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**Taking Stock of NAFTA Chapter 11 In Its Tenth Year--An Interim Sketch of  
Selected Themes, Issues and Methods**

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I. INTRODUCTION

The North American Free Trade Agreement (NAFTA) came into force on January 1, 1994.<sup>1</sup> Its Eleventh Chapter establishes substantive guarantees<sup>2</sup> and an arbitral mechanism by which qualifying investors may seek damages for breach of those guarantees. The much-discussed investor-state arbitration apparatus<sup>3</sup> was first invoked in September of 1996,<sup>4</sup> and since

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<sup>1</sup>North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 2203, 32 I.L.M. 605, 702 [hereinafter NAFTA]. NAFTA was brought into U.S. law by the NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (codified in 19 U.S.C. §§ 3301-3473 (1993)).

<sup>2</sup>Contained in Section A of Chapter 11, the substantive protections conferred resemble those found in modern Bilateral Investment Treaties (BIT)s. Among these guarantees are national and most favored nation treatments, *id.* arts. 1102, 1103, observance of the international minimum standard-including fair and equitable treatment, *id.* art. 1105, and full compensation in the event of expropriation. *Id.* art. 1110.

<sup>3</sup>The literature has grown appreciably as a result of Chapter 11. *See Bibliography of Selected Works on Chapter 11*, 17 (1) NEWS & NOTES INST. TRANSNAT'L ARB. 6 (Winter 2003) [hereinafter ITA Bibliography]. For general treatments of Chapter 11's dispute resolution regime, see Henri Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393 (2000); David A. Ganz, *Resolution of Investment Disputes Under the North American Free Trade Agreement*, 10 ARIZ. J. INT'L & COMP. L. 335 (1993); Robert Paterson, *A New Pandora's Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 77 (2000); Horacio G. Naón, *The Settlement of Investment Disputes Between States and Private Parties*, 1(1) J. WORLD INVEST. 59 (2000); Clyde C. Pearce & Jack Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311 (2000); Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993); Daniel M. Price, *Some Observations on Chapter 11 of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421 (2000) .

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then has been resorted to several times against each NAFTA state. Many cases have concluded. Others are nearing completion.<sup>5</sup> Though a mature jurisprudence has by no means emerged, substantive trends have been established and several of Chapter 11's distinctive features, strengths and weaknesses have been illuminated.

NAFTA's investor-state docket has generated predictably high levels of interest among international law scholars and practitioners. It has also sustained a remarkable collection of observers beyond specialist circles. Numerous critiques have issued from both groups, and reactions to NAFTA have prefigured much of the debate that will ensue in relation to its more ambitious proposed successor, the Free Trade Agreement of the Americas (FTAA).<sup>6</sup> In assessing Chapter 11's disputes regime, it is difficult to fully divorce substance from procedure. Accordingly, while the following interim appraisal of Chapter 11 is concerned primarily with the investor-state arbitration regime, that framework's impact on the substantive jurisprudence of NAFTA will also be treated, albeit not comprehensively.

Part II surveys elements of architecture and develops certain themes. Part III identifies emerging docket patterns. Part IV considers processes and sources that influence the formation of Chapter 11 jurisprudence. Part V discusses selected conceptions and misgivings that have

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<sup>4</sup> The proceeding was *Ethyl v. Canada*, which ended in settlement after the tribunal's unanimous award on jurisdiction rejected Canada's petition for dismissal. *Ethyl Corporation v. Canada, Award on Jurisdiction* (June 24, 1998), *reprinted in* 38 I.L.M. 708 (1999). [hereinafter *Ethyl Corp.*, *Award on Jurisdiction*]. Ethyl, Inc. was a Virginia Corporation that manufactured and distributed methylcyclopentadienyl manganese tricarbonyl (MMT), a fuel additive. Its wholly owned Ontario company operated fuel blending and processing facilities in Ontario. In 1995, a bill to ban import and inter-provincial distribution of MMT was introduced in Parliament. Before the measure became law, which it eventually did, the claimant had both issued its Article 1119 Intent to Claim and the claim itself. *See infra* note 54 and accompanying text. The claim alleged breaches of Articles 1102 (national treatment) and 1110 (expropriation). Canada's unsuccessful jurisdictional challenges relied in large measure on the claimant's premature initiation of arbitration. Having not prevailed on jurisdiction, Canada settled before an award on the merits was issued, paying Ethyl \$13 Million. *See* Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 47-48 n.32, 57-59 (2001); *See generally* Alan C. Swan, *Ethyl Corporation v. Canada, Award on Jurisdiction (Under NAFTA/UNCITRAL)* 94 AM. J. INT'L L. 159 (2000); Todd Weiler, *The Ethyl Arbitration: First of Its Kind and Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187 (2000).

<sup>5</sup>At year-end 2002, there were roughly 16 pending cases, distributed among the three respondent states. *See generally* <http://www.naftalaw.org> (comprehensive website collecting most essential Chapter 11 docket-related materials).

<sup>6</sup> *See generally* [http://www.ftaa-alca.org/alca\\_easp](http://www.ftaa-alca.org/alca_easp).

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recurred concerning Chapter 11. Part VI considers the mechanisms intended to exert control on Chapter 11 awards and introduces proposals for refining the associated framework. In general, this essay concludes that the existing arrangement is neither fundamentally flawed nor entirely free of troubling features.

### II. AN OVERVIEW OF NAFTA'S INVESTOR-STATE ARBITRAL MECHANISM—SOME BROAD THEMES

#### A. *Claim Processing Architecture--A Patchwork of Old And New*

##### 1. In General

Chapter 11, Section B, sets forth with specificity rules conditioning an investor's resort to arbitration, the character and mandate of the arbitral tribunals that are to serve, and numerous related matters.<sup>7</sup> It also relies upon several generally well-tested texts and regimes, including three rules formulae and three arbitral conventions. These texts perform their ordinary function, subject to the specific ways of proceeding agreed by the NAFTA states and set forth in Section B. Domestic arbitration statutes too play a role, though as a practical matter it is one largely restricted to the post-award setting.<sup>8</sup>

Private lawsuits in one NAFTA state against other NAFTA states have been explicitly foreclosed by the NAFTA and associated statutes of implementation.<sup>9</sup> Some flexibility is nevertheless

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<sup>7</sup>NAFTA's arbitral regime is established in Section B of Chapter 11. Section A contains substantive investor protections. Section C contains definitions bearing on Sections A and B.

<sup>8</sup>Under the present ratification patterns, the ICSID Convention (with its internal annulment procedure) does not apply to Chapter 11 disputes. Consequently, attacks on Chapter 11 awards occur in the courts of the place of arbitration, which apply local grounds for vacatur. Two such set-aside actions have been instituted, one by Mexico, one by Canada – both in Canadian courts. Similarly, since ICSID Convention arbitration cannot yet be elected, global enforcement of Chapter 11 awards depends primarily on the New York Convention, in the manner of ordinary commercial awards. *See generally* Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19(3) J. INT'L ARB. 185 (2002) [hereinafter Coe, *Achilles Heel*].

<sup>9</sup>Article 2021 of the NAFTA states that “[n]o Party may provide a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement.” NAFTA, *supra* note 1, art. 2021. The United States and Canada have codified Article 2021. *See* 19 U.S.C.A. § 3312(c) (West 2003) and North American Free Trade Implementation Act, S.C 1993, cl. 44, § 6(2); *and see* J. Christopher Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 450 (2002)(discussing Canadian law related to the § 6(2) limitation).

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afforded claimants under the arbitral remedy to which they are confined in the form of a choice of formats. Section B contemplates that in many instances the aggrieved investor may designate either UNCITRAL Rules arbitration or one of two ICSID<sup>10</sup> formats<sup>11</sup> (the type and availability depending on the ICSID Convention status of the states involved). The present range of options however is not as diverse as one might imagine. Because neither Mexico nor Canada is yet a member of the ICSID Convention,<sup>12</sup> only the alternative of ICSID's Additional Facility has been available, and then only in the common circumstance in which the United States is either the claimant's state of nationality or is the respondent.<sup>13</sup>

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<sup>10</sup>The International Centre for the Settlement of Investment Disputes [hereinafter ICSID]. ICSID is a creature of treaty. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar 18, 1965, 17 U.S.T. 1270, T.I.A.S. No 6638 [hereinafter ICSID Convention].

<sup>11</sup> NAFTA, *supra* note 1, art. 1120.

<sup>12</sup>In addition to establishing ICSID (the Centre), *see supra* note 10, the Convention sets forth a detailed arbitral regime designed, in conjunction with the Centre's arbitration rule formulae, to operate independently of national legal systems. *See generally* Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 330 (1972 II).

<sup>13</sup>That is, strictly speaking no ICSID format exists to accommodate investment disputes where neither state implicated is an ICSID Convention party. The restriction means that, at present, Canadian and Mexican investors are limited to UNCITRAL arbitration where, respectively, Mexico or Canada are the respondent states. *See* Arbitration (Additional Facility) Rules, art. 2 (1979) (revised 2002), *available at* [http://www.worldbank.org/icsid/ICSID\\_Addl\\_English.pdf](http://www.worldbank.org/icsid/ICSID_Addl_English.pdf) [hereinafter Additional Facility Rules]. There are indications, however, that ICSID is prepared to help administer NAFTA arbitrations under the UNCITRAL Rules, which would mitigate the effects of limited treaty membership. When another NAFTA state ratifies the ICSID Convention, the Chapter 11 docket will become potentially more diverse; proceedings under three regimes -- the two ICSID offerings and UNCITRAL Rules arbitration-- will be possible. There will, in that case, invariably be a choice of regimes. Assuming, for example, that Canada ratifies the Convention, a Canadian investor seeking arbitration with the United States may designate either UNCITRAL Rules or ICSID arbitration (just as a U.S. investor could against Canada). A Mexican investor bringing claims against the United States or Canada, by contrast, would be able to proceed under ICSID's Additional Facility, or under the UNCITRAL Rules, but not under the Convention (assuming Mexico remained a non-ICSID Convention Party).

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2. Section B—The Basic Sequence and Departures Therefrom

The procedures detailed in Section B of Chapter 11, though somewhat intricate, contemplate a scenario in which notice and cooling off periods induce more deliberate claims than might otherwise occur. An uncontroversial marshaling of a claim would unfold as follows: Upon ascertaining that an apparent breach of Chapter 11 by its NAFTA Party host had injured its investment, the investor (a national of another NAFTA state) would pursue redress through consultation with host state officials<sup>14</sup> and, upon the failure of such efforts, would notify the host state of its intention to bring a Chapter 11 claim<sup>15</sup> (Notice of Intent or Notice). The Notice would contain specified information (including the provisions alleged to have been breached and the factual basis for the claim).<sup>16</sup> Thereafter, the arbitral claim could be filed, subject to three timing restraints. First, it would be submitted not sooner than 90 days from the date upon which the Notice of Intent<sup>17</sup> was delivered and, second, not sooner than six months after the occurrences prompting the claim.<sup>18</sup> Third, irrespective of when the Notice was given, the claim would not be filed later than 3 years from the date when the investor should have discovered the breach and injury.<sup>19</sup>

The claim would be filed in the manner set forth in the arbitral rules corresponding to the investor's choice of format (UNCITRAL or the applicable ICSID regime),<sup>20</sup> and would be accompanied by a written waiver and consent to arbitration.<sup>21</sup> The waiver would relinquish the investor's right "to initiate or continue" certain domestic proceedings "with respect to the measure...alleged to be a breach of [Chapter 11]."<sup>22</sup>

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<sup>14</sup> NAFTA, *supra* note 1, art. 1118.

<sup>15</sup> *Id.* art. 1119.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* art. 1120.

<sup>19</sup> *Id.* arts. 1116, 1117.

<sup>20</sup> *See supra* note 13.

<sup>21</sup> NAFTA, *supra* note 1, art. 1121(3).

<sup>22</sup> The waiver requirement applies to damage suits. Excepted therefore from the waiver requirement are "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." NAFTA, *supra* note 1, art. 1121(1)(b).

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Despite the prosaicness of the foregoing claim marshalling procedure, jurisdiction-related skirmishes have become commonplace, in part because claimants have deviated from the prescribed ordering and content set forth above. What should be the consequence of premature initiation of the process?<sup>23</sup> Is the waiver an element of jurisdiction or largely a formality?<sup>24</sup> These and numerous other questions of this type have regularly occupied tribunals as preliminary matters, a characteristic of Chapter 11 arbitration more fully discussed under C below.

### B. Chapter 11 Arbitration—A Hybrid

#### 1. Public and Private Features

Arbitration between states and private parties—“mixed” arbitration—of the kind sponsored by Chapter 11 has characteristics both of inter-state arbitration<sup>25</sup> and of private international commercial arbitration.<sup>26</sup> The similarities to the latter are readily apparent. Once underway, Chapter 11 arbitration follows the familiar pattern, ordinarily progressing through written and oral phases culminating in deliberations and the issuance of a written, reasoned award. Typically, three-arbitrator tribunals are formed by each party appointing one arbitrator; the disputants themselves (and not the party-appointed arbitrators) collaborate to designate the presiding arbitrator.<sup>27</sup> All arbitrators are expected to be independent.

As in standard contract-based arbitration, the tribunal enjoys wide discretion in the pursuit, admission and weighing of evidence, and appreciable latitude in the conduct of the proceedings in general.<sup>28</sup> In at least one critical respect, Chapter 11 arbitrators have been called

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<sup>23</sup> See *supra* note 4 and accompanying text.

<sup>24</sup> See *infra* note 54 and accompanying text.

<sup>25</sup> NAFTA Chapter 20 contemplates inter-state arbitration and sets forth a corresponding regime. See David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481 (2000).

<sup>26</sup>For similar reflections upon the Iran-U.S. Claims Tribunal, see David Caron, *The Nature of the Iran-U.S. Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J INT'L. L. 104, 154-155 (1990).

<sup>27</sup> NAFTA, *supra* note 1, art. 1123.

<sup>28</sup>See generally JACK J. COE, JR., *INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* chs. 9-10 (1997) [hereinafter COE, *PRINCIPLES AND PRACTICE*].

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upon to exercise their discretion with greater regularity than occurs in private international arbitration—in designating the place of arbitration (“place” in the juridical sense of arbitral seat). At present, like its private cousin, Chapter 11 arbitration attributes to the seat jurisdictional and applicable law consequences, particularly evident if an award is attacked.<sup>29</sup> Yet, no meaningful pre-dispute opportunity typically arises for the disputants to fix by agreement such details as the place of arbitration. After dispute arises, of course, agreement is difficult to reach for other reasons. Accordingly, tribunals, seemingly always, have designated the place of arbitration in Chapter 11 proceedings.<sup>30</sup>

Chapter 11’s variations from its private counterpart arise because one disputant is always a state<sup>31</sup>

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<sup>29</sup> See *infra* notes 286-302 and accompanying text.

<sup>30</sup> NAFTA Article 1130 provides that, subject to the contrary agreement of the disputing parties, the place of arbitration is to be in the territory of a NAFTA state that is also a New York Convention state, selected in accordance with whichever rule formulation governs. Under all potentially applicable rules, the tribunal may designate the place of arbitration when the parties fail to do so. Under the Additional Facility Rules, the tribunal is to consult with the parties before fixing a place. Additional Facility Rules, *supra* note 13, ch. IV, art. 20(1). Under article 16(1) of the UNCITRAL Rules, the tribunal is to have “regard to the circumstances of the arbitration.” With respect to designations of the place of arbitration, it has become common for tribunals, after hearing the parties, to weigh, with some variations, the factors listed in the UNCITRAL Notes on Organizing Arbitral Proceedings. See UNCITRAL Y.B., vol. XXVII: 1996, part 1, ¶¶ 11-54. Neutrality is not a NAFTA-mandated factor in the designation process, though in *Metalclad* - an Additional Facility proceeding between an American claimant and Mexico - the tribunal, citing neutrality considerations, selected Vancouver, B.C.; see also *Ethyl Corp. v. Canada*, Decision Regarding Place of Arbitration (Nov. 28, 1997) (tribunal considered UNCITRAL Notes’ ¶ 22 factors *and* neutrality in deciding upon Toronto) *available* at <http://www.naftalaw.org>.

<sup>31</sup> See, e.g., Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 313 (Julian D.M. Lew ed., 1987) (“[t]he presence of a state as a party to arbitral proceedings gives a particular colouration to the arbitral process [manifest in] ...a number of original issues.”); see generally PRINCIPLES AND PRACTICE, *supra* note 28, Ch 13. Questions and topics regularly arise in Chapter 11 that would not likely be involved in a commercial arbitration not involving a state. To mention but a few: which acts with arguably private elements can be attributed to a state for assessing responsibility? See generally *Loewen Group, Inc. v. United States*, Final Award (June 26, 2003), [hereinafter *Loewen*, Final Award] and *Loewen Group, Inc. v. United States*, Decision on Jurisdiction (Jan. 5, 2001) ¶¶ 32-74, [hereinafter *Loewen*, Decision on Jurisdiction] *available* at <http://www.naftalaw.org>. Should the instrument conferring competency on Chapter 11 tribunals be construed so as to defer to sovereignty? See *Ethyl Corp.*, Award on Jurisdiction, *supra* note 4; *S.D. Myers, Inc. v. Canada*, Final Award on the Merits (Nov. 13, 2000), *available* at <http://www.naftalaw.org> [hereinafter *S.D. Myers, Award* on Merits] Must a Chapter 11 claimant

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and because of system features designed to both confer limited private standing for obligations ordinarily subsisting only on the international plane<sup>32</sup> and to anticipate the resulting train of arbitrations against the very respondents who crafted that chapter. Among Section B's defining characteristics are the sources consulted for rules of decision (the treaty text and rules of public international law)<sup>33</sup> and the associated jurisprudential methods.<sup>34</sup>

Perhaps more distinctive than the applicable law is the role played by non-disputant stake-holders in identifying the content of the obligations in question. In particular, the treaty text—a tribunal's first stop in identifying controlling principles—is subject to formal interpretations issued jointly by the Parties (as more fully discussed below)<sup>35</sup> and to the influence the two non-disputant NAFTA states may exert individually through their Article 1128 submissions.<sup>36</sup> On occasion,

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exhaust local remedies? *See infra* notes 76-80 and accompanying text. What is the scope and effect of Crown Privilege and who decides those questions? *Pope & Talbot v. Canada*, Award on Crown Privilege and Solicitor-client Privilege (Sept. 6, 2000), *available at* <http://www.naftalaw.org>. What inferences if any should a tribunal draw from the government's perfunctory destruction of materials later sought as evidence? *Cf. Feldman v. Mexico*, Final Award (Dec. 16, 2002), ¶ 6 (ministry destruction of documents every five years) *available at* <http://www.naftalaw.org> [hereinafter *Feldman*, Final Award]; *see also id.* ¶¶ 123, 132, 167, 174-178 (problems created by incomplete information).

<sup>32</sup> *See infra* notes 82-87, 157-158 and accompanying text.

<sup>33</sup>The investment-related obligations assumed by NAFTA states are a blend of treaty standards and customary rules incorporated expressly or implicitly by reference. Thus, in NAFTA Article 1110, references to “expropriation” implicate a body of customary doctrine addressing what constitutes a compensable taking and whether the conditions for lawfulness of that taking have been met. NAFTA, *supra* note 1, art. 1110. Concurrently, the same Article confirms standards that might otherwise be disputed, such as that full, prompt compensation (not just ‘appropriate’ compensation must be paid), that lawfulness depends on a public purpose, and that nondiscrimination is required. *Id.* Sometimes the incorporation of international law is explicit, such as in Article 1105 which requires “treatment in accordance with international law,” a reference to a customary minimum standard that regulates host state behavior in relation to nationals of other states and their property. *Id.* art. 1105.

<sup>34</sup>For example, Chapter 11 tribunals apply standard rules of treaty interpretation, which among other principles take account of a treaty's objects and purposes. *See Ethyl Corp.*, Award on Jurisdiction, *supra* note 4, ¶ 56 (relying on principles found in the Vienna Convention on the Law of Treaties).

<sup>35</sup>*See infra* notes 226–231 and accompanying text.

<sup>36</sup>The two non-disputant NAFTA Parties are entitled to make submissions on points of



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though not expressly contemplated in the NAFTA, *amici* have also been allowed to contribute views.<sup>37</sup>

### 2. Relative Complexity

Compared to investment treaties in general, Chapter 11 is relatively complex. A crude but descriptive portrayal of Chapter 11 is that it is a BIT inserted into a multi-lateral free trade agreement. While Chapter 11's similarity to recent U.S. and Mexican BITs is apparent, it is more involved than most bilateral instruments. Its embedding in a multi-chapter text that addresses a range of activities in addition to investment engenders questions of coverage and hierarchy and broadens the context in which Chapter 11's proper meaning is to be deduced. For the conditions under which a tax measure might be compensable, for example, one looks also to Chapter 21.<sup>38</sup> The acts of monopolies and state enterprises might be actionable under Chapter 11, but only under parameters outlined in Chapter 15.<sup>39</sup> And the application of most of Chapter 11's central guarantees is qualified by exemptions and reservations detailed in several Annexes and associated schedules.<sup>40</sup>

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interpretation, and to be provided with the evidence and argument adduced by the disputants. NAFTA, *supra* note 1, arts. 1128, 1129. In a given case the claimant may perceive that it has three opponents, though it is not true that the positions taken by the two non-disputant states invariably are the same as, or even favorable to, those of the respondent. *See* Pearce & Coe, *supra* note 3, at 319-20.

<sup>37</sup>In *Methanex*, the tribunal determined that it would accept written amicus submissions of a limited nature from certain organizations wishing to express, in particular, views related to environmental protection. *See* *Methanex v. United States*, Decision of the Tribunal on Petitions for Third Persons to Intervene as “Amici Curiae” (Jan. 15, 2001), ¶¶ 47-53, *available at* <http://www.naftalaw.org>. The United Parcel Service v. Canada tribunal, in principle, also authorized limited, written amici submissions, subject to strictures to be established in consultation with the disputants. *See* *United Parcel Service of America, Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae (Oct. 17, 2001), ¶ 73, *available at* <http://www.naftalaw.org>.

<sup>38</sup> *See* NAFTA, *supra* note 1, art. 2103(6).

<sup>39</sup> *Id.* arts. 1502(3)(a), 1503(2).

<sup>40</sup>*See, e.g.,* *ADF Group Inc. v. United States*, Award (Jan 9, 2003), *available at* <http://www.naftalaw.org>. [hereinafter *ADF*, Award]. In *ADF* a Canadian supplier of processed steel wished to participate in a state highway project. Its business plan was frustrated by federal “buy American” regulations—implemented through the state of Virginia—which required that the claimant fabricate in the United States the steel to be supplied for the project. The tenability of the claim depended in part on the applicability of NAFTA Article 1108(7) which exempts

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### 3. Intersections With Domestic Arbitral Regimes

The interplay between Section B and domestic arbitral regimes has occasionally produced interesting questions, many not purely academic. In *Metalclad*,<sup>41</sup> for instance, when the award was attacked,<sup>42</sup> two potentially applicable arbitration statutes competed for application; the outcome depended upon whether Chapter 11 awards are “commercial” within the meaning of British Columbia’s International Commercial Arbitration Act (ICA). Justice Tysoe ruled that they are commercial, and thus fall under the ICA, an important determination since the default was to a statute that (unlike the ICA) allowed review for errors of law.<sup>43</sup>

Institutional policies and statutory prerogatives may also come into tension, as illustrated again by the *Metalclad* litigation. The trial court authorized remission of the award, pursuant to the ICA. Chapter 11, however, does not address remission. The ICSID Additional Facility Rules contemplate limited post-award resort to the tribunal, but similarly do not speak directly to

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“procurement by a Party” from Chapter 11’s guarantees of national and most favored nation treatment and from its restrictions on the performance requirements. The specific question was whether procurement by the Commonwealth of Virginia constituted “procurement by a Party.” The tribunal ruled that it did, so that the exemption reached Virginia’s policies.

