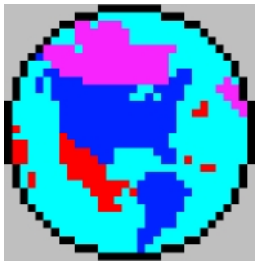
THE LAW OF
REGIONAL ECONOMIC INTEGRATION
IN THE AMERICAN HEMISPHERE



J.H.H. Weiler
University Professor, NYU
Joseph Straus Professor of Law and European Union Jean Monnet Chair,
NYU School of Law
AND

Sungjoon Cho
Assistant Professor of Law
Chicago-Kent College of Law,
Illinois Institute of Technology

Unit XIV
Investment

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Table of Contents

Guiding Questions

1. In General --- As you may know, there has been a consistent tension between developed countries and developing countries regarding the proper compensation after nationalization and expropriation of property. (See the so-called Calvo Doctrine) How was this tension mediated in the NAFTA context, in particular, in Article 1110?

2. Dispute Settlement Mechanism --- NAFAT Chapter 11 is famous for recognizing direct access by private parties. What is the role of private parties in Chapter 11 proceedings? How can an arbitral award be enforced in domestic jurisdiction? If not enforced in domestic courts, is Chapter 20 proceeding possible?

3. Issues on Jurisdiction and Admissibility --- What is the definition of "investment" or "investor" within the context of NAFTA Chapter 11? Would it be consistent with those found in other regimes?

4. Article 1102 (National Treatment) --- Would the case law regarding this article be compatible with that of GATT / WTO? What would be differences, if any?

5. Article 1105 (Fair and Equitable Treatment) --- The interpretation of this article has been an epicenter of enormous controversies. You should look carefully at a train of case law both by NAFTA Chapter 11 panels and domestic courts as well as the recent authoritative interpretation by the Free Trade Commission (FTC)? What do you think is the basic reason for such an unusual move by the FTC? Would such interpretation mean a (de facto) amendment of the NAFTA? Would such interpretation unduly reduce the autonomy of the panel as a neutral arbitrator?

6. Article 1110 (Expropriation) --- Peruse the text of Article 1110. Could a mere breach of contract fall with the rubric of "expropriation" in the context of Article 1110? (See Metalclad and BC Supreme Court's ruling on this issue. See also Azinian) Compare this concept with "Regulatory Taking" under the US Constitutional Law.

7. Amicus Brief --- What is the core holding of the panels on this issue? Would it make any difference in future panels' accepting or rejecting the substance (arguments) in amicus briefs?

8. Reservation --- In a practical manner, it is VERY important to know in what subject

matters Chapter 11 claims cannot be made.

9. Comparative Perspective --- Should and could the WTO adopt this type of investment claims? Compare NAFTA Chapter 11 regime to “direct effect” under the EU system.

I. Introduction

1-1. Summary of the NAFTA Chapter 11

* A full text of NAFTA Chapter can be found in the NAFTA Secretariat web-site at www.nafta-sec-alena.org/english/index.htm

OAS Overview of the North American Free Trade Agreement Chapter 11, Section A: Investment
http://www.sice.oas.org/summary/nafta/nafta11a.asp

The NAFTA definition of investment includes minority interests, portfolio investment, and real property as well as majority-owned or controlled investments from the NAFTA counties. In addition, NAFTA coverage extends to investments made by any company incorporated in a NAFTA country, regardless of country of origin. Land, rail and specialty air transportation services, which were excluded from the FTA, are covered by the NAFTA. The Parties also agreed to subject disputes raised by foreign investors to international arbitration. This section provides the rules for the treatment of investors and their investments by the governments of the three Parties. Generally, it sets out the rules for the treatment of investments owned by investors of another Party, although the provisions on performance requirements and environmental measures apply to all investments (that is, including domestic investments and investments from non-NAFTA countries).

Article 1101 states that section A covers measures by a Party (i.e., any level of government) that affect: investors of another Party; investments of investors of another Party; and for purposes of the provisions on performance requirements and environmental measures, all investments. The section does not apply to any measure to the extent it is covered by chapter fourteen relating to financial services.

Article 1101 affirms the right of a Party to perform functions (such as law enforcement) and to provide services (such as social welfare and health). The Article also affirms the right of Mexico to perform exclusively the economic activities set out in Annex III, which lists those sectors reserved to the state in the Mexican Constitution. To the extent that Mexico permits foreign investment in these sectors (e.g., in the form of a service contract or joint production arrangement), the protections of the investment chapter apply to that

investment. Additional exceptions to particular obligations are set out in separate Articles (e.g., Article 1108 provides that subsidies are not subject to the national treatment obligation).

Article 1102 sets out the basic obligation of national treatment for investors and their investments with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition. National treatment means that a Party will treat investors of the other Parties and their investments as favourably as it treats its own investors and their investments, in like circumstances. This last phrase stablishes the basis for comparison between domestic and NAFTA investors and investments. National treatment by state, provincial, and local governments is defined as the best treatment provided by that government to any investor or investment. The Article explains that national treatment prohibits the imposition of requirements that a minimum level of equity be held by nationals as well as forced divestiture on the basis of nationality. In effect, the national treatment obligation provides investors the right to establish an investment on as favourable terms as domestic investors and as favourable treatment as domestic investors after establishment.

Article 1103 requires that a Party may not treat an investor or investment from a non-NAFTA country more favourably than an investor or investment from a NAFTA country (i.e., Canada must treat US and Mexican investors and investments as favourably as it treats, for example, European or Japanese investors or investments). The treatment required by Article 1104 is the better of national treatment and most-favoured-nation treatment.

Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. National treatment provides a relative standard of treatment while this Article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law. In the case of losses suffered as a result of armed conflict or civil strife, each Party shall provide compensation on a non-discriminatory basis. However, the last paragraph of the Article provides a limited exception for existing subsidy programs which are not provided on a national treatment basis.

Article 1106 prohibits the imposition and enforcement of a number of specified performance requirements, in connection with the "establishment, acquisition, expansion, management, conduct or operation" of investments such as export requirements and domestic content. It also prohibits using the specified performance requirements as

conditions attached to advantages (such as subsidies, including tax incentives) including preferences for domestic sourcing of goods and restricting domestic sales by tying such sales to export performance. These prohibitions do not apply to subsidies that are conditioned on requirements to locate production, provide a service, train or employ workers, construct or expand facilities, or perform research and development. It does not restrict the use of certain measures (such as environmental measures) which require domestic content or a preference for domestic goods or services, provided that such measures are not arbitrary and do not constitute a disguised restriction on international trade or investment. Permitted measures include those necessary to protect human, animal or plant life or health.

Parties are prohibited from imposing a nationality requirement on senior personnel employed by investments of NAFTA investors under Article 1107. This provision is intended to permit NAFTA investors to employ personnel of their choosing (subject to the immigration laws of the host country). In addition, a Party may impose a requirement that a majority of the Board of Directors of a company be nationals or residents only if this requirement would not impair the ability of the investor to exercise control over its investment. Reservations in Annex I protect these requirements.

Articles 1102, 1103 and 1107 do not apply to procurement by government and subsidies. Article 1108 specifies the exceptions permitted to the obligations of Articles 1102 (national treatment), 1103 (most-favoured-nation treatment), 1106 (performance requirements) and 1107 (senior management and boards of directors). It also sets out the relationship of Annexes I, II, III, and IV to this Section. Annex I describes existing measures that do not meet the obligations of Articles 1102, 1103, 1106, and/or 1107. All existing, non-conforming measures may not be amended to be made more restrictive in the future, and once liberalized may also not be made more restrictive. At the federal level, non-conforming measures to be maintained are described in each country's schedule to Annex I. Existing state and provincial measures are excepted from the relevant obligations for two years after the entry into force of the Agreement, i.e., until January 1, 1996. In order to maintain such measures they must be set out in Annex I after the two-year period. Local government measures may be maintained and are not required to be listed in Annex I. Article 1108 also sets out a number of limited exceptions to Article 1106 allowing some performance requirements relating to foreign aid, export promotion, government procurement and preferential tariffs and quotas.

For Canada, all existing non-conforming federal measures are grandfathered and listed in Annex I. In the NAFTA, Canada has agreed to extend to Mexican investors the higher

Investment Canada review thresholds established in the FTA as well as to amend the FTA indexing formula for the review thresholds to include real economic growth as well as inflation (these commitments are specified in Annex I). For the US, all nonconforming existing federal measures are grandfathered and listed in Annex I. Mexico, however, has made commitments for significant further liberalization of its investment regime, and these commitments are specified in the Mexican schedule to Annex I. This liberalization includes a significant increase in the thresholds for Mexican review of foreign take-overs, reduction or elimination of many restrictions on foreign investment in specific sectors, and the phasing out of trade-distorting performance requirements.

Annex II sets out the sectors or activities to which Articles 1102, 1103, 1106 or 1107 do not apply, both for existing, non-conforming measures and possible new or more restrictive measures. However, a Party may not require divestiture of existing investments, by reason of its nationality, when introducing new measures covered by Annex II.

Annex III sets out the sectors reserved to the state under the Mexican constitution as well as the provisions applicable to Mexico in the privatization of state enterprises. Mexico retains the right to impose foreign ownership restrictions at the time that private (domestic) investment is permitted. For activities reserved to the state on January 1, 1992 but not reserved to the state at the date of entry into force, Mexico retains the right to impose foreign ownership restrictions on the initial sale for a period not exceeding three years. As Mexico liberalizes these restrictions, the provisions of Article 1108 will apply, i.e., once a sector is opened to private and/or foreign participation, restrictions may not be re-introduced in the future and exceptions must be listed in Annex I.

Annex IV sets out exceptions to Article 1103 (most favoured-nation treatment) including all existing bilateral and multilateral agreements as well as future agreements involving aviation, fisheries, maritime matters, and telecommunications .

Under Article 1109, each Party is required to permit the transfer of funds related to investments (such as profits, loan payments, liquidations) to be made freely and without delay. The Article also prohibits forced repatriation of funds (i.e., by the home government). Certain exceptions are permitted to enforce laws of general application related to, for example, bankruptcy and trading in securities. (A limited exception for balance-of-payments difficulties is set out in Article 2104).

Under Article 1110, no Party may expropriate investments of investors of another Party,

except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation. Compensation must be equivalent to fair market value, plus interest at a commercially reasonable rate. If compensation is not paid in a G-7 currency, the Article requires that any exchange rate fluctuation between the expropriation date and the payment date must be incorporated into the amount of compensation paid. The Article does not apply to compulsory licences and the issuance, revocation, and creation of intellectual property rights, to the extent these are consistent with chapter seventeen (intellectual property).

Article 1111 permits special formalities such as incorporation requirements, provided that these do not materially impair the protections under he chapter. In addition, a Party may require investors of the other Parties to provide routine information about their investments, to be used for statistical purposes.

In the case of any inconsistency between the investment chapter and other chapters, Article 1112 provides that the latter shall prevail to the extent of the inconsistency. This Article ensures that the specific provisions of other chapters are not superseded by the general provisions of this chapter. In the case that a Party requires a service provider to post a bond in order to provide the service on a cross-border basis, the Article specifies that this chapter applies to the bond, but not to the cross-border provision of the service.

Under Article 1113, a Party may deny the benefits of this chapter in the case that investors of a non-Party control the investment and the denying Party does not maintain diplomatic relations with the non-Party or the denying Party has prohibited transactions with enterprises of the non-Party which could be circumvented if the NAFTA applied. A Party may also deny benefits in the case of "sham" investments (i.e., where there are no substantial business activities in a NAFTA country).

The first paragraph of Article 1114 affirms each Party's right to adopt and enforce environmental measures, consistent with the chapter (e.g., environmental measures must be applied on a national treatment basis). The second paragraph, which addresses the pollution haven issue, requires that the Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures, and that Parties should not waive or derogate from such environmental measures to attract investment. If one Party considers that another has done so. it may request consultations.

Chapter 11, Section B: Settlement of Disputes between a Party and an Investor of Another

Party
http://www.sice.oas.org/summary/nafta/nafta11b.asp

Section B of chapter 11 refers private Parties, who have a dispute with a NAFTA Party other than their own, to one of three applicable sets of arbitration rules which are intended to govern the arbitration proceedings in question.

The purpose of the section, set out in Article 1115, is to establish a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal. The provisions of this section are without prejudice to the rights and obligations of the Parties under chapter 20.

Under Article 1116, a claim may be submitted to arbitration under this section if an investor believes that another Party (i.e., other than the Party of whom the investor is a national or an entity controlled by a national of that Party) has breached an obligation under section A or Article 1503(2) (state enterprises), or Article 1502(3)(a) (monopolies and state enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under section A, and that investor has incurred a loss or damage as a result of the alleged breach of an obligation in question. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of a loss or damage.

On the same basis as in the case of a claim under Article 1116, Article 1117 provides that an investor may submit a claim under this section on behalf of an enterprise incorporated in the jurisdiction of another Party where the investor owns or controls directly or indirectly that enterprise. If an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise in question makes a claim under Article 1116 arising out of the same events, the claims are to be heard together by a tribunal established under Article 1126, unless the tribunal finds that the interests of a disputing party would be prejudiced. An investment may not make a claim under this section.

Article 1118 requires that disputing parties are first to attempt to settle a claim through consultation or negotiation. Should such consultation or negotiation fail, Article 1119 provides that the investor is to deliver to the Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted. The notice is to contain information as to the identity of the claimant, the nature of the claim and the relief

and damages sought. Article 1120 states that, except in those cases where the investor, or a Mexican entity controlled by an investor of another Party, has initiated proceedings in a Mexican court, that investor may submit the claim to arbitration under: the International Centre for the Settlement of Investment Disputes Convention (ICSID), provided that both the Party alleged to have breached an obligation and the Party of which the investor is a national are parties to the Convention; the Additional Facility Rules of ICSID, provided that either the Party alleged to have breached an obligation or the Party of which the investor is a national, but not both, is a party to the ICSID Convention; or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

These rules provide the rules of procedure under which the arbitration will take place. Six months must have elapsed since the events giving rise to a claim before a claim may be submitted to arbitration; this is intended to permit time to resolve the matter amicably, before invocation of dispute resolution proceedings.

Under Article 1121, an investor may submit a claim under Article 1116 to arbitration only if: the investor consents to arbitration in accordance with the procedures set out in this Agreement; and the investor and, in those cases where an enterprise that the investor controls directly or indirectly suffered the damages claimed, that enterprise, waive their right to initiate or continue legal proceedings (except specific proceedings for injunctive, declaratory or other extraordinary relief) concerning the measure in question.

Claims made under Article 1117 on behalf of investments must meet the same conditions. The consent and waiver are to be included with the submission of the claim to arbitration. The requirement for a waiver from enterprises cannot be used against the investor in those cases where the Party alleged to have breached an obligation has deprived the investor of control of the enterprise. In those cases, no waiver is required from the enterprise and, specifically in the case of Mexican enterprises challenging the loss of control in Mexican legal proceedings, the investor is not barred from taking the matter to arbitration.

By virtue of Article 1122, Canada, the United States and Mexico cannot, at a later date, say that they have not consented to arbitration in any particular matter. Consent to all future claims to arbitration has been made in this Article provided such claims are made in accordance with the procedures set out in Section B. This consent and the submission of the claim satisfies the technical requirements of the ICSID Convention, the United Nations (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Inter-American (Panama) Convention on International Commercial Arbitration. Except in respect of a Tribunal established under Article 1126 (consolidation)

to consolidate a number of claims, Article 1123 provides that each tribunal will have three arbitrators. One arbitrator is to be appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, is to be agreed upon by parties to the dispute. The parties are, however, free to agree to any other number of arbitrators. If a tribunal, other than a tribunal established under Article 1126 (consolidation), has not been constituted within 90 days from the date that a claim is submitted to arbitration, then Article 1124 establishes a procedure for appointing the arbitrators.

The Parties to NAFTA agree that the Secretary general of ICSID, on the request of either disputing Party, shall appoint, at his or her discretion, the arbitrator or arbitrators not yet appointed. The only requirements are that the presiding arbitrator must be appointed from a roster of panelists and not be a national of the disputing Party or a national of the Party of the disputing investor. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties.

Canada, the United States and Mexico have agreed jointly to maintain a roster of 45 presiding arbitrators meeting the qualifications referred to in Article 1120. The members of this roster are to be experienced in international law and investment matters and are to be appointed by consensus and without regard to nationality.

In order to meet the technical requirements of the ICSID Convention and the ICSID Additional Facility Rules, the Parties to NAFTA agree in Article 1125 to the appointment of each individual member of a tribunal. Similarly, this Article makes it a condition that anyone wanting to make a claim under Articles 1116 or 1117 must agree in writing to each individual member of the tribunal before a claim can be submitted. While a disputant "agrees", this agreement is without prejudice to its right to object to the appointment of an arbitrator for legitimate reasons, such as nationality. Article 1126 permits a single arbitration tribunal to consolidate and hear two or more claims where the claims have a question of law or fact in common. Such a tribunal is to be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with the rules, except as modified by this section. Within 60 days of receipt of the request, the Secretary-General of ICSID shall establish a tribunal composing three arbitrators and appoint the presiding arbitrator. The presiding arbitrator is to be selected from either the roster established by the Parties to NAFTA or, if none is available, from the ICSID Panel of Arbitrators. The presiding arbitrator cannot be a national of a NAFTA Party. The Secretary-General shall then appoint the two other members of the tribunal with one member being a national of the disputing Party and one member a national of a Party of

the disputing investors. A tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established under this Article has assumed jurisdiction. On the application of a disputing Party, a tribunal established under this Article, pending its decision to assume jurisdiction, may order that the proceedings of a tribunal established under Article 1120 be stayed, unless that tribunal has already adjourned its proceedings. Where a tribunal has been established under this Article and there is a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request to consolidate the proceedings, that investor may make a written request to the tribunal that it be included in the proceedings.

Under Article 1127, a disputing Party shall deliver to the other Parties written notice of a claim no later than 30 days after the date that the claim is submitted along with copies of all pleadings filed in the arbitration. Article 1128 ensures that, on written notice to the disputing Parties, a Party may make submissions to a tribunal on a question of interpretation of this Agreement.

Under Article 1129, a Party shall be entitled to receive from the disputing Party a copy of the evidence that has been tendered to the tribunal as well as the written argument of the disputing Parties. When a Party receives such information it must respect the confidentiality of such information as if it were a disputing Party.

Unless the disputing parties agree otherwise, Article 1130 provides that a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with the applicable arbitration rules used by the Parties.

Article 1131 states that an arbitration tribunal will decide a dispute in accordance with the provisions of NAFTA and any applicable rules of international law. An interpretation of a provision of the NAFTA by the Commission is binding on an arbitration tribunal. Where it is claimed that the alleged breach of an obligation is a permitted exception as set out in one of the annexes to chapter 11, Article 1132 provides that the tribunal, when requested to do so by the Party concerned, shall request the interpretation of the NAFTA Commission on the issue. The Commission is to submit in writing its interpretation to the Tribunal within 60 days of delivery of the request; the Commission's interpretation is binding on the tribunal. Should the Commission fail to submit an interpretation within 60 days, the tribunal is to decide the issue.

Where it is authorized to do so under the applicable arbitration rules, a tribunal, on request

or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding (Article 1133). A tribunal may order an interim measure of protection under Article 1134 to preserve the rights of a disputing Party, or to ensure that the tribunal's jurisdiction is made fully effective. Such orders may include an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. However, a tribunal may not order attachment, or stop the application, of a measure alleged to constitute a breach referred to in Article 1116 or 1117. Consistent with the practice of tribunals in this field, for purposes of this paragraph, an order includes a recommendation.

In its final award under Article 1135, a tribunal may award monetary damages including interest or the restitution of property, in which case the award shall provide that the Party may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs in accordance with the applicable arbitration rules. An award under Article 1117(1) must provide that it is made without prejudice to any right that any person may have in relief under applicable domestic law. Finally, a tribunal may not order a Party to pay punitive damages.

