] This issue became important in *Methanex*, as the focus of that case shifted toward discrimination between domestic and foreign interests. In its amended statement of claim, Methanex relied on *S.D. Myers* in arguing that establishment of discrimination under Article 1102 essentially automatically met the requirements of an Article 1105 violation as well.[141]

However, the construction of international law in Article 1105(1) as customary international law complicated the NAFTA Parties' (as well as the tribunals') problems with Article 1105, even though the governments likely understood customary international law to be the meaning of international law. International law and customary international law are not identical, although the differences may not be as significant as the Parties suggested in their extensive pleadings. International law presumably means the full range of sources in the hierarchy set forth in the Statute of the International Court of Justice.[142]

Thus, customary international law is indicated in Article 38(1)(b) of the ICJ Statute as: "a usage felt by those who follow it to be an obligatory one,"[143] or "a general and consistent practice of states that

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139. *See supra* notes 118-121 and accompanying text (discussing the *Pope & Talbot* Tribunal's holding that the fair and equitable standard went beyond the international law standard).

140. *See supra* notes 124-127 and accompanying text (reviewing the *S.D. Myers* decision finding that an Article 1102 violation established a finding of an Article 1105 violation as well).

141. *See* Claimant Methanex Corporation's Second Amended Statement of Claim, Methanex v. United States, paras. 313-15 (NAFTA Arb. Trib. (Nov. 5, 2002)) (characterizing the case as "raw economic protectionism"), *available at* http://www.state.gov/documents/organization/15035.pdf

142. *See* Statute of the International Court of Justice, *supra* note 116, art. 38(1) (listing the sources of international law as 1) international conventions; 2) international custom; 3) general principles of law recognized by civilized nations; and 4) judicial decisions and the teachings of the most highly qualified publicists).

143. J. BRIERLY, THE LAW OF NATIONS 60 (4th ed. 1949).

they follow from a sense of legal obligation,"[144] and is only a subset of the broader idea of international law. But it is not always clear what "customary international law" means, particularly in terms of the extent to which treaty law and judicial decisions are relevant in determining whether a legal principle has become customary international law and is thus binding upon states. As one scholar has noted, "[t]he determination of customary international law is more an art than a scientific method."[145]

In fact, all of the NAFTA Parties were undoubtedly aware of these definitions of customary international law, and officials presumably felt that several NAFTA tribunals had overreached. It may well be that they intended at the time to argue, as they did in the cases discussed below, that the customary international law of "minimum standard of treatment" and "fair and equitable treatment" had not evolved significantly in recent years, or at least that regardless of any evolution, the threshold for demonstrating a violation of customary international law in this area remains very high. The Parties were likely even more concerned that if NAFTA's concept of international law was not limited to customary international law, it might encompass any treaty or treaty provision rather than an explicit right under Section A of Chapter 11. As outside counsel for the Mexican government noted that:

> if Article 1105's reference to international law granted jurisdiction to a tribunal to determine breaches of the rest of NAFTA itself and of other treaties . . . investor-state arbitration would be available for . . . the rest of NAFTA, the WTO and any other treaties to which the respondent state was a party.[146]

In any event, the July 2001 Interpretation came after *Metalclad* was already final, and the British Columbia Supreme Court had already reviewed the *Metalclad* decision and decided that a denial of

144. Chile FTA, *supra* note 1, Annex 10-A.

145. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 44 (4th ed. 2003).

146. J. C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 449 (2002); *see also* Kirkman, *supra* note 35, at 391 (asserting that a broad reading of international law to encompass the parties' obligations under other international agreements is "illogical in light of the NAFTA's purpose, structure and jurisprudence").

transparency was not an actionable Chapter 11 violation under Article 1105, because transparency was neither an explicit requirement of Chapter 11, Section A, nor of customary international law.[147]

In the then ongoing *Pope & Talbot* case, all three NAFTA governments argued that the applicable customary international law standard of "fair and equitable treatment" was essentially frozen with the *Neer* case in 1926. The governments advanced this argument notwithstanding the hundreds of bilateral investment treaties and various arbitral and judicial decisions, treatises, and other source materials that suggested that the standard to which a state was bound was something more than avoiding conduct that was outrageous or shocked the conscience.[148]

The *Pope & Talbot* Tribunal, however, was not receptive to this approach, suggesting that the Interpretation was in fact a back-door effort to amend NAFTA without the benefit of approval through the constitutional processes of each Party.[149] The tribunal focused specifically on the absence of the phrase "customary international law" in NAFTA's *travaux preparatoires*.[150] Despite viewing the NAFTA Parties' attempt to narrow the applicability of the term international law through an Interpretation as illegal, the tribunal ultimately found that the Interpretation in question was binding, but it refused to accept the static version of customary law advanced by Canada and the other Parties.[151]

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147. *See* United Mexican States v. Metalclad Corp., [2001] B.C.L.R.3d 359 para. 68 (stating that "no proper basis" existed for the tribunal's readings of international law).

148. *But see* Kirkman, *supra* note 35, at 391-92 (concluding that the *Neer* standard is too narrow, especially considering the history of friendly relations among the parties and the treatment each NAFTA Party offers stronger investment protection in their BITs with states with which the Parties have weaker relationships).

149. Pope & Talbot, Inc. v. Canada, 41 I.L.M. 1347, 1352-53 (NAFTA Arb. Trib. (May 31, 2002)) (stating that each Party must obtain formal approval to modify or add to the Agreement).

150. *See id.* at 1355 (quoting counsel for Canada: "Let me make it easy for everybody . . . I happen to know if there are any traveaux preparatoires, and I can tell you that I have not been able to find any").

151. *Id.* at 1356-57.

Instead, the tribunal opined that the "range of actions subject to international concern has broadened since the 1920s" to "include the concept of fair and equitable treatment."[152] The tribunal found that this principle was recognized by the OECD, was central to the 1800 BITs negotiated to protect foreign owned property, and was thus clear evidence of state practice towards the formation of customary international law. [153] However, the tribunal did not formally decide the applicable standard because, regardless of any particular standard, Canada's Softwood Lumber division was found to have violated Article 1105 by treating Pope & Talbot in an egregious manner.[154]

Several subsequent tribunals have struggled with the same issues and have backed away from the idea that an interpretation may go beyond the scope of what can properly be done by NAFTA governments under Article 1131(2) without actually amending NAFTA.[155] These subsequent tribunals have been equally adamant in rejecting the idea that the scope of "fair and equitable treatment" is frozen in time. All of these cases were pending during much of the negotiations of the Chile FTA and Singapore FTA. In *Mondev v. United States*, the Claimant directly challenged the Interpretation, the meaning of fair and equitable treatment and the requirements of customary international law. Therefore the tribunal reviewed not only Article 1105, but also had to consider these factors as well.[156] However, since Mondev had chosen to invoke the protection of local courts, which had decided against the firm, the tribunal limited its

152. *Id.* at 1357.

153. *See id.* at 1357-58 (noting also that the OECD Draft Convention on the Protection of Foreign Property recognized fair and equitable treatment as required by customary international law).

154. *Id.* at 1359.

155. *See* discussion *infra* notes 156-196 (discussing the attempts of the arbitral tribunals to interpret the language of NAFTA as well as particular cases that have directed the trend of these efforts).

156. *See* Mondev v. United States, 42 I.L.M. 85, 102 (2003) (ICSID (W. Bank) Oct. 11, 2002) (acknowledging that extensive debate took place regarding the meaning and scope of Article 1105 as interpreted by the Commission). Specifically, this debate centered on both the meaning of particular terms within the language of the Article as well as to what extent the rubric of the "minimum standard of treatment" under international law included customary international law duties.) *Id.* at 103.

review to "that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals."[157]

Like Pope & Talbot, Mondev also argued that the Interpretation was effectively an amendment to NAFTA, permitted only "with the applicable legal procedures of each Party."[158] If the appropriate standard was found to be customary international law, Mondev argued that "that law had to be given its current content, as it has been shaped by the conclusion of hundreds of bilateral investment treaties, including NAFTA, and by modern international judgments and arbitral awards."[159]

The United States, in defending the Interpretation and criticizing the *Pope & Talbot* Tribunal, contended that "customary international law" meant just that, and the BITs were not relevant unless it could be shown that they reflected *opinio juris*.[160] The United States also sought to discredit arbitral decisions that attempted to apply standards of customary international law based on a specific treaty.[161] Both Mexico and Canada admitted that the customary international law standard could evolve over time. However, both countries but still argued that the threshold for finding a violation of customary international law in this area was high, or required evidence of an "arbitrary action substituted for the rule of law" for a violation.[162]

In *Mondev,* the tribunal examined whether the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties was any different than it was in the 1920s.[163] The tribunal held that the

157. *Id.* at 103.

158. NAFTA, *supra* note 1, art. 2202(2).

159. Mondev v. United States, 42 I.L.M. 85, 104 (2003) (ICSID (W. Bank) Oct. 11, 2002).

160. *Id.* at 104. By virtue of the fact that the *Pope & Talbot* case relied upon the Chamber decision in the *ELSI* case and without any consideration for *opinio juris*, the United States contended that the decision did not reflect a true development in customary international law. *Id.*

161. *Id.*

162. *Id.* at 106.

163. *Id. at* 106-09.

"substantive and procedural rights of the individual in international law have undergone considerable development," "to the modern eye, what is unfair or inequitable need not equate with the outrageous or egregious," and that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[164]

The tribunal also recognized that dozens of nations' BITs had influenced the content of the rules governing the treatment of foreign investment in current international law by obligating parties to accord foreign investment fair and equitable treatment.[165] While the United States conceded the significance of the jurisprudence of state practice and arbitral tribunals, it also contended that a tribunal still could not "adopt its own idiosyncratic standard of what is 'fair or equitable' without reference to established sources of law."[166] The tribunal reasoned that the reference to "customary international law" in the Interpretation must mean that status of that body of law no earlier than 1994, when the NAFTA came into force.[167] As a result, where the tribunal found no denial of justice, there could be no violation of Article 1105, and the tribunal dismissed Mondev's claim.[168] In the course of its opinion, the tribunal essentially assumed that the Interpretation was valid, and focused instead on the content of customary international law.[169] Additionally, the value of the *Mondev* Tribunal's analysis is probably enhanced by the fact that one of the arbitrators was Stephen M. Schwebel, a former president of the International Court of Justice.

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164. *Mondev*, 42 I.L.M. at 106.

165. *See id.* at 107-08 (tribunal observing that the phenomena of many states voluntarily acting to address foreign investment through the utilization of BITs would necessarily influence the content of the current international legal rules overseeing the treatment of foreign investment).

166. *Id.* at 108.

167. *See id.* at 109 (holding that the interpretation of the phrase "customary international law" is not limited to international law of either the nineteenth century or the first half of the twentieth century, though there are relevant decisions from those periods). The tribunal went on to state that the Commission interpretation of Article 1105(1) did encompass current international law, the content of which is defined by the conclusion of over two thousand BITs as well as many other commerce and friendship treaties. *Id.*

168. *Id.* at 116.

169. *Mondev*, 42 I.L.M. at 107.

A similar analysis occurred in *ADF Group v. United States*, where the tribunal focused on the key question of whether the enforcement of a federal "Buy American" provision precluded ADF from fabricating steel for guardrails to be sold in Virginia, and was therefore a violation of Article 1105.[170] Here, as in both *Pope & Talbot* and *Mondev*, the investor challenged the Interpretation, in this instance by arguing that it was up to the tribunal to determine whether it was a "true interpretation" or an amendment to NAFTA.[171] The tribunal, however, accepted the NAFTA Parties' advisement that the Interpretation was not meant to be an amendment, observing that nothing in NAFTA suggests that "a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretations by the Parties acting through the FTC is in fact an amendment which presumably may be disregarded until ratified by all the Parties under their respective internal law."[172]

Thus, customary international law is the standard applicable in Article 1105.[173] However, the tribunal recognized that Article 1105 is something more than a rule against discrimination between domestic and foreign investors.[174] Presently, the United States, Mexico, and Canada all agree that the Interpretation refers to customary

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170. *See* ADF Group, Inc. v. United States, paras. 44-55 (ICSID (W. Bank) Jan. 9, 2003) (describing the dispute from which the case arose), *available at* http://www.worldbank.org/icsid/cases/ADF-award.pdf (last visited Mar. 10, 2003). According to the facts of the case, the "Buy America" clause, included to ensure compliance with 23 C.F.R. 635.410, forced ADF Group, Inc. to fabricate steel bridge components at various domestic subcontracting facilities as opposed to importing the components into Canada for fabrication. *Id.* As a result, estimated costs for ADF Group, Inc.'s fulfilling the subcontract increased "massively." *Id.*

171. *Id.* para. 177.

172. *Id.* The tribunal further opined that following such a proposition would result in the dilution of the binding nature of Commission interpretations. *Id.*

173. *See id.* (the tribunal concluding there was no obligation to try to determine whether the Commission had either interpreted or attempted to amend NAFTA).