<sup>41</sup> See *Metalclad Corp. v. Mexico*, Award (Aug. 30, 2000), available at <http://www.worldbank.org/icsid/cases/awards.htm> [hereinafter *Metalclad*, Award], re interface with rules. *Metalclad* was the first Chapter 11 claim filed against Mexico and the first proceeding initiated under the Additional Facility Rules. See generally Pearce & Coe, *supra* note 3.

<sup>42</sup> Attacks on Chapter 11 awards in domestic courts are discussed at *supra* note 8 and accompanying text, and *infra* notes 286 -302 and accompanying text.

<sup>43</sup> *United Mexican States v. Metalclad Corp.*, Reasons for Judgement of Hon. Mr. Justice Tysoe (May 2, 2001), ¶¶ 44, 49, (B.C. Sup. Ct. 2001), available at <http://dfait-maeci.gc.ca/tna-nac/documents/trans-2may.pdf> [hereinafter *Metalclad*, Reasons for Judgment of Hon. Mr. Justice Tysoe]. For insights as to the pleading and strategic intricacies affecting the two alternatives from Mexico’s vantage point, see J. Christopher Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT’L L. 433, 441-42 (2002) [hereinafter Thomas, *Reply to Professor Brower*]. Arbitral tribunals considering a similar question under the FAA for purposes of selecting from among potential seats have found it unnecessary to reach a result, as the competing cities could be said to be served by comparable arbitration laws regardless of the FAA’s applicability. See Jack J. Coe, Jr., *The Serviceable Texts of International Commercial Arbitration: An Embarrassment of Riches*, 10 WILLAMETTE J. INT’L L. DISP. RESOL. 143, 153 n.46 (2002) [hereinafter Coe, *Riches*].

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remission. ICSID's Secretariat and the tribunal questioned whether remission would be proper.<sup>44</sup> Because the parties settled before the question of remission could be fully considered by ICSID and the British Columbia trial court,<sup>45</sup> the role of remission remains subject to speculation.<sup>46</sup>

### C. The Preeminence of Jurisdiction-Related Issues

#### 1. In General

In international commercial arbitration, consent to arbitrate and hence the arbitrators' mandate is typically contained in a clause embedded in a main contract. Ordinarily, the mutual commitment to arbitrate is forged before dispute arises and implicates only those in contractual privity. By contrast, Chapter 11 contains the NAFTA states' continuing offer to a class of potential claimants to arbitrate claims fitting within subject matter and temporal parameters enunciated in NAFTA's text. In pressing a claim, the investor in a sense accepts the host state's offer, and hence its terms.<sup>47</sup>

Most Chapter 11 arbitrations have involved jurisdictional contests instigated by respondent states relying upon the limitations and qualifications said by them to condition their offer to arbitrate. Chapter 11 is unique within NAFTA's multi-chapter network of trilateral undertakings, which extends well beyond questions of investor protections. While private entities are the intended beneficiaries of many of NAFTA's protections, it is only breaches of Chapter 11 that may be

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<sup>44</sup> Correspondence on file with the author. There were questions raised about whether the tribunal was *functus officio* and whether the remission order was properly framed under the ICA. See also *United Mexican States v. Metalclad Corp.*, Supplemental Reasons for Judgment of Hon. Mr. Justice Tysoe (Oct. 31, 2001), (B.C. Sup. Ct. 2001) available at <http://www.naftalaw.org>.

<sup>45</sup> See Jack J. Coe, Jr., *Metalclad – A Retrospective*, NAFTA ARB. REP. 65, 79-80 (2002) [hereinafter Coe, *A Retrospective*]. As to the thinking behind the Model Law's remission provision, replicated in British Columbia's ICA, see HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 920-922 (1989).

<sup>46</sup> As a remedial option given to the trial court under the *lex arbitri*, the power to remit presumably would be unaffected by arbitral rules that neither authorize nor expressly prohibit remission. An opposite conclusion would follow if the proceeding were governed by the ICSID Convention; in that circumstance, remission would not be proper because the autonomous control regime established by the Convention is exclusive.

<sup>47</sup> See generally Andrea Bjorklund, *NAFTA Chapter 11: Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183 (2001); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

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redressed through private arbitral claims. Thus, just as a contract may designate only certain of its provisions as arbitrable, leaving the remainder for other forms of dispute resolution, so has NAFTA limited private arbitral standing to Chapter 11.<sup>48</sup>

### 2. Terms of Art As Jurisdictional Gatekeepers

Chapter 11 tribunals are empowered to decide jurisdictional questions in the first instance and in doing so are bound by the scope and character of the consent establishing their competency. The types of jurisdictional limitation classically associated with tribunals-- temporal, subject matter-related, and personal-- are apparent in Chapter 11, which sets forth expressly or by implication numerous prerequisites to a viable arbitration. Limitations *ratione temporis* would include the rule that to be actionable a breach of NAFTA's undertakings must have occurred not earlier than January 1, 1994, NAFTA's effective date.<sup>49</sup> Subject-matter strictures (jurisdiction *ratione materiae*), confine actions essentially to those arising out of "measures adopted or

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<sup>48</sup>The relationship between Chapter 11 and other chapters is to some extent moderated by express provision. Under Article 1112(1), if there arises an inconsistency between Chapter 11 and another chapter the other chapter prevails "to the extent of the inconsistency." Cf. NAFTA, *supra* note 1, art. 1114(1) (parties may take appropriate measures with respect to investment activity to protect the environment, subject to the remaining provisions of Chapter 11).

<sup>49</sup>NAFTA applies to investments existing on January 1, 1994. See NAFTA, *supra* note 1, at n.39. The rule that alleged breaches occurring before that date are not actionable comports with the presumption that treaties are not ordinarily retroactive. See *Mondev v. United States*, Final Award (October 11, 2002), ¶¶ 60- 61, 73, available at <http://www.naftalaw.org> [hereinafter *Mondev*, Final Award]; see also *Feldman*, Final Award, *supra* note 31, ¶ 51 (accord, reiterating decision of December 6, 2000). The *Mondev* tribunal disallowed certain of claimant's theories of recovery including an expropriation claim that in the tribunal's view became actionable no later than during 1991. It also limited the extent to which a continuing breach might fall within a tribunal's jurisdiction; a post-1993 refusal to compensate an investor for a pre-NAFTA breach would not be enough. *Mondev*, Final Award, *supra*, ¶ 70 ("[t]he mere fact that earlier conduct has gone unremedied ...when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct").

The post-1993 breach rule is to be distinguished from the 3-year time bar of Articles 1116 and 1117. The period begins to run when investor should have become aware of the NAFTA breach and its injury. NAFTA, *supra* note 1, arts. 1116(2), 1117(2). The time when the breach is deemed to occur is a mixed-- law and fact--question. Though, as demonstrated in *Mondev* a claim may run afoul of both requirements, the same date may not govern the two analyses. In theory there could occur a pre-NAFTA breach reasonably not discovered until after NAFTA came into effect. For purposes of the non-retroactivity rule, presumably the date of breach--not the date of discovery--would control and the claim would fail.

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maintained by a Party relating to...investments...in the territory of another Party.”<sup>50</sup> Proper persons (jurisdiction *ratione personae*), consist in the claimant being a national of a NAFTA Party other than the respondent NAFTA state.

The surgical approach of states in pressing limits on the types of claims that may be brought has ensured that no subsidiary element to be divined from the text goes unnoticed. Chapter 11 submissions and awards bristle with hard fought battles over the meaning of “measure,” “adopted and maintained,” “by a Party,”<sup>51</sup> “relating to,”<sup>52</sup> “an investment,” and “an investor of a Party.”<sup>53</sup>

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<sup>50</sup>NAFTA, *supra* note 1, art. 1101.

<sup>51</sup>For example, are the acts of local governments capable of being “measures” of a “Party”? The issue was broached by Mexico in *Metalclad*, in part because NAFTA’s “Extent of Obligations” provision, *id.* art. 1101, only expressly requires the Parties to achieve observance “by state and provincial governments.” The question was not academic; a municipality’s conduct was central to the claim. *Metalclad*, Award, *supra* note 41, ¶ 40. Consistent with the third-party (Article 1128) submissions of the United States, the tribunal construed NAFTA to extend to local government measures. *Id.* ¶ 73. The *Loewen* tribunal also reached an affirmative answer in relation to the acts of courts in administering private lawsuits. *See Loewen*, Decision on Jurisdiction, *supra* note 31.

<sup>52</sup>The *Methanex* case resulted in a watershed construction of “measures... relating to: investors [and] investments.” NAFTA, *supra* note 1, art. 1101(1). The claimant, a Canadian entity, produced methanol, an ingredient in the gasoline additive MTBE, which California lawmakers determined to exclude from gasoline. The tribunal attributed to Article 1101 jurisdictional import, requiring it to determine whether the measures complained of “related to” Methanex’s investment. The question arose because neither measure was overtly aimed at methanol, methanol producers in general, or Methanex in particular. The tribunal ruled that merely being affected by a measure was not sufficient. Accordingly, as pleaded, Methanex’s claim did not satisfy Article 1101(1)’s predicate that the measure prompting the claim be “related to” an investment of an investor. *Methanex Corp. v. United States*, Preliminary Award on Jurisdiction (Aug. 7, 2002), ¶ 128, available at <http://www.naftalaw.org> [hereinafter *Methanex*, Preliminary Award]. Methanex was allowed to refashion its pleadings to demonstrate government conduct more specifically targeting it.

<sup>53</sup> *See, e.g., Loewen*, Final Award, *supra* note 31. *Loewen* involved two claimants (one corporate, one individual), alleging injuries to two corporations (a Canadian corporation and its American subsidiary). The individual investor, Raymond Loewen, claimed under Article 1117, characterizing himself as an “investor of a Party” entitled, by control or ownership, to bring an action on behalf of the Canadian entity. That entity in turn brought a claim on its own behalf, and on behalf of its American subsidiary. *Id.* ¶¶ 1, 9. After the claim was filed, the Canadian entity was reorganized, emerging as an American company. *Id.* ¶ 220. That left, in the tribunal’s view, no Canadian entity capable of pursuing the claim, despite the assignment of the NAFTA action to

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Seemingly clerical elements in the claims processing protocol have also been invoked by respondent states, sometimes with surprising success. In at least two cases, for example, Chapter 11 tribunals have had to consider defects in the waiver required by Article 1121; in one of the two, dismissal followed.<sup>54</sup>

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a Canadian corporation (apparently formed for that sole purpose). *Id.* ¶¶ 220, 237. With respect to the corporate claim, the diversity of nationality required for a proper Chapter 11 claim, though satisfied when the claim was initiated, had not—because of the reorganization—been observed for the entire pendency of the arbitration. In the tribunal’s view, the real party in interest had become an American entity, thus breaking the continuity of nationality. *Id.* ¶¶ 231-240. As a jurisdictional matter, the position became as if an American entity had brought a Chapter 11 claim against the United States. *Id.* ¶ 225. The individual claim ultimately failed because Mr. Loewen did not demonstrate his ownership in the Canadian entity on whose behalf he purported to claim. *Id.* ¶ 239. As to the merits, *see* notes 83, 188-196 and accompanying text.

<sup>54</sup>Article 1121, under the heading “Conditions Precedent to Submission of a Claim to Arbitration” requires claimants in writing to:

“waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a [Chapter 11] breach[.]”

The waiver is to be “included in the submission of claim to arbitration.”—a submission deemed under the UNCITRAL Rules to occur when notice of arbitration is given. In *Ethyl*, the investor was arguably late by tendering its Article 1121 waiver with its statement of claim, rather than with its UNCITRAL Rules Notice of Arbitration. As with that investor’s precipitous handling of the Notice of Intent and claim, *see supra* note 4, the tribunal would not dismiss the claim on the basis of the timing of the submission.

An ostensibly more rigorous approach to the waiver requirement was applied in the first *Waste Management* proceeding, in which flaws in the waiver led to dismissal of the claim. *See Waste Management v. Mexico*, Award (June 2, 2000), *available at* <http://naftalaw.org> [hereinafter *Waste Mgmt. I*]. In anticipation of pressing certain domestic actions, the claimant added to its waiver an interpretive rider, stating in one of its iterations:

Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA including the municipal law of Mexico

*Waste Mgmt. I, supra*, §§ 4-5.

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### D. NAFTA Jurisprudence: Accessibility and Importance

The practice of publishing Chapter 11 awards gives NAFTA jurisprudence an accessibility greater than that associated with international commercial awards. To some extent, the ready availability of most Chapter 11 briefs, orders, and awards acknowledges the potentially immense sphere of influence likely to be enjoyed by such work-product. Well over 2000 BITs exist at present. Many of them have marked similarities to each other and to Chapter 11, giving Chapter 11 awards immediate relevance outside of the three NAFTA countries.<sup>55</sup>

NAFTA jurisprudence has a broader constituency than commercial arbitration in another respect. Citizens of the three states have a stake in the manner in which their governments behave generally, and in the way in which they mediate the sometimes competing goals of promoting trade, protecting local enterprise, and regulating on the public's behalf. NAFTA arbitration holds government conduct up to scrutiny that it might not otherwise receive. Concurrently, a given tribunal's power to influence the mix of competing interests by attaching a penalty to governmental choices has far-reaching implications.<sup>56</sup>

Chapter 11 has also had tertiary influences on business culture, apart from inducing enterprises to order their affairs with treaty advantages in mind. Instances have occurred, for example, in which

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The rider's focus on "sources" was not fully responsive to Article 1121's reference to "measure" (not sources) in identifying the sphere of activities to be waived. For a majority of the *Waste Mgmt. I* tribunal, it was not sufficient that "no NAFTA-related breach of international law" had been alleged in the domestic proceedings. By the Claimant's own admission, at least one of the measures complained of was common to the domestic and Chapter 11 proceedings. The form and timing of the waiver, though required to be proper, had to also be matched by conduct consistent with the waiver's undertakings. *Id.* §§ 27-31. *See* William Dodge, *International Decision: Waste Management v. Mexico*, 95 AM. J. INT'L L. 186 (2001). The case was resubmitted before a new tribunal, and is pending. *See* Eduardo. Sequeiros T., *NAFTA Chapter 11 Arbitration: Recent Developments*, 17(1) NEWS & NOTES INST. TRANSNAT'L ARB. 1 (Winter 2003).

<sup>55</sup>For example, a survey of approximately 550 of the 2000-plus BITs, ranging from perhaps the oldest (signed November 25, 1959) to among the very recent, reveals that roughly 90% have fair and equitable treatment clauses. *See* ICSID, *Investment Treaties* vols. 1-7 passim (1992); Charles H. Brower, II et al., *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L PROC. 9, 19 (2002) [hereinafter ASIL Proceedings] (textual analysis of minimum standard clauses by Coe).

<sup>56</sup>*See infra* notes 268-80 and accompanying text.



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Chapter 11 has been invoked for its *in terrorem* value. Thus, in *Metalclad*, a kind of preemptive deployment was attempted by counsel for the investor who supplied the Mexican government with the draft Chapter 11 claim,<sup>57</sup> hoping to effect a change of course.<sup>58</sup> Similarly, in *Ethyl* the

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<sup>57</sup>See generally Pearce & Coe, *supra* note 3, (additional supporting correspondence on file with the author). *Metalclad* has generated extensive discussion, and remains the only Chapter 11 proceeding in which the claimant received an award under Article 1110 (expropriation). *Metalclad*, a U.S. corporation, acquired in 1993 a Mexican company that held certain Mexican state and federal permits required to construct and operate a hazardous waste landfill. See generally William S. Dodge, *International Decision: Metalclad Corp. v. Mexico*, 95 AM. J. INT'L L. 910 (2001) [hereinafter Dodge, *Metalclad Note*]; Coe, *A Retrospective*, *supra* note 45; Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD TRADE L. 685 (2001) [hereinafter Weiler, *A Play in Three Parts*]. Doubt remained at the time of acquisition whether the project also needed a municipal construction permit. Relying on federal assurances that it possessed all essential permits, *Metalclad* began construction, but was informed by local officials that the project lacked an essential local construction permit. Those officials ordered cessation of building activities; the company applied for the permit, but on the advice of federal officials, openly continued construction. *Metalclad*, Award, *supra* note 41, ¶¶ 88-92.

After a federal environmental audit of the project, the company and federal authorities reached an accord (the *Convenio*) resolving issues raised by the audit and establishing other details of the landfill's prospective operation. After construction was substantially complete, soon after the *Convenio* was published, local officials--after 13 months of inaction--declined the construction permit on grounds that included certain environmental concerns. *Id.* ¶¶ 90-92.

Company representatives had not been notified of or otherwise invited to the meeting at which the application was disposed of. Soon thereafter, the Municipality initiated proceedings against the federal government attempting to block landfill operations under the *Convenio*. Protracted court proceedings ensued during which an injunction prohibited landfill operations. Several months after *Metalclad*'s January 1997 claim had been filed, the Governor of the state in which the landfill was located created a ecological reserve encompassing the landfill and surrounding areas; the reserve's use limitations seemed to preclude landfill operations. *Id.* ¶¶ 90-94, 109-111.

The unanimous final award issued in August of 2000 found an expropriation on two different theories and a breach of fair and equitable treatment; it ordered Mexico to pay *Metalclad* over \$16 million (each disputant to bear its own costs). Mexico received from a British Columbia court a judgment partially setting aside the award, resulting in a downward adjustment in the amount of compensation owed. Rather than pursue mutual appeals, Mexico and *Metalclad* settled. See David Hechler, *U.S. Firm Gets \$16 Million in First NAFTA Claim*, NAT'L L.J., Nov. 12, 2001, at A 17. Coe, *Riches*, *supra* note 43, at 153 n.44 (additional correspondence on file with the author).

<sup>58</sup>In the investor's view, this practice was consistent with Article 1118's suggestion that it consult and negotiate with Mexico before formally launching a claim.



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claimant filed its Notice of Intent to arbitrate while the complained of measure was yet before Canadian lawmakers.<sup>59</sup> There was also a Mexican super market chain which, in anticipation of being denied a certain permit in California, alerted the press<sup>60</sup> to an imminent “reverse *Metalclad*” breach of Chapter 11—a reference to *Metalclad v. Mexico* in which a certain permit figured prominently in facts leading to recovery.<sup>61</sup> Because of the private standing conferred under Chapter 11, there have also been attempts to style certain non-Chapter 11 grievances as investment-related in an effort to avail of an arbitral remedy otherwise not available.<sup>62</sup>

### III. DOCKET CHARACTERISTICS

#### A. Subject-Matter

The explicit focus of Chapter 11's substantive guarantees are “measures” of one Party relating to “investors” and “investments of investors” of another Party.<sup>63</sup> The treaty defines these terms broadly<sup>64</sup> and, in general, tribunals have declined to give them a restrictive scope. A wide variety of “measure” types have been the basis of claims, including trade restrictions (import and export), justice system practices (in particular alleged denials of justice by state courts), concession cancellations, alterations in real property rights, and permit-related facility closures. The substantive provisions more often relied upon are those contained in Articles 1102 (national treatment),<sup>65</sup> 1105 (minimum standard)<sup>66</sup> and 1110 (expropriation).<sup>67</sup> That many of the measures

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<sup>59</sup>See *Ethyl Corp.*, Award on Jurisdiction, *supra* note 4, ¶ 21.

<sup>60</sup>The author was contacted for comment by the Orange County Register, and gathered this information by phone.

<sup>61</sup>See *supra* note 57 and accompanying text.

<sup>62</sup> The pivotal question often is whether the claimant in fact had an “investment” within the meaning of Chapter 11. Investments do not include, for example, “claims to money that arise solely from . . . commercial [sale of goods] contracts.” NAFTA, *supra* note 1, art. 1139.

<sup>63</sup>*Id.* art. 1101(1).

<sup>64</sup>*Id.* arts. 201, 1139.

<sup>65</sup>*Id.* art. 1102. Requiring NAFTA host states to accord treatment “no less favorable than” that it confers upon its own nationals “in like circumstances.”

<sup>66</sup>*Id.* art. 1105. Requiring NAFTA host states to accord the investments of other NAFTA states’ investors “treatment in accordance with international law including fair and equitable treatment and full protection and security.” See *infra* notes 217-225 and accompanying text.

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complained of affect the trans-boundary movement of goods and services—thus implicating chapters other than 11—does not preclude its application where such measures also “relate to” an investment.<sup>68</sup>

### B. Disputant Patterns

Though all of the NAFTA Parties have been respondents, certain combinations have been more prevalent than others, presumably owing in part to geographically influenced investment flows.<sup>69</sup> The majority of claimants against the United States have been Canadian. Most of the claims against Canada, in turn, have been brought by U.S. investors, who also account for the bulk of actions brought against Mexico. Actions by Mexican investors against the other two Parties have not been found among the published sources. Similarly, Canadian claims against Mexico have not been reported.<sup>70</sup>

### C. Regime Selections and Arbitral Seats

In the approximately 16 Chapter 11 claims that have advanced beyond the Notice of Intent stage, claimants have designated both available arbitral regimes several times, though the Additional Facility has been the more frequently selected format.<sup>71</sup> Unlike the UNCITRAL Rules which had by 1994 experienced considerable use, the Additional Facility Rules were pressed into service for the first time in early 1997.<sup>72</sup> Published data demonstrate that thereafter U.S. investors have overwhelmingly selected the Additional Facility when bringing claims against Mexico but have preferred the UNCITRAL Rules in arbitrations with Canada.<sup>73</sup> Canadian investors have chosen the Additional Facility Rules most often when arbitrating with the United States. These

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<sup>67</sup>*Id.* art. 1110. Requiring, inter alia, that direct and indirect expropriation of an investment be undertaken for a public purpose, without discrimination, and with prompt compensation equating to the investment’s fair market value.

<sup>68</sup> See, e.g., *S.D. Myers*, Award on Merits, *supra* note 31 (ban on exportation of hazardous waste).

<sup>69</sup> See Table 1 *infra*.

<sup>70</sup> The author is informed that at least one such claim is in preparation however.

<sup>71</sup> See Table 1, *infra*.

<sup>72</sup> *Metalclad* was the first claimant to designate the Additional Facility Rules, followed soon thereafter by *Azinian*.

<sup>73</sup> See Table 1, *infra*.

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patterns no doubt reflect a variety of factors, including the preferences of certain firms whose services have been enlisted several times in Chapter 11 cases.