Under Article 1136, an award made by a tribunal is binding only on the disputing parties and in respect of the particular case. Subject to waiting periods set out in this Article and the review procedure under the arbitration rules for an interim award, a disputing party shall abide by and comply with an award without delay. An investor is entitled to seek enforcement of an award only after proceedings for judicial review of the award, if initiated, have been completed. In the case of a final award made under the ICSID Convention, the investor must wait until either 120 days have elapsed from the date the award was rendered or after revision or annulment proceedings have been completed. In those cases held under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules, the investor must wait until three months have elapsed from the date the award was rendered, or a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal. Each Party shall provide for the enforcement of an award in its territory. If a disputing Party fails to abide by or comply with a final award, the matter may be referred to the NAFTA Commission for further consideration as to whether such inaction is a breach of NAFTA.

Article 1137 sets out miscellaneous provisions regarding such matters as the time when a claim is considered as being submitted to arbitration. Canada and the US will make any arbitration award public, while the publication of an award in Mexico will be governed by

the applicable arbitration rules. A Party may not invoke the fact that the investor making a claim has received compensation through any insurance policy or program.

Under Article 1138, a decision by a Party pursuant to Article 2102 (National Security) to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, is not subject to the dispute settlement provisions of section B or chapter 20. The Parties have agreed that this particular exclusion is "without prejudice to the applicability or non-applicability of the dispute settlement provisions" of the NAFTA to other actions taken by the Parties pursuant to Article 2102.

Under annex 1138.2, a decision by Canada following a review under the Investment Canada Act, or by Mexico's National Commission on Foreign Investment (Comisi6n Nacional de Inversiones Extranjeras), with respect to whether or not to permit an acquisition of an investment that is subject to review, is not subject to the dispute settlement provisions of section B or of chapter twenty.

(…)

1-2. Edited Version of NAFTA Chapter 11

Chapter Eleven: Investment

Section A - Investment

Article 1101: Scope and Coverage
Article 1102: National Treatment
Article 1103: Most-Favored-Nation Treatment Article 1104: Standard of Treatment
Article 1105: Minimum Standard of Treatment Article 1106: Performance Requirements
Article 1107: Senior Management and Boards of Directors Article 1108: Reservations and Exceptions Article 1109: Transfers
Article 1110: Expropriation and Compensation
Article 1111: Special Formalities and Information Requirements Article 1112: Relation to Other Chapters Article 1113: Denial of Benefits Article 1114: Environmental Measures

Section B - Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

Section A - Investment

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1104: Standard of Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

Article 1105: Minimum Standard of Treatment

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

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

(a) to export a given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory,
or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.
Article 1107: Senior Management and Boards of Directors

1. No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof,

of an enterprise of that Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment. (…)

Article 1109: Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

(a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

(b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

(d) payments made pursuant to Article 1110; and (e) payments arising under Section B.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.

4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offenses;

(d) reports of transfers of currency or other monetary instruments; or (e) ensuring the

satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the

date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

* * *

Article 1112: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that crossborder service. This Chapter applies to that Party's treatment of the posted bond or financial security.

Article 1113: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

Article 1114: Environmental Measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Section B Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a noncontrolling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

Article 1118: Settlement of a Claim through Consultation and Negotiation

The disputing parties should first attempt to settle a claim through consultation or negotiation.

(…)

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative

tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for 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.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for 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.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:

(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply.
Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility
Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and (c) Article I of the Inter-American Convention for an agreement. Article 1123: Number of Arbitrators and Method of Appointment

Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
Article 1124: Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

1. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3.

3. The Secretary-General shall appoint the presiding arbitrator from the roster of presiding arbitrators referred to in paragraph 4, provided that the presiding arbitrator shall not be a national of the disputing Party or a national of the Party of the disputing investor. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties.

4. On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality.
Article 1125: Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality:

(a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a disputing investor referred to in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and

(c) a disputing investor referred to in Article 1117(1) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.
* * *

Article 1130: Place of Arbitration

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules. Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.
Article 1132: Interpretation of Annexes

1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Article 1133: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 1134: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

Article 1135: Final Award

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules. 2. Subject to paragraph 1, where a claim is made under Article 1117(1):

(a) an award of restitution of property shall provide that restitution be made to the

enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages. Article 1136: Finality and Enforcement of an Award

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. A disputing party may not seek enforcement of a final award until: (a) in the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.

5. If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall

establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the Party abide by or comply with the final award.

6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 5.

7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

* * *

Section C - Definitions

Article 1139: Definitions

For purposes of this Chapter:

disputing investor means an investor that makes a claim under Section B; disputing parties means the disputing investor and the disputing Party; disputing party means the disputing investor or the disputing Party;

disputing Party means a Party against which a claim is made under Section B;

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

equity or debt securities includes voting and non-voting shares, bonds, convertible

debentures, stock options and warrants;

G7 Currency means the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States;

ICSID means the International Centre for Settlement of Investment Disputes;

ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;

Inter-American Convention means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

- (i) commercial contracts for the sale of goods or services by a national or enterprise
- (ii) in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);
(…)

1-3. Against NAFTA Chapter 11

From Global Trade Watch (A Trade Division of the Public Citizen founded by Ralph Nader)

http://www.publiccitizen.org/trade/ftaa/Background/articles.cfm?ID=1700
WTO/NAFTA Failures

The WTO/NAFTA model has existed for six years and has provided extensive data documenting its failure. The USTR and CGR must learn from these failures and move away from the WTO/NAFTA model of international commercial agreements toward a new type of international commercial agreement that respects citizens' rights to a safe food supply, accountable governance, and a healthy and safe environment and workplace. In contrast, the current U.S. approach to FTAA negotiations has been to use NAFTA as a template for the FTAA. Given that some NAFTA provisions are considerably more extreme than related WTO provisions, basing the FTAA on NAFTA would serve as a back door means to overcome unified developing nation opposition to imposing further investment liberalization or new corporate intellectual property provisions.

1. Investment

What Has Failed: NAFTA's provisions on investment have been an unmitigated disaster. NAFTA Chapter Eleven rules governing "Expropriation and Compensation" allow private investors to sue NAFTA nations directly outside of domestic courts and before NAFTA tribunals for cash compensation for government actions that the tribunal decides undermine an investor's NAFTA rights and privileges. Specifically Chapter Eleven guarantees foreign investors compensation from NAFTA nation governments for any government action "tantamount" to an "indirect expropriation."(2)

These provisions have created a broad regulatory takings mechanism, permitting corporations to sue national governments for huge sums of money for enacting legitimate, non-discriminatory measures to protect public health and the environment. Such regulatory takings ransoms are an unthinkable prospect in domestic courts.

A recent and glaring example of this extreme NAFTA investment provision occurred in July, 1999, when the Canadian corporation Methanex sued the U.S. government after the

California Governor Gray Davis, by executive order, mandated the removal of methyl tertiary butyl ether (MTBE) from gasoline sold in the state by December 31, 2002.(3) Significantly, once the ban is completely implemented, it will be non-discriminatory, treating domestic and foreign goods and investors identically, with both domestic and foreign producers prohibited from using MTBE in gas sold in California.

However, Methanex claims that California's ban on MTBE violates its investor rights under NAFTA's Chapter Eleven rules by limiting the corporation's ability to sell MTBE. Methanex is suing for $970 million. If a NAFTA tribunal finds the regulation to be a "regulatory taking," as claimed by Methanex, the U.S. government can be held liable for the corporation's lost profits.

Governor Davis implemented the phase out of MTBE after reviewing considerable scientific evidence of public health and environmental problems caused by MTBE. He concluded that "on balance, there is significant risk to the environment from using MTBE in gasoline in California."(4) The chemical has been associated with human neurotoxicological effects, such as dizziness, nausea, and headaches, and has been found to be an animal carcinogen with the potential to cause human cancer.(5) The California MTBE ban is based on a 1998 University of California-Davis study which found, "There are significant risks and costs associated with water contamination due to the use of MTBE."(6) The report noted, "MTBE is highly soluble in water and will transfer readily to groundwater from gasoline leaking from underground storage tanks, pipelines and other components of the gasoline distribution system."(7) The report also noted that the use of MTBE gas in motor boats results in contamination of surface water.(8) It concluded, "We are placing our limited water resources at risk by using MTBE."(9)

Methanex claims that MTBE provides cleaner air.(10) However, the U.C.-Davis report found that "there is no significant additional air quality benefit to the use of oxygenates such as MTBE in reformulated gasoline. . . ."(11) The report also found no economic benefit from the use of MTBE. In comparing the costs of gas with MTBE added to gas with ethanol added and gas without any oxygenate added, the report concluded that MTBE gas "has the highest net annual cost due primarily to the costs of treating contaminated water supplies, higher fuel prices, and lower fuel efficiency."(12)
In effect, this extreme NAFTA provision allows one special interest, Methanex, to override the Governor, State Senate, and people of California. The case is being watched closely by many Members of the U.S. Congress, including those who supported and opposed NAFTA, as a test of NAFTA's ability to undermine the legislative process and the public health and environmental legislation resulting from it.

The Methanex case has drawn comparisons to the 1998 case brought against Canada by the U.S.-based Ethyl Corporation under NAFTA's Chapter Eleven provisions. In that case, Ethyl sued Canada for $250 million after Canada banned the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT) because the additive posed health risks and clogged vehicles' catalytic converters. Ethyl claimed the ban violated NAFTA because it "expropriated" future profits and damaged Ethyl's reputation. After learning that the NAFTA tribunal was likely to rule against its position, the Canadian government revoked the ban, paid Ethyl $13 million, and issued a public statement declaring there was no evidence that MMT posed health or environmental risks.(13)
There are several other examples of corporations using NAFTA's investment rules to sue governments for adopting legitimate, non-discriminatory laws to protect public health and safety or the environment. However, the two cases described suffice to illustrate why NAFTA's investment rules are threatening to the public interest and should not be emulated in the FTAA.

FTAA negotiators must also take into consideration that Canada has sought changes to the Chapter Eleven provisions to eliminate the regulatory takings aspect. The U.S. to date has blocked efforts to fix this extreme NAFTA provision and instead continues to try to expand its coverage to all FTAA nations.

Canada, which has been subjected to several NAFTA Chapter Eleven lawsuits, is seeking interpretive changes to the Chapter Eleven rules to limit the ability of private investors to obtain compensation from governments for legitimate, non-discriminatory public health, the environment, culture, and other concerns.(14) A November 13, 1998 Canadian government memo listed potential methods of reining in the NAFTA Chapter Eleven provisions, including shifting the burden of proof to the private investor to show that a government had abused its power by enacting a particular regulation and that the regulation is "truly expropriative;" or listing governmental activities that could not be the subject of a Chapter Eleven suit.(15)

Moreover, the USTR and CGR should note that the attempt to establish investment rules similar to those in NAFTA's Chapter Eleven at the Organization for Economic Cooperation and Development (OECD) failed miserably. The proposed Multilateral Agreement on Investment (MAI) would have allowed private investors to circumvent domestic sovereignty rules and sue national and sub-national governments that attempted to limit the degree and nature of foreign

investment (both outgoing and incoming), impose standards of behavior on investors, and shape investment policies promoting social, economic, and environmental goals.

Fortunately, in 1997, Public Citizen and other consumer groups began campaigns in OECD countries against the MAI and succeeded in forcing some sunshine on the MAI. The MAI was finally scrutinized by lawmakers, citizens' groups, environmental groups, and labor unions in numerous countries. This attention resulted in broad concern about the sweeping impact the proposed treaty could have on national and local governments' ability to pursue policies in support of decent living standards, environmental protection, and human rights. Due largely to these campaigns, the OECD announced in December 1998 that it had ceased negotiations on the MAI. Yet, FTAA negotiators also seem to have missed this rather dramatic lesson: the widespread popular opposition to these extreme investment rules will not be overcome simply by changing the venue and attempting to include them in the FTAA.

A New Approach: Investment rules that set forth investors' rights and obligations clearly are useful. For instance, as guaranteed by U.S. law, private investors should be compensated for actual takings. For example, when a government body seeks to put a road through an individual's property for the public good, the government must compensate the individual for taking his/her property. Similarly, as currently provided by U.S. law, property owners can be regulated to promote the public welfare, for instance by forbidding the dumping of toxic chemicals.

In direct contrast to this latter notion in U.S. property law, current NAFTA investment rules forbid the imposition of obligations on property holders. Clearly a private investor should not be compensated with public funds for lost future profits when a local, state, or national government enacts a non-discriminatory law or regulation that restricts the sale of the investor's product because it poses risks to public health or the environment. These "indirect takings" are a form of domestic deregulation, an attempt by corporations to circumvent domestic legislative and judicial processes (and the domestic media) and undercut local, state, and federal health and environmental laws in closed and secretive trade venues. FTAA negotiators must base their positions regarding investment rules on the long-existing U.S. principles: non-discriminatory public interest regulations are not only permitted, but their observance by a property holder is an objective, with penalties for failure to comply.

(…)

Footnote

1. 65 Fed. Reg. 38872 (Jun. 22, 2000).

2. North American Free Trade Agreement, Part Five - Investment, Services and Related Matter, Chapter Eleven, Article 1110: Expropriation and Compensation.

3. California Executive Order D-5-99, Mar. 25, 1999. 4. Id. at 1.

5. Keller, Arturo, et. al, Health & Environmental Assessment of MTBE, Vol. 1, Summary & Recommendations, Nov. 1998, at 23-24.

6. University of California at Davis Report: MTBE Fact Sheet, Nov. 12, 1998, at 1.

7. Id. 8. Id. 9. Id.

10. See Bullet Point Background on Methanex's NAFTA Claim and MTBE, available at www.methanex.com, at 1; site visited on July 21, 1999.

11. University of California at Davis Report: MTBE Fact Sheet, Nov. 12, 1998, at 1.

13. See Courtney Tower, "Canada Backs Away From US Firm's NAFTA Challenge," Journal of Commerce, Jul. 22, 1998.

14. See Edward Alden, "Canada Seeks Tighter NAFTA Rules to Limit Compensation," Financial Times, Jan. 22, 1999; and Courtney Tower, "NAFTA Considers Curb on Claims from 'Green' Laws," Journal of Commerce, Feb. 23, 1999.

15. Nihal Sherif, "Canadian Memo Identifies Options for Changing NAFTA Investment Rules," Inside U.S. Trade, Feb. 12, 1999.

II. Jurisprudence

2-1. Issues on Jurisdiction and Admissibility

2-1-1. Measure

2-1-1-1. A Statute under Construction

* Background from the US State Department Website http://www.state.gov/s/l/c3745.htm
Ethyl Corp. v. Government of Canada

On April 15, 1997, Ethyl Corporation, a Virginia corporation with a Canadian subsidiary, submitted a claim under the UNCITRAL Rules on its own behalf to arbitration against Canada. Ethyl claimed that a Canadian statute banning imports of the gasoline additive MMT for use in unleaded gasoline breach Chapter Eleven's requirement of national treatment (Article 1102), prohibition of expropriation (Article 1110) and prohibition of performance requirements (Article 1106).

A Canadian court subsequently found the act to be invalid under the Canadian law, and Canada and Ethyl settled the Chapter Eleven claim.

(…)

(c) Requirement of .a "Measure"

65. The bulk of the written and oral proceedings have been devoted to what constitutes a "measure" within the meaning of Article 1101, which stipulates that Chapter 11 (including. therefore, Articles 1102, 1106 and 1110, all of which Ethyl claims Canada has breached) "applies to measures adopted or maintained by a Party." ("Measure" appears also several times in Article 110625, and Article 1110 addresses specifically “a measure tantamount to nationalization or expropriation.") Succinctly, Canada has argued that no legislative action short of a statute that has passed both the House of Commons and the Senate and has received Royal Assent constitutes a "measure" subject to arbitration under Chapter 11. Since at the time Ethyl's claim was "submitted to

arbitration," i.e., 14 April 1997, by delivery of its Notice of Arbitration (see Article 1137(1)(c) at note 9, supra), the MMT Act had not yet received Royal Assent (which was forthcoming eleven days later), Canada argues that jurisdiction fails.

66. In addressing what constitutes a measure the Tribunal notes that Canada's

Statement on Implementation of the North American Free Trade Agreement, Can. Gaz, Part IC(1), Jan 1994 (hereinafter Canadian Statement on Implementation of NAFTA) (at 80) states that.

> The term "measure" is a non- exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions.

This is borne out by Article 201(1), which provides that:

> measure includes any law, regulation, procedure, requirement or practice.

Clearly something other than a "law," even something in the nature of a "practice," which may not even amount to a legal stricture, may qualify.
(…)

The Tribunal notes that the MMT Act, according to the allegations of Claimant's Notice of Intent, Notice of Arbitration, and Statement of Claim, was the realization of a legislative program of the Canadian Government, sustained over a period of time. As of the date on which Claimant delivered its Notice of Intent pursuant to Article 1119, on 10 September 1996, Bill C-94, the original proposal that resulted in the MMT Act and that had died after it had had a second reading (and been reported back by committee without amendment) due to the prorogation of Parliament, had been reinstated as Bill C-29 and deemed to have been read the second time, reported out of committee without amendment and subject to third reading.
(…)
In any event, the M1MT Act is, as of 24 June 1997, a reality, and therefore the Tribunal is now presented with a claim based on a -measure' which has been "adopted or maintained" within the meaning of Article 1101.
(…)

2-1-1-2. Judicial Action (Court Judgments)

The Loewen Group, Inc. and Raymond L. Loewen
v
United States of America
(ICSID Case No. ARB(AF)/98/3)

Decision on hearing of Respondents objection
To competence and jurisdiction

www.state.gov/s/l/c3741.htm

* Background from the US State Department Website

http://www.state.gov/s/l/c3755.htm

The Loewen Group, Inc. ("TLGI"), a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, its chairman and CEO at the time of the events at issue, have filed claims under the ICSID Additional Facility Rules in their individual capacities and on behalf of Loewen Group International, Inc., TLGI's U.S. subsidiary (collectively "Loewen"). Loewen seeks damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts in 1995-96.

Loewen alleges violations of three provisions of NAFTA - the anti-discrimination principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. Loewen requests damages in excess of $600 million.

The United States objected to the jurisdiction and competence of the tribunal. In a decision issued on January 9, 2001, the tribunal rejected one of the United States' objections to jurisdiction, and decided to hear the other objections with the merits of the case. The tribunal will issue a decision on those other jurisdictional objections when it issues a decision on the merits of the case.

In October 2001, the tribunal held a hearing on liability and on those other jurisdictional objections.

In January 2002, the United States objected to the continuing competence of the tribunal over the claims of The Loewen Group, Inc., on the ground that The Loewen Group, Inc., had completed a corporate reorganization that resulted in a discontinuity of the attributes of a claimant necessary to maintain a claim under NAFTA Chapter Eleven. A hearing on the United States' objection is scheduled for June 2002.

The United States denies that the tribunal has jurisdiction over the claims and denies that any of the alleged measures violated the NAFTA.

* * *

I. INTRODUCTION

1. This dispute arises out of litigation brought against the first Claimant, the Loewen Group, Inc ("TLGI') and Loewen Group International, Inc ('LGII'), its principal United States subsidiary, in Mississippi State Court by Jeremiah O'Keefe Sr., his son and various companies owned by the O'Keefe family (collectively called 'O'Keefe'). The litigation arose out of a commercial dispute between O'Keefe and the Loewen companies which are competitors in the funeral home and funeral insurance business in Mississippi. The dispute concerned three contracts between O'Keefe and the Loewen companies said to be valued by O'Keefe at $980,000 and an exchange of two O'Keefe funeral homes said to be worth $2.5 million for a Loewen insurance company worth $4 million approximately.

2. The Mississippi jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. The verdict was the outcome of a seven-week trial in which, according to the Claimants, the trial judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to the Claimants' foreign nationality (which was contrasted to O'Keefe's Mississippi roots); (ii) race-based distinctions between O'Keefe and the Loewen companies; and (iii) class-based distinctions between the Loewen companies (which were portrayed as large wealthy corporations) and O'Keefe (who was portrayed as running family-owned businesses). Further, according to the Claimants, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that

nationality-based, racial and class-based discrimination was impermissible.