174. *See id.* para. 178. "Where the treatment accorded by a State under its domestic law to its own nationals falls below the minimum standard of treatment required by customary international law, non-nationals become entitled to better treatment than that which the State accords under its domestic law." *Id.*

international law as it exists today,[175] although Mexico and Canada continue to remind tribunals that "the threshold remains high" for a violation of that standard.[176]

However, this does not mean that the investor had demonstrated that there exists, "a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments" in today's customary international law. [177] In *ADF Group*, the investor simply did not make his case that such U.S. domestic measures as domestic content and performance requirements in the peculiar context of government procurement are violations of fair and equitable treatment as that term is used in NAFTA.[178]

In *UPS v. Canada*, UPS charged that Canada violated its rights under NAFTA Articles 1102 and 1105 with regard to the powers exercised by Canada Post, the government postal monopoly, in its non-monopoly operations that were in competition with UPS' small package delivery services.[179] UPS claimed in part that the Canadian Post monopoly was inconsistent with Canada's obligation to provide UPS with fair and equitable treatment under international law, by ensuring "the existence of a transparent and effective regime for the supervision and regulation of Canada Post in the non-monopoly

175. *ADF Group, Inc.*, para. 179. According to the tribunal, the interpretation of "customary international law" in NAFTA Article 1105(1) is not a fixed standard of minimum treatment but rather is in a constant process of development. *Id.*

176. *Id.* para. 179.

177. *Id.* para. 183.

178. *See id.* paras. 188, 192 (noting that NAFTA, in Chapter 10, treats government procurement of goods and services separately from other trade in goods and services). Under Article 1108(8)(b), the performance requirements ban in Article 1106 does not apply to "procurement by a party or state enterprise" but that language is inapplicable to Article 1105. *Id.*

179. UPS v. Canada, paras. 9-10 (ICSID (W. Bank) Nov. 22, 2003), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf (last visited Mar. 10, 2003). These allegations included questions of the fairness and appropriateness of Canada Post's actions, that it was an unfair competitor in a manner detrimental to private sector competitors, and that Canada Post's ability to utilize a publicly funded network based on a government-granted monopoly allowed for an unfair pricing advantage. *Id.*

postal market in Canada," thus affording Canada Post a competitive advantage.[180] UPS also specifically alleged that Canada's Article 1105 obligations "included not engaging in anti-competitive practices while exercising governmental authority,"[181] and Canada's alleged failure to enforce its antitrust laws was a violation of Article 1105.[182]

Canada at the time was still arguing that to constitute a violation of Article 1105, government action must amount to "an outrage, to bad faith, to willful neglect of duty, or to an insufficiency" of government action so far short of international standards that every reasonable person would recognize its insufficiency.[183] The tribunal agreed that a rule of customary international law required a demonstration both of actual state practice and *opinio juris* of states.[184] The tribunal also noted that "obligations imposed by customary international law may and do evolve," but that treaties have "an important role in recording and defining rules deriving from custom."[185] However, in *UPS*, there was no indication that any national competition laws had been "enacted out of a sense of general international legal obligation."[186] Under such circumstances, the tribunal concluded that "there is no rule of customary international law prohibiting or regulating anti-competitive behavior."[187]

The tribunal also examined the question of whether, even under the "additive" approach, a state must have anti-competition laws in order to meet its obligation to foreign investors to provide fair and equitable treatment. The *UPS* tribunal determined that this was not the case, held that the "additive" approach was erroneous, and found

180. *Id,* para. 72.

181. *Id.* para. 73.

182. *Id.*

183. *Id.* para. 78.

184. *See id.* para. 84 (citing the Case Concerning the Continental Shelf (Libyan Arab Jamahriya/Malta), 1985 I.C.J. 13, para. 27 (June 3)).

185. *See UPS.*, para. 84.

186. *Id.* para. 85. The tribunal also noted that only beginning in November 2001, with the Doha WTO Ministerial meeting, did the Members begin "to address the possibility of negotiating competition rules on a multilateral basis." *Id.* para. 87.

187. *Id.* para. 92.

that Article 1105 obligations imposed no requirement for laws on anti-competitive behavior.[188] The tribunal discussed both claims because it determined that it had no jurisdiction to proceed under Article 1105 or under NAFTA Chapter 15, relating to competitive policy.[189]

The tribunal in *Methanex v. United States* originally dismissed Methanex's complaint relating to California's ban of the gasoline additive methyl tertiary butyl ether ("MTBE") because, in the tribunal's view the measures in question were not sufficiently connected to Methanex's investment in facilities for the production and marketing of methanol.[190] Specifically, the tribunal held that "the phrase 'relating to' in NAFTA Article 1101(1) signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them."[191] Methanex then re-filed the complaint, claiming that 1) the connection between the California action and Methanex was legally significant and is "related to" an investment; and 2) that California intended to harm foreign methanol producers by banning MTBE.[192]

Article 1105 is also at issue in Methanex's current proceeding. In addition to attacking the tribunal's "relating to" determination, Methanex has argued that the Interpretation was irrelevant to its case and that the tribunal should disregard it. The United States, however, asserted that the Interpretation "establishes that many of Methanex's arguments based on Article 1105(1) are ill-founded."[193] The United

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188. *Id.* paras. 97-99.

189. *Id.* para. 134. The *UPS* case was refilled and remains pending. *See* Investor's Revised, Amended Statement of Claim, UPS v. Canada (Dec. 20, 2002) *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/RevisedAmended.pdf (visited Apr. 12, 2004).

190. Methanex Corp. v. United States, para. 147 (NAFTA Arb. Trib. (Aug. 7, 2002)), *available at* http://www.state.gov/documents/organization/12613.pdf (last visited Apr. 13, 2004)

191. *Id.*

192. Claimant Methanex Corporation's Second Amended Statement of Claim, Methanex v. United States, paras. 142-280 (NAFTA Arb. Trib. (Nov. 5, 2002)), *available at* http://www.state.gov/documents/organization/15035.pdf.

193. Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001

States argued, as it had previously, that the tribunal did not have a right to review the validity of an Interpretation, and that in any event the "customary international law" Interpretation was consistent with "thirty years of state practice."[194] The United States also argued that "fair and equitable treatment" did not go beyond the requirements of customary international law, and did not incorporate broad concepts of "equity, fairness, due process and appropriate protection."[195] Furthermore, the United States offered that Article 1105 would not permit claims "based on violations of WTO or other conventional international obligations."[196] The *Methanex* tribunal has not yet ruled on any of the substantive violations of Chapter 11 charged by Methanex, including those based on Article 1105(1).

C. THE CHILE FTA LANGUAGE

With this background, we turn to the Chile FTA changes, which are also reflected in most subsequent FTAs and in the 2004 Model BIT. While the operative language of NAFTA Article 1105 is quite brief, the operative language of Article 10.4 of the Chile FTA provides considerably more detail than previous investment agreements "with respect to the standards of treatment of aliens and their property found in customary international law."[197]

Interpretation, Oct. 26, 2001, at 1 [hereinafter U.S. Response], *available at* http://www.state.gov/documents/organization/6028.pdf (last visited Apr. 10, 2004).

194. *Id.* at 4.

195. *Id.* at 6.

196. *Id.* at 8.

197. OFFICE OF THE U.S. TRADE REPRESENTATIVE, SUMMARY OF U.S. - CHILE INVESTMENT CHAPTER (2003) [hereinafter USTR Summary], *available at* http://www.ustr.gov/new/fta/Chile/summaries/Chile%20Investment%20Summary.PDF (last visited Mar. 28, 2004); *see also*, Chile FTA, *supra* note 1, art. 10.4:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and

It is unlikely that either U.S. or Chilean investors will be able to argue that there has been an *ultra vires* effort to amend the treaty since both parties have structured paragraph one of the Chile FTA to ensure no confusion as to the applicability of "customary international law" rather than simply "international law."[198] Similarly, the parties attempted to address the vagueness of "fair and equitable treatment" and "full protection and security" by clarifying that those concepts are not additive to the requirement of compliance with customary international law, but rather, are part of that concept.[199] Thus, "fair and equitable treatment" is defined as including, but not limited to, avoiding a denial of justice, and the concept of "due process embodied in the principal legal systems of the world."[200]

The latter section of Article 10.4(2) of the Chile FTA also serves the purpose of reflecting the language of the TPA in seeking to

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do not create additional substantive rights. The obligation in paragraph [1] to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provisions of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 10.7(5)(b), each Party shall accord to investors of the other Party, and to covered investment, non-discriminatory treatment with respect to measures it adopts or maintains relating to loses suffered by investments in its territory owing to armed conflict or civil strife.

Id.;

The Parties confirm their shared understanding that "customary international law" . . . results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.4, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Id. Annex-10A.

198. Chile FTA, *supra* note 1, art. 10.4(1).

199. *Id.*,. art. 10.4(2).

200. *Id.* art. 10.4(2)(a).

equate fair and equitable treatment under customary international law with the U.S. standards of due process, so that the former is not broader than the latter.[201] Presumably, the reference to due process in the principal legal systems of the world, rather than just in the United States, is an effort to avoid reducing "fair and equitable treatment" to no more than non-discriminatory treatment where national treatment does not meet minimum standards of customary international law.[202] Also, the link to due process effectively would buttress the United States' position in cases such as *Loewen*, where the allegations of denial of justice were effectively those of a denial of procedural due process, with the issue being whether the seriousness of the denial rises to the level of a violation of customary international law.

At the same time, the language "principal legal systems of the world" seems at least partly inconsistent with what the United States has argued in *Methanex*, that "fair and equitable treatment" does not incorporate broad concepts of "equity, fairness, due process and appropriate protection."[203] If these concepts are relevant to defining "fair and equitable treatment" and are found in principal legal systems of the world, it would seem difficult to argue at the same time that they would not also be relevant to determining the content of customary international law.

Article 10.4(3) of the Chile FTA essentially adopts paragraph three of the Interpretation, and eliminates the practice enunciated in *S.D. Myers* of using an NAFTA Article 1102 violation as the principal basis for finding an Article 1105 "fair and equitable treatment" violation.[204] This article could also help to avoid the bootstrapping engaged in by the *Metalclad* tribunal, where a violation of Article 1105 was used to support a finding of indirect expropriation under Article 1110. The new language also avoids a

201. 19 U.S.C. § 3802(b)(3)(E) (2002) ("[S]eeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process").

202. *See id.* (lacking a definition for "[p]rincipal legal systems of the world"). Presumably, arbitral tribunals would have to decide which nations and/or legal systems—common law, civil law, Islamic law, etc.—meet this criterion for inclusion.

203. *See* U.S. Response, *supra* note 193, at 6-7 (discussing the United States' argument that Methanex's interpretation is too broad).

204. *See* Chile FTA, *supra* note 1, art. 10.4(3).

possible argument by a claimant that the violation by a government of one of the provisions of a separate international agreement is in itself a denial of fair and equitable treatment.

In addition, Annex 10-A to the Chile FTA provides a classical definition of customary international law,[205] which possibly could have shortened the debate over the meaning of customary international law in such cases as *Mondev*, *ADF*, and *UPS* had this annex been included in NAFTA. However, the definition of customary international law in the Chile FTA fails to deal directly with the more critical question of the current scope of customary international law encountered when a tribunal attempts to define the reach of "fair and equitable treatment." Given that the United States has conceded that customary international law in this area has evolved since 1926, and continues to evolve, it would probably have been unwise for the United States to go beyond incorporating due process into the standard required for "fair and equitable treatment."

Finally, Article 10.21(3) of the Chile FTA provides subtle clarification to the scope of an Interpretation as previously explained in NAFTA Article 1131(2). Where Article 1131(2) of NAFTA provided that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a tribunal established under this section,"[206] Article 10.21(3) of the Chile FTA provides that "[a] decision of the Commission declaring its interpretation of a provision of this Agreement under Article 21.1 (Free Trade Commission) shall be binding on a tribunal established under this section, and any award must be consistent with that decision."[207] Referring to a "decision . . . declaring . . . interpretation" suggests that the interpretation exists and is just being pointed out by the Commission, perhaps making it more difficult (although by no means impossible) for a party to argue that the interpretation is an amendment. The final phrase clearly explains the meaning of "binding:" put simply, the tribunal has to follow the interpretation.

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205. *See id.*, Annex 10-A ("The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.4 and 10.9 results from a general and consistent practice of States that they follow from a sense of legal obligation.").

206. NAFTA, *supra* note 1, art. 1131(2).

207. Chile FTA, *supra* note 1, art. 10.21(3).

D. OTHER RELEVANT AGREEMENTS

The "Minimum Standard of Treatment" language of Article 15.5 of the Singapore FTA is essentially identical to that of the Chile FTA, and the language of Annex 10-A of the Chile FTA is identical in all substantive respects to an exchange of letters on customary international law that "shall form an integral part of the [United States - Chile Free Trade] Agreement."[208] The Canada - Chile FTA, negotiated seven years ago, does not depart from NAFTA in its "fair and equitable treatment" language, even with regard to adding a reference to "customary" before "international law."[209] This is not surprising, because the first decision under Chapter 11 (*Ethyl Corp. v. Canada*) was not rendered until 1998, and that determination was procedural.[210]

Negotiations towards a Free Trade Agreement of the Americas ("FTAA") began years before the negotiations of the Chile FTA and Singapore FTA, and are likely to continue in the future. The concept of an FTAA was agreed to in principle by the Presidents of the thirty-four nations of the Western Hemisphere (less Cuba) in Miami, Florida, in 1994.[211] A text, including investment provisions, was made public in July 3, 2001,[212] and revised versions were published in 2002 and 2003.[213] The almost completely bracketed text reflects

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208. Singapore FTA, *supra* note 1, art. 15.26.