Washington D.C., Montreal, Ottawa, Toronto and Vancouver B.C. have all been seats of Chapter 11 arbitration.<sup>74</sup> To the author's knowledge, no Mexican city has yet been selected.

### D. Settlement and Recoveries

The initiation a Chapter 11 claim has rarely led to settlement. Though several claims have been abandoned, perhaps only two—both against Canada—have been resolved early in the process by the aggrieved investor accepting an offer of compensation.<sup>75</sup>

Claimants in many Chapter 11 cases have alleged extensive damages.<sup>76</sup> The amounts in controversy confirm one's sense that Chapter 11's dispute mechanism attracts significant claims generally brought by enterprises with correspondingly adequate funding to contemplate a vigorous, protracted campaign. The elite character of the process is further illuminated when the chances of success are considered; the docket to date makes plain that the probability of non-recovery, or less-than expected recovery, is high, as vividly conveyed in table form below.<sup>77</sup> Despite regular invocation of NAFTA's expropriation provisions, for instance, only one award has found a compensable taking.<sup>78</sup> Two recoveries have been awarded against Canada: one for \$S461,566 under Article 1105's fair and equitable treatment provision,<sup>79</sup> the other for CAN \$6,050,000 for violations of Articles 1105 and 1102 (national treatment). A nearly 17 million peso award has also been levied against Mexico for breach of its national treatment obligations.<sup>80</sup>

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<sup>74</sup>As is common in international arbitration, hearings and other meetings in furtherance of the proceedings sometimes occur away from the arbitral seat (place). *Metalclad* was an extreme example of this practice; all arbitration hearings occurred at ICSID's Washington D.C. facility, although the seat of arbitration was Vancouver, B.C.

<sup>75</sup>One settlement occurred in *Ethyl*, summarized *supra* note 4. The other is Trammel Crow v. Canada, reported at <http://naftalaw.org>.

<sup>76</sup>See Table 4, *infra*.

<sup>77</sup>*Id.*

<sup>78</sup>*Metalclad*, Award, *supra* note 41, ¶¶ 103-107. See *supra* note 57.

<sup>79</sup>*Pope & Talbot v. Canada*, Award on Damages (May 31, 2002), \_ 90, available at <http://www.naftalaw.org> [hereinafter *Pope & Talbot, Award on Damages*].

<sup>80</sup>*Feldman*, Final Award, *supra* note 31, \_ 205. Mexico has sought annulment. See <http://www.naftalaw.org>. (Application for Annulment, Ontario court filing).

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Tribunals thus far have also exhibited a disinclination to award costs of the proceeding, though the costs of deciding a specific issue have sometimes been awarded.<sup>81</sup>

### IV. THE PROCESSES OF NAFTA JURISPRUDENCE

#### A. Arbitral Relationship to Domestic Courts

Virtually from the first award rendered, NAFTA tribunals have disavowed any appellate competency over domestic courts.<sup>82</sup> The most recent and elaborate enunciation came in *Loewen*, a case in which the tribunal was highly critical of the state court proceeding prompting the claim. Despite condemning the state court proceedings in question in the strongest of terms, the tribunal felt compelled to “stay its hand” in acknowledgment of the limited mandate conferred upon Chapter 11 tribunals.<sup>83</sup>

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<sup>81</sup> Regarding awards of costs, see *Mondev*, Final Award, *supra* note 49; Pope & Talbot, Inc. v. Canada, Award on Costs (Nov. 26, 2002), available at <http://www.naftalaw.org>.

The factors considered in not disturbing each side’s burden have included: the lack of uniform NAFTA practice to the contrary, the complexity of the subject-matter, the failure of either side to fully prevail, the mutual use of wasteful arguments and tactics, the embryonic character of NAFTA jurisprudence, and the good faith and plausibility of the losing party’s claim.

<sup>82</sup> See, e.g., *Azinian v. Mexico*, Award (Nov. 1, 1999), ¶ 99, available at <http://www.worldbank.org/icsid/cases/awards.htm> [hereinafter *Azinian*, Award] (claimant not entitled to seek before arbitrators plenary review of national court decisions under NAFTA; denial of justice or other international wrong must be alleged).

<sup>83</sup> Characteristic of the high literary value contained in certain Chapter 11 awards, the passage deserves extensive quotation: The tribunal wrote:

We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was an unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair

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Additionally, domestic court rulings have often been given appreciable deference by tribunals when announcing the content of domestic law. This is not surprising given the relative expertise a domestic court can be supposed to have in relation to local law. Regardless, it is textbook doctrine that the two spheres are separate. A failure to comply with domestic law does not necessarily imply a breach of the NAFTA.<sup>84</sup> Nor does lawfulness of a measure under domestic law control on the international plane;<sup>85</sup> indeed, the conduct of a domestic court may itself constitute a Chapter 11 “measure,”<sup>86</sup> so that its handling of litigation involving an investor may support a Chapter 11 claim.<sup>87</sup>

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treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

*Loewen*, Final Award, *supra* note 31, ¶¶ 241-42 (paragraph numbering omitted).

<sup>84</sup> *Feldman*, Final Award, *supra* note 31, ¶ 78.

<sup>85</sup> *Id.* ¶ 98. See generally Eileen Denza, *The Relationship Between International and National Law*, in INTERNATIONAL LAW Ch 14, 1-6 (forthcoming Malcom D. Evans ed., 2003) (uncorrected proofs on file with the author).

<sup>86</sup> See *Loewen*, Decision on Jurisdiction, *supra* note 31, ¶¶ 39-60.

<sup>87</sup> The United States has twice been named in denial of justice cases, in each case by Canadian investors. As to each, the United States prevailed. The first to reach an award was *Mondev v. United States*, *supra* note 49. *Mondev* arose out of a 1978 tripartite commercial real estate development contract among claimant’s entity (LPA), the Boston Redevelopment Authority (BRA) and the City of Boston (the City). In part, the contract granted LPA a land purchase option with the City, the exercise of which allegedly was frustrated by the City’s failure to accomplish certain tasks--failings said by the investor to have been promoted by BRA. In the resulting lawsuit, the jury agreed with LPA, issuing verdicts against both the City and BRA,

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### B. SOURCES OF SUBSTANTIVE GUIDANCE

#### 1. In General

Chapter 11 tribunals are instructed to apply the NAFTA text and “applicable rules of international law.”<sup>88</sup> In discharging this mandate they have consulted, in addition to the treaty’s text, non-treaty sources including custom, general principles,<sup>89</sup> reasoned adjudications, and publicists. Among the customary principles relied upon have been rules of treaty interpretation,<sup>90</sup> elements of the law of taking,<sup>91</sup> and principles of state responsibility.<sup>92</sup> Often to provide evidence of custom, resort has been had to treaties and other texts thought to codify custom,<sup>93</sup> certain

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totaling \$16 million. The trial judge upheld the verdict against the City, but by JNOV held BRA immune from liability under Massachusetts law. On appeal, the Supreme Judicial Court affirmed the trial court’s immunity finding and overruled the breach of contract finding against the City. LPA’s request for rehearing was denied as was its petition for review by the U.S. Supreme Court. In its Chapter 11 arbitration, certain of Mondev’s theories of recovery were disallowed on jurisdictional grounds. Its denial of justice claim failed on the merits under a fact-dependent test enunciated by the tribunal after consulting modern jurisprudence and other influences. Claimant had failed to demonstrate that:

“having regard to generally accepted standards of the administration of justice...in light of all the facts that the impugned decision was clearly improper and discreditable [thus resulting in]’unfair and inequitable treatment.’ *Mondev*, Final Award, *supra* note 49, ¶ 127.

*Loewen*, *supra* note 31, was decided in June 2003, and, in contrast to *Mondev*, was based on facts which, but for a failure to exhaust local remedies and certain jurisdictional flaws, would have established denial of justice. *See supra* note 83, *infra* notes 188-202 and accompanying text.

<sup>88</sup>NAFTA, *supra* note 1, art.1131(1).

<sup>89</sup>For example, a theory of tolling has been considered by at least one tribunal, as a potentially applicable general principle of law. *Feldman*, Final Award, *supra* note 31, ¶ 58.

<sup>90</sup> *See infra* notes 93, 245-46 and accompanying text.

<sup>91</sup> *See infra* notes 232-50 and accompanying text.

<sup>92</sup> *See supra* note31 and *infra* note 126 and accompanying text (questions of attribution).

<sup>93</sup>Most notably the Vienna Convention on the Law of Treaties. *See S.D. Myers*, Award on Merits, *supra* note 31, ¶ 201; *See also Loewen*, Final Award, *supra* note 31, ¶ 167 (discussing the Harvard Draft Convention of Professors Sohn & Baxter on the International Responsibility of

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International Law Commission (ILC) drafts and reports,<sup>94</sup> and occasionally the Restatement (Third) of the Law of Foreign Relations.<sup>95</sup> As developed below, open borrowing from trade-law decisions, and careful study of the awards of other arbitral tribunals have been commonplace.<sup>96</sup>

### 2. Consultation of Domestic Sources

NAFTA tribunals and the NAFTA bar have invoked various domestic and private law principles. One finds in the awards references to domestic administrative law,<sup>97</sup> decisional law<sup>98</sup> and legislation.<sup>99</sup> Perhaps not surprisingly, rather than always being the product of exacting comparative method, the national rules relied upon have often been supplied by the jurisdictions in which the arbitrators—most notably the presiding arbitrators—have been trained. Thus, while in the abstract the link between a NAFTA case and, for instance, the Greek Civil Code seems elusive, as an example familiar to the tribunal it is understandable.<sup>100</sup>

Though to consult general principles common to developed legal systems is concordant with

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States for Injuries to Aliens (12<sup>th</sup> Draft), *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545 (1961).

<sup>94</sup>See *Loewen*, Final Award, *supra* note 31, ¶¶ 149, 153 .

<sup>95</sup>The Restatement is openly consulted less frequently as one might have expected. The *Feldman* tribunal considered its provisions in relative detail however. *Feldman*, Final Award, *supra* note 31, ¶¶ 99-106 (noting that both disputants had made reference to it).

<sup>96</sup>It would be misleading to suggest that these sources invariably have been studied *sua sponte*, since the submissions of the disputants drive the process to an appreciable degree. Nevertheless, Chapter 11 arbitrators often bring to the task considerable depth in public international law and they are not expected to ignore helpful authority known to them.

<sup>97</sup>See, e.g., *S.D. Myers*, Award on Merits, Schwartz, Sep. Op. *supra* note 31, ¶ 243.

<sup>98</sup>See, e.g., *Id.*, ¶249, n. 44 (Canadian and US decisions).

<sup>99</sup> See *Feldman*, Final Award, *supra* note 31, ¶ 58.

<sup>100</sup>*Id.* But see, M. Shahabuddeen, *Municipal Law Reasoning in International Law in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 90, 92 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996)(among the dangers of reliance on private law is the tendency “to resort to notions peculiar to [a particular] municipal law”).

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general conceptions of international law sources,<sup>101</sup> there are limits to which analogies supplied by private law can be employed; at least one Chapter 11 tribunal has been clear that silence in the NAFTA text does not irresistibly lead to adoption of a private law approach.<sup>102</sup>

3. International Authorities

*a. Adjudication*

In addition to the quite understandable tendency to consult the reasoned decisions of other Chapter 11 arbitrators (returned to below) Chapter 11 tribunals have often referred to the decisions of other international tribunals such as the International Court of Justice,<sup>103</sup> the Iran-U.S. Claims Tribunal,<sup>104</sup> various claims commissions,<sup>105</sup> numerous tribunals convened under the

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<sup>101</sup>See generally Maurice Mendelson, *The International Court of Justice and Sources of International Law* in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 79-80 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

<sup>102</sup>The *Loewen* Tribunal opined:

It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system...and that the handling of disputes within that system by professionals experienced in the handling of international arbitration has tended in practice to make NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where the claimants are permitted for convenience to enforce what are in origin the rights of Party states. *Loewen*, Final Award, *supra* note 31, ¶ 233.

<sup>103</sup>This includes repeated consultation of the ICJ's chamber award in the *ELSI* case. Case Concerning Elettronica Sicula S.p.A. (*ELSI*), (U.S. v. Italy), Judgment (July 20, 1989) 1989 I.C.J. 15 [hereinafter *ELSI*, Judgment]. See *Loewen*, Final Award, *supra* note 31, ¶ 160.

<sup>104</sup>Given the extensive and readily available jurisprudence on expropriation produced by the Iran-U.S. Claims Tribunal, one might have expected within NAFTA awards far more frequent references to its awards. One explanation is the broader mandate of that tribunal—extending to certain non-expropriatory property interference—and the historical setting in which those claims arose. See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, nn.129-135 and accompanying text (2003). Additionally, the jurisprudence of the Tribunal has been subject to a sustained disparagement from some quarters, being characterized for example as merely *lex specialis* with limited general applicability. See RICHARD B. LILICH, BURNS H. WESTON, & DAVID J. BEDERMAN, INTERNATIONAL CLAIMS:



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ICSID Convention,<sup>106</sup> and certain ad hoc arbitration tribunals.<sup>107</sup> GATT and WTO jurisprudence has been consulted both in relation to NAFTA provisions with obvious trade law analogues, such as Article 1102 (treatment “no less favorable than” that accorded nationals) and for principles of international adjudication.<sup>108</sup>

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THEIR SETTLEMENT BY LUMP SUM AGREEMENTS: 1975-1995 8 (1999) (“withering attack”, albeit rebuffed). Among the better one-volume references on the Tribunal are CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998) and GEORGE ALDRICH, *THE JURISPRUDENCE OF THE IRAN-U.S. CLAIMS TRIBUNAL* (1996).

<sup>105</sup> See, e.g., *Mondev*, Final Award, *supra* note 49, ¶ 114 (General Claims Commission, United States-Mexico).

<sup>106</sup> As to which, see *supra* notes 8 and 13 and accompanying text and *infra* notes 151-152, accompanying text and authority cited there.

<sup>107</sup> In *Metalclad*, an ad hoc award under the UNCITRAL Rules featured with perhaps surprising prominence in the arbitration, and consequently in the subsequent set aside proceedings in British Columbia. The *Metalclad* tribunal found influential *Biloune et al. v. Ghana Investments*, 95 I.I.R. 183 (1993) (citing *id.*, at 207-10). See *Metalclad*, Award, *supra* note 41, ¶ noting in common government assurances about a building permit and consequent construction, followed by forced termination of project). The *Biloune* arbitrators had found an indirect taking, just as the *Metalclad* tribunal later did. Justice Tysoe in adjudicating Mexico’s request for set aside, examined *Biloune*, found it readily distinguishable from the case before the *Metalclad* tribunal and concluded that it could not have been meant to be the rationale behind the finding of taking. See *Metalclad*, Reasons for Judgment, *supra* note 43, ¶ 80. Tysoe has attracted criticism for second-guessing the tribunal, which had openly characterized *Biloune* as “persuasive authority.” See *infra* notes 132-139 and accompanying text. The *Biloune* tribunal was highly distinguished and was presided over by H.E. Judge Stephen Schwebel, of the ICJ, a fact no doubt enhancing the resulting award’s attractiveness as guidance.

<sup>108</sup> See, e.g., *Pope & Talbot v. Canada*, Final Merits Award (April 10, 2001), ¶ 49, available at <http://www.naftalaw.org> (GATT, art. III.4; TRIMS and GATS, art. XVII(1-3) (examined in response to Canada’s argument that defacto discrimination must cause “disproportionate” harm to be actionable). In an example of procedural borrowing, the *Feldman* tribunal cited the WTO’s Appellate Body in ruling that when one disputant adduces evidence sufficient to raise a presumption of truth, the burden shifts to the other party to rebut the presumption by competent evidence. *Feldman*, Final Award, *supra* note 31, ¶ 177. In *Feldman*, the transplanted rule determined the outcome, for the claimant had set forth sufficient support for its claim of sub-national treatment to establish a “presumption and a prima facie case” under Article 1102. Mexico, in response, had “failed to introduce any credible evidence into the record to rebut that presumption.” *Id.* A majority of the tribunal drew the inference that had equal treatment been accorded, Mexico would certainly have supplied proof of it, rather than relying

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### b. *Texts, Commentaries and Publicists*

In relation to the mounting literature on Chapter 11, tribunals have been very selective; more often than not, individual publicists have been cited for their works of general importance, not for essays specific to Chapter 11. Certain standard references, many time-honored, have been regularly consulted: however, Amerasinghe,<sup>109</sup> Bourchard,<sup>110</sup> Cheng,<sup>111</sup> de Arechaga,<sup>112</sup> and Freeman<sup>113</sup> are among the names one encounters several times.

### C. Reasoning Methodologies and Tribunal Attitudes

Both within a given tribunal and among tribunals, Chapter 11 arbitrators have represented a diverse range of legal traditions: civil law, common law, and mixed.<sup>114</sup> Whatever the tribunal's makeup, the arguments of advocates and the authority they have marshaled have often dictated much of its focus and analysis. Many of the awards produced seem to carry methodologically a common law influence. Despite the formal absence of *stare decisis*,<sup>115</sup> prior awards have often been carefully dissected, sometimes cited with approval, and sometimes distinguished on their facts.

Substantively, tribunals have often been progressive in adapting, refining, and articulating governing principles and, as in matters of procedure, have often relied for inspiration on NAFTA's objects and purposes.<sup>116</sup> Despite the unifying influences mentioned below, the

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heavily on a more technical and tenuous theory of defense. *Id.* ¶ 178.

<sup>109</sup>C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW (1990).

<sup>110</sup>EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915).

<sup>111</sup>BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953).

<sup>112</sup>Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 1, (1978 I).

<sup>113</sup>ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938).

<sup>114</sup>*See* Table 3 *infra*.

<sup>115</sup>*See* NAFTA, *supra* note 1, art. 1136(1) (only disputants bound by Chapter 11 awards).

<sup>116</sup>As they have been instructed to do by NAFTA itself. *Id.* art. 102(2).

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decentralization built into Chapter 11's system of ad hoc adjudications has produced variations in approach, tone and principle. Unanimous awards have been common. Nevertheless, separate opinions, both concurring<sup>117</sup> and dissenting,<sup>118</sup> have occasionally been authored--often to the great benefit of the reader. Invariably, the individual facts of the particular case have proven pivotal.

Tribunals, in general, have not been quick to adopt narrow meanings of such words as “investment”, “investor,” “measure,” and the like, in part because those terms are broadly defined in the NAFTA itself.<sup>119</sup> They have also distinguished conditions that are fundamental to their jurisdiction from procedural conditions more appropriately thought of as clerical, or going to claim admissibility.<sup>120</sup> Open rebukes of legal formalisms sometimes have surfaced<sup>121</sup> and claimants have been allowed to evolve theories of recovery and to amend claims during the course of proceedings, absent prejudice to the respondent.<sup>122</sup>

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<sup>117</sup>See, e.g., *S.D. Myers*, Award on Merits, *supra* note 31 (separate opinion of Dr. Bryan Schwartz).

<sup>118</sup>See, e.g., *Feldman*, Final Award, *supra* note 31 (Dissent of Arbitrator Bravo).

<sup>119</sup> That is not to suggest that disingenuous positions have been the norm. Though illuminated in part by definitions, critical words such as “investment” and “measure,” are sufficiently elastic to allow room for good faith advocacy by claimants and respondents alike.

<sup>120</sup>See generally Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 84 (2001) [hereinafter *Brower, Equilibrium*].

<sup>121</sup>See, e.g., *Mondev*, Final Award, *supra* note 49, ¶ 86 (“International law does not place emphasis on merely formal considerations”). The preference for substance over form has been evident in several respects. The arbitrators have often examined the motivation behind a given claim submission requirement, questioned whether its strict enforcement would be consistent with the investor protections sought to be promoted by Chapter 11, considered whether the respondent had suffered any genuine prejudice as a result of the alleged defect, and assessed whether rigorously enforcing a procedural predicate would merely defer the bringing of an ostensibly viable claim. See Weiler, *Ethyl-A Harbinger*, *supra* note 4, at 192-95. Some of the same considerations naturally influence tribunals in determining as a preliminary matter the exact content of the rule invoked.

<sup>122</sup> See, e.g., *Metalclad*, Award, *supra* note 41, ¶¶ 64-69 (future reliance on Ecology Decree signaled in claimant’s memorial; opportunity to address its effect given respondent in counter-memorial and rejoinder).

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### D. Unifying Forces

#### 1. *In General*

As noted above, the decentralized and fragmentary nature of international law sources and the differing backgrounds of the arbitrators and advocates have combined with many questions of first impression to generate differing approaches to identical issues. Nevertheless, even in the absence of a unifying appellate mechanism, several influences—both formal and informal—have promoted convergence on several points. These influences include cross-consultation of decisions among NAFTA tribunals, the NAFTA Parties’ Article 1128 submissions and responsive pleadings, the binding interpretations those Parties may jointly issue, and the set-aside jurisprudence produced by domestic courts.

#### 2. Inter-Tribunal Cross-Fertilization

The ready availability of Chapter 11 awards and associated materials has equipped disputants to invoke in a current proceeding the reasoning of other NAFTA tribunals.<sup>123</sup> Tribunals in turn have been willing to consult and sometimes adopt the reasoning of other Chapter 11 tribunals, generating, if somewhat unpredictably, strands of uniformity.<sup>124</sup> One suspects, moreover, that even when a prior award is not openly embraced, the added reflection stimulated by a competing view has subdued extremes and exerted a beneficial influence on award quality.

#### 3. Direct and Indirect Submissions of Non-Disputant Parties

The views of non-disputant NAFTA Parties may be communicated to sitting Chapter 11 Tribunals in at least two, non-binding ways; one is direct, the other indirect. First, NAFTA states that are not party to a particular Chapter 11 proceeding are, under Article 1128, entitled to make submissions on questions of interpretation.<sup>125</sup> In contrast to the Interpretations rendered jointly by the three Parties under Article 1131(2), Article 1128 submissions do not necessarily evince a

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<sup>123</sup> The web sites of the NAFTA governments and ICSID publish many important materials as does [naftalaw.org](http://naftalaw.org). Moreover, counsel within the NAFTA bar tend to consult each other, sharing information to varying degrees.

<sup>124</sup> See, e.g., *Loewen*, Final Award, *supra* note 31, ¶ 133 (quoting with approval the denial of justice test articulated in *Mondev*, *supra* note 49) *see also id.* ¶ 126 (adopting the principle enunciated in *Azinian* that Chapter 11 tribunals do not stand as appellate courts in relation to domestic courts).

<sup>125</sup> See *Loewen*, Decision on Jurisdiction, *supra* note 31, ¶ 35 (submissions by Mexico on the meaning of “measure” and on the import of certain Chapter 11 awards).

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single view. Accordingly, in addition to stimulating further comments by the disputants, they may serve a moderating function, either because the respondent state softens its position in anticipation of the potentially contradicting views of its NAFTA co-Parties or because the tribunal is alerted to a preferable view.<sup>126</sup> Nothing of course prevents the parties from collaborating before making submissions. Regardless of whether they do, where their views agree, a tribunal, though not bound by apparent accord, generally will take due account of it.<sup>127</sup>

The NAFTA Parties have regularly exercised their right to make submissions as non-disputants. Their submissions, however, are often selective in the questions addressed. Such self-restraint is a function of resources and of prudential considerations; unlike many private litigants states must consider both the reciprocal and long-term implications of a views they sponsor, and how those views mesh with past positions they have taken. There is no doubt a tension between the dual roles of each NAFTA Party. Ultimately, each is both a home state to investors requiring protection abroad and a member of a class of perpetual respondents.