3. The Loewen companies sought to appeal the $500 million verdict and judgment but wore confronted with the application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment, but allows the bond to be reduced or dispensed with for 'good cause'.

4. Despite the Claimants' claim that there was good cause to reduce the appeal bond, me Mississippi Supreme Court refused to reduce the appeal hand at ail and required the Loewen companies to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. According to the Claimants, that decision effectively foreclosed the Loswen companies' appeal rights,

5. The Claimants allege that the Loewen companies were then forced to settle the case 'under extreme duress'. Other alternatives to settlement were said to be catastrophic and/or unavailable. On January 29, 1996, with execution against their Mississippi assets scheduled to start the next day, the Loewen companies entered into a settlement with O'Keefe under which they agreed to pay $175 million.

6. In this claim the Claimants seek compensation for damage Inflicted upon TLGI and LGII and for damage to the second Claimants interests as a direct result of alleged violations of Chapter Eleven of the North American Free Trade Agreement ('NAFTA') committed primarily by the State of Mississippi in the course of the litigation.
(…)

V. THE RESPONDENT'S OBJECTION TO COMPETENCE AND JURISDICTION

32. By its Memorial on Competence and Jurisdiction, the Respondent objected to the competence and jurisdiction of this Tribunal on the following grounds:

(i) the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not 'measures adopted or maintained by a Party" within the scope of NAFTA Chapter Il;
(ii) the Mississippi court judgments complained of are not 'measures adopted or maintained by a Party' and cannot give rise to a bread of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system; (…)

VI. THE RESPONDENT'S FIRST GROUND OF OBJECTION:

WHETHER JUDICIAL ACTS IN LITIGATION BETWEEN PRIVATE PARTIES ARE'MEASURES' REGULATED BY NAFTA

39. Article 1101(1) of NAFTA provides:

> 'This Chapter [Eleven] applies to measures adopted or maintained by a party' relating to:
>
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party; ...'

40. Article 201 defines 'measure' as including 'any law, regulation, procedure, requirement or practice'. The breadth of this inclusive definition, notably the references to 'law, procedure, requirement or practice', is inconsistent with the notion that judicial action is an exclusion from the generality of the expression 'measures.' 'Law' comprehends judge-made as well as statute-based rules. 'Procedure' is apt to include judicial as well as legislative procedure. 'Requirement" is capable of covering a court order which requires a party to do an act or to pay a sum of money, while 'practice' is capable of denoting the practice of courts as well as the practice of other bodies.

(…)
43. The Respondent concedes that when a government entity is involved in a domestic court proceeding, it tray be that, in appropriate circumstances, a resulting court judgment constitutes a 'measure adopted or maintained by a Party'. This concession is at odds with the argument that the failure to mention 'judicial order' or 'judgment" In Article 201 signifies an intention to confine 'measures' to legislative and executive actions. In general, where the meaning of 'measures' is so confined, the restricted meaning arises from an express limitation or an implied limitation arising from the context. No such limitation is to be found in Article 201.

44. Nor can "measures' be confined to provisional or interim judicial acts as distinct from final judicial acts. Such a distinction finds support neither in Article 1701 nor Chapter 10 of NAFTA (which applies to 'measures adopted or maintained by a Party relating to procurement'). The reference in Article 1019(1) to 'precedential judicial decision' which is one instance of a measure 'adopted or maintained by a Party', is to a final decision as well as a provisional decision. See also Annex 1010.18 paras 2 and 3.

45. The approach which this Tribunal takes to the interpretation of 'measures' accords

with the interpretation given to the expression in international law where it has been understood to include judicial acts. In Regina v Pierre Bouchereau, Case 30 77 [1977] ECR 1999, the European Court of Justice rejected the argument that 'measure' excludes actions of the judiciary, holding that the word embraces 'any action which affects the rights of persons' coming within the application of the relevant treaty provision (at 11). In the Fisheries Jurisdiction Case (Spain v Canada), No. 96 (ICJ 4 December 1998), the International Court of Justice stated that 'In its ordinary sense the word' ['measure'] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby' (at 66). See also Oil Fields of Texas Inc v NIOC, 12 Iran-US Cr Trib Rep 303 (1986) at 318-319 (where the judicial acts in question were held to be expropriations within the expression 'expropriations or other measures affecting property rights', thus amounting to 'measures affecting property rights').

(…)

47. Such an interpretation of the word 'measures' accords with the general principle of State responsibility. The principle applies to the acts of judicial as well as legislative and administrative organs. (See draft Article 4 on State Responsibility adopted by the International Law Commission and later provisionally adopted by the United Nations General Assembly Drafting Committee on its second reading, Geneva, May 1-June 9, July 10-August I4, 2000, A/CN.4/L.600, August 21, 2000.) In Azinlan v United Mexican States Case No. ARB(AF)/97/2,14 ICSID Review-FILJ 538, the Tribunal, in rejecting the claim that there were violations of NAFTA, quoted (at 567) with approval the comments made by the former President of the International Court of Justice who, after acknowledging the reluctance in some arbitral awards of the last century to admit that the State is responsible for judicial actions, stated:

'... in the present century State responsibility for judicial acts came to be recognized. Although independent of Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.' (Eduardo Jimenez de Aréchaga, 'International Law in the Past Third of a Century', 159-1 Recueil des Cours (General Course in Public International Law, The Hague, 1978).
(…)

48. The Azinian Tribunal pointed out (at 568) that State responsibility for judicial decisions does not entitle a claimant to a review of national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is neither true

generally nor for NAFTA. As the Tribunal said,

`What must be shown is that the court decision itself constitutes a violation of the treaty' (at 568).

(…)
52. We agree with the Respondent that not every judicial act on the part of the courts of a Party constitutes a measure 'adopted or maintained by a Party'. Mexico submits that, in order to constitute a 'measure', the judicial action under consideration must have a general application. Thus a judicial affirmation of a general principle might well constitute a measure, whereas a specific order requiring a defendant to pay a sum of money would not. The definition of 'measure' in Article 201 (which includes 'requirement') is by no means consistent with this argument.

53. The question then arises whether the words 'measures adopted or maintained by a Party' should be understood, as the Respondent argues, to exclude judicial acts being the judgments of domestic courts in purely private matters. The purpose of Chapter Eleven, 'Section B - Settlement of Disputes between a Party and an Investor of Another Party' is to establish 'a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an arbitral tribunal'. The text, context and purpose of Chapter Eleven combine to support a liberal rather than a restricted interpretation of the words 'measures adopted or maintained by a Party', that is, an interpretation which provides protection and security for the foreign investor and its investment: see Ethyl Corporation v Canada, Award on Jurisdiction, .June 24, 1998, 38 ILM 708, (where the NAFTA tribunal concluded that the object and purpose of Chapter Eleven is to 'create effective procedures ... for the resolution of disputes' and to 'increase substantially investment opportunities' (at 83)).

57. The Respondent argues that the words 'adopted or maintained' in Article 1101 are indicative of an intent to limit Chapter 11 to those actions that involve ratification by government. This limitation, so the Respondent submits, accords with the 'act of state' doctrine. That doctrine is a doctrine of municipal rather than international iaw.
(…)
58. Whatever the effect of the act of State doctrine may be, Article 1105, in requiring a Party to provide “full protection and security' to investments of investors, must extend to the protection of foreign Investors from private parties when they act through the judicial organs of the State.

59. Further, the award of punitive damages would satisfy the public element of the Respondent's public/private dichotomy. It is generally accepted that punitive damages awards are Intended to serve the public Interest (D.B. Dobbs, Dobbs Law of Remedies §3.11(1) at 457 (2d ed 1993).

60. We reject therefore the Respondent's objection that the Mississippi Court judgments as not 'measures adopted or maintained by a Party' because they resolved a dispute between private parties.

VI. THE RESPONDENTS SECOND GROUND OF OBJECTION;
THE MISSISSIPPI COURT JUDGMENTS ARE NOT 'MEASURES ADOPTED OR MAINTAINED BY A PARTY' AND CANNOT GIVE RISE TO A BREACH OF CHAPTER 11 BECAUSE THEY WERE NOT FINAL ACTS OF-THE UNITED STATES JUDICIAL SYSTEM

61. The Respondent argues that the expression 'measures adopted or maintained by a Party' must be understood In the light of the principle of customary international law that, when a claim of injury is based upon judicial action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole. This proposition is based on the notion that judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted. In other words, the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort. The Respondent distinguishes this substantive requirement of customary international law for a final non-appealable judicial action, when an international claim is brought to challenge judicial action, from international law's procedural requirement of exhaustion of local remedies ('the local remedies rule').
(…)

69. Although it has been said that the responsibility of the State for a breach of international law constituted by an alleged judicial action arises only when there is final action by the State's judicial system considered as a whole, It is now recognized that the judiciary is an organ of the State and that judicial action which violates a rule of international law Is attributable to the State (A.V. Freeman, The International Responsibility of States for Denial of Justice, 31.33 (1970)). The rule of judicial finality was influenced by the principles of separation, independence of the judiciary and respect for the finality of judicial decisions. However, the judiciary, though independent of

goverrment, is not independent of the State and the judgment of a court proceeds from an orgarn of the State as does a decision of the executive.

70. The modern view is that conduct of an organ of the Stale shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State. That, in effect, is the principle expressed in draft Article 4 on State Responsibility, provisionally adopted by the Drafting Committee of the United Nations General Assembly, based on the draft previously adopted by the International Law Commission (A/CN.A/L.600, August 21, 2000). Although the draft has not been finally approved, it is a highly persuasive statement of the law on State Responsibility as it presently stands. Draft Article 4 accords with the view expressed by Eduardo Jimenez de Aréchaga, the former President of the International Court ('International Law In the Past Third of a Century, 159-1 Recueil des Cours, (General Course in Public International Law, The Hague, 1978).'

71. Viewed in this light, the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

72. Just as It was said that the function of the local remedies rule was to establish whether the point had been reached at which the home State may raise the issue on the international level (G. Schwarzenberger, International Law, 604, (1957)), now it is the function of the rule to establish that State responsibility for a breach of an international obligation may be invoked.

(…)

74. Having reached this point in our consideration of the arguments, we have concluded that this ground of objection should be dealt with at the hearing on the merits. Our reasons for reaching this conclusion relate partly to the arguments based on Article 1121(2)(b) and Chapter Eleven and partly to other arguments advanced by the Claimants in response to the Respondont'3 objection. We have already mentioned the lack of specificity in the Respondent's acknowledgment that the Article partially relaxes the local remedies rule.
(…)

Azinian Case

CASE No. ARB(AF)/97/2
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

BETWEEN:

ROBERT AZINIAN. KENNETH DAVITIAN, & ELLEN BACA
Claimants
and
THE UNITED MEXICAN STATES
Respondent

AWARD

Before the Arbitral Tribunal
constituted under Chapter Eleven of the North American Free Trade Agreement , and comprised of:

Mr Benjamin R Civiletti
Mr Claus von Wobeser
Mr Jan Paulsson(President)

Date of dispatch to the parties:
November 1st 1999

http://www.dfait-maeci.gc.ca/tna-nac/azinian-en.asp

(…)

II. ESSENTIAL CHRONOLOGY

4. In early 1992, the Mayor of Naucalpan and other members of its Ayuntamiento (City Council) visited Los Angeles at the invitation of the Claimants to observe the operations of Global Waste Industries, Inc., a company said by the latter to be controlled by them.

5. On 7 October 1992, Mr Azinian, writing under the letterhead of Global Waste Industries Inc. (hereinafter "Global Waste") as its "President," sent a letter to the Mayor of Naucalpan containing a summary of the way "we expect to implement … the integral solution proposed for the solid waste problem" of the city. (…)

7. (…) In support of the project, Mr Ariel Goldenstein, a close business associate of the Claimants, and the future general manager of DESONA, said that "our company has been working in the U.S. for more than 40 years." Naucalpan's Director of Economic Development said "that's why we chose Global Waste." Naucalpan's Mayor referred to the Claimants' "more than 40 years experience in this area, in the city of Los Angeles, in a county that as you know has more than 21 million inhabitants." (…)

9. On 15 November, the Concession Contract was signed. Two days later DESONA commenced its commercial and industrial waste collection, using two reconditioned front-load vehicles.

10. On 13 December, DESONA commenced residential waste collection for the Satelite section of Naucalpan but did not supply the five rearload vehicles as provided for by the schedule of operations under the Concession Contract. Until the termination of the Concession Contract, the two initial front-loaders remained the only units of the 70 "state-ofthe-art" vehicles called for under the Concession Contract to be put into service by DESONA.
(…)

13. In mid-February, the Ayuntamiento sought independent legal advice about the Concession Contract. It was advised that there were 27 "irregularities" in connection with the conclusion and performance of the Concession Contract.
(…)

17. On 21 March, despite a protest from DESONA on 16 March, the Ayuntamiento decided to annul the Concession Contract. The Claimants were notified of this decision two days later.
(…)

23. On 18 May 1995, the Federal Circuit Court ruled in favour of the Naucalpan Ayuntamiento, specifically upholding the Superior Chamber's judgment as to the legality of the nine bases accepted for the annulment.
(…)

C. The contention that the annulment was an act of expropriation

93. The Respondent argues that the Concession Contract came to an end on two independently justified grounds: invalidity and rescission.

94. The second is the more complex. It postulates that the Ayuntamiento was entitled to rescind the Concession Contract due to DESONA's failure of performance. If the Ayuntamiento was not so entitled, its termination of the Concession Contract was itself a breach. Most of the evidence and debate in these proceedings have focused on this issue: was DESONA in substantial non-compliance with the Concession Contract? The subject is complicated by the fact that DESONA was apparently not given the benefit of the 30-day cure period defined in Article 31 of the Concession Contract.

95. The logical starting point is to examine the asserted original invalidity of the Concession Contract. If this assertion was founded, there is no need to make findings with respect to performance; nor can there be a question of curing original invalidity.

96. From this perspective, the problem may be put quite simply. The Ayuntamiento believed it had grounds for holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA's initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento's determination? Further, the Claimants have neither contended nor proved that the Mexican legal standards for the annulment of concessions violate Mexico's Chapter Eleven obligations; nor that the Mexican law governing such annulments is expropriatory.

97. With the question thus framed, it becomes evident that for the Claimants to prevail it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento. A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven.

98. True enough, an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials. As a former President of the International Court of Justice put it:

"The principles of the separation and independence of the judiciary in municipal law and of respect for the finality of judicial decisions have exerted an important influence on the form in which the general principle of State responsibility has been applied to acts or omissions of judicial organs.

These basic tenets of judicial organization explain the reluctance to be found in some arbitral awards of the last century to admit the extension to the judiciary of the rule that a State is responsible for the acts of all its organs.

However, in the present century State responsibility for acts of judicial organs came to be recognized. Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.

The responsibility of the State for acts of judicial authorities may result from three different types of judicial decision.

The first is a decision of a municipal court clearly incompatible with a rule of international law.

The second is what it known traditionally as a 'denial of justice.'

The third occurs when, in certain exceptional and well-defined circumstances, a State is

responsible for a judicial decision contrary to municipal law." Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century," 159-1 Recueil des cours (General Course in Public International law, The Hague, 1978). (Emphasis added.)

99. The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.

100. But the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice. Without exception, they have directed their many complaints against the Ayuntamiento of Naucalpan. The Arbitral Tribunal finds that this circumstance is fatal to the claim, and makes it unnecessary to consider issues relating to performance of the Concession Contract. For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated.

(...)

102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.
(…)

2-1-2. Investment

IN A NAFTA ARBITRATION UNDER THE
UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
-and-
Government of Canada
(Respondent)

PARTIAL AWARD

http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp

* Background (From the US State Department Website)
http://www.state.gov/s/l/c3746.htm

S.D. Myers, Inc., an Ohio corporation that processes and disposes of PCB waste, filed claims against Canada under the UNCITRAL Rules on October 30, 1998 for alleged violations of NAFTA Articles 1102, 1105, 1106 and 1110 arising out of Canada's ban on the export of PCB wastes from Canada to the United States in late 1995. S.D. Myers claims that, as a result of the ban, it "suffered economic harm to its investment through interference with its operations, lost contracts and opportunities in Canada."

A hearing on the merits was held in Toronto on February 14-16, 2000. An interim award issued on November 13, 2000 found for the investor with respect to the Article 1102 and 1105 claims but in favor of Canada in all other respects. A hearing on damages was held in September, 2001. Canada has petitioned the federal court in Ottawa to set aside the arbitral award.

* * *

(…)
Chapter VII: Was SDMI (S.D. Myers, Inc.) an Investor? Was There an Investment?

(…)

222. SDMI's claim is advanced pursuant to Article 1116.37 It is a claim by SDMI itself as an "investor" on its own behalf. It is a dispute in relation to SDMI's alleged investment in Canada and is for damages arising out of the alleged breach by CANADA of its obligations under Section A of Chapter 11. SDMI asserts that it … has suffered economic harm to its Investment through interference with its operations, lost contracts and opportunities in CANADA. [emphasis added].38 That is, that it has sustained damages because its investment in Canada has suffered harm.

223. The issue is one of standing. To sustain a claim, SDMI must meet the qualifying requirements of Chapter 11.

224. Chapter 11 covers claims by investors against a host Party. In the context of this case, SDMI contends that it is an investor which is a national of a Party …that seeks to make, is making or has made an investment. It is common ground that SDMI is a national of a Party, but CANADA asserts that it did not have an investment in Canada.

225. Two of the definitions set out in Section C of Chapter 11 are of consequence in considering CANADA's contention. First:

investment means:

(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise

    (i) where the enterprise is an affiliate of the investor, or
    (ii) where the original maturity of the debt security is at least three years,
    but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

    (i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;
(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but an investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money, (…)

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

investment of an investor of a Party means an investor other than an investor of a Party, that seeks to make, is making or had made an investment;" (…)

226. During the proceedings there was considerable debate concerning whether Myers

Canada fitted into any of the categories under the definition of "investment". Evidence was presented to demonstrate that SDMI lent money to Myers Canada and that SDMI had an expectation that it would share in the income or profit if there were any. In fact, some payments for services were made by Myers Canada to SDMI.

227. At the relevant time Myers Canada was undoubtedly an "enterprise", but CANADA submitted that it was not owned or controlled directly or indirectly by SDMI. This is because the shares of Myers Canada were owned not by SDMI, but equally by four members of the Myers family. They also owned the shares in SDMI, but in different proportions. As noted previously, Mr. Dana Myers owned 51% of that company. His was the authoritative voice in SDMI and the evidence of his brother, Mr. Scott Myers, was that Dana Myers was the authoritative voice in Myers Canada.
(…)

229. Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above.

230. The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons so that it remained wholly within the family and that he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests.

231. On the evidence and on the basis of its interpretation of the NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of the NAFTA and that Myers Canada was an "investment".

232. The Tribunal recognizes that there are a number of other bases on which SDMI could contend that it has standing to maintain its claim including that (a) SDMI and Myers Canada were in a joint venture, (b) Myers Canada was a branch of SDMI, (c) it had made a loan to Myers Canada, and (d) its market share in Canada constituted an investment. It is not necessary to address these matters in this context and the Tribunal does not do so, although they may be relevant to other issues in the case. Insofar as they are, they will be dealt with at the appropriate time.
(...)