209. Canada-Chile FTA, *supra* note 5, art. G-05.

210. Ethyl Corp. v. Canada, 38 I.L.M. 708 (1999) (NAFTA Arb. Trib. (June 24, 1998))

211. *See* Free Trade Area of the Americas, *First Summit of the Americas Declaration of Miami, December 19-11, 1994* (resolving to begin construction of the FTAA and conclude negotiations no later than 2005), *at* http://www.ftaa-alca.org/Summits/Miami/declara_e.asp (last visited Mar. 20, 2004).

212. *See* Press Release, Office of the U.S. Trade Representative, USTR Zoellick Says Publication of Free Trade Area of the Americas (FTAA) Text Will Help Explain Trade Benefits (July, 3, 2001) (relaying news of the published FTAA text as a result of a promise by those leaders involved in order to make negotiation a more "transparent and accessible" process), http://www.ustr.gov/regions/whemisphere/ftaa.shtml (last visited Feb. 9, 2004); Free Trade Area of the Americas, *First Draft Agreement*, http://www.ftaa-alca.org/FTAADraft/draft_e.asp (last visited Apr. 9, 2004).

213. Free Trade Area of the Americas, *Second Draft Agreement*, http://www.ftaa-alca.org/ftaadraft02/draft_e.asp (last visited Mar. 20, 2004); Free

proposals by many participating countries, and language proposed by the United States reflects developments in language similar to what is found in the Singapore FTA and Chile FTA. While the FTAA language represents the first major step in the evolution from NAFTA to the Chile FTA or Singapore FTA,[214] nothing in the FTAA context with regard to investment has been agreed upon, and the prospects of concluding a Free Trade Agreement of the Americas by the specified 2005 date seem problematic at best.[215]

Interestingly, the FTAA language on fair and equitable treatment reflected some evolution between the July 3, 2001 draft and the draft released October 31, 2002. The July 3, 2001, draft contained a single paragraph with suggested language reflecting many of the author nations' differences in views, but none of the significant updates found in the Chile FTA or Singapore FTA.[216] The 2002 draft

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Trade Area of the Americas, *Third Draft Agreement* [hereinafter *Third Draft Agreement*], http://www.ftaa-alca.org/FTAADraft03/Index_e.asp (last visited Feb. 15, 2004).

214. *See* 1994 U.S. Model BIT, *supra* note 96 (noting than an examination of the U.S. bilateral investment treaty program reflects no significant changes). The 1994 "model" U.S. BIT that remains on U.S. government websites, essentially a pre-NAFTA document, had not changed since 1994, and most recent U.S. BITs – all with developing countries – followed that model. *Id.* For example, the Treaty Between the Government of the United States of American and the Government of the Republic of El Salvador for the Encouragement of Reciprocal Protection of Investment do not deviate significantly from the 1994 model BIT. *See* Treaty Between the Government of the United States of American and the Government of the Republic of El Salvador for the Encouragement and Reciprocal Protection of Investment (Oct. 3, 1999), http://www.sice.oas.org/bits/usecu_e.asp (last visited Feb. 9, 2004) It is only very recently that a 2004 Model BIT has been promulgated, and this new version—reflecting the Chile and Singapore FTA changes—will remain in draft form until the interagency consultation process is complete.

215. *See* David Haskell and Rosella Brevetti, *Hemisphere Free Trade Talks Stall Again Over U.S.-Mercosur Agriculture Split,* 21 INT'L TRADE REP. 617 (Apr. 8, 2004) (reporting yet another postponement of FTAA negotiations due to disagreements between Brazil and the United States on services, investment, government procurement and government subsidies). At the time of this writing, the chances of completing negotiations toward a comprehensive FTAA, one that includes investor protection, are exceedingly dim.

216. *First Draft Agreement, supra* note 212, ch. on Investment, art. 6.

[1. [Each Party] [A Party] [Each Contracting Party] [shall accord] [shall ensure] [shall at all times ensure] [to the investments of the investors of another Party] [to the investors of another Party and their investments] [to the investments of investors of one of the Contracting Parties] [to the investments

contained minor changes to previous text, but also included three new paragraphs that appear to have been taken almost verbatim from the Interpretation.[217]

The November 2003 version incorporated additional minor changes, but also made significant further changes with the inclusion of language that mirrored the Chile FTA and Singapore FTA.[218] Based on the inclusion of these clauses to date, one can presume that when and if the negotiations of an FTAA with investment provisions are concluded, the United States will have succeeded in

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of investors of the other Contracting Parties, made in keeping with the present Agreement] [to covered investments of investors of the other Parties] [to the investments of another Contracting Party] [treatment in accordance with international law, including] fair and equitable treatment [within its territory] [as well as full protection and security] [as well as juridical protection and security within its territory] [in accordance with the norms and principles of international law] [in accordance with principles of international law] [and shall not impair their management, maintenance, use, enjoyment or disposal through unjustified or discriminatory measures] [and shall ensure that the exercise of the rights recognized herein are not impaired in practice.]].

Id.

217. *Second Draft Agreement*, *supra* note 213, ch. on Investment, art. 6.

[1. Each Party shall accord to investments of investors of another Party treatment in accordance with the customary international law standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. For greater certainty, the concepts of "fair and equitable treatment" and "full protection and security" mentioned in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.]

Id.

218. *See Third Draft Agreement*, *supra* note 213, ch. XVII, art. 9.

[The obligation in paragraph [9.1] to provide:

a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.]

Id.

incorporating language in the FTAA similar to the Chile FTA and the Singapore FTA for "fair and equitable treatment."[219]

V. EXPROPRIATION UNDER ARTICLE 1110 OF NAFTA

There is more than a little irony in the fact that nearly ten years after NAFTA entered into force, despite a great deal of concern expressed by the U.S. government, the Congress, and the public regarding NAFTA's expropriation provisions, only one NAFTA tribunal has found a violation of Article 1110. In that instance the taking was effectively direct and complete.[220] While several other tribunals have considered Article 1110 claims in the context of alleged indirect or "creeping" expropriations, explicitly or implicitly seeking compensation for partial takings, no tribunal has found in favor of such a claimant.[221]

Nevertheless, the concerns are not idle, and even those tribunals rejecting Article 1110 claims have struggled over the concept. Tribunals have made, and will continue to make, determinations on a

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219. *See* Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA),* 33 U. MIAMI INTER-AM. L. REV. 1, 51 (2002) (suggesting that the drafters admired Chile's similar goals and commitments towards advancing free and open trade and investment in the America's and around the world). However, it is evident that some, such as Brazil, do not share the Chilean – U.S. goals. S*ee supra* note 215 and accompanying text.

220. *See* Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 50-51 (2001) (ICSID (W. Bank) Aug. 30, 2000) (holding that the representations of the Mexican federal government as to its authority to authorize the hazardous waste site, and the absence of any basis for the municipality's denial of construction permits amounted to an indirect expropriation).

221. *See* Azinian v. United Mexican States, 39 I.L.M. 537, 555 (2000) (ICSID (W. Bank) Nov. 1, 1999) (holding that Mexico's annulment of a concession contract did not violate its obligations under NAFTA); *see also* Pope & Talbot, Inc., v. Canada, paras. 100-01 (NAFTA Arb. Trib. (Jun. 26, 2000)) (emphasizing that an incidental interference in an investment activity does not constitute expropriation), *available at* http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF (last visited Apr. 9, 2004); S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1440 (NAFTA Arb. Trib. (Nov. 13, 2000)) (holding that regulations are generally not considered as expropriation and constitute a lesser degree of interference); Feldman v. United Mexican States, 42 I.L.M. 625, 669 (2003) (ICSID (W. Bank) Dec. 16, 2002) (finding no expropriation).

case-by-case basis as to whether a government regulatory action is a legitimate or an indirect expropriation. Because of this approach, the outcome of an expropriation claim is probably more difficult to predict than with regard to any other provision of Chapter 11, including Article 1105.[222]

A. THE NAFTA CASES

The first NAFTA decision, *Azinian v. Mexico*, was an alleged taking of a concession contract for a waste disposal plant.[223] However, the tribunal never reached the expropriation issue. Rather, the tribunal observed that the claimants only challenged the actions of the municipality in terminating the concession contract, but had never criticized court decisions as being violations of NAFTA provisions.[224] The tribunal held that if the courts determined the contract to be invalid, and the claimant did not raise an objection to that court decision, there was, by definition, no contract to be expropriated.[225]

In *Pope & Talbot*, the claimant contended that Canada's lumber export control regime amounted to a taking of its property by reducing the firm's exports to its traditional U.S. market.[226] The claimant argued that Article 1110 went beyond customary international law, and that the inclusion of the phrase "tantamount to expropriation" allowed the consideration of creeping expropriation that included "non-discriminatory measures of general application which have the effect of substantially interfering with investments of investors of NAFTA Parties."[227] Canada argued that the right to sell lumber in the U.S. market was not a property right and that there had been no deprivation of the claimant's investment, given that it had continued to export lumber at all relevant times.[228] Moreover, "mere

222. *See supra* Part IV.

223. *See Azinian*, 39 I.L.M. at 547-48 (describing the essential chronology and the relief that claimant sought).

224. *Id.* at 552.

225. *Id.*

226. *Pope & Talbot, Inc.*, para. 81 (NAFTA Arb. Trib. (Jun. 26, 2000)).

227. *Id.* paras. 81, 84.

228. *Id.* para. 87.

interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required."[229] Canada also asserted that the term "tantamount" simply meant "equivalent," and did not expand Article 1110's coverage beyond creeping expropriation to cover regulatory action.[230] Despite Canada's arguments, the tribunal rejected Canada's more narrow interpretation of Article 1110, partially accepted the applicant's broader interpretation, but ultimately found no expropriatory action under Article 1110.[231] The lumber export control regime was considered not to be the "substantial deprivation" required for a finding of expropriation under Article 1110.[232] While the *Pope & Talbot* tribunal found that Canada's regulations did not amount to creeping expropriation, the tribunal did affirm that it might have considered regulations as creeping expropriation under different circumstances.[233]

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229. *Id.* paras. 87-88.

230. *See id.* para. 89 (noting also that "creeping expropriation" is not a term used in treaty drafting).

231. *See id.* para. 96 (holding that investor's access to the U.S. market was a property interest subject to protection under Article 1110). The tribunal also held that the scope of Article 1110 did cover a state's non-discriminatory regulatory powers, and that "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation." *Id.* para. 99.

> First of all, there is no allegation that the Investment [property] has been nationalized or that the [export control] Regime is confiscatory . . . . The investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained . . . . Canada does not supervise the work of the officers or employees of the Investment, does not take any part of the proceeds of company sales . . . does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions outing the Investor from full ownership and control of his investment.

Id. para. 100.

232. *See Pope & Talbot, Inc.*, paras. 100-02 (NAFTA Arb. Trib. (Jun. 26, 2000)) (considering it significant that Pope & Talbot "continued to export substantial quantities of softwood lumber to the United States and to earn substantial profits on those sales"). The tribunal further suggested that in determining "whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner." *Id.*

233. *Id.*

The *S.D. Myers* tribunal took a somewhat different approach. The claimant, in addition to charging violations of national treatment and fair and equitable treatment (on which claimant ultimately prevailed), contended that when Canada barred exports of hazardous waste to the firm's facilities in the United States it effectively took actions "tantamount to expropriation" under Article 1110.[234] The tribunal was not sympathetic, and opined that the term "expropriation" should be interpreted "in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases."[235] The tribunal then attempted to draw a distinction between deprivation of ownership rights and the "lesser interference" of regulation,[236] noting that "[t]he distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."[237] Moreover, expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights, although it would be appropriate to view even partial or temporary deprivation as amounting to expropriation in some circumstances.[238]

Ultimately, the tribunal decided that Canada's interference in S.D. Myers' business was temporary, and thus not a violation of Article 1110.[239] The NAFTA Parties likely found the tribunal's holding on expropriation unexceptionable, but were probably less sanguine about the willingness of the tribunal to consider a partial or temporary deprivation of economic rights in some circumstances as a violation of Article 1110.

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234. S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1422 (NAFTA Arb. Trib. (Nov. 13, 2000)).

235. *Id.* at 1440.

236. *See id.* (suggesting that expropriation tends to deprive individuals of ownership rights, while regulations do not, thereby reducing interference).

237. *Id.*

238. *See id.* (observing that the words "tantamount to expropriation" were designed to embrace the concept of creeping expropriation rather than to "expand the internationally accepted scope of the term expropriation").

239. *See id.* (opining that although testimony stated that SDMI had lost some competitive advantage, these facts did not support the conclusion that Canada's actions constituted an expropriation under Article 1110).

The decision in *Metalclad v. Mexico* also concerned an alleged expropriation.[240] Here, the firm obtained all the necessary federal permits for its hazardous waste disposal facility, and relied on the federal government's assurances that no state or municipal permits were required.[241] However, the municipality denied Metalclad permits purportedly required for Metalclad to legally operate its facility.[242] The tribunal found that this action exceeded the municipality's authority, "effectively and unlawfully prevented the Claimant's operation of the landfill,"[243] and amounted to an indirect expropriation.[244]

A British Columbia Supreme Court (trial court) reversed this finding because it was based in part on the finding of Mexico's obligation to provide transparency to Metalclad, an obligation not found in Section A of Chapter 11.[245] However, the breadth of the arbitral opinion raises the issue of compensation for partial takings,

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240. Metalclad Corp. v. United Mexican States, 40 I.L.M. 36, 37 (2001) (ICSID (W. Bank) Aug. 30, 2000).