The second avenue by which non-disputant Partys are introduced in a pending arbitration is episodic and circuitous. The inter-Party distribution of pleadings promoted by an explicit NAFTA provision<sup>128</sup> has resulted, functionally speaking, in indirect submissions. Specifically, it is not unusual for a NAFTA respondent in one proceeding to rely on views independently taken in other proceedings by one or both of the other two NAFTA states. Whether the objective is to formally suggest to the arbitrators a species of state practice or to merely offer evidence of the NAFTA Parties' intent, through this method the concordant views of the Parties become available for tribunal consideration.

### 4. Binding Interpretations

As noted above and more fully treated below,<sup>129</sup> Chapter 11's governing law provision<sup>130</sup> instructs tribunals to decide by reference to applicable rules of international law, the NAFTA text,

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<sup>126</sup> For example, in *Metalclad* the United States' Article 1128 observations confuting an interpretation sponsored by Mexico were largely adopted by the Tribunal. *See Metalclad*, Award, *supra* note 41, ¶¶ 27, 73 (local government acts attributable to host state for purposes of NAFTA).

<sup>127</sup> *See Mondev*, Final Award, *supra* note 49, ¶¶ 103-27 (taking note of common ground among submissions of disputants and Parties in formulating modern test for denial of justice).

<sup>128</sup> NAFTA, *supra* note 1, art. 1129.

<sup>129</sup> *See infra* notes 131, 217-231 and accompanying text

<sup>130</sup> NAFTA, *supra* note 1, art. 1131.

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and any interpretations issued by the NAFTA Fair Trade Commission (FTC). The FTC's interpretations, though having no effect on the content of custom, by definition establish a common meaning to the NAFTA text in question, representing the only formal, centralized, mechanism for unifying NAFTA jurisprudence. Thus far, the Commission has produced one such interpretation, eliminating certain questions raised by Article 1105 and prompting others.<sup>131</sup>

### 5. Set-Aside Precedent

The published set-aside decisions of domestic courts within the NAFTA territories, though limited to narrow grounds of review, may affect the content and formation of Chapter 11 jurisprudence. Though instances of completed set aside proceedings are limited for the time being to Justice Tysoe's *Metalclad* decision,<sup>132</sup> as that decision illustrates, a court's examination of a tribunal's mandate often traverses matters of substance.<sup>133</sup> Such open explorations may occur as a natural by-product of matching the tribunal's apparent mandate with the sources and powers it purported to employ. In *Metalclad*, the tribunal found a failure to accord fair and equitable treatment under Article 1105 and an expropriation (on two separate theories) obliging Mexico to compensate the investor. Justice Tysoe partially set the award aside, reasoning that the tribunal had exceeded its mandate by announcing a transparency principle not expressly found in Chapter 11.<sup>134</sup>

The Tysoe opinion ventures observations about NAFTA's architecture and about the resulting content of Articles 1105 and 1110. Though criticized by numerous commentators as being too invasive,<sup>135</sup> Justice Tysoe's opinion adds to the available information just as any thoughtfully-

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<sup>131</sup>The Interpretive Note has generated questions about the interpretation mechanism itself, such as: when does a purported "interpretation" constitute a de facto amendment (a power not vested in the FTC), must such interpretations be given effect in pending arbitrations, and should they have any effect in post-award proceedings assessing the award? See *infra* notes 230-231 and accompanying text. For arbitrator discussion of some of these questions, see *Pope & Talbot, Award on Damages, supra* note 79, ¶¶ 43-69 and see generally Charles H. Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 78-86 (2003) [hereinafter Brower, *Legitimacy*].

<sup>132</sup> *Metalclad*, Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 43.

<sup>133</sup> See Coe, *Achilles Heel, supra* note 8, at 198 n.91, 205 n.126 and accompanying text; Coe, *A Retrospective, supra* note 45, at 77-78.

<sup>134</sup> Justice Tysoe's decision is examined further at *supra* note 107 and *infra* note 288 and accompanying text.

<sup>135</sup> See, e.g., Weiler, *A Play in Three Parts, supra* note 57 (lamenting invasion of merits); Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire*

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crafted decision would. As the only set-aside judgment thus far, it has been studied by Chapter 11 tribunals, both for interpretive guidance<sup>136</sup> and presumably in seeking to immunize their awards from a similar fate.<sup>137</sup> Disputants have consulted it for substantive insights and in assessing the relative suitability of Vancouver as an arbitral seat.<sup>138</sup> Other courts asked to nullify a Chapter 11 awards, especially those operating under the Model Law, will no doubt refer to it as well.<sup>139</sup>

### V. POPULAR MISGIVINGS—FACT AND FABLE

#### A. In General

That Chapter 11 has commanded a remarkably diverse audience is apparent from a perusal of the mounting literature. The introduction of voices from outside the ranks of international law specialists has occasioned fresh perspectives, eloquent studies, popular oversimplifications and the occasional unmitigated canard. Among experts as well, variations in orientation have engendered shades of attitude reflected in expressions of concern and calls for reform. While it is not the purpose of this essay to catalog and critique the profusion of views in evidence, a brief exploration is offered of recurrent themes bearing most heavily on systemic viability and

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*Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43 (2001) [hereinafter Brower, *Empire*] (referring to Tysoe's review as, *inter alia*, "heightened"); *but see* Thomas, *Reply to Professor Brower*, *supra* note 43 (disputing that Justice Tysoe conducted a "heightened" review).

<sup>136</sup>*See, e.g., Feldman*, Final Award, *supra* note 31, ¶ 133 ("While this Tribunal is not required to reach the same result as the British Columbia court, it finds this aspect of their decision instructive."). *But see, Pope & Talbot*, Award on Damages, *supra* note 79, ¶ 74 n.37 (Tysoe's construction of 1105 *ipse dixit*, and thus of questionable precedential value).

<sup>137</sup>The tendency on the part of Chapter 11 tribunals to present alternative bases for their decisions, if not prompted by *Metalclad*, are certainly in keeping with its approach. In that decision, it was the tribunal's alternative basis for finding an expropriation that survived attack in Justice Tysoe's court. *See Loewen*, Final Award, *supra* note 31 (continuity of nationality and failure to exhaust); *Mondev*, Final Award, *supra* note 49 (three year time bar and pre-NAFTA breach); *ADF*, Award, *supra* note 40 (no violation of Articles 1102 and procurement exemption).

<sup>138</sup>To the author's knowledge, Vancouver has not been designated as the arbitral seat since the *Metalclad* decision was rendered. The author is reliably informed that certain counsel have advised against Vancouver as a place for Chapter 11 arbitration on the basis that Justice Tysoe's decision signifies an undesirable proclivity.

<sup>139</sup>The set aside ruling in the *S.D. Myers* is forthcoming from another Canadian court.

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legitimacy.<sup>140</sup> What follows are introductory discussions of private standing to assert treaty breaches (free of espousal and exhaustion), substantive indeterminacy, process transparency, arbitrator accountability and the impact of potential Chapter 11 liability on regulation.

### B. Chapter 11 as “Unprecedented”

#### 1. The Labels and Underlying Sensibilities

Some commentators have referred to Chapter 11 as “unique”<sup>141</sup> or “unprecedented.”<sup>142</sup> Characterizations of this type typically have reference to a cluster of Chapter 11 attributes and potentialities. Most prominently these include the direct standing conferred on investors in relation to alleged Chapter 11 breaches<sup>143</sup> and the corresponding possibility that a state may be required to pay damages, possibly for activities undertaken for a public purpose in circumstances in which that sovereign’s own courts have been shunned by the investor<sup>144</sup> and in which that sovereign’s own citizens may not have been able to recover.<sup>145</sup> Some commentators also

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<sup>140</sup>“Legitimacy,” a now-popular term is used variously by different writers, some having in mind, for example, the stimulating thought of Professor Thomas Franck, in *Legitimacy in the International System*, 82 Am. J. Int’l L. 705 (1988). By contrast, I use it in a non-technical sense to connote the sum total of attributes that inspire confidence in, and rightfully perpetuate, a given system or result. In using the term I do not necessarily, therefore, have reference to, or attempt to answer, the legitimacy concerns expressed about Chapter 11 by others. For an illustrative list of commentators expressing concerns, see Charles H. Brower, II, *NAFTA’s Investment Chapter: Initial Thoughts About Second -Generation Rights*, \_\_ VAND. J. TRANSNAT’L L. \_\_, nn.2-3 and accompanying text, (forthcoming 2004)(manuscript on file with the author). See also Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. Miami L. Rev. 773, 828-29 (2002) (describing and replying to certain critics).

<sup>141</sup>Swan, *supra* note 4, at 166.

<sup>142</sup>Lydia Lazar, *NAFTA Dispute Resolution: Secret Corporate Weapon?*, 1(3) J. GLOBAL FIN. MARKETS \_\_, \_\_ (Winter 2000).

<sup>143</sup>*Cf.* Thomas, *A Reply*, *supra* note 43, at 460 (Chapter 11 disputes mechanism an extraordinary elevation of private standing to assert international legal rights owed to a state); and see Charles H. Brower, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT’L L. 465 (2002)] (Chapter 11 disputes mechanism meant to function within general framework for international commercial arbitration) [hereinafter Brower, *Reply to Mr. Thomas*].

<sup>144</sup> *Cf. infra* notes 181-185 (the *Metalclad* example).

<sup>145</sup>See Been & Beauvais, *supra* note 104, at 41-43. The authors conclude that the



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emphasize the high number of Chapter 11 claims likely to arise and the corresponding prospect that both NAFTA state coffers and regulatory zeal will suffer.<sup>146</sup> More specifically, Chapter 11 is thought to be different from existing investment treaties because of its tripartite character, the well-developed regulatory apparatuses in place in two of the three countries, the high volume of trade involved and the resulting possibility that powerful enterprises—inevitably affected by regulation--will use Chapter 11 to shift business risks properly borne by themselves to NAFTA territory taxpayers.

The notions that direct standing is novel and ill-considered are addressed in the immediately following sections; the question of chilling effect is discussed more fully under G. below.

### 2. Chapter 11's Lineage

In light of not too recent treaty practice, comment denying Chapter 11 of a pedigree may tend to mislead.<sup>147</sup> At least thirty years before Chapter 11 took effect, BITs had begun to both grant direct investor standing and to waive the local remedies rule, often in connection with a designation of ICSID arbitration.<sup>148</sup> By the time NAFTA took effect, numerous U.S. BITs had established the right of foreign investors to bring arbitral claims against the United States, in exchange for reciprocal rights for U.S. investors.<sup>149</sup>

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competitive advantage potentially given foreign investors under international law relative to local enterprises is more concretely detrimental than the potential chill on regulation, which they regard as more speculative. *Id.* at 77;

<sup>146</sup>*See also infra* note 268-275 and accompanying text.

<sup>147</sup>Professor Carbonneau seems to agree that certain characterizations of Chapter 11 have been misleading, or in his words “in effect, amounting to misrepresentation[.] pitched at the level of deceit” Carbonneau, *supra* note 140, at 827 (with reference to certain incredulous journalists’ failure to place the Chapter 11 process in context) and see *infra* note 156 and accompanying text. *See generally* Barton Legum, *The Innovation of NAFTA Investor-State Arbitration*, 43 HARV. INT’L L. J. 531 (2002)(tracing mixed claims processes historically and demonstrating that Chapter 11 is not wholly novel).

<sup>148</sup>*See generally* Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287 (1997); Naón, *supra* note 3, 85-88.

<sup>149</sup> *See, e.g.*, Senegal-U.S. Treaty Concerning the Reciprocal Encouragement and Protection of Investment art.VII (1986) *reprinted in* KENNETH VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE App. B at 120 (1992) (calling for ICSID Arbitration upon failure of collaborative means).

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Like their European counterparts,<sup>150</sup> U.S. BITs in increasing numbers contemplate that a tribunal composed exclusively or partially of foreign lawyers (typically holding no judicial rank in their home countries) will be empowered, for the single dispute in question, to award damages to an investor, subject to little or no judicial review, perhaps based on state conduct that was perfectly lawful as a matter of domestic law. This central thesis animates the highly successful ICSID Convention<sup>151</sup> and it is to this basic model that international agencies point in counseling states seeking to attract foreign direct investment.<sup>152</sup> It was to a variation of this formula that the creators of the Iran-U.S. Claims Tribunal turned over two decades ago<sup>153</sup> and from which the drafters of the ill-fated Multilateral Investment Agreement (MIA) took inspiration in composing its investor-host dispute provisions.<sup>154</sup> While the uninitiated may find the standard dispute features of modern BITs and Chapter 11 remarkable, those texts adhere to a norm that persists also in post-1994 treaty practice, serving as a model even for Mexican BIT's.<sup>155</sup>

### B. *Direct Standing or Espousal?*

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<sup>150</sup>See generally RUDOLPH DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 1-11 (1995).

<sup>151</sup>The literature regarding the Convention is considerable and of a high quality. For a seemingly exhaustive bibliography see CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1291-1329 (2001). For an instructive and insightful account of ICSID Convention arbitration that outlines the process concisely, see Abby Cohen Smutny, *Arbitration Before the International Centre for Settlement of Investment Disputes*, 3 *BUS. L. INT'L* 367 (2002).

<sup>152</sup>See generally Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 *ICSID REV.* 1 (1986); see also *Guidelines on the Treatment of Foreign Direct Investment*, 7 *ICSID REV.* 297, 306 (World Bank formulation recommending investor-state arbitration).

<sup>153</sup> See generally BROWER & BRUESCHKE, *supra* note 104, at 16-20.

<sup>154</sup>See generally Christopher N. Camponovo, Comment, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 *UCLA J. INT'L L. & FOREIGN AFF.* 181 (1996); see also Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 *INT'L LAW.* 1033, 1045-46 (2000) (investor-state approach to disputes not new, but opposed by NGO's). *But see* S.D. Myers, Award on Merits, *supra* note 31, Schwartz Sep. Op., ¶¶ 84-86 (fear of chilling liability and disruptive claims delayed MAI).

<sup>155</sup>See, e.g., *Bilateral Investment Treaty Between the Swiss Confederation and the United Mexican States*, July 10, 1995, Switz.-Mex. (provisions inspired by NAFTA).

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### 1. The Question

As noted above, for some critics the seemingly unbridled prerogative of wealthy corporations to promote through NAFTA claims their narrow interests without having to consult broader societal priorities is part of what condemns Chapter 11.<sup>156</sup> Given that the obligations relied upon are owed among states and not directly to NAFTA citizens, should not claims of private injury be moderated by interposing home-state discretion in the claims process? Should not some mechanism prevent the disruption of worthy initiatives common to states acting for the common good? Traditional espousal was potentially such a mechanism.

### 2. Espousal – State of Nationality as Traditional Protector

Under the traditional method still functioning today, international obligations—such as the rules governing treatment of aliens and their property—primarily bind states inter se. Mistreatment of an alien was for the state of nationality to pursue, in its discretion, by exercising “diplomatic protection,” perhaps by “espousing” its citizen’s claim.<sup>157</sup> The corresponding lack of private standing on the international plane left aggrieved parties to seek redress in the domestic courts. Justice in host state courts often proved elusive, however, for reasons not difficult to imagine, while in the investor’s home fora questions of state immunity and separation of powers often delayed or foreclosed a remedy.<sup>158</sup>

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<sup>156</sup> See generally Bill Moyers, *Reports: Trading Democracy* (PBS television broadcast) transcript on file with author and available at [http://www.pbs.org/now/printable/transcript\\_tdfull\\_print.html](http://www.pbs.org/now/printable/transcript_tdfull_print.html). But see Carbonneau, *supra* note 140, at 827:

Nothing is ever said—and, therefore, understood—about the larger operation and aspirations of NAFTA. The critics never bothered to communicate an understanding of the difficulty of international adjudication or of how instrumental a functional system of adjudication is to the pursuit of international trade.”

<sup>157</sup> See generally *Preliminary Report of the International Law Commission on Diplomatic Protection*, Feb. 4, 1998, UN Doc. A/CN.4/484 (Bennouna: Rapporteur) [hereinafter *Preliminary Report*]; Werner Goldschmidt, *Transactions Between States and Public Firms and Private Foreign Firms (A Methodological Study)* in *RECUEIL DES COURS (HAGUE ACADEMY OF INT’L L.)* 203, 239-42 (1972 II); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 406-407 (5th ed., 1998); PETER MALUNCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 256-57 (7<sup>th</sup> ed. 1997); JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSIONS’S ARTICLES ON STATE RESPONSIBILITY* 223-224 (2002).

<sup>158</sup> See, e.g., *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state doctrine precluded judicial consideration of foreign government’s alleged taking of property); see also Pearce & Coe, *supra* note 3, at 317-319 nn.27-29 (discussing act of state doctrine and

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Difficulties facing investors in domestic courts, and foreign governments' corresponding reluctance to appear there, would be less significant if the mechanism of diplomatic protection provided a serviceable substitute. By its nature, however, the doctrine of diplomatic protection confers on the state of nationality wide latitude in determining, what--if anything--to do about an alleged breach.<sup>159</sup> The calculus dictating the avenue chosen might be informed by the full range of interests and imperatives affecting states in an interdependent world; for the aggrieved investor the doctrine's discretionary nature and sometimes non-transparent mechanisms provide only limited control and predictability. Limitations on ICJ jurisdiction<sup>160</sup> in turn resulted in only episodic availability of the standing tribunal arguably best-suited to deciding such disputes. Though increasing numbers of inter-state arbitration provisions in bilateral treaties have provided an alternative to the ICJ, states remain only somewhat efficient and effective in marshaling claims, especially where only a single investor is involved. Moreover, where multiple claims have arisen (such as from a nationalization), the lump sum settlements often reached frequently do not make investors whole.<sup>161</sup>

From the vantage of the host state, diplomatic protection is encumbered by additional defects, not least its reputation as a prerogative available only to powerful states who have used it as a pretext for undue reprisals.<sup>162</sup> A powerful reminder of these concerns is Article 27(1) of the

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sovereign immunity questions and providing related authority) .

<sup>159</sup> See *Preliminary Report*, *supra* note 157, at 1, 4.

<sup>160</sup> See generally J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 121-129, 168-169 (3d ed. 1998); BROWNLIE, *supra* note 157, at 728-30. JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 132-68 (1999).

<sup>161</sup> WESTON, LILICH, & BEDERMAN, *supra* note 104, at 84-88 (lump sum agreements often, but not invariably, lead to partial compensation).

<sup>162</sup> Shihata, *supra* note 152, at 15-16. Judge Padilla's separate opinion in the *Barcelona Traction* case is characteristic of these misgivings:

The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a Government to make the reparation demanded.

Case Concerning Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 246 (Feb. 5).

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ICSID Convention, which rewards a host state's offer to arbitrate direct investment claims by disallowing the investor's home state from exercising diplomatic protection once a dispute has been submitted to ICSID.<sup>163</sup>

### 2. Chapter 11 and Espousal

It follows from the foregoing that the trend Chapter 11 follows is in granting private standing to make direct claims is neither fully experimental nor accidental. Espousal, though responsible for interesting investment-related decisions, such as *Barcelona Traction*<sup>164</sup> and *ELSI*,<sup>165</sup> would mesh poorly with NAFTA's stated objective of creating "effective procedures for...the resolution of disputes."<sup>166</sup>

For host states the direct standing approach (combined with the foreclosure of other avenues) greatly limits their exposure both to municipal court actions abroad and diplomatic protection. It also signifies to prospective investors and to other stake-holders that protections corresponding to the prevailing model are in place in the host country.<sup>167</sup> For investors, direct

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<sup>163</sup> Diplomatic protection may be exercised, however, if the arbitrating state fails to abide by any award ultimately rendered against it. ICSID Convention, *supra* note 10, art. 27(1). The prospect of diplomatic protection supplies an inducement to states to comply promptly with ICSID awards, but would appear not to preclude parallel resort to private mechanisms for enforcing the award.

<sup>164</sup> *Barcelona Traction Power & Light Co. (Belg. v. Spain)*, 1964 I.C.J. 6 (Preliminary Objections); 1970 I.C.J. 3 (2d Phase).

<sup>165</sup> *ELSI*, Judgment, *supra* note 103. *ELSI* is distinguishable in that it was before a Chamber of the ICJ, and may be presumed to have been more efficient than would a full Court proceeding. Nevertheless, it remained an espoused claim, and as Keith Highet wrote "[i]n the Hydra-headed example of a derivative claim in an espousal case...matters are not so simple. There were at least two 'clients' here [Raytheon and the United States in dual capacities]." Keith Highet, *Evidence, the Chamber and the ELSI Case*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* (Richard B. Lillich, ed. 1990) 33, 43 (referring to the problems of national-home state cooperation in attempting to produce convincing evidence and argument).

<sup>166</sup> NAFTA, *supra* note 1, art. 102 (1)(e).

<sup>167</sup> See Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID Rev. 339, 382 (1992) (vast majority of 335 BITs and similar treaties surveyed contained ICSID arbitration provisions); *Cf.* Caron, *supra* note 26, at 155 (investment flows stimulated by availability of arbitration); Ibrahim F. I. Shihata, *Promotion of Foreign Direct Investment--A General Account with Particular Reference to the Role of the World Bank*, 6 ICSID REV. 484, 505 (World Bank sponsored ICSID to foster environment conducive to

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arbitration provides an independent, expert, systemically neutral, alternative to domestic courts, especially those of the host state. It also carries greater autonomy, control, efficiency, and predictability than diplomatic protection, while producing a result that is globally enforceable by treaty.<sup>168</sup>

### C. *Direct Standing and Exhaustion of Local Remedies*

#### 1. Exhaustion In General

The doctrine that an aggrieved foreign national must exhaust local remedies before it –or its state of nationality – brings a claim against the host state on the international plane is well established in customary international law,<sup>169</sup> so much so that a distinguished chamber of the International Court of Justice, as recently as 1989, was unwilling to infer without a convincing basis that the doctrine did not obtain under the bilateral treaty there involved. In that case--the *ELSI* decision --the majority opinion referred to the exhaustion doctrine as “ an important principle of customary international law.”<sup>170</sup>

It is not from simple inertia that the exhaustion doctrine still occupies a place in custom, and its underlying policies are not difficult to divine. Allowing the host state’s internal mechanisms of redress to operate may result in an expeditious adjustment to the dispute, saving that state the embarrassment of an international claim and adding deference and, perhaps, fairness to the process. In settings in which the alternative is home state espousal, successful resort to municipal remedies spares the two states involved the negative effects of adversarial dealings. Requiring domestic proceedings moreover promotes a ripening of claims and helps develop a factual base that may facilitate more informed adjudication in any subsequent international proceeding. Particularly in a case of an alleged denial of justice, it may make little sense to credit the claim where the domestic mechanisms in place for addressing low level justice system missteps have not been pursued. Given the forgoing and related considerations, at least one commentator has concluded that exhaustion ought to be encouraged, if not required, in at least

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investment); *but see* Been & Beauvais, *supra* note 104, at 63 n.432 (no evidence that treaty protections encourage investment).