2-1-3. "Relating to" Investors or Investments

Methanex Corp. V. United States of America

NAFTA Chapter 11 Arbitration

First Partial Award on Issues of Jurisdiction and Admissibility

www.state.gov/s/l/c3741.htm

* Background: From the US State Department Website
http://www.state.gov/s/l/c5818.htm

Methanex Corporation, a Canadian marketer and distributor of methanol, has submitted a claim to arbitration under the UNCITRAL rules on its own behalf for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE.
Methanex contends that a Califiornia Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claims damages of $1 billion.
The United States denies that the tribunal has jurisdiction over the claims and denies that any of the alleged measures violated the NAFTA. A hearing on jurisdiction and admissibility was held in July 2001.
On August 7, 2002, the Tribunal issued a First Partial Award on issues of jurisdiction and admissibility. (…)

* * *

CHAPTER J-
THE USA'S JURISDICTIONAL CHALLENGE III:
ARTICLE 1101(1) NAFTA
(…)

(2) The Meaning of the Phrase: “relating to”

129. It is a short phrase; and it might be thought, as with many issues of linguistic interpretation, that the answer was a matter of first impression. In order not to lengthen an already long document, we shall again refrain from dealing here with every submission on the issue made by the Disputing Parties and the NAFTA Parties, Canada and Mexico. We have nonetheless considered all those submissions; and in deciding here that the matter can properly be decided on a more limited basis, we intend no discourtesy to any person.

130. The USA: In summary, the USA contends that, in the context of Article 1101(1), the phrase “relating to” requires a legally significant connection between the disputed measure and the investor. It argues that measures of general application, especially measures aimed at the protection of human health and the environment (such as those at issue here), are, by their nature, likely to affect a vast range of actors and economic interests. Given their potential effect on enormous numbers of investors and investments, there must be a legally significant connection between the measure and the claimant investor or its investment. It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as “relating to” that investor or investment (USA Memorial on Jurisdiction, pages 48-49.)
(…)
131. Methanex: In summary, Methanex contends that it is sufficient that the measures “affect” the investor or its investment. It argues that the requirement for a legally significant connection between the measure and the investment is not supported by an interpretation of Article 1101(1) or other legal materials. Methanex relies on various dictionary definitions of the phrase, the separate opinion of Dr Schwartz in the SD Myers case (paragraphs 49-59 thereof) and the separate opinion of Judge Shahabuddeen in the Headquarters Agreement case18, which refers in turn to the dissenting opinion of Judge Schwebel in the Yakimetz case (where “relating to” is interpreted as meaning “has reference to” or “is connected with”19). Methanex also contends that past statements of the USA and Canada support its interpretation and contradict the USA’s current submissions. It cites the USA’s interpretation of the words “relating to” put forward before the WTO appellate body in United States Standards for Reformulated and Conventional Gasoline. There, the phrase“relating to” was interpreted as merely suggesting “any connection or association existing between two things”20. Methanex also refers to Canada’s reformulation of “related to” as “affecting” in its Statement of

Implementation of NATFA.

(…)

(3) The Ordinary Meaning

(…)

136. In the Tribunal's view, none of these dictionary definitions decide the issue. (…)It is also necessary to consider the ordinary meaning of the term in its context and in the light of the object and purpose of NAFTA and, in particular, Chapter 11 (as required by Article 31(1) of the Vienna Convention).

(4) Context, Object and Purpose
(…)

147. Conclusion: We decide that the phrase "relating to " in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11. As indicated above, it is not necessary for us to address other submissions advanced by the USA in support of its interpretation based on Article 31(3) of the Vienna Convention (supported by Canada and Mexico).
(…)

2-1-4. Ratione Temporis

www.state.gov/s/l/c3741.htm

Case No. ARB(AF)/99/2

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)
BETWEEN:
MONDEV INTERNATIONAL LTD.
Claimant
and
UNITED STATES OF AMERICA
Respondent

AWARD

Before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement, and comprised of:
Sir Ninian Stephen (President) Professor James Crawford Judge Stephen M. Schwebel

Date of dispatch to the parties: October 11, 2002

* Background: From the US State Department Website
http://www.state.gov/s/l/c3758.htm

Mondev International Ltd., a Canadian real-estate development corporation, has submitted a claim under the ICSID Additional Facility Rules on its own behalf for losses allegedly suffered by Lafayette Place Associates ("LPA"), a Massachusetts limited partnership it owns and controls. Mondev alleges that these losses arise from a decision by the Supreme Judicial Court of Massachusetts and from Massachusetts state law.
Mondev alleges that Massachusetts' statutory immunization from intentional tort liability of the Boston Redevelopment Authority is incompatible with international law, and that the decision of the Supreme Judicial Court was arbitrary and capricious and amounted to a

denial of justice. Mondev also alleges that the United States failed to meet its Chapter Eleven obligations by not according LPA national treatment (Art. 1102); by not according it treatment in accordance with international law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). Mondev claims damages of not less than $50 million.
On October 11, 2002, the tribunal issued an award dismissing all claims against the United States.

* * *

(…)
C. The Tribunal Juurisdiction and the Admissibility of the Claim

(…)
2. The Tribunal's views on the preliminary issues

56. The Tribunal has reached the following conclusions on the preliminary issues

(a) The United States objection ratione temporis

57. Both parties accepted that the dispute as such arose before NAFTA's entry into force, and that NAFTA is not retrospective in effect. They also accepted that in certain circumstances conduct committed prior to the entry into force of a treaty might continue in effect after that date, with the result that the treaty could provide a basis for determining the wrongfulness of the continuing conduct. They disagreed, however, over whether and how the
concept of a continuing wrongful act applied to the circumstances of this case.

58. For its part the Tribunal agrees with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations. But there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage.9 Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached. (…)

66. As to Mondev's claim under Article 1105(1), this covers conduct both before and

after the date of NAFTA's entry into force. Mondev argued that the situation at the end of 1993 was that it had an unremedied claim in respect of conduct of Boston and BRA, which conduct was (or, if NAFTA had been in force at relevant times, would have been) a violation of the standard of protection under Article 1105(1). The subsequent failure of the United States courts to provide any remedy for that continuing situation was itself, in the circumstances, a breach of Article 1105 (1), which matured only with the definitive rejection of Mondev's claims.

67. The United States for its part did not dispute that the decisions of the City of Boston, BRA and the Massachusetts courts were attributable to it for NAFTA purposes.12 But it denied that any conduct which occurred prior to 1 January 1994 could be taken as constituting a breach of NAFTA. In this respect it cited the following passage from Feldman v. United Mexican States:
"Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994."

The Respondent also argued that any remedial duty that might have arisen as a result of the acts of Boston and BRA before 1994 could not, ex hypothesi, involve any continuing breach of NAFTA obligations. Any such duty could only arise from a breach of NAFTA, which was not in force at the time.

68. The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties14 and in the ILC's Articles on State Responsibility,15 and has been repeatedly affirmed by international tribunals.16 There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that "this Chapter covers investments existing on the date of entry into force of this agreement as well as investments made or acquired thereafter". Thus, as the Feldman Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA.

69. On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force. To the extent that the last sentence of the passage from the Feldman decision, quoted in para. 67 above, appears to say the contrary, it seems to the present Tribunal to be too categorical,

as indeed the United States conceded in argument.

70. Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.

(…)

75. For these reasons, the Tribunal concludes that the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA.
(…)

(b) Mondev's standing under Articles 1116(1) and 1117(1)

76. In substance, only two claims were before the United States courts, although these were formulated in a variety of ways, both under the common law of Massachusetts and under certain Massachusetts statutes. These claims concerned, first, the City's breach of contract by reason of its failure to sell the Hayward Parcel on the terms agreed, and secondly, BRA's wrongful interference with the sale contract for the enterprise as a whole between LPA and Campeau. It may be noted that these claims were not coextensive with Mondev's overall grievance against Boston. However, for the reasons given in the preceding section, either these broader claims were not covered by NAFTA at all, or (if they survived as domestic law claims which might have been pursued before the Massachusetts courts) they were not pursued and are now on any view time-barred. Thus the only live question for the Tribunal is whether Mondev has standing to protest the

United States' court decisions concerning LPA's claims for breach of contract and wrongful interference. For the reasons given, the only basis for challenging those claims is Article 1105.
(…)

80. In the present case, in the Tribunal's view, Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" as at 1 January 1994,20 and they were not caught by the exclusionary language in paragraph (j) of the definition of "investment", since they involved "the kinds of interests set out in subparagraphs (a) through (h)". They were to that extent "investments existing on the date of entry into force of this Agreement", within the meaning of Note 39 of NAFTA. In the Tribunal's view, once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. This is obvious with respect to the protection offered by Article 1110: as the United States accepted in argument, a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an "investor" as someone who "seeks to make, is making or has made an nvestment". Even if an investment is expropriated, it remains true that the investor "has made" the investment.
(…)

82. Accordingly, there were subsisting interests relating to Mondev's investment in the project as at 1 January 1994. It is true that these interests were held by LPA, but LPA itself was "owned or controlled directly or indirectly" by Mondev, and these interests were an "investment of an investor of a Party" as defined in Article 1139. It may be noted that the United States did not really contest Mondev's standing under Article 1116, subject to the question whether it had actually suffered loss or damage. In the Tribunal's view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA.

83. For these reasons, the Tribunal concludes that Mondev has standing to bring its claim concerning the decisions of the United States courts by virtue of Article 1116 of NAFTA in conjunction with paragraph (h) of the definition of "investment" in Article 1139.
(...)

2-1-5. Exhaustion of Local Remedies

From the U.S. State Department Website
http://www.state.gov/s/l/c3751.htm

Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States

Marvin Feldman, a U.S. citizen, has submitted claims on behalf of CEMSA against Mexico under the ICSID Additional Facility Rules. The notice asserts that CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico since 1990, was allegedly denied the benefits of a law that allowed certain tax refunds to exporters. Feldman claims expropriation under NAFTA Article 1110 based on Mexico's refusal (1) to implement a 1993 Mexican Supreme Court decision in CEMSA's favor ordering a refund of taxes paid, and (2) to refund taxes on cigarettes CEMSA exported in 1997. CEMSA claims approximately US$40 million in damages.

Prior to CEMSA's claims being submitted to arbitration, the United States and Mexico agreed pursuant to NAFTA Article 2103, which governs taxation measures, that one of CEMSA's claims, which was based on certain Mexican tax legislation, could not be pursued.

On December 16, 2002, the tribunal issued an award dismissing the investor's claim of expropriation but upholding the claim of a violation of the national treatment obligation.

(…)

International Centre for Settlement of Investment Disputes
AWARD (DEC. 16, 2002)

A. INTRODUCTION AND SUMMARY OF THE DISPUTE

1. This case concerns a dispute regarding the application of certain tax laws by the United Mexican States (hereinafter “Mexico” or “the Respondent”) to the export of tobacco products by Corporación de Exportaciones Mexicanas, S.A. de C.V. (“CEMSA”), a company organized under the laws of Mexico and owned and controlled by Mr. Marvin Roy Feldman Karpa (hereinafter “Mr. Feldman” or “the Claimant”), a citizen of the United States of America (“United States”). The Claimant, who is suing as the sole nvestor on behalf of CEMSA, alleges that Mexico’s refusal to rebate excise taxes applied

to cigarettes exported by CEMSA and Mexico's continuing refusal to recognize CEMSA's right to a rebate of such taxes regarding prospective cigarette exports constitute a breach of Mexico's obligations under the Chapter Eleven, Section A of the North American Free Trade Agreement (hereinafter "NAFTA"). In particular, Mr. Feldman alleges violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Level of Treatment), and 1110 (Expropriation and Indemnification). Mexico denies these allegations.
(…)

D. FACTS AND ALLEGATIONS
(…)
7. The case concerns the tax rebates which may be available when cigarettes are exported. Mexico imposes a tax on production and sale of cigarettes in the domestic market under the Impuesto Especial Sobre Producción y Servicios ("IESP") law, a special or excise tax on products and services. In some circumstances, however, a zero tax rate has been applied to cigarettes that are exported. According to the Respondent, the IEPS Law "has basically remained the same since its origins [in 1981], although the underlying methodology of the tax has changed several times" (counter-memorial, para. 85). Review of the various versions of the IEPS law between 1990 and 1999 confirms this conclusion.
(…)

G. ADDITIONAL JURISDICTIONAL ISSUES
(…)

71. The decision on the issue of exhaustion of local remedies as a condition for claim admissibility primarily depends on the wording and construction of the relevant NAFTA provisions. Indeed, it is generally understood that the local remedies rule may be derogated from, qualified, or varied by virtue of any binding treaty (*Case Concerning Elettronica Sicula,S.p.A.*, United States of America v. Italy, 1989, I.C.J. Reports 4, para. 50). Such qualification took place here under NAFTA Articles 1121 and Annex 1120.1.

72. Article 1121(2)(b) and (3) in its relevant parts provides as follows:

> 2. A disputing investor may submit a claim under Article 1117 [Claim by an Investor of a Party on Behalf of an Enterprise] to arbitration only if both the investor and the enterprise:
>
> …….
>
> (b) waive their right to initiate or continue before any administrative

> tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for 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.
>
> 3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

73. It appears that this Article, rather than confirming or repeating the classical rule of exhaustion of local remedies, envisages a situation where domestic proceedings with respect to the same alleged breach referred to in Article 1117 are either available or even pending in a court or tribunal operating under the law of any Party. In such case, Article 1121(2)(b) requires, for a recourse to arbitration to be open, that the disputing investor waive his right to initiate or continue the other domestic proceedings. Therefore, in contrast to the local remedies rule, Article 1121(2)(b) gives preference to international arbitration rather than domestic judicial proceedings, provided that a waiver with regard to the latter is declared by the disputing investor. This preference refers, however, to a claim for damages only, explicitly leaving available to a claimant "proceedings for injunctive, declaratory or other extraordinary relief" before the national courts. Thus, Article 1121(2)(b) and (3) substitutes itself as a qualified and special rule on the relationship between domestic and international judicial proceedings, and a departure from the general rule of customary international law on the exhaustion of local remedies. The thrust of such substitution seems to consist in making recourse to NAFTA arbitration easier and speedier, as opposed to the general pattern of opening up international arbitration to private parties as against third states.

(…)

78. The Respondent observes that the Claimant, in spite of the waiver, did not in fact withdraw from several related domestic proceedings in Mexico; nor does the Respondent suggest that it was incumbent upon the Claimant to withdraw (see rejoinder, paras. 47, 48). The Arbitral Tribunal, however, does not find the point to be pertinent. Mexican courts are hailed by the Respondent as the appropriate forum for determining the Claimant's rights under the IEPS law (see, *e.g.*, counter-memorial, paras, 367, 368; rejoinder, paras. 48-51). In the first instance, we agree. However, questions as to whether Mexican law as determined by administrative authorities or Mexican courts is consistent with the requirements of NAFTA and international law are to be determined in this

arbitral proceeding, and we are not barred from making that determination by the fact that not all of the issues have yet been resolved by Mexican courts. Otherwise, any arbitral tribunal could be prevented from making a decision simply by delaying local court proceedings. Nor is an action determined to be legal under Mexican law by Mexican courts necessarily legal under NAFTA or international law. At the same time, an action deemed to be illegal or unconstitutional under Mexican law may not rise to the level of a violation of international law.
(…)

2-2. Issues on the Merits (Material Obligations)

2-2-1. National Treatment (Article 1102)

2-2-1-1. S.D.Myers

IN A NAFTA ARBITRATION UNDER THE
UNCITRAL ARBITRATION RULES

S.D. Myers, Inc.
(Claimant)
-and-
Government of Canada
(Respondent)

PARTIAL AWARD

http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp

*Background (From the US State Department Website)
http://www.state.gov/s/l/c3746.htm

S.D. Myers, Inc., an Ohio corporation that processes and disposes of PCB waste, filed claims against Canada under the UNCITRAL Rules on October 30, 1998 for alleged violations of NAFTA Articles 1102, 1105, 1106 and 1110 arising out of Canada's ban on the export of PCB wastes from Canada to the United States in late 1995. S.D. Myers claims that, as a result of the ban, it "suffered economic harm to its investment through interference with its operations, lost contracts and opportunities in Canada."

A hearing on the merits was held in Toronto on February 14-16, 2000. An interim award issued on November 13, 2000 found for the investor with respect to the Article 1102 and 1105 claims but in favor of Canada in all other respects. A hearing on damages was held in September, 2001. Canada has petitioned the federal court in Ottawa to set aside the

arbitral award.
* * *

Abbreviations

19. The following abbreviations are adopted in this award:

BITs	Bilateral Investment Treaties
Basel Convention	Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (adopted 1989, in force May 5, 1992, ratified by CANADA August 29, 1992, in force for Canada November 26, 1992)
CANADA	The Government of CANADA
CCME	Canadian Council of Ministers of the Environment
CEPA	Canadian Environmental Protection Act 1995
Chem-Security	Chem-Security (Alberta) Ltd.
Disputing Parties	SDMI and CANADA
FIRA	The Foreign Investment Review Act
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
Mexico	The United States of Mexico
Myers Canada	S.D. Myers (Canada) Inc.
NAAEC	The North American Agreement on Environmental Co-operation
NAFTA	The North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
Parties	CANADA, MEXICO and the USA
PCB	Polychlorinated biphenyl
PCO	Privy Council Office of CANADA
PO	Procedural Order
Rules	UNCITRAL Arbitration Rules 1976
SDMI	S.D. Myers, Inc.
TCSA	Toxic Controlled Substances Act
Transboundary Agreement	CANADA-USA Transboundary Agreement on Hazardous Waste
UNCITRAL	United Nations Commission on International Trade Law
US EPA	United States Environmental Protection Agency

U.S. or USA	The United States of America
WTO	The World Trade Organization

Chapter III: The Factual Background
(…)

92. SDMI's interest in Canada developed in the 1990's as the U.S. market declined. Mr. Dana Myers testified that SDMI went into the Canadian market because …that's going to extend the usefulness of our facility. It's going to extend our business.4 The PCB remediation business was working its way out of existence, because no new PCBs were being manufactured and the world's stockpiled inventory was decreasing as SDMI and its competitors did their work.

93. Although SDMI did give consideration to developing a treatment facility in Canada, the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility. It was envisaged that Canadian entities would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the contract as its remuneration. The business was done by marketing, customer contact, testing and assessment of oil and other like services. SDMI personnel from the USA participated in these activities.
(…)

100. In 1977 CANADA added PCBs to the toxic substances listed under the Environmental Contaminants Act and prohibited the use of PCBs in new products manufactured in or imported into Canada. This legislation was later replaced by the CEPA which came into force on June 30, 1988. The regime imposed by the CEPA were in turn supplemented by the PCB Waste Export Regulations 1990, which effectively banned the export of PCB waste from Canada to all countries other than the USA. Under these regulations exports to the USA were permitted with the prior approval of the US EPA.
(…)

112. Even by 1993, when SDMI entered the Canadian market, there was only one credible Canadian competitor: Chem-Security, which was located in Swan Hills, Alberta. As the majority of the Canadian PCB inventory was in Ontario and Quebec - several thousand kilometres from Alberta - SDMI possessed a significant cost advantage as against ChemSecurity and, indeed, as against many of its U.S. competitors.

113. SDMI started a lobbying campaign which involved making numerous petitions to

the US EPA in the USA (there were two in August 1993 alone) and many representations to Environment Canada. In Canada, SDMI enlisted the assistance of several potential Canadian customers who were under pressure to dispose of their PCB waste and wanted to have it done as cost-effectively as possible.

(…)

116. The position in Canada was equally sensitive. In answer to a parliamentary question on July 9, 1995, the then Minister for the Environment is recorded by Hansard as saying:

> It is still the position of the government that the handling of PCBs should be done in Canada by Canadians [emphasis added]

This may have reflected a movement from the 1989 policy, referred to above, that CANADA's policy (in line with the Basel Convention), was simply that disposal of PCBs should take place in Canada.

117. The Tribunal received a substantial amount of evidence concerning SDMI's activities during the period 1990 to the Fall of 1995. In summary, SDMI through its employees and the employees of Myers Canada, contacted Canadian PCB holders with the objective of having their PCBs remediated by SDMI using its facilities in the USA. Marketing initiatives were undertaken and assessments made of PCB contaminated equipment. Equipment was drained and transportation organized.

118. That evidence may be relevant to other questions that arise in the case, but no more need be said about it for the purposes of this narrative of the events giving rise to the measure taken by CANADA to close the border to the transit of PCBs. For present purposes, it is sufficient to record that on October 26, 1995, the US EPA issued an enforcement discretion to SDMI valid from November 15, 1995 to December 31st 1997, for the purpose of importing PCB's and PCB waste from Canada into the US for disposal.