241. *See id.* at 50 (noting tribunal's view that the Mexican Federal Government fully approved and endorsed the project, and opining—presumably under Mexican law—that the exclusive authority for approving and permitting a hazardous waste landfill rested with the federal government).

242. *See id.* (based on the municipality's assertion that the land fill would result in adverse environmental effects because of the geological unsuitability of the landfill site).

243. *Id.*

244. *Id.* According to the tribunal, indirect expropriation

> includes not only open, deliberate and acknowledged takings of property . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host state.

Id.

245. *United Mexican States v. Metalclad Corp.*, [2001] B.C.L.R. 3d 359 para. 72. The court also held that there was no evidence establishing that transparency had become part of customary international law, and that the arbitral decision's finding of an expropriation based in part on a lack of transparency was thus beyond the scope of arbitration under Chapter 11. *Id.*, paras. 68, 80; s*ee also* discussion *supra* Part IV (arbitral tribunal determining that Mexico's regulatory scheme was not adequately transparent and therefore was the key factor in the tribunal's finding of a denial of fair and equitable treatment).

which caused governments to become uncomfortable.[246] Ironically, as this discussion illustrates, the *Metalclad* tribunal effectively turned a relatively straight-forward direct takings case into a much more complex indirect taking. The governor of the State of San Luis de Potosi, in his its final effort to block the hazardous waste site, declared the concession area part of an "ecological preserve," which effectively barred the landfill operation permanently, and rendered Metalclad's investment worthless by permanently precluding operation of the landfill.[247] While the tribunal also found in passing that this was a "further ground for a finding of expropriation,"[248] the British Columbia Supreme Court relied solely upon this fleeting reference in affirming the tribunal's determination.[249] Arguably, the decision would have been more logical if the tribunal had simply found a direct (or indirect) expropriation as a result of the governor's action, and avoiding unnecessary speculation over "incidental interference," which was far from the situation here.[250]

In *Feldman v. Mexico,* the claimant alleged that a series of actions by the Mexican government constituted a "creeping" or indirect expropriation under Article 1110.[251] The allegations surrounded the claimant's efforts to obtain domestic excise tax rebates on cigarettes that the claimant purchased from retailers for export, essentially a "gray market" export scheme.[252] However, the tribunal declined to

246. Metalclad Corp. v. United Mexican States, 36, 50 (2001) (ICSID (W. Bank) Aug. 30, 2000) ("Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably- to-be-expected economic benefit of property . . . .").

247. *Id.* at 44.

248. *Id.*

249. United Mexican States v. Metalclad Corp, United Mexican States v. Metalclad Corp., [2001] B.C.L.R.3d 359 paras. *94, 95.*

250. *See Metalclad Corp.*, 40 I.L.M. at 51 (emphasizing that the tribunal considered that the implementation of the ecological degree would, in and of itself, constitute an act tantamount to expropriation).

251. Feldman v. United Mexican States, 42 I.L.M. 625, 642-43 (2003) (ICSID (W. Bank) Dec. 16, 2002).

252. *Id.* The tribunal was of the view NAFTA and customary international law does not require a state to permit a "gray market" scheme on the importation of cigarettes. *Id.* at 649.

find an expropriation, in part because Feldman's exporting business "remained under the complete control of the Claimant with the apparent right to engage in the exportation" of almost anything other than cigarettes.[253] It also suggested that "not every business problem experienced by a foreign investor is an expropriation under Article 1110."[254]

A decision on the merits in *Methanex* has potentially great importance in terms of shaping government and public policy with regard to the dividing line between a compensable taking and valid government regulation. However, developments since the initial filing make a decision based on a finding for or against expropriation unlikely.[255] Methanex's claim arose out of an Executive Order in which the State of California directed the removal of a gasoline additive, known as MTBE from all gasoline.[256] California appears to

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253. *Id.* at 648.

254. *Id.* at 648. A majority of the tribunal did find a violation by Mexico of the claimant's right to national treatment under Article 1102. *Id.* at 669.

255. *See* Kirkman, *supra* note 35, at 388-389 (summarizing Methanex's Second Amended Statement of claim focusing on alleged discrimination against Methanex by the California authorities).

256. *See* News Release, Methanex Corp., Methanex Seeks Damages Under NAFTA for California MTBE Ban (June 15, 1999), *at* http://www.methanex.com/investorcentre/newsreleases/nafta.pdf (last visited Feb. 9, 2004).

> MTBE (methyl tertiary butyl ether) is a gasoline component manufactured from methanol and isobutylene by oil refiners and chemical manufacturers. Since the 1970s, MTBE has been used as an affordable and effective source of octane, first as lead was phased-out of gasoline and subsequently as gasoline aromatics levels, including benzene, have been reduced. Since the mid-1990s, clean air legislation has required the use of oxygenates in gasoline (reformulated gasoline) to reduce tailpipe emissions. MTBE is the refiners' oxygenate of choice.

Id.; *see also* Notice of a Submission of a Claim to Arbitration, Methanex Corp. v. United States, 8 (Dec. 3, 1999) (arguing that the actions of the California State Legislature and the Governor of California constitute an interference with and taking of Methanex U.S.' and Fortier's business and investment), *available at* http://www.state.gov/documents/organization/8773.pdf (last visited Feb. 13, 2004). *But see* Exec. Order No. D-52-02 (Cal. 2002) (declaring an extension of one year past the December 31, 2002 deadline in order to avoid risking any problems with the availability of gasoline in California), http://www.governor.ca.gov/state/govsite/gov_htmlprint.jsp?BV_SessionID=@@@@2055905551.1076340555@@@@&BV_EngineID=eadcjiemlflfbemgcfkmchchi.0&sFilePath=%2fgovsite%2fexecutive_orders%2f20020314_eo_d_52_02.html

have decided to discontinue the use of MTBE because of a University of California at Davis study that concluded that "MTBE use did not significantly benefit air quality, but its use did cause significant risks and costs to water contamination."[257] Methanex conceded that MTBE was a pollutant of underground aquifers and that remediation (largely through better control of underground storage tanks) was needed, but also argued that there was no scientific proof that exposure to MTBE was dangerous to human health at "reasonably expected exposure levels,"[258] despite considerable research on the subject.[259] Of course, most of the alternatives to MTBE, such as ethanol, raise environmental or human health questions as well.

While Methanex does not manufacture MTBE,[260] Methanex claimed to be the world's largest producer and marketer of methanol

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&sTitle=Executive+Orders+++&sCatTitle=Executive+Orders&sSubCat=null&iOID=29861 (last visited Feb. 9, 2004).

257. *See* UAW Local 2209, *NAFTA's Investor "Rights": A Corporate Dream, A Citizen Nightmare* (mentioning Governor Gray Davis's statement, in reaction to the University of California at Davis study, that the use of MTBE poses a significant environmental risk), *at* http://www.local2209.org/NAFTA/default2.asp (last visited Feb. 9, 2004).

258. *See* Q&A BACKGROUND ON METHANEX'S NAFTA CLAIM AND MTBE 4 (2000) [hereinafter Q&A Background], *available at* http://www.methanex.com/newsroom/mtbe/naftaQ%26A.pdf (last visited Apr. 4, 2004).

259. *See* ARTURO KELLER ET AL., HEALTH AND ENVIRONMENTAL ASSESSMENT OF MTBE: REPORT TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF CALIFORNIA AS SPONSORED BY SB 521 38-40 (1998) (explaining the extensive research by the University of California at Davis which determined that the proposed Secondary Drinking Water Standard for MTBE would be adequate to protect human health), *available at* http://tsrtp.ucdavis.edu/mtberpt/vol1.pdf (last visited Feb. 12, 2004). However, MTBE imparts an undesirable odor to the water that is noticeable to consumers and appears to penetrate underground aquifers more quickly and pervasively than other chemicals found in motor fuels. *See* Q&A Background, *supra* note 258, at 5 (noting that according to Methanex claims, MTBE is more soluble than other gasoline additives and travels faster and farther); *see also* David Stout, *E.P.A. Urges Substitution of an Additive to Gasoline*, N.Y. TIMES, Mar. 21, 2000, at A20 (explaining that although MTBE may make the air cleaner, it can leak into wells). Even low concentrations of MTBE can cause water to smell bad and can make it dangerous to drink. *Id.*

260. *See* News Release, Methanex Corp., *supra* note 256 (explaining that Methanex is a major supplier of methanol to MTBE producers in the United States and elsewhere, but the only product that Methanex actually produces is methanol).

– the principal ingredient of MTBE.[261] On this basis, Methanex contended that California's actions were both directly and indirectly tantamount to expropriation where California's actions constituted a "substantial interference and taking of the business of Methanex US and Fortier, and a substantial interference and taking of Methanex's investment in Methanex US and Fortier."[262]

If the *Methanex* tribunal ever reaches the merits of Article 1110, the California ban may meet all of NAFTA's requirements (a non-discriminatory action, for a public purpose, in accordance with due process of law, and fair and equitable treatment), but that in itself may not excuse the United States, on behalf of California, from paying compensation if the tribunal interprets Article 1110 in an expansive manner and deems the action expropriatory.[263] However, such a ruling is not likely because the original complaint was dismissed on grounds that the connection between Methanex's operations and the MTBE ban was not the "legally significant" connection that would be required satisfy the "relating to" language in NAFTA, Article 1101.[264]

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261. *See* News Release, PR Newswire, Methanex Closes Kitimat Methanol Plant (July 4, 2000) (noting that the Kitimat Petrochemical Facility obtains approximately $90 million annually in methanol export revenue), *available at* http://www.findarticles.com/cf_dls/m4PRN/2000_July_4/63106791/p1/article.jhtml (last visited Feb. 9, 2004).

262. Notice of Arbitration at 8, Methanex Corporation v. United States (Dec. 3, 1999) *available at* http://www.state.gov/documents/organization/8773.pdf; *see also* Dennis Pfaff, *NAFTA Challenge to California*, S.F. DAILY J., July, 1999 (discussing Methanex's June 15, 1999 notice of intent to submit a formal claim filed with the U.S. State Department), http://www.globalexchange.org/campaigns/rulemakers/pfaff.html (last visited Apr. 9, 2004).

263. NAFTA, article 105 requires that the NAFTA Parties ensure that the provisions of NAFTA are observed by state and provincial governments. However, Section B of Chapter 11 provides only for "Settlement of Disputes Between a Party and Investors of Another Party." *Id.* arts. 1115-22.

264. Methanex v. United States, Preliminary Award on Jurisdiction, Aug. 7, 2002, para. 147. *See also* Claimant Methanex Corporation's Second Amended Statement of Claim, Methanex v. United States, para. 294 (asserting that Methanex's principal argument in the continuing proceeding is based on a denial of national treatment under Article 1102), *available at* http://www.state.gov/documents/organization/15035.pdf. That is, California, through its MTBE ban, sought to favor domestic producers of the competing

Overall, and in contrast to decisions under Article 1105, the record of NAFTA governments in defending expropriation claims is quite good. The only finding of an Article 1110 violation was in *Metalclad*, where there was a direct taking that eliminated the full value of the firm's investment.[265] Despite expansive language in several other decisions, there has been no finding of indirect expropriation, partial taking, or government regulation that crosses the line.[266]

B. PRESSURES FOR CHANGE

To date at least, the NAFTA Parties have not issued an interpretation under Article 1131(2) that relates to expropriation. It is unclear whether this is the result of a lack of sufficient concern, the inability to agree on specific language, or a combination of the two.[267] The measured approach to critiquing the NAFTA taken by Canadian and American officials emphasizes that the governments' concerns are with improper interpretation of NAFTA provisions. One American official has suggested, "[t]hat promise [of NAFTA as a model for the FTAA and other agreements], however, will only be fulfilled if Chapter 11 tribunals are successful in distinguishing valid claims under NAFTA and international law from claims beyond the bounds of what the Parties believed they were agreeing to when they

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gasoline additive, ethanol. *Id.* para. 298. California's actions, according to Methanex, thus violated NAFTA Article 1102. *Id.*

265. As noted earlier in this section, the tribunal's finding of expropriation based on a lack of transparency in the Mexican regulatory process was effectively vacated by a British Columbia supreme court; the remaining ground for expropriation, the conversion of Metalclad's property into an ecological preserve — a direct taking — stands. *See supra* notes 245-250 and accompanying text.

266. *See supra* notes 220-254 and accompanying text (analyzing the decisions in the cases of *Feldman*, *Metalclad*, *S.D. Myers, Inc.*, *Pope & Talbot*, and *Azinian*).