<sup>168</sup>Both the ICSID and New York Conventions have over 100 parties. *See* News & Notes, *supra* note 3, at 10 (table of treaty adherence).

<sup>169</sup>*See generally* BROWNLIE, *supra* note 157, at 496-506; *Cf.* Amerasinghe, *Whither the Local Remedies Rule?*, 5 ICSID REV. 292 (1990); M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 328-29 (2000); Nsongurua J. Udombana, *The Local Remedies Rule in the Jurisprudence of the African Commission*, 97 AM. J. INT’L L. 1, 3-6 (2003).

<sup>170</sup>*ELSI*, Judgment, *supra* note 103, at 42.

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some Chapter 11 arbitrations.<sup>171</sup>

As a matter of first principles, however, states may through treaty waive the local remedies rule. In the context of a treaty intended to promote investment by supplying effective dispute resolution means, there may be solid reasons to eliminate the exhaustion phase in perfecting the claim. Apart from the argument that exhaustion makes illusory a sovereign's commitment to arbitrate,<sup>172</sup> are the delay that ponderous domestic adjudication may produce and the corresponding effects of the passage of time (such as degradation in evidence). Further, domestic courts may not offer satisfactory levels of neutrality and transparency, defects not easily addressed by a Chapter 11 proceeding given the rigors of establishing denial of justice.<sup>173</sup> When exhaustion applies, the requirement adds an issue for tribunal consideration and an additional hurdle for the claimant to overcome.<sup>174</sup> To the extent that the claimant elects to forgo a theoretically available avenue, moreover, the tribunal must determine whether the remedy forsaken was effectively futile so that claimant's foreshortening of the process can be forgiven.<sup>175</sup>

### 2. Chapter 11 and Exhaustion

No Chapter 11 provision explicitly addresses whether investors are required to exhaust local remedies. From its overall architecture a compelling inference nevertheless arises that no such requirement applies as a general matter-- a departure from the customary rule. Rather than encouraging exhaustion, a confluence of provisions establish a cooling off period and, through a waiver requirement, disallow most domestic proceedings that might otherwise parallel the

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<sup>171</sup>William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 572 (2002) [Hereinafter Dodge, *Trials*]. Professor Dodge holds that certain architectural changes would be necessary to establish the requirement. *Id.* at 573.

<sup>172</sup>See Aurthur T. von Merhen, *Arbitration Between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution*, 5 ICSID REV. 54, 61-62 (1990) (discussing Resolution, Article 8: "[t]he requirement of exhaustion of local remedies as a condition is not admissible unless the arbitration agreement provides otherwise"). The resolution is reprinted *Id.* at 139.

<sup>173</sup> See *supra* note 87 and *infra* notes 188-202, 251 and accompanying text.

<sup>174</sup>Under a prevailing view, at least once the issue is properly raised, the burden is on the claimant to demonstrate that available remedies have been exhausted. See *Loewen*, Final Award, *supra* note 31, ¶ 215.

<sup>175</sup> See *Id.* ¶¶ 207-211 (discussing whether failure to seek Supreme Court review would be excused).

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arbitration.<sup>176</sup> In relation to claims brought against Mexico, moreover, an attempt to rely on NAFTA in a domestic court may constitute an election precluding subsequent Chapter 11 arbitration.<sup>177</sup> Nevertheless, in certain cases the exhaustion question has featured with sufficient gravity in the disputants' pleadings that the tribunals have addressed the doctrine's applicability. The awards in *Metalclad* and *Feldman* both devoted attention to the question: both found that exhaustion is not required,<sup>178</sup> a conclusion also reached by commentators<sup>179</sup> and other Chapter 11 tribunals.<sup>180</sup> Against this background, the *Loewen* tribunal's final award is remarkable. As discussed below, the tribunal interpreted Chapter 11 as requiring exhaustion, at least in denial of justice cases. To place *Loewen* in context, brief consideration of *Metalclad*—a non-denial of justice case— follows.

2. Metalclad

That exhaustion is not required was the conclusion reached by the tribunal in *Metalclad*, the first claim filed against Mexico.<sup>181</sup> The claimant there asserted breaches of Articles 1105 and

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<sup>176</sup> See NAFTA, *supra* note 1, art. 1121(1); *supra* note 54 (discussing *Waste Mgmt. I*). The argument for implied exemption from the exhaustion requirement is that the NAFTA Parties while affirmatively requiring the investor to repudiate local remedies if wishing to arbitrate, were silent on the seemingly related question of exhaustion. Though the waiver requirement may simply be aimed at preventing inconsistent decisions arising out of the same measure, the implication is that an investor may shun domestic redress provided it is prepared to not prosecute parallel actions—one in arbitration, one in local courts. If an investor were required to exhaust local remedies concerning the measure complained of, there would be little left to waive, rendering Article 1121 superfluous.

<sup>177</sup> NAFTA Annex 1120.1 records Mexico's stipulation that an investor "may not allege that Mexico has breached an obligation under [Chapter 11] both in an arbitration under [Chapter 11] and before a Mexican court or administrative tribunal." The apparent effect is to prevent an unsuccessful NAFTA-based court claim before a Mexican court from being followed by a second attempt through Chapter 11 arbitration (or vice versa).

<sup>178</sup> See *Metalclad*, Award, *supra* note 41, ¶ 97 n.4; *Feldman*, Final Award, *supra* note 31, ¶¶ 71-73.

<sup>179</sup> See Pearce & Coe, *supra* note 3, at 323-24; William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 373-76 (2000) [hereinafter Dodge, *Exhaustion*]; See Dodge *Trials*, *supra* note 171, at 572-77.

<sup>180</sup> *Mondev*, Final Award, *supra* note 99, ¶ 126.

<sup>181</sup> See Dodge, *Metalclad Note*, *supra* note 57; Weiler, *A Play in Three Parts*, *supra* note



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1110. Among the pivotal events in the case were a municipality's insistence that the investor apply for a certain permit and that municipality's subsequent refusal to issue that permit. The investor's initial tack was to attempt reversal of the municipality's decision, by petitioning the municipality itself.<sup>182</sup> It discontinued its effort after losing at that level, preferring rather to pursue collaborative initiatives and ultimately Chapter 11 arbitration.<sup>183</sup> The claim's admissibility was not affected by Metalclad's abandonment of local court avenues.<sup>184</sup> Technically, (under the pre-*Loewen* view) *Metalclad* did more than it was required to by seeking an administrative remedy. Importantly, however, its claim was not predicated on alleged mistreatment in Mexican courts.<sup>185</sup>

### 3. Consequences for the Non-Exhausting Investor

*Metalclad* also demonstrates the more subtle substantive consequences of removing the exhaustion requirement. To the extent the claimant based its allegations of unfair and inequitable treatment on the actions of the municipality, it could do so without placing those acts in the context of the entire Mexican system for correcting low-level errors. That is, Mexico faced the conundrum of arguing that fairness must be considered in light of the sum total of remedial mechanisms available to the investor while appearing not to ask the tribunal to penalize the investor for doing exactly what Chapter 11 allows. Though in *Metalclad*, the investor's failure to exhaust the court system had little apparent bearing on the award, Mexico successfully made its

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<sup>182</sup>*Metalclad v. Mexico*, Counter Memorial, at 183; Reply Brief, at 75 (briefs on file with author).

<sup>183</sup>*See generally* Pearce & Coe, *supra* note 3, at 323-24 (Metalclad's counsel discussing exhaustion).

<sup>184</sup>In a rare footnote, the tribunal observed that Mexico had not insisted that exhaustion was required, and that its forbearance was concordant with the tribunal's reading of Article 1121(2)(b). *Metalclad*, Award, *supra* note 41, ¶ 97 n.4. Mexico would later question the tribunal's command of the Mexican argument on exhaustion.

<sup>185</sup>At the hearing, Metalclad's counsel made reference to the Municipality's handling of its permit request as, among other things, an administrative denial of justice and in its post-hearing brief commended the tribunal's further consideration of *Amco v. Indonesia*, Resubmitted Case, Award on the Merits (May 31, 1990), 1 ICSID REP. 569 (1993). Post-Hearing Brief, submitted November 9, 1999, at 17 n.43 (Brief on file with the author). Had the claimant more squarely relied on the theory as an autonomous basis of recovery, its failure to exhaust local appeals may have raised questions similar to those confronted in *Loewen*. *See infra* notes 189-202 and accompanying text.

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point (under a different guise) in *Feldman*,<sup>186</sup> in which the tribunal was influenced by the investor's failure seasonably to clarify by formal ruling its entitlement to certain tax rebates.<sup>187</sup> In *Feldman*, the investor's inaction was reflected in the Tribunal's assessment of the merits, not claim admissibility. Regardless, it underscores that a claimant fails to vigorously consolidate its rights within the domestic system to its peril.

4. Rethinking Exhaustion--Loewen v. The United States

*Loewen*<sup>188</sup> arose out of a lawsuit brought in a Mississippi court by certain American owned companies with close ties to Mississippi, against a Canadian corporation and its United States subsidiary (the Loewen companies). The plaintiff's action related to a troubled commercial transaction between the parties and alleged breach of contract, unfair competition and fraud.<sup>189</sup> According to the Chapter 11 tribunal's subsequent evaluation of the proceedings, plaintiff's trial strategy seemed calculated to inflame jury prejudice on the basis of the defendant's national origin in comparison to plaintiff's own local roots. The trial court failed to control the tactic or to take effective measures to mitigate its effects with the jury,<sup>190</sup> which after a seven week trial awarded the plaintiff \$500 million, including \$400 million as punitive damages.<sup>191</sup> Thereafter, the Mississippi Supreme Court declined Loewen's request to relax the 125 per cent bonding requirement applicable to appeals under Mississippi state law.<sup>192</sup> Loewen did not seek U.S. Supreme court review. In January of 1996, Loewen settled the dispute, agreeing to pay the judgment holder \$175 million.<sup>193</sup>

In July of 1998, Ray Loewen and the Canadian parent entity brought Chapter 11 claims, advancing among other bases of recovery, denial of justice (subsumed within Article 1105's

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<sup>186</sup>*Feldman*, Final Award, *supra* note 31.

<sup>187</sup>*Id.* ¶ 114.

<sup>188</sup> *Loewen*, Final Award, *supra* note 31. For pre-award factual summary and analysis, see generally Dodge, *Trials*, *supra* note 171, at 563-567 and Robert E. Lutz & Russell C. Trice, *NAFTA at Five and the Loewen Case*, TRANSLEX 1 (October 1999).

<sup>189</sup>*Loewen*, Final Award, *supra* note 31, ¶¶ 30-38.

<sup>190</sup>*Id.* ¶¶ 119-123.

<sup>191</sup>*Id.* ¶¶ 122.

<sup>192</sup>*Id.* ¶ 6.

<sup>193</sup>*Id.* ¶ 7.

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minimum standard).<sup>194</sup> In June of 2003 both claims were dismissed on jurisdictional grounds.<sup>195</sup> The award nevertheless contained extensive dicta addressing the merits. The tribunal concluded that despite the highly deficient state court proceedings prompting the Chapter 11 claim,<sup>196</sup> those claims would have failed under the local remedies rule. The tribunal reasoned that the failure to seek Supreme Court review obliged the claimants to demonstrate why that avenue was not among the “reasonably available and adequate” local remedies, which under the rule a claimant must pursue.<sup>197</sup> The award, which has generated considerable controversy, contains much of importance.

Interpretive issues aside, the doctrine adopted in *Loewen* is somewhat attractive in that before a state will be held responsible for the acts of judicial organs, the curative mechanisms designed to redress the type of error complained of will be allowed to function. Consequently, the investor would not – by ignoring appeal opportunities – be able to make state responsibility depend upon on what may be the host state justice system’s weakest link. This concern was at heart of the *Loewen* tribunal’s thinking. It observed:

[I]t would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal were not pursued, let alone exhausted.<sup>198</sup>

The award, however, raises questions about the role of exhaustion when the claim is not based on judicial conduct. To impose an exhaustion requirement the tribunal had to find that Article 1121 (requiring waiver of domestic proceedings) did not by implication supplant the customary doctrine of exhaustion. It may well be true that Article 1121 is not aimed at the exhaustion

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<sup>194</sup>See generally Jack J. Coe, Jr., *Denial of Justice and NAFTA Chapter Eleven—The Mondev Award*, INT’L ARB. NEWS 2 (Winter 2002/2003) (ABA SILP publication).

<sup>195</sup>Through a corporate reorganization, the Canadian corporation had lost the requisite nationality to fall within the tribunal’s jurisdiction; the individual claim of Ray Loewen failed because he had not to the tribunal’s satisfaction demonstrated ownership or control. For a more complete summary see *supra* note 53.

<sup>196</sup>In summation the tribunal observed : “[t]he whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.” *Loewen*, Final Award, *supra* note 31, ¶ 137.

<sup>197</sup>*Id.* ¶ 215. That grants of certiori are discretionary and infrequent would not alone excuse the failure to seek such review. *Id.* ¶¶ 215-217.

<sup>198</sup>*Id.* ¶ 46.

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requirement specifically,<sup>199</sup> but within Chapter 11's overall architecture, it is difficult to see how one can both exhaust local remedies and waive their initiation or continuance.<sup>200</sup> The tribunal acknowledged that “Article 1121 may have consequences” for other kinds of claims, but declined to speculate further.<sup>201</sup> If the exhaustion requirement is not affected by Article 1121 when judicial acts are involved, why would it be when they are not? Perhaps the same beneficial finality requirement applied by the tribunal could have been installed by insisting that until redress has been pursued at the highest available levels, justice system acts and omissions are not “measures ...adopted by a Party.”<sup>202</sup>

Alternatively, but in a similar vein, the “exhaustion” requirement identified by the tribunal might come to be viewed as a substantive element specific to denial of justice claims. Thus, just as a recovery under Article 1110 (expropriation) requires a showing of permanency of deprivation, so would a denial of justice claim imply necessarily that appeals had been fully pursued within the legal system under consideration. Regardless, even though (and perhaps because) the just-minted *Loewen* award is both fully dictum on these points and a bit elliptical, one should expect extensive reaction from commentators.

### 5. The Impact of Domestic Court Adjudication

In several of the Chapter 11 expropriation cases, there were pre-claim attempts by an investor to pursue local remedies. Often the findings in domestic courts have been unfavorable to the investor. While Chapter 11 tribunals are not bound by domestic court judgements, they have been influenced by those determinations.<sup>203</sup> Provided the process below does not rise to the level of a denial of justice,<sup>204</sup>—itself a violation of Article 1105--domestic courts may be regarded as shedding persuasive light on the content of domestic law, as *Azinian*, the second case filed against Mexico, demonstrates.

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<sup>199</sup>*See Id.* ¶ 161 (relying on agreement between Professors Christopher Greenwood and Sir Robert Jennings).

<sup>200</sup>*See* NAFTA, *supra* note 1, art. 1121.

<sup>201</sup> *Loewen*, Final Award, *supra* note 31, ¶ 163.

<sup>202</sup>*See* NAFTA, *supra* note 1, art. 1101. The definition of “measure” however is very broad, so that this line of reasoning encounters difficulty. Why would a lower court’s handling of a case not fall within “any law, regulation, procedure, requirement or practice.” *See* NAFTA, *supra* note 1, at art. 201(1).

<sup>203</sup>*See generally* Dodge, *Exhaustion*, *supra* note 179; Dodge, *Trials*, *supra* note 171.

<sup>204</sup> *Mondev*, Final Award, *supra* note 49, ¶¶ 115-116, 125-27.

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*Azinian* arose from a concession, which the Claimant alleged had been wrongfully terminated or materially breached.<sup>205</sup> Mexican administrative and judicial courts had passed on the concession's viability, finding it--in essence--to be voidable, because of the manner in which it was procured.<sup>206</sup> In dismissing *Azinian*'s claim, a unanimous tribunal credited the domestic court decisions with establishing the concession's vulnerability as a matter of Mexican law. It followed that the municipality in question had merely acted as it was entitled to given the defective rights the investor held. There was thus, according to the tribunal, "by definition no contract to be expropriated."<sup>207</sup>

### 6. Resulting Strategic Considerations

In denial of justice cases, *Loewen* may take hold among NAFTA arbitrators so that an investor aggrieved by a court's handling of its case would at its peril fail to seek appeal at the highest level. If, as seems likely, *Loewen* remains limited to denial of justice claims, in relation to non-justice system measures investors will retain the choices whether and to what extent to pursue local remedies. How claimants will react to the present array of factors in making the choice is difficult to predict. The considerations that inform the decision to press municipal avenues are as much strategic as jurisprudential; and they cut both ways.

To recapitulate, if local courts provide a simple remedy, so as to obviate arbitration, time, money and other resources may be saved. Equally, an investor's failure to engage domestic mechanisms of redress, may be seen by the tribunal as imprudent and contributing to the investor's losses or business failures.<sup>208</sup> Domestic proceedings however may not advance quickly or cheaply. Preoccupation with such proceedings moreover will imperil the subsequent NAFTA arbitration if the investor overlooks the three year limitation period applicable to Chapter 11 claims.<sup>209</sup> The passage of time might also make critical evidence less available. Further, the results below may be unfavorable to the investor, and to the extent they define the investor's rights under domestic law, they may be given persuasive effect by a Chapter 11 tribunal. Finally, in a Mexican court,

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<sup>205</sup>*Azinian*, Award, *supra* note 82, ¶¶ 17,75.

<sup>206</sup>Principally, the defects related to misrepresentations made by the investor in seeking the concession. *Id.* ¶ 21.

<sup>207</sup>*Id.* ¶ 100.

<sup>208</sup>*See Feldman*, Final Award, *supra* note 31, ¶ 114 (failure to seek clarification of eligibility for rebates damaging to investor's case).

<sup>209</sup>*Cf. Mondev*, Final Award, *supra* note 49, ¶ 87 (claims dismissed as time-barred under Article 1116).

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reliance on the NAFTA may be deemed an election of the domestic remedy over Chapter 11 arbitration, a consequence peculiar to Mexico's implementation of the NAFTA.<sup>210</sup>

### *D. Governing Law Indeterminateness and Outcome Unpredictability*

#### 1. The Stakes - Legitimacy and Efficiency

Thoughtful students of Chapter 11 and of adjudicative systems in general have rightly stressed the role of determinateness—the clarity and accessibility of governing law—in establishing and sustaining system legitimacy.<sup>211</sup> In the context of Chapter 11, the consequences of achieving and maintaining sufficient levels of determinacy might include increased likelihood of NAFTA-compliant behavior by host states, greater probability of settlement in the event of breach, and fewer baseless claims. With these concerns in mind, informed observers have identified divergence among Chapter 11 tribunals on questions of procedure and substance.

#### 2. Adopting Reasonable Expectations, Present and Future

One's expectations about clarity and stability of Chapter 11 law necessarily make assumptions about what can be achieved given its dependence on custom. Customary international law remains fragmentary in many respects and its quickening mechanism is ponderous.<sup>212</sup> Consequently, a realistic appraisal of determinateness must account for international law's diffuse nature, a trait not peculiar to its application under Chapter 11. The precision superimposed on custom by the treaty text is only a partial answer; the more often relied upon bases of recovery found there, after all, refer to custom for rules of decision.<sup>213</sup> Critically important also is the recognition that many of the tests for determining responsibility are highly fact-dependent and it is often misleading to explain differing outcomes by emphasizing apparent variations in the juridical language used, rather than by reference to distinguishable facts.

#### 3. Indeterminacy and Formal Mechanisms—The Role of Binding Interpretations

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<sup>210</sup>See NAFTA, *supra* note 1, annex 1120.1.

<sup>211</sup>See Brower, *Legitimacy*, *supra* note 131, at 66-68 (2003) (discussing the perceived amenability of certain treaty standards to arbitral law-making and consequent potential for doctrinal incoherence).

<sup>212</sup>See generally BROWNLIE, *supra* note 157, at 4-11.

<sup>213</sup>See *supra* note 33 and accompanying text.

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### a. *In General*

As noted above,<sup>214</sup> the NAFTA drafters anticipated unacceptable departures from intended meaning by retaining in themselves the prerogative of conclusively interpreting the text. The prerogative is exercised through the Fair Trade Commission (FTC), comprised of members of the three trade ministries. The governing law mandate to which Chapter 11 arbitrators are subject therefore carries the prospect that the controlling text will acquire –at any given point–a gloss which may be different from that they would discover on their own. In theory the disruptiveness of FTC interpretations should be no greater than when a governing statute is amended—an occurrence standing judges face regularly. Conceptually, interpretative notes merely describe what has been NAFTA’s content from its inception, and ordinarily ought to take effect immediately. The situation becomes more complex when counsel, academics and arbitrators raise genuine doubts about a Note’s validity,<sup>215</sup> a predictable turn of events when the Note, rather than confirming generous exposure to responsibility, arguably contracts that exposure.<sup>216</sup> Indeed, the cynic will readily note that thus far the three governments have only been stirred to action by readings of their obligations perceived by them to be unduly broad. The catalyst for what proved to be an important bench-mark in Chapter 11’s development was Article 1105.

### b. The Article 1105 Example

Hindsight reveals that certain of Chapter 11’s provisions, on the day they took effect, had more promise than substantive clarity. As a review of the literature readily confirms, Article 1105 has been singular in generating confusion and controversy.<sup>217</sup> Its guarantee of treatment “in accordance with international law, including fair and equitable treatment...” corresponds to

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<sup>214</sup> See *supra* notes 129-131 and accompanying text.

<sup>215</sup> For more on the distinction between amendment and interpretation, see Brower, *Empire*, *supra* note 135, at 50, 65. For discussion by a Chapter 11 tribunal, see *Pope & Talbot, Award on Damages*, *supra* note 79, ¶¶ 105-118.

<sup>216</sup> In *Pope & Talbot* the validity question was linked to whether a finding of liability should be reassessed in light of a subsequent Note arguably presenting a different interpretation than that supporting the award. See *Pope & Talbot, Award on Damages*, *supra* note 79, ¶¶ 105-118, and *infra* note 231 and accompanying text; see generally J. Christopher Thomas, *Reflections on Article 1105 of the NAFTA: History State Practice and the Influence of Commentators*, 17 ICSID REV. 21, 98-101 (2002) [hereinafter reflections].

<sup>217</sup> See generally Brower, *Legitimacy*, *supra* note 131, at 66-68; Thomas, *Reflections*, *supra* note 216..

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similar provisions found in hundreds of BITs.<sup>218</sup> Despite the pre-NAFTA prevalence of the fair and equitable treatment formula, Chapter 11 arbitration appears to have presented the first opportunity for authoritative construction of that clause. In particular, with seemingly every claimant relying on Article 1105, the meaning of “international law” and “including” soon became hotly contested.