(…)

122. Simultaneously, the fledgling Canadian PCB disposal industry started a vigorous lobbying campaign designed to persuade CANADA to maintain the closed status of the border. (…)

123. On November 16, 1995 the Minister of the Environment signed an Interim Order that had the effect of banning the export of PCBs from Canada. (…)

125. The Interim Order was confirmed by the Canadian Privy Council on November 28, 1995. (…)

126. On February 26, 1995, by means of an Order in Council of the Governor General amending the PCB Waste Export Regulations, CANADA turned the Interim Order into a Final Order banning the commercial export of PCB waste for disposal. (…)

127. In February 1997 CANADA opened the border by a further amendment to the PCB Waste Export Regulations. The border was closed (for the cross-border movement of PCBs and PCB waste) by regulations introduced by CANADA for a period of approximately 16 months, from November 20, 1995 to February 1997. Thereafter, the border was open and there were seven contracts pursuant to which PCBs and PCB waste material was exported from CANADA to the USA for processing by SDMI.

128. In July 1997 the border once again was closed to PCBs and PCB wastes as a result of a decision of the Ninth Circuit of the U.S. Court of Appeals. The overall effect of these events in Canada and the USA was that the border was only open for cross-border shipment of the materials in question from February to July 1997 – a period of approximately five months.
(…)
Chapter V: The Export Ban

(…)
193. Having reviewed all the documentary and testimonial evidence before it, the Tribunal is satisfied that the Interim Order and the Final Order favoured Canadian nationals over nonnationals. The Tribunal is satisfied further that the practical effect of the Orders was that SDMI and its investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors.

194. Insofar as intent is concerned, the documentary record as a whole clearly indicates that the Interim Order and the Final Order were intended primarily to protect the Canadian PCB disposal industry from U.S. competition. CANADA produced no convincing witness testimony to rebut the thrust of the documentary evidence.

195. The Tribunal finds that there was no legitamte environmental reason for introducing the ban. Insofar as there was an indirect environmental objective – to keep the Canadian industry strong in order to assure a continued disposal capability – it could have been achieved by other measures.
(…)

Chapter IX: Did Canada Comply with Its NAFTA Chapter 11 Obligations?

237. In this Chapter the Tribunal reviews the merits of SDMI's claims under four separate provisions of Chapter 11 of the NAFTA.

Article 1102 (National Treatment)

238. SDMI claims that CANADA denied it "national treatment", contrary to Article 1102. Article 1102(1) states:

> Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

239. Article 1102(2) is identical, except that it refers to "investments", rather than "investors":

> Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

240. Article 1102(3) addresses the obligations of "sub-national" authorities - local states or provinces - and states that in that context the relevant comparison is between the treatment accorded to an investment or an investor and the best treatment accorded to investments or investors within the jurisdiction of the sub-national authority:

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or a province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to the investments of investors, or the Party of which it forms a part.

241. CANADA argues that the Interim Order merely established a uniform regulatory regime under which all were treated equally. No one was permitted to export PCBs, so there was no discrimination. SDMI contends that Article 1102 was breached by a ban on the export of PCBs that was not justified by bona fide health or environmental concerns, but which had the aim and effect of protecting and promoting the market share of producers who were Canadians and who would perform the work in Canada.

242. CANADA's submission is one dimensional and does not take into account the basis on which the different interests in the industry were organized to undertake their business.

"Like Circumstances"

243. Articles 1102(1) and 1102(2) refer to treatment that is accorded to a Party's own nationals "in like circumstances". The phrase "like circumstances" is open to a wide variety of interpretations in the abstract and in the context of a particular dispute.

244. WTO dispute resolution panels, and its appellate body, frequently have been required to apply the concept of "like products". The case law has emphasized that the interpretation of "like" must depend on all the circumstances of each case. The case law also suggests that close attention must be paid to the legal context in which the word "like" appears; the same word "like" may have different meanings in different provisions of the GATT. In Japan - Alcoholic Beverages, WT/DS38/AB/R, the Appellate Body stated at paragraphs 8.5 and 8.6:

> [the interpretation and application of "like"] is a discretionary decision that must be made in considering the various characteristics of products in individual cases. No one approach to exercising judgment will be appropriate for all cases. The criteria in [an earlier case], Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which the provisions may apply.

245. In considering the meaning of "like circumstances" under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears.
(…)

246. In the GATT context, a prima facie finding of discrimination in "like" cases often takes place within the overall GATT framework, which includes Article XX (General Exceptions). A finding of "likeness" does not dispose of the case. It may set the stage for an inquiry into whether the different treatment of situations found to be "like" is justified by legitimate public policy measures that are pursued in a reasonable manner.

247. The Tribunal considers that the legal context of Article 1102 includes the various provisions of the NAFTA, its companion agreement the NAAEC and principles that are affirmed by the NAAEC (including those of the Rio declaration). The principles that emerge from that context, to repeat, are as follows:

> states have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
>
> states should avoid creating distortions to trade;
>
> environmental protection and economic development can and should be mutually supportive.

248. As SDMI noted in its Memorial, all three NAFTA partners belong to the OECD. OECD practice suggests that an evaluation of "like situations" in the investment context should take into account policy objectives in determining whether enterprises are in like circumstances. The OECD Declaration on International and Multinational Enterprises, issued on June 21, 1976, states that investors and investments should receive treatment that is …no less favorable than that accorded in like situations to domestic enterprises. In 1993 the OECD reviewed the "like situation" test in the following terms:

> As regards the expression 'in like situations', the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy objectives of Member countries could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is

permissible inasmuch as those objectives are not contrary to the principle of national treatment.

249. The Supreme Court of Canada has explored the complexity of making comparisons as it has developed its line of decisions on discrimination against individuals. In the Andrews case, the Court stated that the question of whether or not discrimination exists cannot be determined by applying a purely mechanical test whether similarly situated individuals are treated in the same manner. Whether individuals are "similarly situated", and have been treated in a substantively equal manner, depends on an examination of the context in which a measure is established and applied and the specific circumstances of each case.

250. The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector".

251. From the business perspective, it is clear that SDMI and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.

National treatment and protectionist motive or intent.

252. The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:

whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals;

whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.

253. Each of these factors must be explored in the context of all the facts to determine whether there actually has been a denial of national treatment.

254. Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produced no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.

255. CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them. The indirect motive was understandable, but the method contravened CANADA's international commitments under the NAFTA. CANADA's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures. The fact that the matter was addressed subsequently and the border re-opened also shows that CANADA was not constrained in its ability to deal effectively with the situation.

256. The Tribunal concludes that the issuance of the Interim Order and the Final Order was a breach of Article 1102 of the NAFTA.

257. The consequences of the Tribunal's determination in relation to Article 1102 of the NAFTA are considered later.
(…)

2-2-1-2. Pope & Talbot

IN THE MATTER OF AN ARBITRATION
UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN
POPE & TALBOT INC
And
THE GOVERNMENT OF CANADA

AWARD ON THE MERITS OF PHASE 2

BY

ARBITRAL TRIBUNAL

http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp

* Executive Summary by the Canadian Ministry of Foreign Affairs and International Trade
http://www.dfait-maeci.gc.ca/tna-nac/awards_10apr01-en.asp

Pope & Talbot Inc. ("the Investor") is a U.S. forest products company with an investment in Canada consisting of three softwood lumber mills and one pulp and paper mill, all located in British Columbia. Unsatisfied with allocations of quota to its investment, it submitted a claim to NAFTA Chapter Eleven arbitration. The claim alleged that Canada's implementation of the Canada-U.S. Softwood Lumber Agreement ("the SLA") breached five of Canada's obligations under NAFTA Chapter Eleven and sought damages in excess of US$ 500 million.

In this Award, the Tribunal rejects the Investor's remaining two allegations that Canada's

implementation of the SLA breached its NAFTA obligations under Article 1102 (national treatment) and Article 1105 (minimum standard of treatment). Previously, the Investor withdrew an allegation based on the MFN treatment obligation and the Tribunal rejected allegations concerning expropriation and prohibited performance requirements in an award dated June 26, 2000.

The Tribunal held the softwood lumber quota allocation system did not discriminate on the basis of the nationality of the parties and, therefore, rejected the claim of denial of "national treatment". The Tribunal further determined that, in administering its responsibilities to allocate softwood lumber quota, Canada did not breach any obligation under NAFTA Article 1105.

However, the Tribunal held the treatment of the investment in connection with the verification review process resulted in a denial of the "fair" treatment required by NAFTA Article 1105. Canada conducted a verification review of the Investor's investment to determine whether its allocations of quota were correct. It insisted that it take place in Canada. Consequently, the Investor was required to produce its investment's sales and production records for review in Canada.
(…)

THE CLAIM UNDER ARTICLE 1102

A. Introduction

30. The Investor claims that its Investment has been denied treatment guaranteed by NAFTA Article 1102, particularly paragraph 2 of that Article, which provides:
Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

31. There is no dispute that the implementation of the SLA does relate at least to the "expansion management, conduct and) operation" of the Investment, The contentions of the Parties concerning Article 1102{2) relate to three other issues: First, how should the terms "investments of investors" and "treatment no less favorable" in Article 1102(2) be interpreted? Secondly, what standards should be employed in determining whether the Investment has been denied "treatment no less favorable" than that received by investments of Canadian investors? Finally, in applying Article 1102(2), to which

Canadian-owned investments should the Investment be compared, i.e., which of those Canadian owned investments are "in like circumstance? to the Investment?

32. These questions requite an interpretation of the language and substance of Article 1102 and consideration of the facts of this case within that legal context.

B. Legal Analysis

1. The Semantics of Article 1102.

a. Use of the plural form.

33. What began as an apparently offhand comment during the May 2000 hearing on the initial phase of this case developed into a significant element of Canada's argumentation on Article 1102(2}. At the May 4, 2000 hearing, counsel for Canada advanced the suggestion that, since Article 1102(2) uses the plural form --"investments of investors" - NAFTA may require that more than one investor be disadvantaged before the national treatment provisions would apply.
(…)

36. The Tribunal rejects Canada's argument that the plural form of the language of Article 11.02(2) places a single investment outside the Article's coverage or requires a claimant on behalf of that investment to demonstrate whether there are other similarly situated foreign owned investments. The Tribunal also rejects the contention that that plural form requires, as a matter of semantics, comparison of the treatment provided to the foreign investor with that accorded to more than one domesticalty owned investment.

37. As a general principle of interpretation, use of the plural form does not, without more, prevent application of statutory or treaty language to an individual case. Laws outlawing discrimination against “women” or setting labour standards for “children” could not reasonably be interpreted to prevent their application to a woman or a child. NAFTA Article 1102 requires the Parties to accord national treatment under specified circumstances, and there is no evidence of any intention that more than one investor need be aggrieved before the requirement comes into play.
(…)

2. The substance of Article 1102

43. The parties agree that Article 1102 can apply to measures that do not facially discriminate against the investors or investments of other NAFTA parties, and that the implementation of the SLA would be such a measure, since it in no way singles out foreign owned lumber producers for special treatment. Canada argues that, in such de facto cases, a violation of national treatment obligations can be found only if the measure in question disproportionately disadvantages the foreign owned investments or investors.

44. Canada asserts that, to apply the disproportionate disadvantage test in this case, the Tribunal must determine whether there are any Canadian owned investments that are accorded the same treatment as the Investor. Then, the size of that group of Canadian investments must be compared to the size of the group of Canadian investments receiving more favorable treatment than the Investment. Unless the disadvantaged Canadian group (receiving the same treatment as the Investor) is smaller than the advantaged group, no discrimination cognizable under Article 1102 would exist.

45. Canada acknowledges that the disproportionate disadvantage test does not appear in the text of NAFTA; it finds these requirements in GATT and WTO precedents. The Tribunal addresses those precedents below.
(…)

67. Accordingly, the Triburial rejects Canada's assertion that WTO/GATT and NAFTA precedents support its position on disproportionate disadvantage.

C. Other precedents

68. Indeed, precedents exist for the contrary position. For example, in United States - Section 337 of the Tariff Act of 1930, the United States argued that the law under dispute contained elements that might, in practice, provide advantages to imported products that were not available to domestically produced competitive products. The panel rejected that approach, stating:

The Panel therefore considered that, in order to establish whether the "no less favourable treatment standard of Article III:4 is met, it had to assess whether or not Section 337 in itself may lead to the application to imported products of treatment less favourable than that accorded to

products of United States origin. It noted that this approach is in accordance with previous practice of the CONTRACTING PARTIES in applying Article III, which has been to base

their decisions on the distinctions made by the laws, regulations or requirements themselves and on the potential impact, rather than on the actual consequences for specific imported products.

The Panel further found that the "no less favorable" treatment requirement of Article II:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.
(…)

B. Determination of "in like circumstances."

a. Introduction

73. As noted, NAFTA Article 1102(1) and (2) require a Parry to accord another Party's investors and investments treatment no less favourable than it accords its own investors and investments that are "in like circumstances." Thus, in determining whether Canada has violated Article 1102, it is necessary to identify the domestic entities whose treatment should be compared with that accorded the Investor and the Investment.
(…)

75. The Tribunal must resolve this dispute by defining the meaning of “like circumstances.” It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, “circumstances” are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of "like" can have a range of meanings, from “similar” all the way to “identical.” In other words, the application of the like circumstances standard will require evaluation of the entire fact setting surrounding, in his case, the genesis and application of the Regime.

76. An important element of the surrounding facts will be the character of the measures under challenge. In this respect, the Tribunal agrees with the NAFTA Chapter 11 tribunal in Myers v. Canada, which stated: “In considering the meaning of 'like

circumstances' under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears." The Tribunal addresses that legal context first and then turns to the other facts of this case.

b. The legal context of "like circumstances."

77. The Investor submits that the legal context of Article 1102 includes "the trade and investment-liberalizing objectives of the NAFTA. The Tribunal agrees. Canada argues that the legal context also includes the entire background of its disputes with the United States concerning softwood lumber trade between the two countries. Again, the Tribunal agrees.

78. In evaluating the implications of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector. However, that first step is not the last one. Differences in treatment +will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment-liberalizing objectives of NAFTA.

79. In one respect, this approach echoes the suggestion by Canada that Article 1102 prohibits treatment that discriminates on the basis of the foreign investment's nationality. The other NAFTA Parties have taken the same position However, the Tribunal believes that the approach proposed by the NAFTA Parties would tend to excuse discrimination that is not facially directed at foreign owned investments. A formulation focusing on the likc circumstances question, on the other hand, will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments. That is, once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, axe they in like circumstances? It is in answering that question that the issue of discrimination may arise.
(…)

c. Factual determinations.

83. The history of the softwood lumber dispute between the United States and Canada prior to the SLA and the evolution of the softwood lumber Export Control Regime under

the SLA are described elsewhere in this Award and in the Tribunal's Interim Award in this case dated June 26, 2000. What follows is an analysis of the cases where the investment was accorded treatment different from that of other softwood lumber producers in Canada.

1) Treatment of softwood lumber producers in the non-covered provinces

(…)

88. Based on that analysis, the producers in the non-covered provinces were not in like circumstances with those in the covered provinces- Accordingly, the Tribunal finds no breach by Canada of its national treatment obligations by virtue of its treatment of producers in the non-covered provinces.

2) Treatment of softwood lumber producers in the covered provinces

(…)

95. Similarly, the Tribunal concludes that there is no violation of Article 1102 arising from Canada's other allocations for new entrants or measures it took to address errors and omissions or hardship cases. The Investment was not in like circumstances to the new entrants, and it never made application for -consideration under the Regime of any alleged errors, omissions or hardships affecting its interests.

(…)

2-2-1-3. Methanex

Methanex Corp. v. United States of America

http://www.state.gov/s/l/c5818.htm (From the U.S. State Department's Website)

Methanex Corporation, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL rules on its own behalf for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE.

Methanex contended that a California Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claimed damages of $970 million.

A hearing on jurisdiction and admissibility was held in July 2001. On August 7, 2002, the Tribunal issued a First Partial Award on issues of jurisdiction and admissibility. A hearing on the merits was held in June 2004.

On August 9, 2005, the Tribunal released the Final Award, dismissing all of the claims. The Tribunal also ordered Methanex to pay the United States' legal fees and arbitral expenses in the amount of approximately $ 4 million. The award and other documents appear on this page.

(…)

IN THE MATTER OF AN INTERNATIONAL ARBITRATION UNDERCHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

Methanex v. U.S.

FINAL AWARD OF THE TRIBUNAL ON JURISDICTION AND MERITS

(…)

PART IV - CHAPTER B
ARTICLE 1102 NAFTA

(…)

(3) THE TRIBUNAL'S DECISION REGARDING ARTICLE 1102 NAFTA

11. Article 1102(3) NAFTA provides as follows:

> *"3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."*

12. In order to sustain its claim under Article 1102(3), Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors and that Methanex and the domestic investor supposedly being favored by California are in like circumstances. It is Methanex's contention that California, in deciding to ban MTBE, intended to favour domestic ethanol producers, of which class ADM is a member, and to harm producers of methanol. Additionally, it is Methanex's position that ethanol and methanol are in like circumstances. The USA opposed both of these contentions on legal and factual grounds. (…)

22. Thus, even assuming that Methanex, as a methanol producer, is deemed to be affected, as a legal and factual matter, under NAFTA and international law, by California's ban of MTBE, Methanex's claim under Article 1102 would fail because it did not receive treatment less favourable than United States investors in like circumstances.
(…)

23. Nonetheless, the Tribunal will consider in further detail the arguments proffered by the Disputing Parties regarding the "like circumstances" of methanol and ethanol. Methanex argues that its investments are in "like circumstances" with the domestic US ethanol industry by reference to GATT jurisprudence. As described above, Methanex's position is that: "Methanol and ethanol are both oxygenates under U.S. law. Methanex and other methanol producers are in 'like circumstances' with US domestic ethanol producers because they both produce the same product—oxygenates used in manufacturing reformulated gasoline—and because they both compete directly for customers in the oxygenate market"
(…)

28. The incontrovertible fact is that Methanex produced methanol as a feedstock for MTBE and not as a gasoline additive in its own right. Aside from the federal prohibition of the use of methanol as an oxygenate, methanol has been tried as a fuel in only limited experiments, but would require, if it were to be used, significant and expensive retro-adjustments in gasoline engines. As a result, the ethanol and methanol products cannot be said to be in competition, even assuming that this trade law criterion were to apply. Insofar as there is a binary choice, it is between MTBE and other lawful and practicable oxygenates. Methanex's alternative theory of like products fails on the facts. (…)

35. In any event, the drafters did not insert the above italicised words in Article 1102; and it would be unwarranted for a tribunal interpreting the provision to act as if they had, unless there were clear indications elsewhere in the text that, at best, the drafters wished to do so or, at least, that they were not opposed to doing so. In fact, the intent of the drafters to create distinct regimes for trade and investment is explicit in Article 1139's definition of investment. (…)

38. For all these reasons, the Tribunal decides that Methanex's claim under Article 1102 fails, for, without regard to the question of causation, the California MTBE ban did not differentiate between foreign and domestic MTBE producers; nor, if it is relevant, did it differentiate between foreign and domestic methanol producers. (…)

2-2-2. Minimum Standard of (Fair and Equitable) Treatment (Article 1105)

2-2-2-1. Pope & Talbot (Pre-FTC's Interpretation)

(…)

THE CLAIM UNDER ARTICLE 1105

A. Interpretation of Article 1105

105. The Investor claims that Canada's implementation of the SLA violated NAFTA Article 1105 (1), which provides:

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

106. The Investor and Canada agree that this provision establishes a minimum standard of treatment that applies apart from the treatment a NAFTA party may accord to its own or to other countries' investors and investments. They do not agree, however, on the content of that minimum standard.