267. *See* Brereton, *supra* note 77, at 13-14 (mentioning that as recently as May 2002, a Canadian government official stated that Canadian officials were discussing a "clarification" and "will make recommendations to the Free Trade Commission should circumstances require"); SANFORD E. GAINES, NAFTA CHAPTER 11 AS A CHALLENGE TO ENVIRONMENTAL LAW MAKING – ONE VIEW FROM THE UNITED STATES 14 (2000) (noting that Canada requested Mexico and the United States to develop a consensus to help tribunals interpret provisions in Chapter 11 of NAFTA), *at* http://www.library.utoronto.ca/envireform/pdf/Conference/Gaines.pdf (last visited Feb. 12, 2004).

entered into the NAFTA."[268] A former Canadian trade minister echoed this sentiment, noting that "[t]here is also room for the NAFTA countries to make more explicit their understanding of the Chapter 11 provisions related to expropriation and compensation. . . [and] to ensure that the NAFTA expropriation provisions are interpreted in a manner consistent with the original intent of the parties."[269]

Non-governmental organizations have more freely expressed their criticisms of NAFTA. Environmental groups, for example, have been highly critical of the repeated use of investor protection provisions "to challenge the host country's environmental laws and administrative decisions," noting that, "the provisions designed to ensure security and predictability for the investors have created uncertainty and unpredictability for environmental regulators."[270] For some commentators, NAFTA's impact on restraining the governments of Canada, the United States, and Mexico from issuing effective regulations is most evident the environmental area, which has been the focus of several major Chapter 11 cases. "[A]lthough they dare not admit it publicly, environmental regulators are increasingly less prepared to consider new regulatory efforts, as legal analyses regularly suggest that they will be opening themselves to potentially expensive claims under NAFTA's investment provisions."[271]

Additionally, during the debate on TPA, a letter written by the Attorney General of California on behalf of the National Association of State Attorneys General expressed "concern over the inclusion of provisions in international trade agreements granting individual foreign investors new rights to challenge and seek compensation for state, local or federal government regulatory actions as

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268. Clodfelter, *supra* note 24, at 1283.

269. *Canada Seeks NAFTA Chapter 11, Improvements, Trade Minister Marchi Says,* 16 INT'L TRADE REP. 1634 (1999).

270. *See* Peter Menyasz, *NAFTA Chapter 11 Provisions Said to Threaten Environmental Protection Rights,* 16 INT'L TRADE REP. 1146 (1999) (quoting a report released on June 22, 1999 by the International Institute for Sustainable Development).

271. *See* Peter Manyasz, *Regulatory Chill of NAFTA Chapter 11 To be Avoided in FTAA, Lawyer Warns,* 18 INT'L TRADE REP. 626 (2001) (quoting Canadian trade attorney Howard Mann).

'expropriations.'"[272] The letter further suggested that the TPA bill be amended "to ensure that foreign investors receive no greater rights than those afforded U.S. citizens made under our constitutional guarantees."[273]

Similar concerns surfaced in Chile, even prior to the Chile FTA entering into force. One Chilean senator has complained that "[a]ny change that we make, any new law that we approve, those who have investments or are considering investing in Chile can take us to an international court, as has happened with Mexico and Canada in NAFTA, and make us pay many millions of dollars."[274]

At the same time, business groups urged the U.S. government to reject proposals that would narrow constraints on compensation for expropriation, particularly by exempting "regulatory takings" from compensation.[275] Since 1922, the U.S. Supreme Court has recognized that indirect or regulatory takings can constitute an expropriation for which compensation is available.[276] Business groups also argued that U.S. investors abroad should not receive less protection for their investments than foreign investors enjoy under U.S. law.[277]

Given all of this discussion, the TPA language on expropriation is relatively limited in scope. While the TPA language encourages the establishment of "standards for expropriation and compensation for

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272. Letter from Bill Lockyer, *supra* note 108.

273. *Id.*

274. *See* James Langman, *Chilean Lawmaker Says Free Trade Accord with U.S. Unconstitutional, Plans Challenge*, 26 INT'L ENV'T REP. 1100 (2003) (noting the intention of a Chilean lawmaker, Jorge Lavandaro, to file a complaint alleging that the USCFTA is unconstitutional and will restrict the issuance of environmental regulations).

275. *See* Letter from the presidents, supra note 106 at 2 (arguing that the mail goal of the U.S. government should be the protection of investors).

276. *See* Marianne Tyrrell, *Clarifying the Limits of Lucas: Reasserting the Value of Government Police Power Through Land Planning Over Property-Rights Interests in Tahoe-Sierra Preservation, Inc. v. Tahoe Regional Planning Agency*, 13 WIDENER L. J. 351, 353 (2003) (explaining that the theory of providing compensation for regulatory takings originated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

277. *See* Letter from the presidents, *supra* note 106, at 2 (arguing that the Bush administration should not "weaken the high standards of protection for investment guaranteed in NAFTA Chapter 11").

expropriation," these provisions must not afford foreign investors in the United States greater substantive protection than U.S. investors in the United States enjoy under "United States legal principles and practices."[278] In order to maintain these standards, the TPA directs the President to "establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice."[279]

C. EXPROPRIATION PROVISIONS OF THE UNITED STATES - CHILE FREE TRADE AGREEMENT

In fact, the expropriation provisions of the Chile FTA take into account the concerns expressed by governments and environmental groups regarding the distinction between compensable expropriation and valid regulation to an extraordinary degree, not so much in the text of the expropriation provision itself as in the explanatory language contained in an annex. Arguably, the only possibly significant textual change in the provision itself is the substitution of the NAFTA phrase "equivalent to expropriation or nationalization" for "tantamount to nationalization or expropriation," although this is not a substantive change. It provides:

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and (d) in accordance with due process of law and Article 15.5.1, 15.5.2, and 15.5.3.[280]

At least one NAFTA tribunal, *S.D. Myers,* suggested that the terms "tantamount" and "equivalent" were functionally the same.[281]

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278. 19 U.S.C. § 3802(b)(3)(D) (2002); *see also* discussion *supra* Part IV.

279. 19 U.S.C. § 3802(b)(3)(D) (2002).

280. Chile FTA, *supra* note 1, art. 10.9. Article 15.6 of the Singapore FTA is identical except for the cross-references to other articles. Singapore FTA, *supra* note 1, art. 15.6

281. *See* S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1440 (NAFTA Arb. Trib. (Nov. 13, 2000)) (mentioning that the Oxford English dictionary lists "tantamount" as meaning "equivalent").

Moreover, the Spanish language version of the Chile FTA uses the same phrase as the Spanish language version of NAFTA Article 1100, "*equivalente a la expropiación*."[282] Thus, the significance of this language change should not be over-emphasized. [283]

The significant changes related to expropriation appear in Annex 10-D to the Chile FTA.[284] This is a truly remarkable effort to provide detailed guidance to future tribunals seeking to distinguish

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282. *See* Tratado de Libre Comercio Chile – Estados Unidos, *supra* note 9, art. 10.9 (providing the Spanish language version of the Chile FTA).

283. *See S.D. Myers, Inc.*, 40 I.L.M. at 1440 (noting that the tribunal should not focus on technical considerations, but should instead examine the interests involved and the purpose and effect of the government action at issue).

284. Chile FTA, *supra* note 1, Annex 10-D. "Expropriation" provides:

The Parties confirm their shared understanding that:

1. Article 10.9(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.9(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.9(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Id. Annex 10-D is identical to the letter exchange on expropriation annexed to the Singapore FTA, which "shall form an integral part of the Agreement." Singapore FTA, *supra* note 1, art. 15.26(b).

compensable expropriations from valid government regulations.[285] It unquestionably will make it more difficult for a foreign investor to claim successfully that any sort of government regulatory action is an expropriation, particularly if the regulatory action has any environmental or public health nexus. First, Annex 10-D to the Chile FTA confirms the intent of the Parties that Article 10.9 not go beyond customary international law in its protection of investment.[286] Secondly, it seeks to limit expropriation claims to interference with tangible or intangible property rights.[287] This would appear to be designed to exclude from coverage some trade-based claims, perhaps including those which were the subject of NAFTA claims in *Pope & Talbot* and *S.D. Myers*.[288] Whether this will happen, given the breadth of definitions of such terms as "investment" in Article 10.27, remains to be seen.[289]

Third, indirect expropriation claims are highly circumscribed. Paragraph four of the Chile FTA Appendix 10-D stresses the need for "equivalency" of indirect takings to direct takings, absent only the formal transfer of title or outright seizure.[290] The agreement acknowledges that a case-by-case approach is necessary, but states that an adverse effect of government actions on an investment itself may be an indirect expropriation. An inquiry into whether government interference is reasonable includes the extent of government interference, the character of the government action, and the government's investment-based expectations.[291] This language,

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285. *See* CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, COMMENTS ON THE CHILE AND SINGAPORE FREE TRADE AGREEMENTS (2003) (mentioning that replacing the phrase "tantamount to" with "shared understanding" in an annex of the text provides guidance to arbitral panels that might limit expansive readings of the expropriation provision), *available at* http://www.citizenstrade.org/pdf/chile_sing_ciel.pdf (last visited Feb. 15, 2003).

286. *Id.*, para. 1.

287. *Id.*, para. 2.

288. *See* discussion *supra* Part V-A.

289. *See* Chile FTA, *supra* note 1, art. 10.27 (describing various forms of investment, such as an enterprise, shares, stocks, and other forms of equity participation in an enterprise, futures, options, other derivatives, and intellectual property rights).

290. Annex 10-D, *supra* note 284, para. 4.

291. Annex 10-D, *supra* note 284, para. 4(a)(i)-(iii).

including the requirement of a case-by-case analysis, obviously reflects U.S. takings law, specifically *Penn Central Transportation Co. v. City of New York*.[292]

Perhaps most significantly under the Chile FTA, non-discriminatory regulatory actions protecting "legitimate public welfare objectives, such as public health, safety, and the environment" are not actionable as expropriations "except in rare circumstances."[293] The tribunal's holding in *Methanex* resonates in this provision, and it also reflects the Trade Promotion Act objectives. As the USTR summary notes, "[p]ursuant to the directives of the Trade Promotion Act of 2002, the article is supplanted by an annex that elaborates on relevant principles of United States takings law and clarifies the relationship of indirect expropriations and domestic regulation."[294] The Chilean Ministry of Finance also highlighted the clarification of the definition of indirect expropriation in a presentation to the OECD.[295]

This language undoubtedly reflected current U.S. government views as to the proper scope not only of Article 10.9 of the Chile FTA, but also of Article 1110(1) of NAFTA, although it does not and could not modify the latter. As one might have expected, the drafters incorporated bracketed language substantially identical to the Chile FTA Annex 10-D in the latest draft FTAA.[296]

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292. 438 U.S. 104, 123-26 (1978) (indicating that the question of what constitutes a "taking" is a "problem of particularly difficulty" and setting out a framework for analysis adapted with minor variations in para. 4(a)(i)-(iii) of Annex 10-D of the Chile FTA).

293. *Id.*, Annex 10-D para. 4(b).

294. USTR Summary, *supra* note 197, at 4.

295. *See* Republic of Chile Ministry of Finance, Investment and Transparency Provisions in Chile's FTAs with the E.U. and U.S.A., Presentation before the OECD Committee on International Investment and Multinational Enterprises (Apr. 10, 2003) [hereinafter OECD Presentation] (comparing the NAFTA and Chile FTA investor-state dispute provisions), *available at* http://www.minhda.cl/castellano/contenido/otros/Doc_economicos/OECD_April03%20pres.pdf (last visited Feb. 18, 2004).

296. *See Third Draft Agreement*, *supra* note 213, Annex 10 (reflecting the parties' widely differing views as to investment protection provisions).

VI. OTHER SIGNIFICANT CHANGES

A. TRANSPARENCY IN INVESTMENT TRIBUNAL PROCEEDINGS

Of course, the changes in the investment provisions in the Chile FTA and Singapore FTA go beyond fair and equitable treatment and expropriation.[297] Among the most important evolutionary aspects of this chapter is the language relating to transparency and public access to the process. The relatively closed and secretive nature of the NAFTA Chapter 11 process has been a continuing concern of Canada and the United States, although this does not appear to be an issue for Mexico. The problem stems not so much from what NAFTA includes, but from what it excludes. Most significantly, NAFTA does not require the publication of awards, let alone of the pleadings, and there is no provision for public hearings.[298] Where Canada or the United States are respondent governments, either the government or the disputing investor may make the award public.[299] In the case of Mexico, the "applicable arbitration rules" apply to publication of the award.[300] Under the ICSID Additional Facility Rules, "the Secretariat shall not publish the award without the consent of the parties,"[301] so that both effectively must agree. The UNCITRAL Rules similarly state that an "award may be made public only with the consent of both parties."[302]

Over time, the Chapter 11 process has become somewhat more transparent. Insofar as the author is aware, all major interim awards, and all final awards, issued by NAFTA Chapter 11 have been made

297. *See supra* Parts IV & V.

298. NAFTA, *supra* note 1, Annex 1137.4.

299. *See id.* (outlining the procedures for making an award public if the disputing party is Canada or the United States).

300. *See id.* (discussing the publication of the award when Mexico is the disputing party).

301. INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID ADDITIONAL FACILITY RULES art. 53(3) (2003), *available at* http://www.worldbank.org/icsid/facility/facility.htm (last visited Feb. 11, 2004).

302. U.N. COMMISSION ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES art. 32(5) (1976), http://www.jus.uio.no/lm/un.arbitration.rules.1976/32 (last visited Feb. 11, 2004).

available to the public.[303] There do appear to be some minor or dormant cases in which the Notice of Intent to Submit a Claim to Arbitration has never been made public.[304]

NAFTA's opponents have focused on the lack of transparency of Chapter 11 proceedings. For example, Public Citizen has denounced NAFTA Chapter 11 in part because "closed-door arbitral bodies [are] dealing with significant issues of public policy."[305] The broadside continued:

> Indeed, there is no requirement that the public or Congress be given notice that a NAFTA Chapter 11 case has been filed against the United States, raising the specter that in addition to the cases we have been able to unearth, perhaps more cases have been filed and either have been quietly settled through negotiated payments or are still pending.[306]

The first significant effort of the NAFTA governments to deal with this problem occurred with the July 2001 release of the "Notes of Interpretation of Certain Chapter 11 Provisions," stating that:

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4) [referring to the Annex 1137.4 above-

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303. *See generally* NAFTALAW.ORG, *NAFTALAW.ORG*, http://www.naftalaw.org(last visited Apr. 9, 2004). It is worth noting, however, that none of the NAFTA government websites are as transparent as the private NAFTALAW.org.