The fundamental points of divergence related to whether for purposes of Article 1105 “international law” merely meant custom, or whether the full catalog of sources listed, e.g., in the Statute of the International Court of Justice (ICJ) could be consulted.<sup>219</sup> The closely related problem posed by “including” was whether the fair-and-equitable- treatment clause added to the international minimum standard a treaty guarantee assimilating the ordinary meanings of “fair” and of “equitable” or whether the clause simply illustrates one or more of the elements contained in the minimum standard established by custom.<sup>220</sup> The distinction matters because if custom

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<sup>218</sup>See *ASIL Proceedings*, *supra* note 55, at 17-19.

<sup>219</sup>Article 38 of the ICJ Statute lists not only custom but treaties and general principles of law recognized by developed legal systems, sources discussed in detail in the standard references. See BROWNLIE, *supra* note 157, ch 1.

<sup>220</sup>At the time of *Metalclad*, few commentaries shed light on Article 1105 or its predecessor formulae. Among them was F.A. Mann, whose essay in *British Yearbook of International Law* was embraced by claimants with considerable enthusiasm. In discussing the fair and equitable clause in certain British BITs, Mann wrote:

[W]hile it may be suggested that arbitrary, discriminatory or abusive treatment is contrary to customary international law, unfair and inequitable treatment is a much wider conception which may readily include such administrative measures... as are not plainly illegal in the accepted sense of international law.

F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, *reprinted in* FURTHER STUDIES IN INTERNATIONAL LAW 234, 238 (1990).

For Mann it was clear that fair and equitable treatment was not merely a restatement of the minimum standard, or simply one component of it, but extended “far beyond the minimum standard.” *Id.* at 237-38. The provision Mann was construing however—like the majority of BITs-- made no mention of international law in connection with fair and equitable treatment, see *ASIL Proceedings*, *supra* note 55, at 17, whereas Article 1105 refers to “treatment in accordance with international law *including fair and equitable treatment*” (emphasis added). The most natural literal import of that language is that international law includes a fairness component, not that fairness is an augmenting treaty obligation added to the dictates of the international minimum standard. Yet, for disputants, a failure of authorities to provide distinct customary parameters to the concept “fair and equitable treatment” left a vacuum, filled by ordinary



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circumscribes all of Article 1105, a claimant would be required to go beyond ordinary meaning to satisfy the possibly more rigorous tests attributed to custom.<sup>221</sup> Perhaps not surprisingly, Chapter 11 tribunals adopted differing views on Article 1105's meaning and application.<sup>222</sup>

If, as has come to be the prevailing view, Article 1105 is part of a bundle of protections contained in the minimum standard, the further question arises whether that cluster of customary protections overlaps with guarantees found elsewhere in Chapter 11, such as that requiring national treatment (Article 1102). The question would remain somewhat academic but for the *Myers* award on liability, in which tribunal (by a majority) found an overlap between Articles 1102 and 1105 and truncated its Article 1105 analysis accordingly; that is, it derived a breach of Article 1105 from a breach of Article 1102 analyzing the latter's national treatment provision but discussing 1105 only briefly.<sup>223</sup> For the two arbitrators forming the award, "the fact that a host [state] has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105."<sup>224</sup> Though the tribunal acknowledged that this double effect is not always the case, under the facts presented "the breach of article 1102 essentially establish[ed] a breach of 1105 as well"<sup>225</sup> This mode of analysis as well as the scope of Article 1105 was subsequently addressed jointly by the NAFTA states, through its Interpretive Note.

### b. *The Interpretive Note*

On July 31, 2001, NAFTA's Free Trade Commission (FTC) issued a statement (the Interpretive Note) declaring that Article 1105 was no more encompassing than the minimum standard of treatment known in custom and that a breach of one Chapter 11 provision or of another treaty does not establish necessarily the breach of Article 1105(1).<sup>226</sup> The instrument

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meaning. For thoughtful discussion of this and related problems by one of Mexico's counsel, see Thomas, *Reflections*, *supra* note 216.

<sup>221</sup> See *Mondev*, Final Award *supra* note 49, ¶¶ 120-23, 127.

<sup>222</sup> See generally *ASIL Proceedings*, *supra* note 55.

<sup>223</sup> *S.D. Myers*, Award on Merits, *supra* note 31, ¶ 264.

<sup>224</sup> *Id.* ¶ 264.

<sup>225</sup> *Id.* ¶ 266. The tribunal cited F. A. Mann for the observation that the fair and equitable treatment as an overriding duty may be sufficiently broad to encompass many of the specific protections contained in BITs. *Id.* ¶ 265.

<sup>226</sup> In pertinent part, the Note states under the heading "Minimum Standard of Treatment in Accordance with International Law":

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generated divergent—and sometimes spirited--views among Chapter 11 tribunals and commentators,<sup>227</sup> who debated whether the Interpretive Note constitutes an ultra vires act, to be ignored accordingly.<sup>228</sup> The trend seems to be toward giving it legitimacy on one basis or another, and at least two tribunals have declined opportunities to resolve all the questions raised by 1105 and the Interpretive Note.<sup>229</sup> The distinguished tribunal in *Mondev*, demonstrating the way forward, attributed to the Note a reasonable construction, which in turn diminished what might have otherwise supported a perception of NAFTA government over-reaching. It confirmed that Article 1105 encompasses modern custom, as distinct from the less evolved and less protective customary law of alien protection that prevailed closer to the beginning of the 20th Century. At the same time it did not question the viability of the Note in general.<sup>230</sup> Subsequent tribunals have expressed views largely concordant with those enunciated in *Mondev*.<sup>231</sup>

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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).

Notes of Interpretation of Certain Chapter 11 provisions, July 31, 2001, § B available at <http://www.naftalaw.org>.

<sup>227</sup>See Brower, *Empire*, *supra* note 135; Thomas, *Reply to Professor Brower*, *supra* note 43; Brower, *Reply to Mr. Thomas*, *supra* note 146, at 465.

<sup>228</sup>For a recounting of copious filings before it on the subject, see *ADF*, Award, *supra* note 40, ¶¶ 109-25.

<sup>229</sup>*Mondev*, Final Award, *supra* note 49, ¶ 125; *ADF*, Award, *supra* note 40, ¶ 186.

<sup>230</sup>*Id.* ¶¶ 120-25. With respect to the FTC Note, the *Mondev* tribunal found nothing implausible in excluding from Article 1105 extraneous treaty obligations among the Parties, *id.* ¶ 121, and in rejecting that fair and equitable treatment are something more than elements among a cluster of protections constituting the international minimum standard (the text referring after all to them as “included”) *id.* ¶ 122. Yet, it also declined to tether Article 1105 to 19<sup>th</sup> Century custom, reasoning rather that the custom referred to must be of a modern and evolving sort. *Id.* ¶¶ 123-125.

<sup>231</sup>The difference in approach to the FTC Note between *Pope & Talbot* and the

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### 4. Article 1110 - Unremarkable or Untidy?

#### a) Apparent Divergence

Compared to the principle of fair and equitable treatment - which arguably was applied for the first time in *Metalclad* - the question of expropriation had been the subject of copious literature and dozens of reported decisions well before NAFTA. By 1994, the volumes reporting the awards of the Iran-U.S. Claims tribunal alone numbered about twenty-seven.<sup>232</sup> Several awards, ad hoc and ICSID-administered, dealing with expropriation could be found in the published reports and much learned commentary graced the field.<sup>233</sup> Given the body of accessible precedent, one could be forgiven for expecting relatively immediate unity as Chapter 11 tribunals confronted Article 1110.

Nevertheless, early in the development of the Chapter 11 docket there surfaced apparent differences in tribunal approaches to what constitutes a taking—the essential finding that triggers the duty to compensate under Article 1110.<sup>234</sup> In particular, the extent to which regulation might be an indirect taking seemed to produce diffuse, and arguably conflicting guidance. There is in

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subsequent *Mondev* and *ADF* tribunals is marked. The former's Award on Damages, *Pope & Talbot*, Award on Damages, *supra* note 79, intimated *in dictum* that it regarded the Note as probably an amendment, not a mere interpretation, so that if required to, it would proceed without giving the Note binding effect. *Id.* ¶ 47. In response, all three NAFTA governments seized their first opportunity to attack that view. *Mondev*, Final Award, *supra* note 49, ¶ 110. Ultimately, the *Pope & Talbot* tribunal confirmed the pre-Note result it had reached in its earlier award after proceeding, *arguendo*, as if the Note governed and attributing to it the strictest approach offered it—that of the Respondent. *Pope & Talbot*, Award on Damages, *supra* note 79, ¶ 68.

<sup>232</sup>*Cf.* George Aldrich, *What Constitutes Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585 (1994) (distilling Tribunal decisional law on expropriation and citing from the 27<sup>th</sup> volume of the Tribunal Reporter).

<sup>233</sup>See Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 259, 232 (1982 III) [hereinafter Higgins, *Taking of Property*]. Some writers and arbitrators distinguish terminologically between property “interference” and property “deprivation,” only the latter being compensable. See Brower, *Equilibrium*, *supra* note 120, at 68-71. The distinction is not uniformly observed.

<sup>234</sup>See Dodge, *Trials*, *supra* note 171, at 576.

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certain awards dictum suggesting that not every business disruption attributable in some fashion to host state regulation constitutes a taking and that governmental regulatory imperatives ought not to be subjected to a hair-trigger breach threshold.<sup>235</sup> These passages might be juxtaposed with the oft-quoted language in the *Metalclad* award, which states that “covert and incidental interference” which deprives the property owner “in significant part” of its “reasonably-to-be expected economic benefit” can constitute a taking.<sup>236</sup> The sense of divergence is amplified by *Metalclad*’s result—an award of compensation under Article 1110—and the opposite results in all other Chapter 11 cases.<sup>237</sup>

### b) A Second Look

Language of course matters, and as proof that an appellate mechanism is needed for Chapter 11 awards, the above comparisons of language and results may offer a prima facie case.<sup>238</sup> It is nevertheless too soon to classify the law of Article 1110 as being in hopeless disarray. Bearing in mind Article 1110’s dependency on the underlying custom, and the fact-intensive nature of expropriation analysis, a measure of untidiness is fully to be expected.

With respect to Chapter 11, the apparent differences in approach may be merely cautionary framing designed to reiterate what is settled doctrine – that regulatory impairment of investment activities does not invariably constitute a taking and that what is required is substantial, permanent deprivation, caused by acts attributable to the host state, rather than to the investor. Indeed, little appears to have changed since then-Professor Rosalyn Higgins gave her first Hague Academy lectures<sup>239</sup> suggesting that – at least as to physical property – the substantiality of the interference suffered is at the heart of the matter.<sup>240</sup> *Myers*, for instance, was decided on the basis that the interference in question was not permanent, a rationale that the *Metalclad* tribunal certainly would have adopted as a matter of first principles. Nor is it certain that the *Metalclad*

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<sup>235</sup>See, e.g., *Feldman*, Final Award, *supra* note 31, ¶ 112 (paraphrasing *Azinian*, *supra* note 82, ¶ 83 (“not all government regulatory activity [thwarting a particular business plan] is an expropriation”); *Myers*, Award, *supra* note 31, ¶ 281 (regulatory action note usually a taking).

<sup>236</sup>*Metalclad*, Award, *supra* note 41, \_ 103.

<sup>237</sup>See ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 476-480 (2002) (comparing several Chapter 11 expropriation cases including *Metalclad*).

<sup>238</sup>See Dodge, *Metalclad Note*, *supra* note 57, at 918 (raising need for appellate body for Chapter 11 awards).

<sup>239</sup>Higgins, *Taking of Property*, *supra* note 233.

<sup>240</sup>*Id.* at 324.

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tribunal would have reached different results from those of the *Pope & Talbot* or *Feldman* tribunals. In those cases, quite plausibly the *Metalclad* tribunal would have concluded that (in the words of that tribunal) the investor had not been deprived “in significant part” of its “reasonably-to-be-expected economic benefit.” Indeed, the *Feldman* tribunal’s approach in particular, which stressed that most of the investor’s export activities remained undisturbed, seems not radically different from the *Metalclad* method.<sup>241</sup> Both tribunals looked to degree of interference, with *Metalclad*—a case of complete, permanent de facto taking<sup>242</sup>--simply being at a different end of the interference continuum from *Feldman*.<sup>243</sup> Importantly, though often expressing various levels of discomfort with the notion that health and safety regulation might oblige a state to compensate, no tribunal has announced an outright exemption for regulatory takings; in fact, such a broad exception has been openly rejected.<sup>244</sup>

### 6. Tentative Conclusions on the Question of Indeterminacy

One’s satisfaction with the levels of principled guidance achieved within Chapter 11 jurisprudence, of course, depends upon the standard one adopts. If the test is whether the process is leading to identifiable doctrine largely defensible in light of the controlling text and law, Chapter 11 has functioned reasonably well. After merely half a decade of docket activity, relative certainty has been achieved about many questions that were untested in 1994. Consequently, a number of trend positions can be identified: NAFTA is not retroactive;<sup>245</sup> standard rules of treaty interpretation govern the process (there is no pro-sovereignty presumption);<sup>246</sup> substance is generally more important than form (especially in relation to procedural questions affecting the claim);<sup>247</sup> Article 1105 is circumscribed by modern custom

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<sup>241</sup>*Feldman*, Final Award, *supra* note 31, ¶ 152.

<sup>242</sup>*Id.* ¶ 148 (Metalclad deprived of all beneficial use, unlike instant claimant).

<sup>243</sup>*See also* *Pope & Talbot v. Canada*, Interim Award (June 26, 2000), ¶ 102, *available at* <http://www.naftalaw.org> [hereinafter *Pope & Talbot*, Interim Award] (test is degree of interference with investment’s operation).

<sup>244</sup>*See Id.* ¶ 99; *Feldman*, Final Award, *supra* note 31, ¶¶ 102, 110; *S.D. Myers*, Award on Merits, *supra* note 31, Schwartz Sep. Op., ¶ 206, 217.

<sup>245</sup>*See Mondev*, Final Award, *supra* note 49, ¶70.

<sup>246</sup>*See Id.* ¶ 43.

<sup>247</sup>*See Ethyl Corp.*, Award on Jurisdiction, *supra* note 4, ¶ 91.

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(which includes fairness elements);<sup>248</sup> the customary law of taking is neither made more encompassing<sup>249</sup> by Article 1110 nor subject to a blanket regulatory exception;<sup>250</sup> denial of justice is a viable theory of recovery under Article 1105, and the underlying test is strict<sup>251</sup> but not as strict as that enunciated in the inter-war years;<sup>252</sup> neither respondents nor claimants should take recovery of costs for granted,<sup>253</sup> but Chapter 11 awards will be denominated in the currency deemed appropriate by the tribunal and will carry interest, at a rate set in the tribunal's discretion.<sup>254</sup>

Even if excused as being merely a partial list, the forgoing collection of broad propositions may seem like a modest haul. Careful observers of Chapter 11 jurisprudence, moreover, will be able to construct an equally long list of unresolved questions or divergent approaches,<sup>255</sup> These inevitable

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<sup>248</sup> See *Mondev*, Final Award, *supra* note 49, ¶¶ 123-25; *ADF*, Award, *supra* note 40, ¶¶ 185-186.

<sup>249</sup> Certain claimants had unsuccessfully argued that the Article 1110 phrase “or a measure tantamount to...expropriation” extends beyond customary limits the scope of compensable property interference. See *S.D. Myers*, Award on Merits, *supra* note 31, ¶ 285; *Pope & Talbot*, Interim Award, *supra* note 243, ¶¶ 84-96.

<sup>250</sup> See *supra* note 244 and accompanying text.

<sup>251</sup> See *Mondev*, Final Award, *supra* note 49, ¶¶ 127.

<sup>252</sup> See *Id.* ¶¶ 123.

<sup>253</sup> See Table 4, *infra*.

<sup>254</sup> Interest formulae designated by Chapter Eleven tribunals have been diverse. The not-unprecedented practice of awarding compounding interest was followed in *Pope & Talbot*, where the tribunal in both its damages and costs awards affixed “5% per annum compounded quarterly and pro rata within a quarter.” *Pope & Talbot*, Award on Damages, *supra* note 79, ¶ 90; Award on Costs, *supra* note 81, ¶ 18. By contrast, the *Feldman* award of nearly seventeen million pesos carried simple interest “to be calculated ... for each month of the period of calculation at a rate equivalent to the yield for the month, of the Federal Treasury Certificates, issued by the Mexican Government, with a maturity of 28 days.” *Feldman*, Award, *supra* note 32, ¶ 211. See William W. Park, Andrea K. Bjorklund, & Jack J. Coe, Jr. *Year in Review: International Arbitration*, \_\_INT’L LAW.\_\_ nn.70-71 and accompanying text (forthcoming 2003)(manuscript on file with the author).

<sup>255</sup> The advent of *Loewen*, see *supra* notes 188-199 and accompanying text, would appear to move the exhaustion question to the head of the list, given that the *Mondev* tribunal, equally in reference to a denial of justice claim, regarded exhaustion as an “option” (not a requirement)

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consequences of decentralization do not alter the fact that there is a process at work that is reasonably effective in rejecting untenable extremes and in confirming and synthesizing principles incrementally. It is a vibrant, if occasionally erratic, process sustained in part by a vigilant NAFTA bar and fiercely independent arbitrators; far from being dispiriting—the docket thus far ought to inspire confidence in the combination of formal and informal mechanisms at work. Whether, nonetheless, these serviceable mechanisms might benefit from centralized oversight is considered under VI below.

### E. *Lack of Process Transparency*

#### 1. Policy Underpinnings and Expectations

Transparency means different things to different people. In a world of televised judicial confirmation proceedings, cameras in the courtroom, proliferating television judges, and entire networks dedicated to tracking judicial proceedings, Chapter 11 arbitration may seem sorely lacking. The appointment of Chapter 11 arbitrators results from a largely private process, members of the public are not ordinarily invited to witness the hearings, and are not privy to the deliberative processes of the arbitrators, who remain free to choose how much extraneous information to include in their written awards and how to frame the material disclosed.

In the abstract, these restrictions might seem to undermine legitimate policies favoring openness. Certainly the public has a legitimate interest in knowing most promptly what its government has done—for good or for ill—to generate the claim; press releases authored by disputants are a poor substitute for raw data exposed in real time in the context of an adversarial exchange. So too would legitimacy of the process and result be enhanced if the rigor and care attending Chapter 11 proceedings were open to public scrutiny, and indeed if some mechanism were in place to regulate arbitrators and sanction those who serve badly. As is evident in certain popular documentaries on Chapter 11, however, exaggeration on these points is too easily accomplished<sup>256</sup> and competing interests too easily ignored.

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*Mondev*, Final Award, *supra* note 49, ¶126.

<sup>256</sup>*See, e.g.,* Anthony De Palma, *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far Critics Say*, N.Y. TIMES, Mar. 11, 2001, § 3, at 1 (investor-state arbitral process a form of “secret government” according to one public interest activist). *Cf.* Carbonneau, *supra* note 140 at 826-829 (regarding ill-informed and misleading critiques of Chapter 11). A different form of transparency deficiency that some observers emphasize is the lack of an open democratic process leading to trade obligations; for these critics, the process ought to afford interested groups an opportunity to comment and to galvanize opposition to perceived imbalances. *See* Been & Beauvais, *supra* note 145, at n.482 and accompanying text.

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2. Comparative Transparency

Transparency and related system attributes can only be measured in degrees, and as a matter of perspective. For the international lawyer accustomed to international commercial arbitration, Chapter 11 proceedings may be discomfoting in their openness. An ICC arbitration between two private enterprises, for instance, may run its course with the mere fact of the dispute never being publically disclosed.<sup>257</sup> Hearings thus are highly private matters and the resulting award, if published at all, will often be redacted to obscure the identity of the parties.<sup>258</sup> Even limited participation in the proceedings by non-party intervenors or amici would be extraordinary. Similarly, the level of interest in a vacatur action would ordinarily not merit streaming video transmissions from the court-room, as happened in the *Metalclad* set aside proceeding.<sup>259</sup>

By contrast, with rare exception, Chapter 11 pleadings, procedural orders, and awards now become available seasonably. During the proceedings, disputant attempts before NAFTA tribunals to enforce expectations of confidentiality (as distinct from privacy) have met with only tepid success;<sup>260</sup> the FTC's Interpretive Note, in turn, helped galvanize this trend and confirmed the Parties' own commitment to liberal disclosure.<sup>261</sup>

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<sup>257</sup> See W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 311-12 (3d ed. 2000).

<sup>258</sup> See COE, PRINCIPLES AND PRACTICE, *supra* note 28, at 86-87, 262-63.

<sup>259</sup> See Thomas, *Reply to Professor Brower*, *supra* note 43, at 457 n.95.

<sup>260</sup> The *Metalclad* tribunal ruled that under the circumstances before it, the disputants were not under a duty to refrain from disclosing details of their arbitration. The question was raised by Mexico, which sought an order preventing claimant from discussing the case with non-participants, such as shareholders and the press. Long before the case was filed, telephone conferences with shareholders had become a common practice for Metalclad and the practice continued. Mexico maintained that matters under consideration before the tribunal were confidential. Metalclad rejected any obligation of confidentiality, relying on the absence of any formal agreement on the subject, Mexico's own conduct in apparent contravention of the supposed rule and its obligations of disclosure as a public company. The Tribunal declined to issue the order that Mexico sought, but expressed the view that limiting public discussion of the case to a minimum would facilitate the orderly unfolding of the proceedings and enhance working relations between the parties.

<sup>261</sup> In pertinent part the Note states:

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), nothing in the NAFTA precludes the Parties from providing public



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access to documents submitted to, or issued by, a Chapter Eleven tribunal....Each Party agrees 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: confidential business information; information which is privileged or otherwise protected from disclosure under the Party's domestic law; and information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents. The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

Notes of interpretation of Certain Chapter 11 Provisions, July 31, 2001, § A, *available at* <http://www.daift-maeci.gcca/tna-nca/NAFTA-Interpr-e.asp>. (paragraphing deleted).

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The two NAFTA tribunals that have allowed *amicus* participation on a limited basis<sup>262</sup> have set precedent likely to be followed. One NAFTA proceeding, moreover, has been opened to the public, though only with the consent of the parties;<sup>263</sup> while such closed circuit broadcasts cannot yet be said to be the norm, other mechanisms within the Chapter 11 architecture are partial proxies for unbridled public access. In particular, because representatives of the two NAFTA states not party to the dispute typically attend the proceedings, receive the associated filings and may make submissions on questions interpretation, extravagant and fanciful theories of recovery or defenses do not escape notice.

### F. *Lack of Tribunal Accountability*

#### 1. The Complaint

Critics of Chapter 11 are often ill-at-ease with what appears to be arbitrator autonomy unrestrained by the professional and constitutional strictures associated with judges.<sup>264</sup> Despite the theoretical independence of arbitrators, once *functus officio*, they return to their full-time posts and—so goes the argument—cannot be made to account for the wake they leave behind. Moreover, they are—or hope to be—repeat players; their dependence on private appointments may exert various influences on them, influences to which judges are not susceptible. Additionally, many of them are cross-over players, serving as arbitrator in one case and as advocate in another, later using the fact of one role to promote appointments to the other.