107. For its part, Investor asserts that the "international law" requirements of Article 1105 include (1) all the sources of international law found in Article 38 of Statute of the International Court of justice, (2) the concept of "good faith" (including pacta sunt servanda), (3) the World Bank's guidelines on foreign direct investment, (4) the NAFTA Parties' other treaty obligations and (5) the body of domestic law of each NAFTA Party that addresses the exercise of domestic regulatory authority.

108. Canada disputes the suggestion that Article 1105 imports this broad range of standards and argues that, before a violation of international law can properly be found, the conduct in question must be "egregious."

109. The precedents relied on by Canada addressed the content of the requirements of international law, rather than the other factors referred to in Article 1105, namely, "fair and equitable treatment and full protection and security." The language of Article 1105

suggests that those elements are included in the requirements of international law, and both the Investor and Canada subscribe to that reading, albeit with vastly different views of the implications of that reading, Canada sees its concept of the international law requirement (only "egregious misconduct covered) being applicable to the fairness elements, so that, for example, a denial of fairness would have to be shocking to be a violation of Article 1105. The Investor sees the incorporation of the fairness elements into international law as support for its view that international law standards have progressed and have liberalized the "egregious" conduct threshold that Canada finds in the older cases.

110. Another possible interpretation of the presence of the fairness elements in Article 1105 is that they are additive to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, plus the fairness elements. It is true that the language of Article 1105 suggests -otherwise, since it states that the fairness elements are included within international law. But that interpretation is clouded by the fact, as all parties agree, that the language of Article 1105 grew out of the provisions of bilateral commercial treaties negotiated by the United States and other industrialized countries. As Canada points out, these treaties are a "principal source" of the general obligations of states with respect to their treatment of foreign investment.

111. These treaties evolved over the years into their present form, which is embodied in the Model Bilateral Investment Treaty of 1987. Canada, the UK, Belgium, Luxembourg, France and Switzerland have followed the Model. It provides as follows:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

The Tribunal interprets that formulation as expressly adopting the additive character of the fairness elements. Investors are entitled to those elements, no matter what else their entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.
(….)

B. Application of Article 1105

(…)

6. Verification Review Episode

156. On December 24, 1998, the Investor served upon Canada a Notice of Intent to Submit a Claim to Arbitration under Article 1119 of NAFTA. That filing triggered a review by Canada's Softwood Lumber Division ("SLD") of the Investor's claim that its Investment had not received the quota allocation to which it was entitled.
(…)
171. The Investor contends that Canada's conduct during this "verification episode" was a denial of fair and equitable treatment in violation of Article 1105. For the following reasons, the Tribunal agrees.

172. A major sticking point on verification was the unwillingness of the SLD to,_ conduct its review at the place where the documents were located. As both sides agree, the volume of the requested documents was large, a number of truckloads; moving them would be a substantial and disruptive burden. The SLD simply advised the Investment that the proposal to conduct verification in Portland was "not acceptable," but gave no reasons why. During the November 2000 hearing the head of the SLD during 1999 stated that he had no authority to conduct verification outside Canada, but he could point to no regulation, written policy or other credible basis for that proposition. Indeed, the former head of the SLD saw no legal reason preventing verification outside Canada.
(…)
181. Against that background, within the context of the verification review process, the treatment of the Investment stands in stark contrast. The relations between the SLD and the Investment during 1999 were more like combat than cooperative regulation, and the Tribunal finds that the SLD bears the overwhelming responsibility for this state of affairs. It is not for the Tribunal to discern the motivations behind the attitude of the SLD; however, the end result for the Investment was being subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting SLD's requests for information, forced to expend legal fees and probably suffer a loss of reputation in government circles. While administration, like legislation, can be likened to sausage making, this episode goes well beyond the glitches and innocent mistakes that may typify the process. In its totality, the SLD's treatment of the Investment during 1999 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105, and the Tribunal finds Canada liable to the Investor for the resultant damages.
(…)

2-2-2-2. S.D.Myers (Pre-FTC's Interpretation)
(…)

Article 1105

SDMI submits that CANADA treated it in a manner that was inconsistent with Article 1105(1) of the NAFTA. Entitled "Minimum Standard of Treatment", it reads as follows:

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

259. The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.
(…)

262. Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases …fair and equitable treatment… and …full protection and security… cannot be read in isolation. They must be read in conjunction with the introductory phrase …treatment in accordance with international law.

263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

264. In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied "fair and equitable treatment", but the fact that a host Party 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.

265. The breadth of the "minimum standard", including its ability to encompass more particular guarantees, was recognized by Dr. Mann in the following passage:

...it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment....so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.

266. Although modern commentators might consider Dr Mann's statement to be an over-generalisation, and the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.

267. Mr. Chiasson considers that a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11. On the facts of this case, CANADA's actions come close to the line, but on the evidence no breach of Article 1105 is established.

268. By a majority, the Tribunal determines that the issuance of the Interim and Final Orders was a breach of Article 1105 of the NAFTA. The Tribunal's decision in this respect makes it unnecessary to review SDMI's other submissions in relation to Article 1105.

269. The consequences of the Tribunal's determination in relation to Article 1105 of the NAFTA are considered in the next chapter. (…)

*Aftermath of S.D. Myers

From the Canadian Ministry of Foreign Affairs and International Trade
http://webapps.dfait-
http://maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/103908.htm

February 8, 2001 (3:00 p.m. EST) No. 20

CANADA SEEKS APPLICATION TO SET ASIDE

NAFTA TRIBUNAL AWARD IN S.D. MYERS ARBITRATION

The Government of Canada will ask the Federal Court of Canada to set aside a decision by a NAFTA tribunal that ruled that Canada violated several aspects of NAFTA's investor-state chapter (Chapter 11), International Trade Minister Pierre Pettigrew announced today.

"While Canada agrees with certain aspects of the NAFTA tribunal's ruling, we are seeking this review because we believe the tribunal exceeded its jurisdiction in several key elements of the award," said Minister Pettigrew.

Under Canada's Commercial Arbitration Act, decisions of arbitral tribunals, such as NAFTA Chapter 11 tribunals, are subject to statutory review on limited grounds, including excess of jurisdiction. Canada believes that elements of the NAFTA tribunal's award exceeded its jurisdiction and were made in conflict with the public policy of Canada.

Canada will ask the Federal Court to have the tribunal's decision set aside. Canada will also seek a stay of the tribunal's damages proceedings, the next phase in the S.D. Myers arbitration, pending the result of the review.

On November 13, 2000, a NAFTA tribunal found that Canada breached its obligations under the following sections of Chapter 11: National Treatment (1102) and Minimum Standard of Treatment (1105). The decision also held that Canada did not breach Chapter 11 with respect to Performance Requirements (1106) and Expropriation (1110).

The tribunal has not ruled on whether S.D. Myers has suffered any damages. A second phase to hear arguments regarding damages has just begun its proceedings.

(…)

2-2-2-3. Metalclad (Pre-FTC's Interpretation)

Background from the US State Department Website
http://www.state.gov/s/l/c3752.htm

Metalclad Corp. v. United Mexican States

The Metalclad Corporation, a U.S. waste disposal company, instituted arbitration proceedings against Mexico under the ICSID Additional Facility Rules. Metalclad alleged breaches of NAFTA Articles 1102, 1103, 1104, 1105, 1106(1)(f), 1110 and 1111. Its notice of arbitration asserted that Mexico wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that Metalclad had built in La Pedrera, San Luis Potosi, despite the fact that the project was allegedly built in response to the invitation of certain Mexican officials and allegedly met all Mexican legal requirements. The notice sought damages of US$43,125,000 "plus damages for the value of the enterprise taken."

Hearings on the merits were held from late August through early September 1999. On August 30, 2000, the Metalclad tribunal issued an award in favor of the investor in the amount of $16.7 million. Mexico petitioned the Supreme Court of British Columbia to set aside the award on the grounds that the Metalclad tribunal exceeded its jurisdiction and that enforcing the award would violate public policy. The British Columbia court set aside the award in part.

(…)

Metalclad Corp. v. United Mexican States

NAFTA Chapter 11 Arbitration

Award

www.state.gov/s/l/c3742.htm

I. INTRODUCTION

1. This dispute arises out of the activities of the Claimant, Metalclad Corporation (hereinafter "Metalclad"), in the Mexican Municipality of Guadalcazar (hereinafter "Guadalcazar"), located in the Mexican State of San Luis Potosi (hereinafter "SLP"). Metalclad alleges that Respondent, the United Mexican States (hereinafter "Mexico"), through its local governments of SLP and Guadalcazar, interfered with its development and operation of a hazardous waste landfill. Metalclad claims that this interference is a violation of the Chapter Eleven investment provisions of the North American Free Trade Agreement (hereinafter "NAFTA"). In particular, Metalclad alleges violations of (i) NAFTA, Article 1105, which requires each Party to NAFTA to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security"; and (ii) NAFTA, Article 1110, which provides that "no Party to NAFTA may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6". Mexico denies these allegations.

II. THE PARTIES

A. The Claimant

2. Metalclad is an enterprise of the United States of America, incorporated under the laws of Delaware. Eco-Metalclad Corporation (hereinafter "ECO") is an enterprise of the United States of America, incorporated under the laws of Utah. ECO is wholly-owned by Metalclad, and owns 100% of the shares in Ecosistemas Nacionales, S.A. de C.V. (hereinafter "ECONSA"), a Mexican corporation. In 1993, ECONSA purchased the Mexican company Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (hereinafter "COTERIN") with a view to the acquisition, development and operation of the latter's hazardous waste transfer station and landfill in the valley of La Pedrera, located in Guadalcazar. COTERIN is the owner of record of the landfill property as well as the permits and licenses which are at the base of this dispute.

3. COTERIN is the "enterprise" on behalf of which Metalclad has, as an "investor of a Party", submitted a claim to arbitration under NAFTA, Article 1117.

(…)

VII. THE TRIBUNAL'S DECISION
(….)
B. NAFTA Article 1105: Fair and equitable Treatment
(….)

76. Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.

77. Metalclad acquired COTERIN for the sole purpose of developing and operating a hazardous waste landfill in the valley of La Pedrera, in Guadalcazar, SLP.

78. The Government of Mexico issued federal construction and operating permits for the landfill prior to Metalclad's purchase of COTERIN, and the Government of SLP likewise issued a state operating permit which implied its political support for the landfill project.

79. A central point in this case has been whether, in addition to the above-mentioned permits, a municipal permit for the construction of a hazardous waste landfill was required.

80. When Metalclad inquired, prior to its purchase of COTERIN, as to the necessity for municipal permits, federal officials assured it that it had all that was needed to undertake the landfill project. Indeed, following Metalclad's acquisition of COTERIN, the federal government extended the federal construction permit for eighteen months.
(…)

85. Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill. Metalclad argues that in all

hazardous waste matters, the Municipality has no authority. However, Mexico argues that constitutionally and lawfully the Municipality has the authority to issue construction permits.

86. Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.
(…)

93. The Tribunal therefore finds that the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility.

97. The actions of the Municipality following its denial of the municipal construction permit, coupled with the procedural and substantive deficiencies of the denial, support the Tribunal's finding, for the reasons stated above, that the Municipality's insistence upon and denial of the construction permit in this instance was improper.

98. This conclusion is not affected by NAFTA Article 1114, which permits a Party to ensure that investment activity is undertaken in a manner sensitive to environmental concerns. The conclusion of the Convenio and the issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns.

99. Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.

100. Moreover, the acts of the State and the Municipality – and therefore the acts of Mexico – fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment. This is so

particularly in light of the governing principle that internal law (such as the Municipality's stated permit requirements) does not justify failure to perform a treaty. (Vienna Convention on the Law of Treaties, Arts. 26, 27).

101. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.
(…)

*Judicial Review by the Supremem Court of British Columbia

The United Mexican States v. Metalclad	Date:	20010502
Corporation	Docket:	L002904
2001 BCSC 664	Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE UNITED MEXICAN STATES
PETITIONER
AND:
METALCLAD CORPORATION
RESPONDENT
AND:
ATTORNEY GENERAL OF CANADA and
LA PROCUREURE GENERALE DU QUEBEC
ON BEHALF OF THE PROVINCE OF QUEBEC
INTERVENORS

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE TYSOE

www.dfait-maeci.gc.ca/tna-nac/metalclad_review-en.asp

INTRODUCTION

[1] This proceeding involves a challenge by the Petitioner, the United Mexican States, ("Mexico") of an arbitration award (the "Award") issued on August 30, 2000 by a tribunal (the "Tribunal") constituted under Chapter 11 of the North American Free Trade Agreement ("NAFTA") between the United States of America, Mexico and Canada (the "Parties" or the "NAFTA Parties"). In the Award, the Tribunal granted damages in the amount of $16,685,000 (U.S.) against Mexico in favour of the Respondent, Metalclad Corporation ("Metalclad"), an American corporation established under the laws of the State of Delaware. Mexico seeks to set aside the Award. The matter comes before this Court because the place of the arbitration was designated to be Vancouver, B.C.
(…)

ARTICLE 1105 – MINIMUM STANDARD

[57] Before I turn to a specific examination of Article 1105, I wish to make some general comments about the structure of arbitration under Chapter 11. Under most agreements containing arbitration provisions, it is provided that a dispute between the parties to the agreement may be resolved through arbitration. Strangers to the agreement cannot invoke the arbitration procedure because it is only the parties to the agreement who consented to resolve disputes between themselves by arbitration. This normal type of arbitration provision is found in Chapter 20 of the NAFTA, which is the general section in the NAFTA dealing with arbitrations of disputes between the NAFTA Parties.

[58] Section B of Chapter 11 establishes a separate arbitration procedure. It allows investors of a NAFTA Party (who are not themselves a party to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other than the obligations imposed by Section A of Chapter 11 and the two Articles of Chapter 15, the investor would have to prevail upon its country to espouse an arbitration on its behalf against the other Party.

[59] I now turn to a consideration of Article 1105. It is a companion provision to Articles 1102 and 1103. In simple terms, Article 1102 provides that a NAFTA Party must treat the investors of another NAFTA Party and their investments no worse than it treats

its own investors and their investments. This is referred to as "national treatment". Article 1103 provides that a Party must treat the investors of another Party and their investments no worse than it treats the investors of any other Party or of a non-party and their investments. This is referred to as most-favored-nation treatment".

[60] Articles 1102 and 1103 are both framed in relative terms by way of a comparison to the way in which the NAFTA Party treats other investors. On the other hand, Article 1105 is framed in absolute terms. In considering Article 1105, the way in which the Party treats other investors is not a relevant factor. Article 1105 is intended to establish a minimum standard so that a Party may not treat investments of an investor of another Party worse than this standard irrespective of the manner in which the Party treats other investors and their investments.
(…)

[62] The tribunal in the Myers partial award went on to discuss the proper approach to the interpretation of Article 1105:

> Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases ... fair and equitable treatment ... and ... full protection and security... cannot be read in isolation. They must be read in conjunction with the introductory phrase ... treatment in accordance with international law. (para. 262)

What the Myers tribunal correctly pointed out is that in order to qualify as a breach of Article 1105, the treatment in question must fail to accord to international law. Two potential examples are "fair and equitable treatment" and "full protection and security", but those phrases do not stand on their own. For instance, treatment may be perceived to be unfair or inequitable but it will not constitute a breach of Article 1105 unless it is treatment which is not in accordance with international law. In using the words "international law", Article 1105 is referring to customary international law which is developed by common practices of countries. It is to be distinguished from conventional international law which is comprised in treaties entered into by countries (including provisions contained in the NAFTA other than Article 1105 and other provisions of Chapter 11).
[63] The Myers tribunal also discussed the level of treatment which violates Article 1105:

> The Tribunal considers that a breach of Article 1105 occurs only when it is shown

> that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law general extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case. (para. 263)

[64] After these Reasons for Judgment had been prepared in draft, counsel for Metalclad provided a copy of the arbitral award in Pope & Talbot Inc. v. Canada (April 10, 2001), in which the tribunal declined to follow the interpretation of Article 1105 given by the Myers tribunal. The Pope & Talbot tribunal concluded that "investors under NAFTA are entitled to the international law minimum, plus the fairness elements". The tribunal based its interpretation on the wording of the corresponding provision in the Model Bilateral Investment Treaty of 1987, which has been adopted by numerous countries. The provision states that investment shall be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. The tribunal rejected the submission of the United States (as intervenor) that the language of Article 1105 demonstrated that the NAFTA Parties did not intend to diverge from the customary international law concept of fair and equitable treatment. The tribunal reasoned that the United States relied solely on the language of Article 1105 and did not offer any other evidence that the NAFTA Parties intended to reject the "additive" character of bilateral investment treaties.

[65] With respect, I am unable to agree with the reasoning of the Pope & Talbot tribunal. It has interpreted the word "including" in Article 1105 to mean "plus", which has virtually opposite meaning. Its interpretation is contrary to Article 31(1) of the Vienna Convention, which requires that terms of treaties be given their ordinary meaning. The evidence that the NAFTA Parties intended to reject the "additive" character of bilateral investment treaties is found in the fact that they chose not to adopt the language used in such treaties and I find it surprising that the tribunal considered that other evidence was required. The NAFTA Parties chose to use different language in Article 1105 and the natural inference is that the NAFTA Parties did not want Article 1105 to be given the same interpretation as the wording of the provision in the Model Bilateral Investment Treaty of 1987.
(…)

[68] On my reading of the Award, the Tribunal did not simply interpret Article 1105 to

include a minimum standard of transparency. No authority was cited or evidence introduced to establish that transparency has become part of customary international law. In the Myers award, one of the arbitrators wrote a separate opinion and surmised an argument that the principle of transparency and regulatory fairness was intended to have been incorporated into Article 1105. The arbitrator crafted the argument by assuming that the words "international law" in Article 1105 were not intended to have their routine meaning and should be interpreted in an expansive manner to include norms that have not yet technically passed into customary international law. However, the arbitrator did not decide the point because it had not been fully argued in the arbitration and he was not aware of the argument having been made in any earlier case law or academic literature. In my view, such an argument should fail because there is no proper basis to give the term "international law" in Article 1105 a meaning other than its usually and ordinary meaning.
(…)

[70] In the present case, however, the Tribunal did not simply interpret the wording of Article 1105. Rather, it misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency.

[71] In addition to specifically quoting from Article 1802 in the section of the Award outlining the applicable law, the Tribunal incorrectly stated that transparency was one of the objectives of the NAFTA. In that regard, the Tribunal was referring to Article 102(1), which sets out the objectives of the NAFTA in clauses (a) through (f). Transparency is mentioned in Article 102(1) but it is listed as on e of the principles and rules contained in the NAFTA through which the objectives are elaborated. The other two principles and rules mentioned in Article 102, national treatment and most-favored nation treatment, are contained in Chapter 11. The principle of transparency is implemented through the provisions of Chapter 18, not Chapter 11. Article 102(2) provides that the NAFTA is to be interpreted and applied in light of the objectives set out in Article 102(1), but it does not require that all of the provisions of the NAFTA are to be interpreted in light of the principles and rules mention in Article 102(1).
(…)

2-2-2-4. FTC’s Interpretation

Notes of Interpretation of Certain Chapter 11 Provisions
(NAFTA Free Trade Commission, July 31, 2001)

http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:
(…)

B. Minimum Standard of Treatment in Accordance with International Law

1.Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

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

3.A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
(…)

2-2-2-5. Mondev (Post-FTC's Interpretation)

www.state.gov/s/l/c3741.htm

Case No. ARB(AF)/99/2

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)
BETWEEN:

MONDEV INTERNATIONAL LTD.
Claimant
and
UNITED STATES OF AMERICA
Respondent

AWARD

Before the Arbitral Tribunal
constituted under Chapter Eleven
of the North American Free Trade
Agreement, and comprised of:

Sir Ninian Stephen (President)
Professor James Crawford
Judge Stephen M. Schwebel

Date of dispatch to parties: October 11, 2002

* Background: From the US State Department Website
http://www.state.gov/s/l/c3758.htm

Mondev International Ltd., a Canadian real-estate development corporation, has submitted a claim under the ICSID Additional Facility Rules on its own behalf for losses allegedly suffered by Lafayette Place Associates ("LPA"), a Massachusetts limited partnership it owns and controls. Mondev alleges that these losses arise from a decision by the Supreme Judicial Court of Massachusetts and from Massachusetts state law.