304. NAFTALAW.ORG, *The Disputes: Canada* (displaying NAFTA disputes involving Canada and listing the legal documents that have been made public, and specifically noting the failure to post the notice of intent to file an arbitration claim in *Singa, S.A. v. Canada*), *at* http://www.naftalaw.org (last visited Feb. 11, 2004); *see also* NAFTALAW.ORG, *The Disputes: Mexico* (displaying NAFTA disputes involving Mexico and listing the legal documents that have been made public, and specifically noting the failure to post the notice of intent to file an arbitration claim in *Halchette Corp. v. Mexico*), *at* http://www.naftalaw.org (last visited Feb. 11, 2004).

305. *See* PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY 2-3 (2001) (using the lack of transparency as a basis to attack NAFTA's investor protections and arguing against the use of "Fast Track" for development of the proposed FTAA on the ground that this process obscures meaningful analysis of a proposed agreement's binding terms and the terms' legal, public health, and environmental implications), *available at* http://www.citizen.org/documents/ACF186.PDF (last visited Feb. 11, 2004).

306. *Id.* at 2.

> mentioned publication of award provision], nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal.[307]

The Congress, in enacting TPA, clearly indicated its belief that more transparency was appropriate. In the Trade Negotiating Objectives,[308] Congress directed the President to "ensur[e] that all requests for dispute settlement are promptly made public" along with submissions, findings, and decisions; to ensure that "all hearings are open to the public;" and to establish "a mechanism for acceptance of *amicus curiae* submissions from businesses, unions and non-governmental organizations."[309]

Prompted by the Trade Negotiating Objectives and the negotiation of the Singapore and Chile FTAs, the United States and Canada issued statements in October 2003 indicating that they would consent to NAFTA Chapter 11 hearings that were open to the public, so long as the hearings were subject to measures to protect confidential information, including confidential business information.[310] At the same time, the NAFTA Parties issued a statement requesting non-disputing party participation in Chapter 11 proceedings, similar to an

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307. *See* INTERPRETATION, *supra* note 29, Part A. In addition to this statement of principle, the Parties agreed "to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal . . ." subject to redaction of privileged or confidential business information, or to the withholding of information that falls under NAFTA articles 2102 and 2105, protecting, respectively, national security or privacy. *Id.* at A.2.b, A.3.

308. *See supra* notes 89-98 and accompanying text (discussing why Congress enacted TPA and how it incorporated the concerns of competing interest groups when drafting the Trade Negotiating Objectives).

309. 19 U.S.C. § 3802(b)(3)(H)(iii) (2002).

310. See Office of U.S. Trade Representative, Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003) (proclaiming that the United States will consent to open hearings in NAFTA Chapter 11 disputes to which it is a party and recommends that tribunals consult with disputing parties to determine appropriate logistical arrangements for these hearings), *available at* http://www.ustr.gov;/regions/whemisphere/nafta2003/statement_openhearings.pdf (last visited Feb. 11, 2004); Canadian Dept. of Foreign Affairs and Int'l Trade, *Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations* (affirming Canada's consent to NAFTA Chapter 11 disputes to which it is a party being open to the public), http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp (last visited Feb. 11, 2004).

amicus brief.[311] It remains to be seen how NAFTA will implement these procedural changes. As of the beginning of 2004, only one case, a jurisdictional hearing in *UPS v. Canada*, has been open to the public,[312] but it can be expected that many others will follow.

The Singapore and Chile FTAs reflect a faithful adherence by the USTR to the Trade Negotiating Objectives in this area. According to the USTR:

> The provisions [on transparency] ensure that the proceedings are transparent by requiring that all documents submitted to or issued by a tribunal be available to the public, except for certain business proprietary and other confidential information, and requiring that the proceedings be open to the public. The public is also able to give its views on the proceedings through a provision expressly enabling the tribunal to accept *amicus curiae* submissions.[313]

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311. *See* Free Trade Commission, *Statement of the Free Trade Commission on Non-disputing Party Participation* (stating that NAFTA tribunals have the discretion to accept written submissions from non-disputing parties and outlining the procedures for non-disputing parties to file submissions with a tribunal), http://www.ustr.gov/regions/whemisphere/nafta2003/statement-nondisputingparties.pdf (last visited Feb. 11, 2004); Press Release, Office of the U.S. Trade Representative, NAFTA Commission Meets, Announces New Transparency Measures (Oct. 7, 2003) (announcing the Free Trade Commission's measures to enhance public participation in the Chapter 11 dispute process, including the affirmation of the authority of tribunals to accept amicus curiae briefs, the endorsement of a standard Notice of Intent from to initiate arbitration, and the consent of the United States and Canada to opening Chapter 11 hearings to the public), *available at* http://www.ustr.gov/releases/2003/10/03-65.pdf (last visited Feb. 11, 2004).

312. *See* Press Release, Int'l Centre for Settlement of Investment Disputes, United Parcel Service of American, Inc. v. Government of Canada NAFTA/UNCITRAL Arbitration Rules Proceeding (Jul. 25, 2002) (stating that the parties in the *UPS v. Canada* NAFTA Chapter 11 dispute have agreed to make the hearing on the objections to jurisdiction open to the public), http://www.worldbank.org/icsid/ups.htm (last visited Feb. 11, 2004); Email from Meg Kinnear, Esq., Canadian Department Dep't of Foreign Affairs and International Int'l Trade, to David Gantz (Nov. 26, 2003) (confirming her belief that the *UPS* hearing was the only public Chapter 11 hearing to date) (on file with author).

313. USTR Summary, *supra* note 197, at 6.

In a presentation to the OECD, Chile noted the greater transparency provisions, including the acceptance of *amicus curiae* submissions and public hearings.[314]

The Chile FTA requires that the notices of intent and arbitration, pleadings, memorials and briefs, minutes or transcripts of hearings of the tribunal, orders, awards, and decisions, all be made public.[315] Likewise, hearings are to be opened to the public.[316] The agreement, however, does include suitable restrictions for protection of privileged or confidential business information.[317] The transparency provisions of the Singapore FTA are virtually identical.[318] The Chile FTA also gives the tribunal the authority, "to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."[319] The Singapore FTA only slightly narrows this scope, granting tribunals "the authority to accept and consider *amicus curiae* submissions from any persons and entities in the territories of the Parties and from interested persons and entities outside the territories of the Parties.[320] These changes are indeed a significant departure from the traditional veil of secrecy that normally surrounds investor-state arbitration.[321] The effect of a more open and transparent set of procedures on the public is difficult to predict with certainty, but one can speculate that public attendance

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314. *See* OECD Presentation, *supra* note 305, at 18 (comparing the transparency provisions between NAFTA and the Chile FTA).

315. *See* Chile FTA, *supra* note 1, art. 10.20(1).

316. *See id.* art. 10.20(2) (requiring the tribunal to make hearings open to the public and to consult with the disputing parties to determine the appropriate logistical arrangements).

317. *See id.* (stating that a disputing party that intends to use privileged or confidential information must advise the tribunal and the tribunal must make appropriate arrangements to protect the information from disclosure).

318. Singapore FTA, *supra* note 1, art. 15.20(1)-(2).

319. *See* Chile FTA, *supra* note 1, art. 10.19(4)(3).

320. Singapore FTA, *supra* note 1, art. 15.19(3).

321. *See, e.g.*, INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, RULES OF PROCEDURE FOR THE INSTITUTION OF CONCILIATION AND ARBITRATION PROCEEDINGS, R. 32(2) ("The Tribunal shall, decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.").

will peak early and decrease dramatically once it becomes clear that the level of excitement is normally quite low![322]

B. OTHER DIFFERENCES IN PROCESS AND JURISDICTION

There are a number of other changes in the Chile FTA, compared to NAFTA, which are mostly procedural or jurisdictional. These may be significant in expanding or restricting a U.S. foreign investor's recourse to international arbitration.[323] At the outset, it is notable that, while the specific options for arbitration (ICSID, ICSID Additional Facility, and UNCITRAL Rules) are the same under NAFTA, the Chile FTA, and the Singapore FTA, the available options are greater, because Chile and Singapore, unlike Mexico and Canada, are parties to the ICSID Convention.[324]

1. Explicit Coverage of Investment Authorizations and Agreements

The scope of the arbitration provisions in the Chile FTA (and the Singapore FTA) were explicitly expanded to include allegations of a breach of "an investment authorization" or "an investment agreement," in addition to a general breach of the obligations set out in Annex A of the investment chapter.[325] References to "investment

322. Speaking as a former arbitrator in several closed NAFTA arbitral hearings.

323. *See id.* (explaining that, under the Chile FTA, if an investor has submitted a claim to a court or administrative tribunal in Chile, the investor may not submit the claim to international arbitration). This provision is not included in the US-Singapore agreement. *Id.*

324. Int'l Centre for the Settlement of Investment Disputes, *List of Contracting States and Other Signatories of the Convention* (stating that Chile became a party on Oct. 24,1991, and that Singapore became a party on Nov. 13, 1968,) *available at* http://www.worldbank.org/icsid/constate/c-states-en.htm (last visited Feb. 13, 2004).

325. *See* Chile FTA, *supra* note 1, art. 10.15(1) (using the definitions from Art. article 10.27, which defines "investment agreement" as "a written agreement that takes effect at least two years after the date of entry into force of this Agreement between a national authority of a Party and a covered investment of an investor of the other Party: (a) that grants rights with respect to natural resources or other assets that a national authority controls; and (b) that the covered investment or the investor relies on in establishing or acquiring a covered investment."). An "investment authorization" is "an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party." *Id.* art 10.27. *See* Singapore FTA, *supra* note 1, arts. 15.15(1) and 15.1

authorizations" or "investment agreements" are absent in Chapter 11, but are found in standard U.S. bilateral investment treaties.[326] These additions resulted in an expansion of the NAFTA's governing law clauses.[327] In the Chile FTA, claims under the general provisions of section A and Annex 10-F of Chapter 10 are subject to this the same governing language.[328] However, where the claim is based on an investment agreement or investment authorization, "the tribunal must decide the issues in dispute in accordance with the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may agree."[329] "If the rules of law were not specified or otherwise agreed to, the tribunal must apply the law of the respondent (including its rules on the conflict of laws), the terms of the investment agreement or investment

(specifying the disputes which the claimant may submit to arbitration, including an investment authorization and an investment agreement).

326. *See, e.g.*, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment Treaty, Aug. 27, 1993, art. VI, S. TREATY DOC. NO. 103-15 (defining an investment dispute as a dispute between a Party and a national or company of the other Party arising out of or relating to: an investment agreement between the Party and such national or company, an investment authorization granted by the Party's foreign investment authority to such national or company, or an alleged breach of any right conferred or created by the treaty with respect to an investment), http://www.sice.oas.org/bits/usecu_e.asp

327. *See* NAFTA, *supra* note 1, art. 1131(1) (stipulating that "a Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law").

328. *See* Chile FTA, *supra* note 1, Annex 10-F, para. 2 (requiring Chile to accord the benefits of Chapter 10 to investors who have concluded investment contracts in Chile under the *Estatuto de la Inversion Extranjera, Decreto Ley 600 de 1974* (DL 600), i.e., "to amend the investment contract to make it consistent with Chile's obligations under this Agreement"). The investor is guaranteed the better of the treatment available under the Agreement or under the investment contract. *Id.* para. 1; *see also Chile Investment Review,* INT'L PRESS SELECTIONS, June 2002, at 11 (according to the Chilean Government, Foreign Investment Committee, DL 600 investments represent "a very high percentage of total U.S. investments in Chile"), *available at* http://www.chile.or.jp/oficom/foreign/Investment%20Review%20June%202002.pdf (last visited Feb. 15, 2004). According to the report, between January and April of 2002, Foreign Direct Investment ("FDI") in Chile reached $679 million, seventy-eight percent of which was channeled through the DL 600. *Id.* During those months, FDI came primarily from the U.S. (31.5%). *Id.*

329. *See* Chile FTA, *supra* note 1, art. 10.21(2).

authorization, such rules of or international laws as may be applicable, and this Agreement."[330] The Singapore FTA, in contrast, essentially mirrors the NAFTA choice of law language.[331]

In both the Chile FTA and Singapore FTA, as in NAFTA, "[a] decision of the [Free Trade] Commission declaring its interpretation of a provision of this Agreement . . . shall be binding on a tribunal established under this Section, and *any award must be consistent with that decision.*"[332] The italicized portion was likely added to both new agreements to avoid the types of questions raised by NAFTA tribunals in arbitrations such as *Pope & Talbot*, which had questioned whether a subsequently issued Interpretation was binding even on a tribunal whose case remained pending, and thought it appropriate to opine on whether the Interpretation was justified under the NAFTA language or was actually an *ultra vires* effort to amend NAFTA.[333] Under the Chile FTA and Singapore FTA, the tribunal must adhere to the Commission's decision.[334]

The incorporation of investment agreements and investment authorizations led to other departures from NAFTA in the Chile FTA, which nevertheless resemble language in older bilateral investment treaties. A tribunal's obligation to determine a claim based on an investment agreement, as discussed earlier, complicates the choice of law issues.[335] Under NAFTA, the applicable law is the agreement itself or international law.[336] Under the Chile FTA, as quoted above, the tribunal may be required to apply the law of the

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330. *See id.*

331. *See* Singapore FTA, *supra* note 1, art. 15.21.