#### 2. A Partial Reply

To compare Chapter 11 arbitrators to judges appointed under a domestic constitution would seem to miss the point; arbitrator detachment is one of the central features that perpetuates arbitration's popularity in international trade.<sup>265</sup> In a given case, an arbitral tribunal may well

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<sup>262</sup> See *Methanex v. United States*, Decision of the Tribunal on Petitions for Third Persons to Intervene as “Amici Curiae”, *supra* note 37. *UPS v. Canada* tribunal, in principle, also authorized limited, written submissions, subject to strictures to be established in consultation with the disputants. See *United Parcel Service of America, Inc. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae, *supra* note 37.

<sup>263</sup> See ICSID Press Release, available at <http://www.worldbank/icsid.org>

<sup>264</sup> See Brower, *Legitimacy*, *supra* note 131, at 70 and authority cited there.

<sup>265</sup> For some this may beg an essential question, since unlike some writers, I do not find investor-state arbitration sufficiently different from its private counterpart for wholly different considerations to obtain; many of the same attributes and factors that make arbitration attractive in private trade also commend its use in the mixed setting.

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pursue a far more objective process than that available in the otherwise available local court, where myriad pressures may exert subtle and not so subtle influences.

What is more, arbitrators have more accountability than may be apparent. The seemingly instant and wide availability of their reasoned awards, and the specter of dissenting opinions encourages care and thoroughness. That many arbitrators hope for further appointments would tend to promote, not discourage judiciousness; the arbitration bar is in general very attentive to such matters and arbitral appointments are often facilitated or thwarted by information informally gathered. Additionally, some formal mechanism is always in place to nullify awards reflecting most true excesses. When vacatur occurs, the award's flaws -- and by extension, the arbitrators' missteps--are typically made public, further discouraging ill-considered awards.

The kind of institutional accountability desired by certain critics more plausibly would result from a standing body to replace the present system of single arbitration appointments, though as discussed below, there are reasons to resist a first instance organ of this type.<sup>266</sup> The related question of instituting such a panel as an appellate organ is also considered below.<sup>267</sup>

### G. *Chilling Effect on Beneficial Regulation*

#### 1. The Fear

In the *Methanex* case, arising out of California's decision to gradually eliminate MTBE from gasoline, the claimant reportedly seeks \$ 970 Million in damages.<sup>268</sup> For certain critics of Chapter 11, the case exemplifies much of what is disturbing about it.<sup>269</sup> One understandable concern, is that the specter of ruinous liability might restrain lawmakers from acting in the public interest. The apprehension has been sufficiently well communicated that tribunals have announced their appreciation for its relevance and gravity. Claimants, in response, have naturally emphasized the chill on investment flows that would result if redress becomes illusive or under-compensation becomes the norm.<sup>270</sup>

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<sup>266</sup> See *infra* text, at 5H.

<sup>267</sup> See *infra* notes 293-309 and accompanying text.

<sup>268</sup> See Evelyn Iritani, *Ban on MTBE Induces Suit Using NAFTA Provision*, L.A. TIMES, Feb.6, 2002, at C1.

<sup>269</sup> See generally William T. Warren, *Paying to Regulate: A Guide to Methanex v. United States and NAFTA Investor Rights*, 31 ENVTL. L. REP. 10986 (2001); Cf. *S.D. Myers*, Award on Merits, *supra* note 31, Schwartz Sep. Op. ¶ 203 (critics warn “[f]ear of liability may cause governments to shy away from bold regulatory action in the interests of health...”).

<sup>270</sup> See, e.g., *S.D. Myers*, Award, *supra* note 31, Schwartz Sep. Op., ¶¶ 85-86 (separate

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### 2. The Interim Data

The staggering numbers accompanying the Chapter 11 prayers for relief, though making for sensational headlines, are misleading. The specter of chilling effect is more accurately assessed by considering net damages awarded rather than damages sought. Approximately fifteen Chapter 11 cases have come to a conclusion. Two have settled, five seem to have been abandoned by the claimants, and eight have reached an adjudicated outcome. Only *Metalclad* and *Myers* have ended in an awards of arguably significant compensation. In *Metalclad*, the recovery (approximately U.S. \$17 Million) constituted less than 20 per cent of what the claimant sought, left the claimant to pay its own costs (estimated to be approximately \$4 Million) and was conditioned on transference to Mexico of title to the investment (comprising a ready-to- operate landfill). The claimant's recovery, moreover, was delayed, and ultimately somewhat reduced, through post-award proceedings in a domestic court; the investor's additional costs of defending the award in those proceedings were not awarded by the trial court.<sup>271</sup> SD Myers' \$6 Million recovery, presently being contested in a Canadian court,<sup>272</sup> has similarly hollow features.<sup>273</sup>

In *Azinian*, *Mondev*, *ADF* and *Loewen*, after costly proceedings, the respective claimants recovered nothing, while having to bear their own costs. Waste Management, moreover, was made to initiate its claim afresh after its first effort was dismissed on jurisdictional grounds. As to *Methanex*, though pending, it is not clear that the claim will enjoy success; it would appear that a recent jurisdictional ruling has lessened the claimant's odds of recovering.<sup>274</sup> In *Ethyl*, Canada settled for \$13 million, perhaps shielding itself from a greater award, and appreciable costs.

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opinion discussing contention that certain Chapter 11 claims challenge “the practical ability of governmental authorities to protect health and the environment.”) and contrast *Metalclad v. Mexico*, Case No. ARB(AF)/97/1, Claimant's Reply, ¶¶ 531(rules of compensation should not make “a non-sense of foreign investment.”)(Reply Brief on file with author).

<sup>271</sup>See *Metalclad*, Reasons for Judgment of Hon. Mr. Justice Tysoe, *supra* note 43.

<sup>272</sup>For a description of *S.D. Myers*, see *infra* note 282 and accompanying text.

<sup>273</sup>Myers had sought \$20, a request moderated no doubt by its knowledge that expropriation had been ruled out by the tribunal's earlier award. It did receive costs, but those awarded were substantially less than \$1 Million U.S.

<sup>274</sup>See *supra* note 52 and accompanying text. When reformulating its case, *Methanex* must show a closer link between the ban complained of and its investment; merely demonstrating a causal connection between the ban and the injury to the investment will not suffice to demonstrate that the measure “related to” the investment. See *Methanex*, Preliminary Award, *supra* note 52, ¶¶ 138-139, 147, 159 (discussing the need for a “legally significant connection” between the measure and the investment), available at <http://www.naftalaw.org>.

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Relatively small recoveries were granted in *Pope & Talbot* and *Feldman*.<sup>275</sup> Taken as a whole, these results should do little to embolden potential claimants or to restrain regulators.

*H. The Perception of Alien Advantage*

1. Dual Systems

The autonomy maintained between domestic and international legal systems, though by no means a characteristic inaugurated with NAFTA, has become a point of contention among some stakeholders. It is inherent in the notion of an international minimum standard for example that treatment accorded nationals of the host state may not discharge a state's obligations when extended to aliens. Similarly, the possibly more-compensatory regime governing expropriation in comparison to domestic takings law means that an alien might be entitled to compensation under NAFTA when a host State citizen would not be.<sup>276</sup> The resulting potential for disparate standards to be applied to competing enterprise groups is readily appreciated beyond the ranks of international law specialists.<sup>277</sup>

2. Potential Consequences of the Perception

*a. Business Planning*

Just as business plans are often ordered with tax considerations and similar factors in mind, the apparent advantages of operating in one NAFTA country while being deemed an investor of another may well influence places of incorporation and related matters. In a given context, moreover, those interacting with regulators on behalf of businesses may search for a "NAFTA

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<sup>275</sup>See Table 4, *infra*.

<sup>276</sup>See Been & Beauvais, *supra* note 145, at nn. 489-490 and accompanying text ("clearest cost" is competitive advantage for foreign firms).

<sup>277</sup>In broaching their misgivings, Been & Beauvais summarize as follows:

[I]f our concerns about what the early tribunals' interpretations of the NAFTA expropriation provision foreshadow are realized, and NAFTA thereby becomes more expansive than U.S. takings law, there will be significant costs: Article 1110 will provide foreign investors with competitive advantages over domestic investors, may deter efficient regulation, and may alter the balance of power between federal, state, and local governments. Alternatively, the NAFTA decisions may have a "ratchet" effect, forcing U.S. regulatory takings law to expand as well.

*Id.*, text at nn. 28-31 (footnotes omitted).

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connection”—such as foreign ownership-- on the off-chance that a measure of regulatory forbearance might be exercised in the client’s favor.<sup>278</sup>

### *b. Legislative Responses*

Proponents of the international minimum standard no doubt envision that it may have an elevating effect on domestic standards. The two systems, of course, might be brought into uniformity in other ways, such as by eliminating the international standard altogether or by declaring that the international minimum and national treatment are synonymous.<sup>279</sup> On the international plane, either of these would require an amendment to the NAFTA. From inception, of course, the FTAA might be so limited, an appreciable regression.<sup>280</sup>

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<sup>278</sup>The author has encountered practitioners espousing this strategy as a method for enhancing bargaining power in dealing with regulatory proceedings in which discretion plays a role.

<sup>279</sup>U.S. lawmakers have attempted to attach such a limitation on future trade compacts. See Bipartisan Trade Promotion Act of 2002, 19 USC 3801; P.L. 107-210, Aug. 6, 2002; 116 Stat. 993. In pertinent part §2102 (b)(3) (Trade Negotiating Objectives) states:

Recognizing that United States law as a whole provides a high level of protection for investment...the 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* (emphasis added).

<sup>280</sup>Similarly, unlike the NAFTA, the FTAA and future BITs, might carve out an exception for “regulatory” takings. The task was one NAFTA’s drafters contemplated and rejected given its difficulty. See Daniel Price, *NAFTA Chapter 11—Investor-State Dispute Settlement: Frankenstein or Safety Valve*, 6 U.S. CANADA L.J. 1, 2 (Supp. 2001). Fashioning an exception that is too broad would authorize uncompensated taking to a far greater degree than may be desirable, such as if the host state is merely required to identify a plausible “health” or “safety” rationale--labels that are sufficiently elastic to invite abuse; exempting too few instances defeats the purpose; for example, requiring proof that substantial damage has already been done, and that no less-disruptive means was available, might discourage robust protective measures seasonably implemented. That any exception should require non-discrimination seems uncontroversial, but even that predicate may be challenging to apply, for example, when the foreign investor occupies the entire field or is otherwise the only enterprise damaged under the facts at hand. See, e.g., *S.D. Myers*, Award on Merits, *supra* note 31 (export ban only impacted claimant; local processors did not export material); see also *Metalclad*, Award, *supra* note 41 ¶¶109-112, and correspondence on file with the author (apparently only Metalclad’s facility encompassed by ecology zone).

An attempt to establish a bias against regulatory takings is found in the Draft U.S.-

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### VI. CONTROL MECHANISMS

#### A. *The Existing Control Patchwork*

As noted above, neither Canada nor Mexico is a party to the ICSID Convention. Despite an architecture that contemplates eventual access to ICSID arbitration, proceedings brought during Chapter 11's first decade have therefore been confined to the default formats not dependent on the involvement of two ICSID parties. For the prospective U.S. claimant, the choice thus has been not a function of which post-award regime was desired, but rather which rule set was preferred (UNCITRAL or Additional Facility) and whether administered arbitration was called for. The manner in which awards might be attacked did not depend on the choice of format. When one more NAFTA state ratifies the Convention, there will be three possibilities; one will be a-national arbitration, in which domestic courts are largely supplanted.

#### B. *Meager Data*

To date, three Chapter 11 awards have been subject to set aside proceedings, those issuing from the *Metalclad*, *SD Myers* and *Feldman* tribunals. Each found breaches of Chapter 11. Each set-aside action was lodged in a Canadian court by the respective respondent states. *Metalclad* led to a carefully reasoned decision partially setting aside the final award, though largely sustaining the monetary obligation the award carried.<sup>281</sup> After the trial court's set-aside ruling, *Metalclad* and Mexico settled; appellate level review therefore was not had. The *Myers* proceeding, while advanced, is pending.<sup>282</sup> The *Feldman* set-aside petition is a recent occurrence, and also remains

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Singapore- Free Trade Agreement (March 7, 2003 version), which carries an expropriation provision (Article 15.6) that replicates--though with more simplicity --the central features of Article 1110. It is, however, subject to a letter of understanding--also in draft--that addresses regulatory takings as follows:

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.

Draft Letter of March 7, 2003 Confirming Understanding on Article 15. 6(1) Draft --U.S. Free Trade Agreement, available at <http://www.ustr.gov>.

<sup>281</sup>See *supra* note 57 and *infra* note 288 and accompanying text.

<sup>282</sup>S.D. Myers, Inc.(SDMI), a company based in Ohio was a prominent operator of Poly Chlorinated Biphenyl (PCB) disposal facilities in the United States. It planned to process, in Ohio, PCB waste that had accumulated in Canada, thereby exploiting competitive advantages it enjoyed. After the U.S. EPA had granted SDMI permission to import PCB waste, Canada's Minister of the Environment prohibited export of PCB waste. The border remained closed to PCB exports until February 1997.

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pending.

Given these limited instances, what follows is only a tentative assessment of NAFTA's present reliance on domestic courts. Along with some desirable characteristics, numerous potential flaws will also be noted.<sup>283</sup> The interim conclusion I reach is that an appellate body would be preferable to the present mechanism, provided that body possesses certain attributes, as outlined below.

### C. *Positive Attributes*<sup>284</sup>

A number of laudable by-products no doubt flow from the NAFTA Parties' decision to submit post-award operations to the prevailing framework for international commercial arbitration. The New York Convention, time-honored and widely in effect, has been generally successful in promoting global enforcement of arbitral awards.<sup>285</sup> It is part of a dual and potentially duplicative system of control that balances finality concerns with a recognized need for

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In October 1998, SDMI submitted a Chapter 11 claim, alleging breaches, *inter alia*, of Articles 1102 (national treatment) and 1105 (international minimum standard including fair and equitable treatment). SDMI succeeded, receiving in its favor a partial award on the merits. In finding a violation of Canada's "treatment no less favorable" undertaking, the tribunal reasoned that Article 1102's "in like circumstances" qualification invited consideration of the measure in relation to the Canadian operators in claimant's sector to assess whether its practical effect was to give a disproportionate benefit to them in relation to non-nationals, whether the measure's animus was protectionism, and whether any legitimate purposes that were served by the measure could have been achieved by means more consonant with the NAFTA.

The tribunal found that the government primarily sought to ensure that Canadian PCB waste would be processed in Canada, by Canadians, rather than to mitigate an environmental risk. Though the measure had a legitimate secondary aim--preserving an intra-Canada capacity to process PCB waste -- that aim could have been furthered by measures consistent with NAFTA. The tribunal's more controversial ruling related to Article 1105. It concluded that the violation of Article 1102, in essence, also established a violation of Article 1105. See *supra* notes 222-227 and accompanying text.

As to some of its findings, the award was formed only by a majority.

<sup>283</sup>This segment of my essay builds in part upon, and augments, Coe, *Achilles Heel*, *supra* note 8.

<sup>284</sup>See *Id.*, at 188-91.

<sup>285</sup>See Coe, *Riches*, *supra* note 43, at 144-46; Albert Jan van den Berg, *Refusals of Enforcement under the New York Convention of 1958--The Unfortunate Few*, in ICC ARB. NEXT DECADE 75 (1999).



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safeguards. The manner in which courts have manipulated that balance, however, has generally elevated finality as the norm, not the exception.

The scrutiny entrusted to courts at the place of arbitration, effectuated by open court proceedings, adds an element of transparency to a process which has sometimes attracted scorn for its private aspects. Similarly, some—including the disputants—may assign added legitimacy to the Chapter 11 process by virtue of a court’s independence and adherence to a system of precedent, as opposed to what may be perceived (though wrongly) as an arbitral tribunal’s tendency to ignore the law in favor of compromise. These elements of process supervision may also add a sense of rigor to offset the perception that international law is largely indeterminate. Even when set aside is not pursued, the mere fact that such a mechanism was available may comfort those concerned with the possibility of unrestrained tribunals.<sup>286</sup>

### D. Negative Traits and Potential Flaws

#### 1. Incursions Into the Merits

The arbitration laws of leading arbitral locales within NAFTA territories exhibit a uniform core in part because Mexico and Canada have adopted the UNCITRAL Model Law.<sup>287</sup> The Model Law in turn shares with Section 10 of the Federal Arbitration Act (FAA) a limited number of statutory grounds for vacatur concerned mainly with jurisdictional questions and procedural fairness. Neither the FAA nor the Model Law expressly authorizes judicial excursions into the merits of an award. But as the *Metalclad* decision suggests, even when limited to questions of arbitral excess, courts may define their role so broadly as to firmly abut the boundary between merits review and mere consideration of the tribunal’s mandate.<sup>288</sup>

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<sup>286</sup>See generally William W. Park, *Why Courts Review Arbitral Awards* in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL HEINZ BOCHSTIEGEL 595 (2001) [hereinafter Park, *Why Review*].

<sup>287</sup>UNCITRAL Model Law on International Commercial Arbitration, adopted June 21, 1985, available at <http://www.uncitral.org>; reprinted in COE, PRINCIPLES AND PRACTICE *supra* note 28, at 505 [hereinafter Model Law].

<sup>288</sup>A central theme in *Metalclad*’s argument was that a forfeiture of the right to operate induced by a combination of an unclear regulatory regime and governmental assurances are simply unfair. It referred to the opacity in the permitting regime as among other things, a problem of “transparency,” and cited awards in which tribunals compensated aliens for lost property rights precipitated by a confused or impenetrable regulation. See *Owners of the Tattler* (U.S. v. U.K.), 6 R.I.A.A. 48 (1920); *Marguerite de Joly de Sabla* (U.S. v. Pan.), 6 R. INT’L ARB. AWARDS 358 (1933). Mexico countered by arguing that the regime could have been deciphered by normal due diligence and that, regardless, transparency is not expressly guaranteed to investors under Chapter 11.

In its unanimous award, *Metalclad*, Award, *supra* note 41, the tribunal explicitly found

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Further, at least in the case of the FAA, courts have sometimes embraced non-statutory grounds for vacatur, such as some variant of the “manifest disregard” doctrine.<sup>289</sup> The autonomy enjoyed among circuits moreover has led to variations in the availability of non-statutory grounds and in the construction of Section 10 in general. Added to these potentially outcome-affecting differences may be genuine questions about the FAA’s applicability to NAFTA awards and potential confusion in applicable law engendered by an attacking party’s apparent choice of U.S. courts in some settings.<sup>290</sup>

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transparency to be an obligation that could be enforced by a Chapter 11 claimant, at least in the circumstance where the investor had made the relevant organs of government aware of the problem and had received largely informal but reassuring guidance upon which to proceed. Though, ostensibly, a private claimant would not ordinarily be entitled to directly enforce obligations owed only among the three states inter se, in construing Article 1105, the *Metalclad* tribunal was informed in part by Mexico’s Chapter 18 undertakings and the importance attributed to “transparency” as a “principle” linked to achieving NAFTA’s aims. *See* NAFTA, *supra* note 1, art. 102(1). Though explicitly construing Article 1105, the tribunal cited, without quotation, Article 1802(1), which requires NAFTA states to promptly publish or otherwise make available to “interested persons” “laws, regulations, procedures and administrative rulings of general application respecting any matter covered by the [NAFTA]” and to do so “in such a manner as to enable [said] persons...to become acquainted with them.”

While some of the interim steps are left to inference by the award, it is clear that for the *Metalclad* tribunal, where the host state had failed to fulfill its Chapter 18 transparency obligations, and failed to mitigate the consequences of that inter-state breach in its dealings with an investor, that failing may contribute to a “totality of circumstances” in which fair and equitable treatment had not been practiced. *See generally* Coe, *A Retrospective*, *supra* note 45, at 70-75. Mexico’s attack on the award was that the tribunal exceeded its jurisdiction by relying on transparency obligations found outside of Chapter 11. Mexico v. Metalclad, Petitioner’s Outline of Argument, ¶¶ 242-72 (on file with the author).

Justice Tysoe, though considering a unanimous award, accorded no particular deference to the tribunal’s treaty construction. He adopted in significant part Mexico’s view that the transparency principle had been improperly imported from Chapter 18. The case well illustrates how a determination on the merits, if difficult for the reviewing domestic court to reconstruct, may succumb to what is in theory a jurisdictional analysis. *See* Coe, *Achilles Heel*, *supra* note 8, at 197-98, 202-203.

<sup>289</sup>*See* *Westerbeke Corp. v. Daihatsu Motor Co., Ltd*, 162 F. Supp. 2d 278 (S.D.N.Y. 2001), *rev’d*, 2002 WL 1978908 (2d Cir. 2002); *see generally* Hans Smit, *Is Manifest Disregard of the Law or the Evidence or Both a Ground for Vacatur of an Arbitral Award?*, 8 AM. REV. INT’L ARB. 341 (1997).

<sup>290</sup>*See* *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) (FAA venue provisions permissive; general venue provisions supplement FAA); *also see* Park, et al., *Year In Review*, *supra* note 254, nn. 12-14 and accompanying text (discussing the effects of

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### 2. Systemic Variations

The place of arbitration, and hence the courts that will process set-aside motions, may affect numerous other elements conceivably producing for one side a strategic advantage. Among these are: practice of law restrictions (and the corresponding need for local counsel), rules governing third party intervention and amicus filings,<sup>291</sup> the availability of appeal, the speed with which the docket advances, the ability to avoid certain judges, policies concerning cameras in the courtroom, rules as to costs, and the relative expertise of the local bench and bar in the law of international investment, treaties and commercial arbitration.

### 3. Perceptions Regarding Neutrality

Numerous factors in the pre-award mechanisms established under Chapter 11 promote systemic neutrality and hence, to that degree, legitimacy. That tribunals have designated seats of arbitration in the territory of a given respondent state has thus far not affected the pre-award stages of an arbitration; the courts have not been called on to intervene in any way and Section B in combination with the respective rule formulae have formed a sufficiently comprehensive procedural regime that references to the *lex loci arbitri* have not been common.

In the post-award setting, by contrast, the local arbitration law and courts do matter. Under the present arrangement, as happened in *Myers*, the respondent state will be entitled to bring its set-aside action in its own courts if the seat of the arbitration is within its territory. Though judicial independence is doctrinally well established in each of the NAFTA states, an investor made to defend its award in the courts of the host state might reasonably speculate about what nuanced pressures have infected the process. At a minimum, appearances suffer.<sup>292</sup>

#### *E. Improving Control Mechanisms—Abstract Characteristics*

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*Cortez*).

<sup>291</sup>See Thomas, *Reply to Professor Brower*, *supra* note 43, at 453,457 n. 95; Coe, *Achilles Heel*, *supra* note 8, at 199.

<sup>292</sup>Consider the disappointed investor in *Loewen*. In deciding whether to seek set aside of the tribunal's recent award, it confronts, apart from purely juridical elements, the considerations that the attack would be against the United States, would be brought in U.S. courts, and would be seeking conceivably a fresh, second opportunity to arbitrate government responsibility for the defects in a Mississippi state court's handling of a jury trial, in a setting in which review by the U. S. Supreme Court was not sought by the claimant. Despite the injustice chronicled by the arbitrators, even before it consults the pro-finality doctrines of U.S. law and other jurisprudential factors, the investor might suspect that its case is viscerally unappealing.