Mondev alleges that Massachusetts' statutory immunization from intentional tort liability of the Boston Redevelopment Authority is incompatible with international law, and that the decision of the Supreme Judicial Court was arbitrary and capricious and amounted to a denial of justice. Mondev also alleges that the United States failed to meet its Chapter Eleven obligations by not according LPA national treatment (Art. 1102); by not according it treatment in accordance with international law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). Mondev claims damages of not less than $50 million.

On October 11, 2002, the tribunal issued an award dismissing all claims against the United States.

* * *

A. Introduction

Earlier proceedings concerning the Claim

1. This dispute arises out of a commercial real estate development contract concluded in December 1978 between the City of Boston ("the City"), the Boston Redevelopment Authority ("BRA") and Lafayette Place Associates ("LPA"), a Massachusetts limited partnership owned by Mondev International Ltd., a company incorporated under the laws of Canada ("Mondev" or "the Claimant"). In 1992, LPA filed a suit in the Massachusetts Superior Court against the City and BRA. The trial was held in 1994 and culminated in a jury verdict in favour of LPA against both defendants. The trial judge upheld the jury's verdict for breach of the Tripartite Agreement against the City, but rendered a judgment notwithstanding the verdict in respect of BRA, holding BRA immune from liability for interference with contractual relations by reason of a Massachusetts statute giving BRA immunity from suit for intentional torts. Both the City and LPA appealed. The Massachusetts Supreme Judicial Court ("SJC") affirmed the trial judge's decision in respect of BRA but upheld the City's appeal in respect of the contract claim. LPA petitioned for rehearing before the SJC on both claims, and sought certiorari to the United States Supreme Court in respect of its contract claim against the City. Each of these petitions was denied. In the event, therefore, LPA eventually lost both its claims.

2. Mondev subsequently brought a claim pursuant to Article 1116 of the North American Free Trade Agreement ("NAFTA") and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") on its own behalf for loss and damage caused to its interests in LPA. Mondev claims that due to the SJC's decision and the acts of the City and BRA, the United States breached its obligations under Chapter Eleven, Section A of NAFTA. In particular, the Claimant alleges violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) and seeks compensation from the United States of no less than US$50 million, plus interest and costs.
(…)

B. The Underlying Dispute

37. The dispute arises out of efforts in the late 1970s by the City to rehabilitate a dilapidated area in downtown Boston known as the "Combat Zone", adjacent to a shopping area. BRA, the City's planning and economic development agency, selected Mondev and its then joint-venture partner, Sefrius Corporation, for a project consisting in the construction of a department store, a retail mall, and a hotel in the designated area. In 1978, Mondev and Sefrius formed LPA, through which they would develop, build, own and manage the project. On 22 December 1978, LPA, BRA and the City signed the "Tripartite Agreement", governed by the laws of the Commonwealth of Massachusetts, providing for the development of the area in two phases. Phase I involved the construction of a shopping mall, a parking garage and a hotel. In accordance with the Agreement, LPA acquired in September 1979 the right to develop certain parcels of property necessary for Phase I. Specifically, LPA purchased the "air rights" over the "Lafayette Parcel Phase I". Construction of that Phase was completed in November 1985. Phase II contemplated the construction of additional retail spaces, an office building and a department store on four parcels of City-owned land adjacent to those used in Phase I. These four parcels of land were to be assembled into a single parcel, called the Hayward Parcel. At the time of the Agreement the parcels were partially occupied by a city car park, known as the Hayward Place garage.

38. In the Tripartite Agreement, construction of Phase II of the project was made contingent upon the decision by the City to remove the Hayward Place garage. If it did, the City could build an underground parking garage on the site, and LPA would be granted the air rights to build over it. The agreement as to the development of the Hayward Parcel was principally set out in Section 6.02 of the Tripartite Agreement (as amended). Section 6.02 contained an option for LPA to purchase the Hayward Parcel. The option was conditional on notice by the City of its decision to discontinue the Hayward Place garage and to construct an underground car park. LPA could thereupon notify the City within a three-year period of its intent to purchase the Hayward Parcel for a price calculated by a formula described in Section 6.02 of the Tripartite Agreement. The Tripartite Agreement and accompanying maps identified the boundaries of the Hayward Parcel, but indicated several alternatives concerning the rights to be conveyed. In the Tripartite Agreement, the City was stated to have in hand appraisals of the fair market value of two of the four component parcels of the Hayward Parcel, and agreed "forthwith" to obtain appraisals of the two remaining parcels.

39. In the event, the City decided to demolish the Hayward Place garage, and LPA

notified its intention to purchase the Hayward Parcel in 1986. But there were various delays and difficulties in realising Phase II. By a further amendment to the Tripartite Agreement made in 1987, the last date for closure under LPA's option was 1 January 1989 unless otherwise agreed; this was however subject to the proviso that the option would not expire if "the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing". But this change in the Tripartite Agreement did not accelerate progress. What then happened was described by the SJC in the following terms:

"LPA never demanded and the city never tendered a deed within the required time period or at any other time. The basis of [LPA's] contract action against the city is that the city in bad faith failed to carry out those of its obligations under the Tripartite Agreement necessary to allow LPA to proceed to demand a closing, and indeed that it engaged in bad faith actions designed to impede LPA in effecting a timely closing. The reason for these obstructionist tactics by the city, as LPA sought to show… was that the new administration of Mayor Raymond Flynn believed that the price established by the Section 6.02 formula, which was based on 1978 values, was grossly unfair to the city in the light of a strong surge in real estate prices in the intervening years. LPA offered evidence of several instances of what it claimed were the city's obstructionist tactics. These included failing to complete the appraisals necessary to establish the price for the Hayward Parcel, initiating zoning changes that would have greatly reduced the allowable height of the office towers planned for the site, lack of cooperation about determining [certain road closures], and threatening to put a new street through the middle of the parcel, which would have made its development economically unviable."

In March 1988 LPA leased its rights in the project to another larger Canadian developer, Campeau, which proceeded to redesign the project. It was Campeau acting as lessee which vainly sought an extension of the closure date of 1 January 1989. When this was refused, in December 1988 Campeau notified the City that it wished to complete the transaction immediately. But there was no tender of payment at the time, nor was any other formal step taken. Subsequent to 1 January 1989, Campeau obtained permission for the redesigned project. But subsequently it defaulted on its obligations to LPA under the lease agreement, and LPA terminated the lease. In February 1991, the mortgagor, Manufacturers Hanover Trust Co., foreclosed on the mortgage. LPA subsequently, in March 1992, brought proceedings against the City and BRA.

(…)

D. The merits of Mondev's Article 1105 Claim

(…)

1. The interpretation of Article 1105

94. There was extensive debate before the Tribunal as to the meaning and effect of Article 1105. The debate included such issues as the binding effect and scope of the FTC's interpretation of Article 1105, given on 31 July 2001, the origin and meaning of the terms "fair and equitable treatment" and "full protection and security" occurring in Article 1105(1), and the extent of the various customary international law duties traditionally conceived as falling within the rubric of the "minimum standard of treatment" under international law.

95. Article 1105 is entitled "Minimum Standard of Treatment". It provides as follows:

"(1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
(…)

(a) The FTC's interpretations of 31 July 2001

100. Article 1131 of NAFTA provides that:

"1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

The Commission referred to in Article 1131 is the Free Trade Commission, established pursuant to Article 2001 of NAFTA. It comprises cabinet-level representatives of NAFTA Parties or their designees. One of its functions is to "resolve disputes that may arise regarding [the] interpretation or application" of NAFTA (Article 2001(2)(c)).

101. In pursuance of these provisions, on 31 July 2001 the FTC adopted, among others, "the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions":

"B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

102. The Claimant professed to be "somewhat bewildered" by the interpretations. It maintained that the Respondent saw fit "to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part" and questioned whether it could do so in good faith. It contended that the FTC's decision was "more a matter of amendment" to the text of NAFTA than an interpretation of it, observing that the interpretations conflicted with "judicially found meaning of the text" in three NAFTA arbitration awards. In the view of the Claimant, the 31 July 2001 interpretations added to the text of Article 1105 by adding the word, "customary", while treating the terms "fair and equitable treatment" and "full protection and security" as surplusage. (…)

103. The Respondent maintained that the meaning of Article 1105 had been "conclusively established" by the FTC's interpretations of 31 July 2001. These constituted "the definitive statement of what the Parties intended from the source designated by the Treaty as the ultimate and most authoritative source of its meaning, the Parties themselves." Theobligation of Article 1105(1) "was intentionally limited to that pre-existing body of customary international legal obligations." Fair and equitable treatment and full protection and security were accordingly subsumed within the minimum standard. The NAFTA Parties had adopted the interpretations in view of what they saw as "the misinterpretations" of Article 1105 by earlier NAFTA tribunals. They did not do so in order to frustrate Mondev's arguments, and there was no basis for an allegation that the Respondent had not acted in good faith or had abused its powers as a member of the FTC in order to improve its position in pending litigation. In any event, Article 1131 is "one of the rules of the game, a rule designed just so that the Parties could assure that what they meant by NAFTA's terms could be made known whenever there were

misinterpretations." Nor was there ground for the Claimant's contention that the 31 July 2001 interpretations constituted an amendment to NAFTA. In particular, Paragraph B(3) simply emphasized the original intention of NAFTA Parties not to subject themselves to arbitration of obligations under other international agreements.

104. As noted already, following the Claimant's post-hearing submission of the award of the Pope & Talbot Tribunal on damages, both parties as well as Canada and Mexico submitted post-hearing briefs.

105. In its damages award of 31 May 2002, the Pope & Talbot Tribunal raised the question whether it was bound by the FTC's interpretation, in particular in relation to an award already made. It noted that NAFTA treats issues of interpretation (Article 2001(2)) and amendment (Article 2202) differently, and concluded that it was for the Tribunal to determine "whether the FTC's action can properly be qualified as an 'interpretation'". After referring to newly available travaux preparatoires of Article 1105, it expressed the view that the FTC's decision probably amounted to an amendment rather than an interpretation. (…)

106. In a post-hearing submission of 8 July 2002 in these proceedings, the United States criticised the Pope & Talbot Tribunal for suggesting that it was not bound by the FTC interpretation, and it argued that the award merited little consideration. According to the Respondent, "nothing in the text of NAFTA supports the view that FTC interpretations would be subject to… review by an ad hoc tribunal constituted under Chapter Eleven". In any event the FTC's interpretation was supported by well-settled principles of treaty interpretation. Even if it was permissible to refer to the content of other BITs in interpreting Article 1105(1) (which it denied), the United States had consistently taken the position, for example in advising the Senate on ratification of BITs, that the "fair and equitable treatment" standard "was intended to require a minimum standard of treatment based on customary international law". On the other hand the Pope & Talbot Tribunal had erred in its automatic equation of customary international law with the content of BITs, without regard to any question of opinio juris. In particular, the decision of the Chamber in the ELSI case, on which the Pope & Talbot Tribunal relied, concerned a particular FCN treaty. That decision, in the United States' view, "cannot reflect an evolution in customary international law… ELSI did not even purport to address customary international law standards requiring treatment of an alien amounting to an 'outrage' for a finding of a violation. In any event, ELSI clearly does not establish that any relevant standard under customary international [law] requires mere 'surprise'."
(…)

110. In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in Pope & Talbot which find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the Pope & Talbot Tribunal to consider a necessary element of the establishment of a rule of customary international law, names opinio juris. These States appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for "fair and equitable" treatment of foreign investment.

111. The question is entirely legitimate. It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties. Yet the United States itself provides an answer to this question, in contending that, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA (as well as in other BITs), the intention was to incorporate principles of customary international law.(…)

113. Thus the question is not that of a failure to show opinio juris or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?
(…)

119. (…), for the purposes of the present case the Tribunal does not need to resolve all the issues raised in argument and in the written submissions concerning the FTC's interpretation. The United States itself accepted that Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was "fair" or "equitable" in the circumstances of each particular case. While possessing a power of appreciation, the United States stressed, the Tribunal is bound by the minimum standard as established in States practice and in the jurisprudence of arbitral tribunals. It may not simply adopts its own idiosyncratic standard of what is "fair" or "equitable", without reference to established sources of law.
(…)

123. A reasonable evolutionary interpretation of Article 1105(1) is consistent both with the travaux, with normal principles of interpretation and with the fact that, as the

Respondent accepted in argument, the terms “fair and equitable treatment” and “full protection and security” had their origin in bilateral treaties in the post-war period.52 In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s. (…)

125. The Tribunal agrees. For the purposes of this Award, the Tribunal need not pass upon all the issues debated before it as to the FTC’s interpretations of 31 July 2001. But in its view, there can be no doubt that, by interpreting Article 1105(1) to prescribe 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 under NAFTA, the term “customary international law” refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. (…)

(b) The applicable standard of denial of justice

126. Enough has been said to show the importance of the specific context in which an Article 1105(1) claim is made. As noted already, in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal. As a NAFTA tribunal pointed out in Azinian v. United Mexican States:

“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”

The Tribunal went on to hold:

“A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if

they subject it to undue delay, or if they administer justice in a seriously inadequate way…

There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious."
(…)

2. The application of ARTICLE 1105(I) to the present case

(a) The dismissal of LPA's contract claim against the City

129. On this point the Supreme Judicial Court began by noting that whether there was a binding contract, and whether the City was in breach, were issues which "had to be considered together to come to a fair and sensible view of the arrangements between the parties and their dealings with each other". This was because the contract contained formulae and procedures to deal with unresolved issues (including the price to be paid for the Hayward Parcel); if those formulae and procedures had not been included, the arrangement would have lacked certainty on essential terms. By the same token, however, "if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement". For reasons given in detail in its opinion the SJC concluded "that there was sufficient evidence to find a binding agreement, as the jury indeed did find, but it is also clear, as a matter of law, that LPA failed to follow the steps required of it under the Tripartite Agreement as supplemented to put the city in breach". In particular the SJC relied on earlier authority, including its own decision of 1954 in Leigh v. Rule, for the proposition that a material failure by a plaintiff to put the defendant in breach "bars recovery… unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform". The only evidence of LPA's tender of performance was Campeau's letter of 19 December 1988, but this, in the Court's view, was far too unspecific to satisfy the test in Leigh v. Rule. There was accordingly no basis in law for finding the City in breach of contract. Moreover, the Court held, there was no outright refusal by the City to comply with the contract, and LPA could not "attribute repudiation to the city based on the mere fact that uncertainties remained that LPA shared responsibility for resolving". Nor did LPA's claim based on the City's bad faith assist it: the basis of that claim was the

City's refusal to extend the expiry date for the exercise of the option, but the City was under no contractual obligation to consent to an extension.
(…)

131. Claimant argued that the SJC's decision involved a "significant and serious departure" from its previous jurisprudence, which was exacerbated when the SJC completely failed to consider whether it should apply the rules it articulated retrospectively to Mondev's claims. In those circumstances the SCJ's dismissal of LPA's claims "was arbitrary and profoundly unjust".
(…)

133. The Tribunal is unimpressed by the "new law" argument so far as concerns the basic principle set out in Leigh v. Rule and embodied in many other systems of contract law. The question whether an agreement in principle to transfer real property is binding, and whether all the conditions for the performance of such an agreement have been met, is one which all legal systems have to face. In the Tribunal's view, it is doubtful whether the SJC made new law in its application of the principle in Leigh v. Rule. But even if it had done so its decision would have fallen within the limits of common law adjudication. There is nothing here to shock or surprise even a delicate judicial sensibility.
(…)

(d) BRA's statutory immunity

139. The Tribunal turns to the question of BRA's statutory immunity for intentional torts under the Massachusetts Tort Claims Act (PL 258). Under §10(c) of that Act, a public employer which is not an "independent body politic and corporate" is immune from "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations". As recalled above, the trial judge declined to enter the jury's verdict against BRA, holding that it was entitled to immunity as a "public employer" under the Massachusetts Tort Claims Act. That decision was affirmed by the SJC, which emphasised "the desirability of making the [Massachusetts Tort Claims Act] regime as comprehensive as possible". That decision was not challenged on certiorari to the United States Supreme Court, no doubt on the basis that the matter involved the interpretation of a Massachusetts statute and presented no federal claim or issue.

140. In the present proceedings, Mondev did not challenge the correctness of this decision as a matter of Massachusetts law. Rather, it argued that for a NAFTA Party to confer on one of its public authorities immunity from suit in respect of wrongful conduct affecting an investment was in itself a failure to provide full protection and security to the investment, and contravened Article 1105(1). For its part the United States argued that Article 1105(1) did not preclude limited grants of immunity from suit in respect of tortious conduct. It noted that there is no consensus in international practice on whether statutory authorities should be subject to the same rules of tortious liability as private parties. In the absence of any authority under customary international law requiring statutory authorities to be generally liable for their torts, or any consistent international practice, it could not be said that the immunity of BRA infringed Article 1105(1).
(…)

Rationale for exempting public authorities from liability for intentional torts

145. More important than analogies from other legal regimes is the question of the rationale for the BRA's immunity. The United States argued that the conferral of a limited immunity on certain State authorities for intentional torts was neither arbitrary nor indiscriminate. It adduced in support evidence of two kinds, first, that related to the legislative history and rationale underlying the exemption for intentional torts, and secondly, comparative law indications that there is nothing approaching an international consensus on the appropriate extent of the immunities of public authorities in tort.
(…)

147. For its part, the Claimant argued that any governmental immunity from suit in contract or tort, at least where the only remedy sought was damages, was increasingly seen as anomalous, and that it was inconsistent with the express requirement in Article 1105(1) for "full protection and security" that the government be able to avoid liabilities arising under the general law of the land.

148. The Tribunal notes that the broad exception for intentional torts in United States legislation, and the sometimes artificial ways in which they have been circumvented, have led to criticism and to suggestions that the exception be repealed, leaving the government to rely on the "discretionary functions" exception in the legislation, or to defend the case on the merits. On the other hand, it does not appear that these suggestions have been acted on at federal or state level.
(…)

154. After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory

authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1). Of course such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards – but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply. On the other hand, within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.
(…)

156. In reaching these conclusions, the Tribunal has been prepared to assume that the decision to allow BRA's statutory immunity could have involved conduct of the Respondent State in breach of Article 1105(1) after NAFTA's entry into force on 1 January 1994. That assumption may be questioned. The United States' courts, operating in accordance with the rule of law, had no choice but to give effect to a statutory immunity existing at the time the acts in question were performed and not subsequently repealed, once they had concluded that the statute in question did apply. It is not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve on its face anything arbitrary or discriminatory or unjust, i.e., any new act which might be characterised as in itself a breach of Article 1105(1). In other words, if it was not in December 1993 a breach of NAFTA for BRA to enjoy immunity from suit for tortious interference (and, because NAFTA was not then in force, it could not have been such a breach), it is far from clear how the (ex hypothesi correct) decision of the United States courts as to the scope of that immunity, after 1 January 1994, could have been in itself unfair or inequitable. On this ground alone, it may well be that Mondev's Article 1105(1) claim was bound to fail, and to fail whether or not one classifies BRA's statutory immunity as "procedural" or "substantive".

E. Conclusion

157. For these reasons the Tribunal dismisses Mondev's claims in their entirety.
(…)

2-2-2-6. UPS (Post-FTC's Interpretation)

An Arbitration under Chapter 11 of
the North American Free Trade Agreement

Between

United Parcel Service of America Inc.
And
Government of Canada

Award on Jurisdiction

www.dfait-maeci.gc.ca/tna-nac/gov-en.asp

*Background from the US State Department Website
http://www.state.gov/s/l/c3749.htm

United Parcel Service of America v. Government of Canada

United Parcel Service of America, Inc., a U.S. parcel delivery service provider, has submitted claims against Canada under the UNCITRAL rules. UPS claims that Canada Post, which UPS alleges is a letter mail monopoly, engages in anti-competitive practices: in providing its non-monopoly courier and parcel services (Xpresspost and Priority Courier), it, allegedly, unfairly uses its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly services. UPS alleges that Canada has breached its obligations under the NAFTA (1) to supervise a "government monopoly" and "state entity" (Arts. 1502(3)(a) and 1503(2)); (2) to accord treatment no less favorable than it accords, in like circumstances, to its own investors (Article 1102); and (3) to accord treatment in accordance with international law (Article 1105). UPS seeks US$160 million in damages.