332. Chile FTA, *supra* note 1, art. 10.21(3); Singapore FTA, *supra* note 1, art. 15.21(2); NAFTA, *supra* note 1, art. 1131(2).

333. *See* discussion *supra* Part IV.

334. Chile FTA, *supra* note 1, art. 10.21(3); *accord*, Singapore FTA, *supra* note 1, art. 15.21(2).

335. *See supra* notes 256-258 and accompanying text (explaining the expansion of the governing law clauses in the Chile FTA). When the claim is based on an investment agreement or investment authorization, the tribunal must decide the issues in dispute in accordance with the specified rules of law or as the disputing parties may agree. *Id.*

336. *See* NAFTA, *supra* note 1, art. 1130 (establishing the governing law for all investment disputes arising under the treaty).

investment agreement, which is often the national law of the host country.[337]

2. Parallel Actions and the "Fork in the Road"

Both NAFTA and the Chile FTA establish, as a general rule, a requirement that a claimant seeking to avail herself of the arbitration provisions of the investment chapter must waive, as a condition precedent, any existing or future recourse to national courts or administrative tribunals for the same dispute,[338] subject to an exception for injunctive relief not involving monetary damages.[339] The Singapore FTA contains language on this exception that is virtually identical to that in the Chile FTA.[340] These provisions are termed "no-U-turn" provisions,[341] because once the claimant abandons an existing national court action and then files a claim under Chapter 11, the claimant cannot return to the local courts, except where injunctive relief is at issue.[342] NAFTA treats Mexico differently, in part because it is the only NAFTA party that permits direct domestic court actions in domestic courts explicitly based on NAFTA violations. For Mexico, a foreign national claimant may

337. *See* Chile FTA, *supra* note 1, art. 10.21(2).

338. *See* NAFTA, *supra* note 1, art. 1121(1) (referring to claims brought by both the investor, and an enterprise of another Party that the investor owns or controls directly or indirectly); *see also* Chile FTA, *supra* note 1, art. 110.117(2) (stipulating that the claimant's consent to arbitration and waiver of the mentioned rights must be put in writing).

339. *See* NAFTA, *supra* note 1, art. 1121(1) (excepting "proceedings for injunctive, declaratory or other extraordinary relief"); *see also* Chile FTA, *supra* note 1, art. 11.17(3) (referring to an action seeking "interim injunctive relief" that "does not involve the payment of monetary damages," with the further proviso that "the action is brought for the sole purpose of preserving the claimant's or the enterprises' rights and interests during the pendency of the arbitration").

340. *See* Singapore FTA, *supra* note 1, art. 15.17(3).

341. *See* Clodfelter, *supra* note 24, at 1279 (distinguishing these provisions from "fork-in-the-road" provisions normally found in bilateral investment treaties, which state that once an investor has begun either domestic procedures or investor-state arbitration, she may not switch to the other).

342. *See id.* at 1279 n.1 (explaining that Chapter 11's "no u-turn" provisions apply to all three NAFTA parties, except that under a special annex, in certain respects they do not apply to claims for violations of NAFTA standards brought against Mexico).

allege a violation of Section A of Chapter 11 in a local court or administrative tribunal, or in a NAFTA tribunal, but not both.[343]

The Chile FTA language provides that no claim may be submitted to arbitration under Chapter 10 unless the notice of arbitration contains a written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to the events alleged to give rise to the claimed breach."[344] The Singapore FTA contains the same language.[345] Both NAFTA and the Chile FTA contemplate "interim measures" by the tribunal in identical language, but the relief under the Chile FTA and Singapore FTA is explicitly limited to preserving the rights of a disputing party, evidence in the possession or control of the disputing parties, or the tribunal's jurisdiction.[346] Significantly, tribunals cannot order attachments or enjoin applications of measures alleged to be breaches of the substantive obligations of the investment chapters.

In the Chile FTA, however, there is a full "fork in the road" provision applicable only to Chile, which also resembles NAFTA's Annex 1120.1, and is operationally similar to those in U.S. and other BITs.[347] The Chile FTA's provision is more detailed and explicit in

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343. *See* NAFTA, *supra* note 1, Annex 1120.1 (applying this stipulation to allegations of breaches of Subchapter A; or Article 1502(3)(a) (Monopolies and State Enterprises) or Article 1503(2) (State Enterprises) where the alleged breach pertains to the obligations of Subchapter A). If a Mexican firm owned or controlled by a foreign investor alleges a breach of Section A in a local court or administrative tribunal, "the investor may not allege the breach in an arbitration under this Section." *Id.*

344. Chile FTA, *supra* note 1, art. 10.17(2).

345. Singapore FTA, *supra* note1, art. 15.17(2).

346. *Compare* NAFTA, *supra* note 1, art. 1133 (including expansive language "such measures may include, but are not limited to" when referring to possible interim measures), *with* Chile FTA, *supra* note 1, art. 10.19(8), *and* Singapore FTA, *supra* note 1, art. 15.19(8) (excluding the expansive language incorporated in the NAFTA article).

347. *See, e.g.*, *Ronald S. Lauder and the Czech Republic*, ("Final Award" Sept. 3, 2001) (litigating under the BIT between the United States and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment), *at* http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc (last visited Feb. 10, 2004); *Lanco Int'l, Inc. v. Argentine Republic*, 40 I.L.M. 457, 458 ("Preliminary Decision on Jurisdiction of the Arbitral Tribunal" Dec. 8, 1998) (litigating under the BIT

requiring an election between the local courts and international arbitration under Chapter 10.[348] There is no parallel to this provision in the Singapore FTA.[349] This language was presumably included because Chile, like Mexico, but unlike the United States, would permit consideration of a claim alleging breach of Chapter 10 provisions by the local courts or administrative agencies. Where an American investor in Chile is operating under the general protections of Section A or under Annex 10-F, the investor may not seek arbitration under Chapter 10 if she has already alleged the breach of section A or Annex 10-F before a national court or administrative tribunal.[350] Also, a claim alleging a breach of an investment agreement or investment authorization before a court or administrative tribunal bars later recourse to arbitration.[351]

The election by the U.S. investor to submit the matter to the Chilean court or administrative tribunal is "definitive and the investor may not thereafter submit the claim to arbitration under Section B."[352] It is unclear what happens if the same substantive claim were to be raised in Chilean court charging violations of Chilean law which, if true, would be in violation of the FTA provisions (but not explicitly charging violation of Chapter 10), and

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between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment); *CMS Gas Transmission Co. and Arg.*, 42 I.L.M. 788, 789 ("Decision of the Tribunal on Objections to Jurisdiction" July 17, 2003) (litigating under the BIT between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment); *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Arg.* (Annulment Committee) (Jul. 3, 2002), 41 I.L.M. 1135, 1137 ("Decision on Annulment" July 3, 2002) (litigating under the France-Argentina BIT).

348. *See* Chile FTA, *supra* note 1, Annex 10-E (setting forth rules for the submission of claims to arbitration).

349. *See generally* Singapore FTA, supra note 1, art. 15.15 (setting forth the requirements for a submission of a claim to arbitration, which do no include a requirement that parties elect between local courts and international arbitration).

350. *See id.* Annex 10-E, para. 1(a), "Submission of a Claim to Arbitration – Chile" (indicating that the bar to arbitration arises when the American investor brings a claim in a court or administrative tribunal of Chile). By its explicit title and terms, the Annex applies only to actions in Chile, not to reciprocal situations involving a Chilean investor in the United States.

351. *See id.* Annex 10-E, para. 1(b) (noting that an American investor is also barred from submitting a claim under Section B of the Chile FTA) .

352. *Id.* Annex 10-E, para. 2.

also in an FTA investment arbitration charging violations of Chile's Chapter 10, Section A, obligations. This "fork in the road" provision, here and in the various bilateral investment treaties, is a significant narrowing of the investor's options, compared to the waiver approach, in that the waiver contemplates (through use of the word "continue") the discontinuance of already filed national court actions, while Annex 10-E requires an election.[353] Except for interim injunctive relief, once an action is filed in the national courts or administrative tribunals that choice is final – no waiver is possible.[354] It thus may compel a choice of forum decision at the outset of the dispute, at a time when the seriousness of the dispute may not be fully apparent to the investor.[355]

3. Requiring Jurisdictional and Competence Issues to be Decided at the Outset

Another significant innovation in the Chile FTA and Singapore FTA, compared to NAFTA, is an effort to force tribunals to decide jurisdictional issues at the outset of the dispute, rather than joining them to the merits. This innovation reflects language in the Trade Negotiating Objectives to incorporate "mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims."[356] Presumably, this reflected concerns of the United States (and, probably, the other NAFTA governments), of being required to defend claims on the merits that the governments believe should have been dismissed on procedural grounds.[357] While some cases

353. *See* Chile FTA, supra note 1, art. 10.17 (requiring parties to accompany claims for arbitration with waivers "of any right to initiate or continue before any administrative tribunal or court under the law of either Party . . . any proceeding with respect to the events alleged to give rise to the claimed breach") .

354. *See id.* art. 10.17(3) (reserving the right of parties to initiate or continue an action for injunctive relief "provided that the action is brought for the sole purpose of preserving the claimant's or enterprise's rights and interests during the pendency of the arbitration" even if the party then elects to submit a claim for FTA arbitration).

355. *See id.* (suggesting that a party may seek injunctive relief, without a risk of limiting decisions on the choice of forum).

356. 19 U.S.C. § 3802(b)(3)(G)(ii) (2002).

357. *See, e.g.*, Objection to Jurisdiction of Respondent United States of America, *Canfor Corp. v. United States*, at 32-34 (NAFTA Trib. 32 (Oct. 16,

have been dismissed on procedural or jurisdictional grounds, many others have resulted in decisions on the merits, or combining procedure and the merits, even if the governments ultimately prevailed.[358] There is at most, only one case decided under Chapter 11 that could reasonably be classified as frivolous, *Pope & Talbot*. This proceeding against Canada stretched on for almost four years, with five major decisions, numerous orders, and multiple hearings, and resulted in an award on the merits of only one peripheral claim of less than $500,000, with costs and attorneys' fee exceeding $7.5 million.[359] However, that tribunal did consider many questions relating to the scope of Chapter 11 provisions which had not been addressed previously.

In any event, the Chile FTA incorporates a mandatory procedure for dealing with preliminary competence and jurisdictional issues:

> Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within a tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim

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2003)) (arguing that the NAFTA tribunal should consider the jurisdictional issue as a preliminary matter before addressing the merits of the dispute), *available at* http://www.state.gov/documents/organization/25567.pdf (last visited Apr. 4, 2004).

358. *See, e.g.*, Azinian v. United Mexican States, 39 I.L.M. 537, 556 (2000) (ICSID (W. Bank) Nov. 1, 1999) (holding in favor of respondent United Mexican States but deciding not to award costs); *see also* ADF Group, Inc. v. United States, para. 9 (ICSID (W. Bank) Jan. 9, 2003) (holding in favor of the United States but rejecting the request for an award for costs); *see also* Mondev v. United States, 42 I.L.M. 85, 115-16 (2003) (ICSID (W. Bank) Oct. 11, 2002) (holding in favor of the United States but rejecting its request that petitioner Mondev pay costs and legal expenses on the basis that Mondev's claim was "unmeritorious and should never have been brought").

359. *See* David A. Gantz, *International Decisions: Pope & Talbot, Inc. v. Canada, NAFTA Chapter 11 Arbitration Tribunal, 2000-2002*, 97 AM. J. INT'L L. 937, 937-38 (2003) (noting that Pope & Talbot valued its claims at approximately $509 million). *See generally* Notice of Arbitration and Statement of Claim, *Canfor Corp. v. United States*, (NAFTA Trib. 18 (Jul. 9, 2003)) (setting forth the claimant's charges that the United States' imposition of antidumping and countervailing duties on U.S. imports of softwood lumber constitute violations of various obligations under NAFTA, Chapter 11, Section A), *available at* http://www.state.gov/documents/organization/13203.pdf (last visited Apr. 10, 2004).

> submitted is not a claim for which an award in favor of the claimant may be made under Article 10.25.[360]

Once the respondent government submits an objection to jurisdiction, the tribunal is required to suspend any proceedings on the merits, and decide the competence issue.[361] Where a request is made for decision on an expedited basis, a decision on the objection or objections must be issued within 150 days of the request (160 if there is a hearing, 180 if the tribunal shows "extraordinary cause").[362] The Chile FTA authorizes the tribunal "to award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection."[363] "In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment."[364]

Under the ICSID, ICSID Additional Facility, and UNCITRAL Arbitral Rules, the tribunals have relatively broad discretion in awarding costs and attorneys' fees.[365] Thus, the inclusion of this

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360. *See* Chile FTA, *supra* note 1, art. 10.19(4) (referring to art. 10.25 "Awards"); *see also* Singapore FTA, supra note 1, art. 15.19(4) (incorporating language similar to art. 10.19(4) of the Chile FTA).