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### 1. Overarching Importance and Abstract Criteria

The present system of regulating Chapter 11 awards, being essentially an adoption of the patchwork applicable to private arbitration, is capable of performing many of the important functions entrusted to control mechanisms in general.<sup>293</sup> Though decentralized, the fora to which attacks and requests to enforce are currently addressed are the same ones serving international commerce remarkably well. Nevertheless, many of the arguable weaknesses surveyed above are fundamental to the overall integrity of Chapter 11, suggesting the need for a more specialized, more elaborate mechanism. Conceivably, a jurisprudence of increasing coherency might result from the present architecture, but not elegantly nor rapidly. The eventual introduction of an ICSID option would only be a partial answer; it may further fracture the jurisprudence of control and (because it does not contemplate merits review) would share with the present arrangement an inability to generate a substantive law of investment. From the forgoing critique of Chapter 11's existing reliance on domestic courts, it follows that in fashioning an apt replacement, a number of attributes might be considered. A tentative list of some of these is offered in sections that follow.

### 2. A-Nationality and Neutral Composition

A review body detached from municipal court systems, especially those of the NAFTA, states, would not as readily as the present system arouse questions about neutrality and independence, assuming of course the jurists who serve are predominately nationals of non-NAFTA states and are otherwise free of disabling connections to a party or the subject matter. Whether any of these persons should be party-appointed, ad hoc, for the proceeding in question is among the subsidiary questions that arise. Confidence may actually be enhanced if indulging what one authority has referred to as the "deeply ingrained" belief—at least among states--that the ad hoc judge system (as denominated in ICJ practice) has merit.<sup>294</sup>

### 3. Systemic Neutrality

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<sup>293</sup>See Park, *Why Review*, *supra* note 286; W. Michael Riesman, *Control Mechanisms in International Dispute Resolution*, 2 U.S.-MEX. L.J. 129 (1994).

<sup>294</sup>ELIHU LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* 79 (1991). Similar perceptions have perpetuated the party-appointed arbitrator model prevailing in international commercial arbitration. No reason appears why some form of disputants' participation in the reviewing body's composition is not capable of being manageably accommodated without detracting from the its skill and independence. Much will depend, however, on the size of the chamber that becomes the standard. If only three panelists serve, it may be preferable to limit disputant input to collaboration in appointing the chair from a designated list of body members.

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Where a single unified, transparent procedure and relaxed licensing requirements are established, no side is advantaged by familiarity with the indigenous procedural system. Nor would disputant resources necessarily be allocated to the identification, education, and retention of competent local counsel; each party could enjoy continuity of representation and associated efficiencies.<sup>295</sup> In particular, in-house counsel might play a considerable role throughout and the outside lawyer who may have crafted the theory of the case in arbitration could be retained, obviating the accelerated learning that often accompanies instruction of local counsel.

### 4. Centralization and Standardization

The potential for disparate standards and variegated results inherent in the present configuration would abate if control powers were vested exclusively in a single organ, enjoying appreciable continuity in staffing, and applying a single standard to requests for set aside. The same body would assess requests to confirm and petitions to set aside Chapter 11 awards. Of course, if the award, once confirmed, or set aside, would revert to the New York Convention system, a measure of disunity would persist as courts addressed could rely on local constructions of the Convention.<sup>296</sup>

### 5. Predictable, Manifold Expertise

At present, the judicial expertise applied in a first instance set aside action depends to an intolerable degree on the vagaries of domestic court calendars.<sup>297</sup> This concern would not attach to an appellate mechanism in which all appointed to serve possess depth in international law and arbitration doctrine. Moreover, in contrast to the single judge panel typifying trial level courts, if three or more jurists invariably formed the reviewing panel, the risk of oversight or outright misadventure would be reduced.

## F. *Standards for Set-Aside*

### 1. Substantive Review

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<sup>295</sup>See Coe, *Achilles Heel*, *supra* note 8, at 199 n.96.

<sup>296</sup>This would be less so if post-review awards qualified for ICSID Convention treatment. A related question is whether ICSID awards would be subject to review by the entity under consideration here, in lieu of the ICSID Convention annulment procedure currently available. One approach is to let the moving party elect one or the other annulment procedure, but not both, when the award is issued under the Convention. Such variations on the ICSID model would require treaty undertakings supplemental to the ICSID Convention.

<sup>297</sup>See Coe, *Achilles Heel*, *supra* note 8, at 202-203 (discussing the problem of expertise inversion).

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Reasonable minds can differ as to whether the body envisioned here should be empowered to search for errors of law or to otherwise consider the merits. A full de novo procedure reaching even the tribunal's factual findings would be an extraordinary mandate destined to produce protracted disputes in defiance of NAFTA's stated goal of establishing fair and effective dispute resolution mechanisms.<sup>298</sup> Occupying the other pole might be a mandate built upon the exclusive criteria of the Model Law (which in turn are chiefly derived from the New York Convention's refusal grounds).<sup>299</sup> A middle ground would require reviewers to accept a tribunal's factual findings but would allow them to apply the Model Law grounds augmented by an error of law prong. The latter might be refined to varying degrees by insisting, for example, that set aside only occur for "manifest" or "serious" or "fundamental" or "prejudicial" errors of law.

### 2. Substantive Review--Competing Interests

#### a. *The International Commercial Arbitration Model*

To extend review only to Model Law-like grounds would have several virtues. It would be consistent with the overwhelming trend toward excluding substantive review reflected in the Model Law and in modern arbitration statutes. By making set aside theories less numerous, it would promote finality to a greater degree than expanded review, reducing the overall cost burden shouldered by the disputants. A mandate confined to the Model Law grounds would benefit from the jurisprudence developing in the dozens of Model Law states and, by analogy, under the New York Convention.

#### b. *Prolonged Indeterminacy*

To preclude substantive review would forego one mechanism for addressing the disunity in NAFTA law evident in the awards. An authoritative body enunciating the content of customary international law<sup>300</sup> and construing provisions common to many BITS would produce benefits well

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<sup>298</sup> See NAFTA, *supra* note 1, arts.102 (1)(e), 1115.

<sup>299</sup> Cf. Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in THE INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION 109 (Martin Hunter et al. eds., 1995) (proposing creation of an international court for enforcement and set aside of arbitration awards); H.E. Judge Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, *id.* at 115, (discussing treaty implementation of Judge Holtzmann's proposal).

<sup>300</sup>For discussions of the role of international law before WTO dispute bodies, see James Cameron and Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L & COMP. L.Q. 248 (2001); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go*, 95 AM. J. INT'L L. 535 (2001).

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beyond NAFTA. Further, the fact that substantive review is available to correct errant awards might promote use of sole arbitrator tribunals, thus presumably reducing costs and occasionally enhancing speed and simplifying procedure.<sup>301</sup>

### *G. Advisory and Remedial Powers*

If the appellate organ is given substantive review, it would seem feasible also to allow interim tribunal requests for advisory interpretations on questions of law. Among the subsidiary questions raised by this prospect are: Would the tribunal alone, or the disputants also, be allowed to petition for advice? Could the tribunal advance the arbitration while awaiting the result? Would non-disputant NAFTA parties also be entitled to submit questions prompted by a given proceeding? Would such references be wholly discretionary on the part of tribunals, or would an obligation be triggered by *e.g.*, a joint disputant request?

An second cluster of questions relate to the remedial powers an appellate body should have. The forfeiture and inefficiency that vacatur brings argues for powers of remission, such as those found in Article 34 of the Model Law. Absent fundamental problems of tribunal jurisdiction or independence, it will often be the most efficient avenue for the reviewers to identify a concern and to remit it to the tribunal to “ resume the arbitral proceeding or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.”<sup>302</sup> Little harm would be done by also granting an incidental power to correct clerical errors, though this might be predicated on the petitioner having exhausted procedures for correction under the governing rules.

### *H. Completing ICSID Participation*

Upon ratification of the ICSID Convention by Mexico and Canada, a number of the problems associated with domestic court review of Chapter 11 awards would evaporate, at least in cases in which ICSID arbitration is chosen. Where the claim was properly brought under the ICSID Convention, attacks on the ultimate award would be processed by ICSID’s internal annulment machinery and not by domestic courts at the arbitration’s designated seat.<sup>303</sup> Because the place of arbitration would lose its meaning for control purposes, the perceived variations to be found among domestic venues would be largely irrelevant, unless the claimant had chosen the UNCITRAL option. The standard procedural debates about the location of hearing and other

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<sup>301</sup>My premise is that disputants opt for the more costly three-arbitrator tribunals in light of the finality of awards and prospect that a single arbitrator, if misapprehending governing law, can do lasting harm.

<sup>302</sup>Model Law, *supra* note 287, art. 34(4).

<sup>303</sup>See *supra* notes 8, 12-13 and accompanying text.

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meetings could focus on the balance of conveniences, uncomplicated by asserted deficiencies in one potential *lex arbitri* in comparison to another. In many instances, such debates would be far less contentious than when place serves its usual function of supplying trial judges, and providing grounds for vacatur, rules for intervention, standards for appeal, and guidelines concerning costs.<sup>304</sup>

Full ICSID participation, of course, would not fully eliminate domestic court involvement in the Chapter 11 process. First, domestic courts may be requested to recognize and enforce ICSID awards, and to that extent domestic machinery may be invoked upon occasion. Claimants, moreover, would retain the right to bring their claim as an UNCITRAL Rules proceeding, in lieu of ICSID arbitration.<sup>305</sup> Consequently, assuming the UNCITRAL option retains its popularity, the Chapter 11 docket will produce some awards governed by a domestic *lex arbitri* (with its manifold bases for attack) and others--ICSID Convention awards-- subject only to such rules of sovereign immunity from execution as may apply at the place of enforcement.<sup>306</sup> In the latter case, domestic courts could not properly entertain a vacatur proceeding.<sup>307</sup>

The two-track docket just described--though still decentralized-- seems more satisfying than the present regime because claimants are provided a meaningful alternative to domestic courts and the potential for post-award trial court maneuvering would be retained by choice. Any inefficiencies befalling respondent states in having two somewhat different domains in which to attack and defend are the natural result of inducements purposefully extended to investors.

### H. *Standing Appellate Bodies*

#### 1. ICJ Chamber

Putting aside obvious problems of jurisdiction *ratione personae*, an ICJ Chamber established to review investment awards would have several apparent virtues. In addition to meeting the criterion of centralization, the Court is a standing body with continuity of membership.<sup>308</sup> No new appointment process would be necessary, except as may be required to form the chamber. The Court's members are independent, and possess, *ex hypothesi*, considerable public international law expertise. Even if merits review were excluded from the appellate mandate, the oft-raised cluster of questions regarding excess of mandate will typically be a function of treaty interpretation.

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<sup>304</sup> See *supra* notes 30, 135-139, 288-302 and accompanying text.

<sup>305</sup> See NAFTA, *supra* note 1, art. 1120; *supra* note 11 and accompanying text.

<sup>306</sup> See ICDID Convention, *supra* note 10, art. 55.

<sup>307</sup> *Id.*, art. 54(1).

<sup>308</sup> See MERRILLS, *supra* note 160, at 140-45 (discussing ICJ Chambers).



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Though the NAFTA docket alone might not warrant founding a new chamber, the inauguration of the FTAA should present ample reason for the effort. Indeed, there is no apparent reason why the chamber could not be open to investment awards in general,<sup>309</sup> provided the requisite change in the ICJ Statute—to accommodate mixed disputes--could be accomplished.

### 2. The PCA Variation

The jurisdictional limitations complicating the ICJ Chamber concept might be avoided by inaugurating the appellate chamber under the auspices of the Permanent Court of Arbitration (PCA), whose initiatives in recent years have included adopting procedures for mixed arbitration based on the UNCITRAL Arbitration Rules.<sup>310</sup> Certain currently-serving and retired ICJ judges could be designated to serve as chambers of three or five. The common Peace Palace location of the PCA and ICJ would facilitate efficient dual service by the chamber's jurists. The two bodies' institutional know-how could be immediately combined, presumably making for fewer administrative questions of first impression.

#### H. The Merits of A Standing First Instance Tribunal?

It might be supposed that the same attributes that recommend a standing appellate body for Chapter 11 awards argue for replacing non-permanent tribunals completely. That is, why not submit all alleged breaches of the NAFTA-- and perhaps the FTAA-- to a standing adjudicative organ that could develop a uniform law of investment, benefitted by institutional memory, synergism among tribunal members and similar properties? Despite a certain attractiveness,

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<sup>309</sup> The ICJ statute, article 26 already authorizes formation of chambers, both ad hoc (for the particular case) and standing (such as for environmental disputes. See Collier & Lowe, *supra* note 160, at 127-129. The success of a chamber dedicated to investment award review would naturally depend heavily on chamber composition, especially if that review is to include consideration of the merits. Cf. Highnet, *supra* note 165, at 41 (business expertise); and see Phoebe N. Okowa, *Environmental Dispute Settlement: Some Reflections on Recent Developments*, in REMEDIES IN INTERNATIONAL LAW 157, 168 (Malcom Evans, ed. 1998) (doubts about level of subject matter expertise of ICJ's environmental disputes chamber).

<sup>310</sup> See Jeffrey Bleich, *A New Direction for the PCA: The Work of the Expert Group in THE FLAME REKINDLED* 17, 41 (Sam Muller & Wim Mijs, eds. 1994) (PCA can do more to address need for state/non-state disputes); see also Tjaco T. Van den Hout, *Introduction* in INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS VII (PCA ed., 2000) (mentioning desire that PCA be utilized more fully); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 58 (3d ed, 1999) (much to commend PCA arbitration); cf. PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State, *reprinted in* Coe, *PRINCIPLES & PRACTICE*, *supra* note 28 at 729.

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several points might be made in opposition to this idea. Two will be mentioned.

First, the parties' power to select arbitrators to match the dispute in question promotes legitimacy by enabling a fit between fact-finders and the subject matter in dispute. One can foresee for example a setting which a tribunal chair fluent in French, or versed in the usages of petroleum concessions, might be deemed by both parties indispensable to a correct understanding of key testimony and documentation. Second, being able to submit disputes to a relatively unlimited roster of qualified persons—the present model—allows many cases to advance apace simultaneously.<sup>311</sup>

### V. Conclusion

NAFTA Chapter 11 remains in its infancy and full of promise. Those accustomed to mixed arbitration find Chapter 11's innovations to be mildly sensational, not revolutionary. While it maintains formal and informal mechanisms that exert a unifying influence on substance and procedure, there is reason to hold that an appellate mechanism of some kind would be beneficial. Despite what some observers might hope for, the objective of such a body would not be to rectify international law by consulting a domestic law more familiar and comforting to the populous at large. Rather, it should be to create unity of expectations in those that invoke Chapter 11's disputes machinery, and if properly authorized, to enunciate a substantive jurisprudence coherent enough to facilitate business and governmental planning and to aid in the development of a general law of foreign direct investment.

Regardless, the first ten years have witnessed sufficient tinkering with the process through available mechanisms that many of the criticisms of Chapter 11 launched during its most fledgling operations should by now have lost much of their energy. Increasingly topical, the appellate body notion not original to this essay<sup>312</sup> poses numerous questions that require further study. Some of these have been introduced above, but a comprehensive treatment of the subject will require a far more rigorous examination than has been possible in this *tour d' horizon*. After a decade, some of Chapter 11's features remain untested, such as that potentially available to accommodate multiple

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<sup>311</sup> A two-tiered format in which the first instance is essentially the present Chapter 11 system refrains for the disputants the option to agree to cut costs by having only one arbitrator in the first instance, which they might be willing to do because of the safeguard of an appellate level. A first instance standing tribunal could of course build that option in as well, perhaps making that the norm for disputes below a certain amount in controversy.

<sup>312</sup> See Dodge, *Metalclad Note*, *supra* note 57, at 918 (appellate body could be given power to correct errors of law); Coe, *Heel*, *supra* note 8, at 206-07; cf. Frederick Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 *Hastings Int'l & Comp. L. Rev.* 303, 309 (“preferable that due process challenges be referred to...commission of Supreme Court Justices”).

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claims.<sup>313</sup> The latter should be of particular interest when the amounts in controversy are relatively low,<sup>314</sup> and the need for more streamlined procedures great.<sup>315</sup> Too, there is the prospect that ICSID Convention arbitration will eventually become available, bringing with it new intersections among regimes, new choices, and new challenges.

TABLES

**Table 1: Seats (Places ) of Arbitration**

Respondent	Claimant	Claimant's Nationality	Seats (Places) of Arbitration	Rules
Canada	Ethyl	USA	Toronto	UN
Canada	Pope & Talbot	USA	Montreal	UN
Canada	S.D Myers	USA	Toronto	UN
Canada	UPS	USA	Washington, DC	UN
Mexico	Azinian	USA	Toronto	AF
Mexico	Metalclad	USA	Vancouver, BC	AF
Mexico	Waste Management (I)	USA	Washington, DC	AF
Mexico	Waste Management (II)	USA	Washington, DC	AF
Mexico	Feldman	USA	Ottawa	AF
Mexico	Fireman's Fund	USA		AF
USA	ADF	Canada	Washington, DC	AF
USA	Loewen	Canada*	Washington, DC	AF
USA	Methanex	Canada	Washington, DC	UN
USA	Mondev	Canada	Washington, DC	AF

AF = Additional Facility

UN = UNCITRAL

\* The nationality of the corporate claimant in *Loewen* changed during the arbitration, leading to dismissal on jurisdictional grounds.

**Table 2: Duration of Arbitration (from Article 1119 Notice to liability or dispositive determination)**

<sup>313</sup>See NAFTA, *supra* note 1, art. 1126 (Consolidation).

<sup>314</sup>See, e.g., *Evicted*, CAL. LAW. 34 (Aug. 2001) (discussing Punta Banda dispute, Adams v. Mexico, a pending—but not quickly advancing--Chapter 11 arbitration involving multiple landowner claimants).

<sup>315</sup>*Cf. Guidelines for Arbitrating Small Claims under the ICC Rules*, 14(1) ICC CT. ARB. BULL. (Spring 2003)(relating task force guidelines addressing special considerations affecting smaller claims; specific to ICC Rules).

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<b>Respondent</b>	<b>Claimant</b>	<b>Notice of Intent</b>	<b>Decision</b>	<b>Duration</b>
Canada	Pope & Talbot <sup>i</sup>	12/14/1998	4/10/2001	2 years 4 months
Canada	S.D. Myers <sup>ii</sup>	7/22/1998	11/13/2000	2 years 4 months
Mexico	Azinian	12/10/1996	11/1/1999	3 years 1 month
Mexico	Metalclad <sup>iii</sup>	10/2/1996	8/22/2000	3 years 11 months
Mexico	Waste Management (I)	9/29/1998	6/2/2000	1 year 9 months
Mexico	Feldman	4/30/1999	12/16/2002	3 years 8 months
USA	ADF	3/1/2000	1/9/2003	2 years 10 months
USA	Loewen	1/29/1998	6/26/2003	5 years 5 months
USA	Mondev	5/6/1999	10/11/2002	3 years 5 months

i. Award on damages given May 31, 2002.

ii. Award on damages given October 21, 2002. The award was subjected to set aside proceedings.

iii. The award was subjected to set aside proceedings. The parties settled on October 30, 2001.

4. The award was subjected to set-aside proceedings.

**Table 3: Arbitrators**

<b>Ethyl</b>	Dr. Karl-Heinz Bockstiegel	Germany	Chairman	
	Mr. Charles N. Brower	US	Arbitrator	
	Mr. Marc LaLonde	Canada	Arbitrator	
<b>Pope &amp; Talbot</b>	Hon. Lord Dervaird	Scotland	Presiding Arbitrator	
	Hon. Benjamin J. Greenberg Q.C.	Canada	Arbitrator	
	Mr. Murray J. Belman	US	Arbitrator	
<b>S.D. Myers</b>	Brian P. Schwartz	Canada	Arbitrator	Edward C. Chiasson was appointed June 24, 1999 following the resignation of Mr. Bob Rae (Canada)
	Edward C. Chiasson, Q.C.	Canada	Arbitrator	
	J. Martin Hunter	England	Arbitrator	
<b>UPS</b>	Dean Ronald A. Cass	US	Arbitrator	
	L. Yves Fortier C.C., Q.C.	Canada	Arbitrator	
	Justice Kenneth Keith	New Zealand	President	
<b>Azinian</b>	Mr. Benjamin R. Civiletti	US	Arbitrator	
	Mr. Claus von Wobeser Hoepfner	Mexico	Arbitrator	
	Mr. Jan Paulsson	France	President	
<b>Feldman</b>	Prof. Konstantinos D. Kerameus	Greece	President	
	Mr. Jorge Covarrubias Bravo	Mexico	Arbitrator	
	Prof. David A. Gantz	US	Arbitrator	
<b>Metalclad</b>	Sir Elihu Lauterpacht, CBE, Q.C.	England	President	
	Mr. Benjamin R. Civiletti	US	Arbitrator	
	Mr. José Luis Siqueiros	Mexico	Arbitrator	
<b>Thunderbird</b>	Prof. Dr. Albert Jan van den Berg	Netherlands	Presiding Arbitrator	
	Prof. Thomas W. Walde	Scotland	Arbitrator	
	José Agustín Portal Ariosa	Mexico	Arbitrator	
<b>Waste Management (I)</b>	Mr. Keith Highet	US	Arbitrator	Mr. Eduardo Siqueiros was

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	Mr. Eduardo Siqueiros T.	Mexico	Arbitrator	
	Mr. Bernardo M. Cremades	Spain	President	
<b>Waste Management (II)</b>	Benjamin R. Civiletti	US	Arbitrator	Mr. Eduardo Magallón Gómez was appointed following the resignation of Mr. Guillermo Aguilar Alvarez (Mexico).
	Eduardo Magallón Gómez	Mexico	Arbitrator	
	Prof. James Crawford, SC, FBA	Australia	President	
<b>ADF</b>	Judge Florentino P. Feliciano	Philippines	President	
	Prof. Armand de Mestral	Canada	Arbitrator	
	Ms. Carolyn B. Lamm	US	Arbitrator	
<b>Loewen</b>	Sir Anthony Mason	Australia	President	Lord Mustill was appointed September 14, 2001 following the resignation of Mr. Yves Fortier (Canada).
	Judge Abner J. Mikva	US	Arbitrator	
	Lord Mustill	England	Arbitrator	
<b>Methanex</b>	William Rowley	Canada	Arbitrator	Prof. Michael Reisman was appointed following the resignation of Warren Christopher on September 20, 2002.
	Prof. Michael Reisman	US	Arbitrator	
	Van Vechten Veeder	England	President	
<b>Mondev</b>	Sir Ninian Stephen	Australia	President	
	Prof. James Crawford	Australia	Arbitrator	
	Judge Stephen M. Schwebel	US	Arbitrator	

**Table 4: Outcomes**

\*\* Award was subjected to set-aside proceedings. Metalclad settled October 30, 2001.

<sup>1</sup> “Partial” recovery means less than the amount sought. A given tribunal will ordinarily regard its award as fully addressing the injury demonstrated.