361. *See* Chile FTA, *supra* note 1, art. 10.19(4) (noting also that a party does not waive an objection as to competence merely because the party did or did not raise it under this section).

362. *See id.*, arts. 10.19(4)-(5) (allowing the tribunal to delay the issuance of a decision to 160 days if there is a hearing and 180 days if the tribunal shows extraordinary cause).

363. *Id.* art. 10.19(6).

364. *Id.*

365. *See* ICSID ARB. R. 28 (permitting the tribunal, "unless otherwise agreed by the parties" to decide "the portion which each party shall pay. . . of the fees and expenses of the Tribunal and the charges for use of the facilities of the Centre. . ."), http://www.worldbank.org/icsid/basicdoc/partF-chap03.htm#r28 (last visited Feb. 10, 2004). There is also a reference to "costs reasonably incurred or borne by [each party] in the proceeding. . ." *Id.*; *see also* ICSID ARBITRATION (ADDITIONAL FACILITY) R. 58 (providing that "unless the parties otherwise agree, the Tribunal shall decided how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne"), http://www.worldbank.org/icsid/facility/partD-chap10.htm#a58 (last visited Feb.

language presumably is designed to discourage frivolous claims, although it could apply equally to a respondent government raising frivolous objections.[366] It seems intended to encourage tribunals to support this objective when exercising their discretion over costs and attorneys' fees, as the U.S. Congress intended to accomplish with Rule 11 of the Federal Rules of Civil Procedure many decades ago.[367]

10, 2004); UNCITRAL ARB. R., art. 38(e) (illustrating that unlike the ICSID rules, these rules specifically mention the "costs of legal representation and assistance" along with other costs), http://www.jus.uio.no/lm/un.arbitration.rules.1976/38 (last visited Apr. 9, 2004). The tribunal had discretion here, as under ICSID, as to how to determine or apportion those costs. *Id.*

366. *See* UNCITRAL ARB. R., art. 38(e) (permitting the arbitral tribunal to include in an award costs of legal representation of the successful party, regardless of whether the successful party is a claimant, respondent, government, or private entity).

367. *See* Marguerite L. Butler, *Rule 11- Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, 687-88 (2002) (explaining that one motivation behind the adoption of Rule 11 is to prevent litigants from wasting court resources in filing frivolous claims); *see also* Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1037-43 (1999) (questioning whether the rule is actually successful in deterring frivolous claims). Rule 11 states:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or if specifically so identified, are reasonably based on a lack of information or belief).
>
> FED. R. CIV. P. 11

4. Consideration of Appellate Review Mechanism

Finally, it is notable that the Chile FTA and Singapore FTA reflect the possibility, at least, of establishing some sort of appellate mechanism to review arbitral awards under the agreements.[368] Thus, in the Chile FTA, "[w]ithin three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism."[369] This language, again, reflects a phrase in TPA legislation calling for, in future trade agreements, "an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements."[370]

There is no such mechanism applicable to NAFTA. Rather, review of arbitral decisions under NAFTA are subject to the hit or miss proposition of an action to "revise, set aside or annul the award" in the courts of the place or "situs" of the arbitration.[371] To date, there have been three challenges to NAFTA arbitral decisions, all in Canadian courts. As noted earlier a British Columbia Supreme Court partially setting aside the arbitral decision in *Metalclad*.[372] Reviewing courts in Ontario have affirmed the NAFTA tribunal decisions in

368. *See* Letter from George Yeo on the Possibility of a Bilateral Appellate Mechanism, Minister for Trade and Industry of Singapore, to Robert Zoellick, U.S. Trade Representative (May 6, 2003) (agreeing that the future establishment of an appellate body will be "treated as an integral part of the agreement"), *available at* http://www.ustr.gov/new/fta/Singapore/final/15app.pdf (last visited Feb. 14, 2004).

369. Chile FTA, *supra* note 1, Annex 10-H.

370. 19 U.S.C. § 3802(b)(3)(G)(iv)(4) (2002).

371. NAFTA, *supra* note 1, art. 1136(3)(b)(i); *see also* Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 374-75 (2003) (explaining that although Rule 52 of the ICSID Arbitration Rules provides for review by an ICSID "Annulment Committee," these rules are not available for use by the NAFTA Parties because neither Mexico nor Canada are parties to the ICSID Convention). The authors also discuss the review process, with particular focus on *Metalclad*.

372. *See* United Mexican States v. Metalclad Corp. [2001] B.C.L.R. 359, discussed *infra* Part V.A.

S.D. Myers and *Feldman.*[373] Given that these reviews are taking place before different courts in the same country, under possibly different standards of review, and will likely occur in other courts in other countries in the future, the desirability of a more consistent review mechanism is obvious, even if creating a mutually agreeable one may be difficult.[374] The language in the Chile FTA and Singapore FTA is thus a useful first step in the right direction, although it may make more sense to create a multilateral review mechanism in lieu of a separate mechanism for each FTA negotiated by the United States.

CONCLUSIONS

If one seeks to ascertain the views of the United States Government regarding the interpretation of Chapter 11, by NAFTA tribunals, one needs to look no further than the parallel provisions of the Chile FTA, and the very similar Singapore FTA. The precise

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373. *See* Canada v. S.D. Myers, [2004] FC 38, para. 42 (Can.) (rejecting a jurisdictional challenge based on Canada's allegation that there was no "investment" by S.D. Myers, in a very formalistic approach, and holding that Canada effectively waived its right to submit the issue as "jurisdictional" challenge by failing to label it as such), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/ ReasonsforOrder.pdf (last visited Apr. 23, 2004). The federal court sitting in Ontario also concluded that Canadian law does not permit judicial review of an arbitral decision if the decision is based on an error of law or an erroneous finding of fact, if the arbitral decision itself is within the jurisdiction of the Tribunal." *Id.*; *see also* United Mexican States v. Feldman, No. 03-CV-23500 at paras. 77, 87 (Sup. Ct. Ontario Dec. 3, 2003) (dismissing the challenge to the NAFTA tribunal, and affording the tribunal a high degree of deference: "In my view, a high level of deference should be accorded to the Tribunal, especially in cases where the Appellant Mexico is in reality challenging a finding of fact. The panel who has heard the evidence is best able to determine issues or credibility, reliability and onus of proof") (on file with author). The court also indicated that the public policy exception to enforcement should be invoked only when the award "must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the arbitral Tribunal." *Id.* The Mexican government has appealed this decision.

374. *See* William S. Dodge, *International Decision: Metalclad Corporation v. Mexico*, 95 AM. J. INT'L L. 910, 918-19 (2001) (suggesting the need for an appellate body to review NAFTA Chapter 11 awards and urging that the establishment of an appellate review mechanism for NAFTA Chapter 11 cases has additional benefits, including neutrality in review of awards and an opportunity for review by a trier of fact with greater expertise on questions of international law than typically found in municipal courts).

impact of these changes must necessarily await a decision or two under these agreements or others negotiated with similar provisions, a legal process which is likely to require several years. Nevertheless, one can predict with reasonable confidence that the tribunals convened under these agreements will treat some key issues differently from the way in which at least some tribunals have treated them under NAFTA Chapter 11.

There is no doubt that the United States government intended to weaken investor protection in the Chile FTA, Singapore FTA, and subsequent FTAs and BITs with similar investment protections. The concern was with Congress, public critics and possible future foreign investor actions against the United States, far more than with the need to protect U.S. investors abroad, even though the likelihood of actions against the United States by investors of these nations is miniscule compared to the very real risks for U.S. investors in some of those states. As the Environmental Review of the U.S.-Chile FTA states:

> In our view, these provisions [in the FTA's investment chapter] are significant improvements and further reduce the possibility of a successful challenge under the investment provisions to an environmental law or regulation. These provisions should help alleviate public concerns with some arbitral proceedings that have been brought under the investment provisions of the NAFTA and concerns that arbitral tribunals may adopt interpretations that go beyond the substantive rights contained under U.S. law.[375]

The Chile FTA and Singapore FTA, and others that have incorporated similar provisions,[376] are, not surprisingly, unpopular with the business community. Their representatives recently complained that "adapting the model BIT to the investment chapters of recent FTAs serves only to perpetuate a downward trend in protection for U.S. investors, while their European competitors

375. OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINAL ENVIRONMENTAL REVIEW OF THE U.S. – CHILE FREE TRADE AGREEMENT 31 (Jun. 2003), *available at* http://www.ustr.gov/environment/tpa/chile-environment.pdf (last visited Apr. 23, 2004).

376. *See supra* notes 208-219 and accompanying text.

continue to benefit from BITs that now set the standard for investor protection."[377]

How are these controversial new provisions likely to affect investment arbitrations? First, they are likely to limit violations of fair and equitable treatment to the relatively high standard imposed by customary international law, but a customary international law that reflects evolution, including the influence of a large body of BITs, and the growing jurisprudence of arbitral decisions rendered under Chapter 11 and the bilateral BITs.[378] Secondly, when reviewing alleged expropriations based on government regulatory action, such tribunals are likely to impose a high burden of proof to overcome the strong presumption in the annexes that regulatory actions are not expropriatory.[379] It will be particularly interesting to see whether foreign governments, and their creative attorneys, are tempted to use Annex 10-D of the Chile FTA (excluding most regulatory actions from treatment as indirect expropriation), as a virtual roadmap to uncompensated regulatory takings.

More generally, arbitral tribunals appointed under these new FTA and BIT provisions may face the need to consider and analyze the U.S. (and other national) legal principles incorporated in minimum standard of treatment and expropriation provisions, even though the

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377. Report of the Advisory Committee on International Economic Policy Regarding the Draft Modeal Bilateral Investment Treaty at 2 (Feb. 11, 2004) (nothing that the investor representatives on the Advisory Committee favored the 1994 BIT with provisions similar to those in NAFTA Chapter 11, and opining that "The 1994 model BIT offers strong protections against the substantial risks that face U.S. investors abroad, as demonstrated by ten years of case law, and it continues to reflect modern international law and investment practice") (on file with author). The Report reflects that fact that members of environmental and labor organizations have considerably different views, believing that "even with the new provisions, the draft model BIT fails to protect adequately the authority of governments to adopt and maintain measures that protect important public interests." *Id.*

378. *See* Chile FTA, *supra* note 1, arts. 10.4(1)-(2) (adopting the customary international law minimum standard of treatment as the minimum standard of treatment afforded to covered investments to ensure fair and equitable treatment as limited in that provision).

379. This is particularly true with regard to the Chile FTA, Annex 10-D(4)(b) (stating that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives . . . do not constitute indirect expropriations").

governing law remains the agreement and international law. Further, there remains an inherent conflict between the effort to limit the protection of an investor (in the United States) to what is provided under domestic law— extensive though that protection may be—and the parallel effort to maintain that foreign investors world-wide are subject to minimum standards established under customary international law.

It will also be interesting to see whether claimants in future NAFTA Chapter 11 proceedings (or in proceedings under bilateral investment treaties) cite the Chile FTA and Singapore FTA language to support their own views of NAFTA's scope, effectively arguing that if the NAFTA parties had meant what is said in the Chile FTA provisions, that is what they would have said in NAFTA. Since neither customary international law, nor fair and equitable treatment, nor regulatory takings, are defined under either NAFTA nor most existing bilateral investment treaties, it seems likely that the language of Annex 10-A of the Chile FTA (defining "customary international law) and Annex 10-D (on expropriation and regulatory takings) will be cited as support for the conclusion that NAFTA's protections for foreign investors are broader than those afforded in the Chile and Singapore agreements, and should be interpreted as such to favor the interests of foreign investors.

A more transparent arbitral process may well quiet some of the fears of legitimate critics of the lack of transparency of the NAFTA Chapter 11 arbitral process, simply by providing an opportunity to monitor the proceedings, and at least a chance of participating directly through the *amicus curiae* process.[380] Non-amendment modifications to the NAFTA procedures should have the same effect, particularly if Mexico can be convinced to introduce the same level of transparency as the other two NAFTA governments.

It is apparent that procedural changes, particularly those requiring a preliminary round on jurisdiction and competence issues, with the threat of payment of costs and attorneys' fees if the moving party is unsuccessful, are designed to and may well have a chilling effect on

380. *See* USTR Summary, *supra* note 197, at 6 (describing provisions designed to ensure transparency, and also including a requirement that all documents submitted to, or issued by, a tribunal be available to the public).

new claims, particularly for claimants without deep pockets.[381] However, somewhat more lawyer discipline, private and government alike, would no doubt be welcome both to policy makers and arbitral tribunals. The impact of the other changes, including the explicit coverage of "investment authorizations" and "investment agreements," and the incorporation of "fork in the road" provisions, are likely to be less significant in general but important in specific cases, and will require that actual and potential claimants and their counsel be fully aware of the pitfalls.

Taken as a whole, Chapter 10 of the Chile FTA and Chapter 15 of the Singapore FTA— and the many FTAs and BITs that are now or soon will be incorporating thse same provisions-- represent a significantly different investment protection package. While it may quell some of the NAFTA, Chapter 11 critics who are concerned about the United States as respondent host government, it is at least a partial retreat from the high level of protection afforded to investors in the past under the more traditional U.S. and other bilateral investment treaties and under NAFTA, Chapter 11.

381. *See* Hirt, *supra* note 367, at 1010-11 (discussing the effects and criticism of a similar provision, Rule 11, on claims in the United States including the disincentive for claimants to pursue novel legal contentions).