On November 22, 2002, the Tribunal issued an Award on Jurisdiction. It dismissed a number of UPS's claims, including UPS's claims under NAFTA Chapter Fifteen, to the extent those claims were not limited to alleged violations of obligations in Section A of NAFTA Chapter Eleven, and UPS's Article 1105 claim (because there is no customary international law prohibiting or regulating anticompetitive behavior).(...)

The proceedings

1. United Parcel Service of America, Inc (UPS or the Investor) has brought a claim against the Government of Canada (Canada) alleging that Canada has breached its obligations under the North American Free Trade Agreement (NAFTA or Agreement) with the result that it and its subsidiaries have suffered damage. Canada challenges the jurisdiction of the Tribunal over significant parts of the claim as elaborated in the. Amended Statement of Claim (ASC or Claim, set out in Appendix.
1). This Award rules on that challenge.
(…)

The dispute in brief

10. At the centre of UPS's Claim are its allegations of anticompetitive conduct by Canada and Canada Post in the non monopoly postal services market and of Canada's failure to ensure that such conduct did not occur. its ASC summarises conclusions reached by a Commission appointed in 1995 by Canada to carry out an independent review of Canada Post and its mandate, including its non monopoly business activities, and Canada's role in supervising and recognising those activities (pare 25). According to the investor's summary, the Commission concluded in late 1996 that Canada Post was an unregulated government monopoly engaged in unrestrained competition with the private sector and in particular that

a, Canada Post's practices raised serious concerns of fairness and appropriateness;

b, Canada Post is not subject to any effective accountability mechanisms and lacks the necessary supervision to ensure that its actions are fully consistent with the public interest;

(…)

11. Canada, on 23 April 1997, determined not to implement measures to redress those

findings.

12. UPS, in the overview in its Claim, alleges that, by virtue of the facts it sets out:

> ... Canada has breached NAFTA Articles 1102 and 1105, and NAFTA Articles 1502(3)(a) and 1503(2), all in a manner such that UPS is entitled to bring this claim for compensation under Section B of Chapter 11 of NAFTA. More "particularly, Canada has:
>
> a. Breached its obligations under NAFTA Article .1102 by not providing UPS and UPS Canada with the best treatment available to domestic competitors in the Non Monopoly Postal Services Market, and in particular, to Canada Post;
>
> b. Breached its obligations under NAFTA Articles 1502(3)(a) and 1503(2) by failing to ensure that Canada Post not act in a manner inconsistent with Canada's obligations under the NAFTA; and
>
> c. Breached its obligations under NAPTA Article 1105 by failing to accord UPS Canada treatment in accordance with international law including fair and equitable treatment.

Canada's challenge to jurisdiction

13. Canada's jurisdictional challenge relates primarily to (b) and (c). Its principal contention is that anticompetitive behaviour and its regulation and control do not fall within the scope of articles 1105, 1502(3)(a) and 1503(2), read with the jurisdictional provisions of article 1116(1)(b). Article 1116 enables an investor of a Party to submit to arbitration a claim that another Party has breached certain obligations under Chapters 1 IA and 15:
(…)
Minimum standard of treatment - article 1105

Article 1105(1) is as follows:

> Minimum Standard of Treatment

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including ' fair and equitable treatment and full

protection and security.
(…)

72. Under the third heading of the Claim, the allegation focuses on Canada's. actions alone:

> 33. Further, Canada is obligated under NAFTA Article 1105 to accord to UPS Canada treatment in accordance with international law, including fair and equitable treatment. Pursuant to NAFTA Article 1105, Canada is obligated to:
>
> (b) ensure the existence of a transparent and effective regime for the supervision and regulation of Canada Post In the non-monopoly postal market in Canada.
>
> 34. Canada has breached its obligations under NAFTA Article 1105, by inter alia failing to provide transparency in the supervision, regulation and operation of Canada Post including through its accounting and financial reporting and by failing to enforce Canadian law including in relation to the issues raised herein when it knew or should have known that by doing so it provided Canada Post with a competitive advantage over UPS Canada in the Non Monopoly Postal Services Market.

(...)

77. The very wording of article 1105(1) suggests, according to Canada, that the obligation it states is one that already exists under international law, one that requires each Party, in terms of the heading to the article, to accord a minimum standard of treatment to investors of the other Parties. The reference is to the basic protection conferred on foreign interests by the general body of international law, at least. We say "at least" since the unrestricted reference to "international law" in article 1105 would suggest, as UPS says, that treaty obligations may also contribute to the protection afforded by that article.

78. In another standard usage invoked by Canada, the reference is to the law' of state responsibility towards aliens, again a part of customary international law. While counsel for the Investor criticise that terminology, their real criticism is not so much of the label but rather of the content of the obligations which Canada says arise under article 1105. According to Canada, a breach of article 1105 requires treatment that amounts to an outrage, to bad faith, to wilful neglect of duty, or to an "insufficiency" of government action so far short of international standards that every reasonable person would recognize

its insufficiency. Further, Canada submits that the obligations under article 1105 do not regulate anticompetitive behaviour. There can be no doubt, it says, that there is insufficient state practice to establish customary international law on matters of competition. That position is also taken by Mexico and the United States.

79. Canada and the other two NAFTA Parties depend as well on an Interpretation of article 1105 issued on 31 July 2001 by the Free Trade Commission under article 2001(2)(c) (pare 41 above). The Interpretation reads as follows:

Having reviewed the operation of proceedings conducted under
Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of

Chapter Eleven in order to clarify and re-affirm the meaning of certain of its provisions;

(…)

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

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

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

(…)

81. The Investor, by contrast, stresses what it sees as the very general terms of article 1105 and especially its requirement that Canada accord fair and equitable treatment to it. Whether Canada had met that obligation was something that could be decided only when all the relevant evidence had been adduced and fully assessed. These are not matters that could be assessed in the abstract. Canada is attempting to engage the Tribunal in

prejudging the merits of the dispute.
(…)
83. As will be apparent from this brief summary, the submissions before the Tribunal range widely. From that material one issue is however critical for the present case. Does article 1105 impose obligations on the Parties to control anticompetitive behaviour as alleged in the passages of the ASC set out in paras 72 to 76 above? We consider the position, first, under customary international law and, second, under relevant treaty provisions (touching in that context on the significance of the Free Trade Commission's Interpretation).
(…)

.92. We accordingly conclude that there is no rule of customary international law prohibiting or regulating anticompetitive behaviour.

93. But is there nevertheless a basis in the text of article 1105 itself or in some other treaty source (possibly admitted by the article's general reference to "international law") for this part of the ASC?

94. UPS says that there is, on the basis of Canada's obligation to accord it "fair and equitable treatment". According to UPS, that obligation is to be seen as additional to the minimum standard and not to be subsumed within it.

95. It invokes the recent Pope and Talbot awards in support. The ruling in the earlier award preceded, and the expression of opinion in the later award followed, the PTC's Interpretation. They are inconsistent with the Interpretation, in particular insofar as it says that the obligation to accord fair and equitable treatment is not in addition to or beyond the customary international law standard of minimum treatment.

96. The NAFTA Parties have now submitted to a number of NAFTA tribunals that the "additive" interpretation is not available to the tribunals. By their consistent position they provide, they say, an "authentic" interpretation, in terms of article 31(3) of the Vienna Convention. And in any event the FTC's Interpretation is binding on chapter II tribunals including this one.

97. We do not address the question of the power of the Tribunal to examine the Interpretation of the Free Trade Commission. Rather, we agree in any event with its conclusion that the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard. Our reasons in brief are, first, that that reading accords

with the ordinary meaning of article 1105. That obligation is "included" within the minimum standard. Secondly, the many bilateral treaties for the protection of investments on which the argument depends vary in their substantive obligations; while they are large in number their coverage is limited; and, as we have already said, in terms of opinio juris there is no indication that they reflect a general sense of obligation. The failure of efforts to establish a multilateral agreement on investment provides further evidence of that lack of a sense of obligation. Thirdly, the very fact that. many of the treaties do expressly create a stand-alone obligation of fair and equitable treatment may be seen as giving added force to the ordinary meaning of article 1105(1) and particularly the word "including" ("notamment" and "incluido"). And the likely availability to the investor of the protection of the most favoured nation obligation in article 1103, by reference to other bilateral investment treaties, if anything, supports the ordinary meaning.

98. The remaining possible basis for finding support in article 1105 for the pleading about anticompetitive behaviour is that the expression "international law" in that article may include treaties and in particular article 1502(3)(4). This possible argument is also rejected by the FTC's Interpretation (paras I and 3). Again, we need not address the matter of whether this Tribunal may challenge an Interpretation since the analysis we undertook earlier of the relationship between chapter 11 and chapter 15 excludes the-possibility that any provision of article 1502(3) other than subparagraph (a) can be the subject of investor-State arbitration.

99. The Tribunal accordingly concludes that those parts of the ASC, which are based on article 1105, and which challenge anticompetitive behaviour and the failure to prohibit or control it are not within its jurisdiction.

(…)

2-2-2-7. ADF Group Inc. (Post-FTC Interpretation)

ADF Group Inc. v. United States of America

http://www.state.gov/s/l/c3754.htm *(from the U.S. Department of State Website)*

ADF Group Inc. ("ADF"), a Canadian corporation that designs, engineers, fabricates and erects structural steel, has filed a claim under the ICSID Arbitration (Additional Facility) Rules on its own behalf and on behalf of ADF International Inc., its Florida subsidiary. ADF claims damages for alleged injuries resulting from the federal Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations, which require that federally-funded state highway projects use only domestically produced steel.

ADF claims violations of the national treatment requirement of Article 1102, the minimum standard of treatment requirement of Article 1105(1), and the prohibition against performance requirements contained in Article 1106. It seeks $90 million in damages.

On January 9, 2003, the tribunal dismissed ADF's claims against the United States in their entirety. The tribunal's award, and other documents in the case, appear below.

For the media note on the award, click here.

(…)

V. Findings and Conclusions
(…)
4. Article 1105(1): Minimum Standard of Treatment under Customary International Law

(a) General Considerations
(…)
177. We have noted that the Investor does not dispute the binding character of the FTC Interpretation of 31 July 2001. (…)

178. The FTC Interpretation of 31 July 2001 specifies that the “treatment in accordance

with international law" referred to in Article 1105(1) is the minimum standard of treatment of aliens prescribed in customary international law. (…)

179. In considering the meaning and implications of the 31 July 2001 FTC Interpretation, it is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not "frozen in time" and that the minimum standard of treatment does evolve. The FTC Interpretation of 31 July 2001, in the view of the United States, refers to customary international law "as it exists today." (…)

182.In the present case, the issue may be seen to relate to the normative structure and content of the customary international law minimum standard of treatment, pertinent to foreign investors and their investments. The Investor claims that the customary international law minimum standard of treatment includes a general obligation to accord "fair and equitable treatment" and "full protection and security" to investors and their investments. The Respondent appears to reject the notion that the customary international law minimum standard of treatment prescribes such a comprehensive duty upon a territorial sovereign to give "fair and equitable treatment" and "full protection and security" to aliens and their property, including in principle investors and their investments. The Respondent insists that the Investor, if it is to succeed in its claim based on NAFTA Article 1105(1), must show a violation of a specific rule of customary international law relating to foreign investors and their investments. (…)

183. (…) We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant. It may be that, in their current state, neither concordant state practice nor judicial or arbitral case law provides convincing substantiation (or, for that matter, refutation) of the Investor's position. (…)

(b) Appraising the Investor's claim based on Article 1105(1) as Interpreted by the FTC Interpretation of 31 July 2001.

188. The first submission of the Investor is that the U.S. measures are in themselves "unfair and inequitable within the context of NAFTA." We find this per se argument

unconvincing. It was observed by the Respondent, and not controverted by the Investor, that domestic content and performance requirements in governmental procurement by both federal and sub-federal (state or provincial) entities are common to all three NAFTA Parties. (…)

189. The second submission of the Investor is that the FHWA of the U.S. Department of Transportation refused to follow and apply pre-existing caselaw in respect of ADF International in the Springfield Interchange Project, thus ignoring the Investor's legitimate expectations generated by that caselaw. We do not believe that the refusal of the FHWA to follow prior rulings, judicial or administrative is, in itself, in the circumstances of this case, grossly unfair or unreasonable. (…)The Investor has not, in our view, successfully rebutted that explanation; it has not explained why caselaw under the 1933 statute should be applicable in respect of the 1982 statute notwithstanding the differences between the two laws. (…)

190. The Investor submitted, thirdly, that the FHWA acted ultra vires and in disregard of the terms of the 1982 STAA. [E]ven had the Investor made out a prima facie basis for its claim, the Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law. (…) [S]omething more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1), even under the Investor's view of that Article. That "something more" has not been shown by the Investor.
(…)

2-2-3. Performance Requirements (Article 1106)

IN THE MATTER OF AN ARBITRATION
UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN

POPE & TALBOT INC
and
THE GOVERNMENT OF CANADA

INTERIM AWARD

BY

ARBITRAL TRIBUNAL

http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp

(…)

PERFORMANCE REQUIREMENTS

Contentions of the Investor

45. The Investor has stated and reiterated that it does not take issue with the SLA as such. It does, however, attack the implementation of the SLA by Canada via its Export Control Regime ("ECR" or "the Regime"). inter alia as it relates to performance requirements. Specifically, the Investor contends that the Regime requires its Investment "to export a certain amount of softwood lumber at the EB and LFB levels each year or face a reduction of its EB or LFB in future years." The Investor further states: The Regime also requires the Investment to restrict its sales of lumber bound for the United States by relating such sales to the volume of exports at which no permit fee will be charged." The Investor submits that these requirements are "prohibited" by NAFTA Article 1106, and that those prohibitions "apply to all government measures, regardless of

whether they result in de .jure or de facto requirements."

The relevant provisions of NAFTA Article 1106 for our purposes stipulate as follows:

> 1 No party may impose or enforce am of the. following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Parry in its territory:
>
> (a) to export a given level or percentage of goods or services; (…)
>
> (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; (…)
>
> 3. No party may condition the receipts or continued receipts of an advantage, in connection with an investment in its territory of an investor of a Party or of an non-Party, on compliance with any of the following requirements: (…)
>
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume of its exports or foreign exchange earnings. (…)
>
> 5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

(…)

Canada's Response

50. In response to the Investor's claims. Canada first points to Article 1106(5), which states: "Paragraphs I and 3 [of Article 1106] do not apply to any requirement other than the requirements set out in those paragraphs." That language, Canada argues, emphasizes the clear intent of the Parties that the prohibitions in Articles 1106(1) and (3) be limited to those expressly set out in each paragraph.

51. Canada also asserts that the Investor "has ignored the difference between the rules of Article 1106(1) which forbid imposing or enforcing requirements and 1106(3) which forbids creating an incentive or conditioning an advantage on a narrower group of

performance requirements that does not include export performance."

52. Citing the "ordinary meaning" of the words in Article 1106(1), Canada contends that the only requirements that are prohibited are those that "compel the observance of a mandatory condition." Applying that concept, Canada argues that there can be no de facto violations of Article 1106(1), since they would not, by definition, embody an obligation subject to enforcement by Canada." Moreover, a measure conditioning an incentive, de facto or otherwise, must be analyzed under Article 1 106(3).
(…)

56. In summary, Canada argues that: "Articles 1106(l)(a). (e) and (3)(d) relate to requirements designed to increase exports and foreign exchange earnings. The Export Control Regime, which allocates a finite amount of fee-free export quota, clearly does not do so. The Investor's attempt to bring the Export Control Regime within the scope of these provisions results in an interpretation of Article 1 106 that clearly conflicts with its Ordinary Meaning.

57. Finally, Canada contends that: "Article 1106(5) is crucial to the interpretation of Articles 1106(1)(a). (e) and (3)(d). The Parties have expressed a clear intent in Article 1106(5) that the obligations in paragraphs 1106(1) and (3) not be interpreted broadly=' and that "(t)he Investor's attempts to broaden the scope of the requirements prohibited by Article 1106 must be rejected in the face of the explicit language of Article 1106(5).

DECISION
(…)

65 . Article 102(2) of NAFTA decrees that its provisions shall be interpreted and applied "in the light of its objectives set out in paragraph l and in accordance with applicable rules of international law. NAFTA is a treaty, and the principal international law rules on the interpretation of treaties are found in the Vienna Convention on the Law of Treaties.
(…)
69. Accordingly, the analysis and interpretation of Article 1106 of NAFTA is initially informed by the ordinary meaning of its terms. As the Appellate Body of the World Trade Organization expressed it: "Interpretation must be based above all on the text of the treaty."

70. The Tribunal endorses Canada's contention that Article 1106(5) is vital to the

interpretation of Articles 1106(1) and (3). Consequently. the ambit of those two Articles may not be broadened beyond their express terms. The enumeration of seven requirements in Article 1.106(1) and four in Article 1106(3) is limiting in each case.

74. The Investor claims that the Regime imposes a requirement to export a given level or percentage of goods. Canada argues that the aim generally [of performance requirements] is to raise the foreign exchange earnings of the host country and to increase employment in the export sector, that is, to increase exports. The Tribunal accepts that Canada's position may reflect what is generally the aim of such requirements. However, the Tribunal is not prepared to rule that the language of Article 1106(t)(a) adopts that general approach. The language of that Article is not expressly limited to the imposition or enforcement of a higher level or percentage of exports of goods and services, but could admit equally the imposition or enforcement at any given level or percentage of those exports.

75. However, the Tribunal concludes that the Investor has not made out a valid claim under Article 1106(l)(a), because the Regime does not "impose or enforce * * * requirements." Rather, it is a tariff-rate export restraint regime fixing only the level up to which covered products may be exported fee-free (EB), then at a lower fee (LFB) up to a given higher level, and thereafter in unlimited quantities at a higher fee (UFB). The Regime functions on the basis of the allocation of EB and/or LFB quotas to specific exporters, employing a system of permits and, where applicable, the payment by the exporter to Canada of export fees, which are later remitted by Canada to the respective covered provinces. While the Regime undoubtedly deters increased exports to the U.S., that deterrence is not a "requirement" for establishing, acquiring, expanding, managing. conducting or o,perating a foreign owned business in Canada.

76. For all these reasons, the Investor's claim under Article 1106(1)(a) has not been made out and is dismissed.
(...)

2-2-4. Expropriation (Article 1110)

2-2-4-1. S.D. Meyers

(…)

Article 1110 – Expropriation

279. SDMI claims that the Interim Order and the Final Order were "tantamount" to an expropriation and violated Article 1110 of the NAFTA.

280. The term "expropriation" in Article 1110 must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases. In general, the term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the "taking".

281. The Tribunal accepts that, in legal theory, rights other than property rights may be "expropriated" and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures. The Interim Order and the Final Order were regulatory acts that imposed restrictions on SDMI. The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.

282. Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.

283. An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.

284. In this case the closure of the border was temporary.47 SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive advantage. This may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 110548, but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110.

285. SDMI relied on the use of the word "tantamount" in Article 1110(1) to extend the meaning of the expression "tantamount to expropriation" beyond the customary scope of the term "expropriation" under international law. The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent". Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.

286. The Tribunal agrees with the conclusion in the Interim Award of the Pope & Talbot Arbitral Tribunal, that something that is "equivalent" to something else cannot logically encompass more. In common with the Pope & Talbot Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping expropriation", rather than to expand the internationally accepted scope of the term expropriation.

287. In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed.

288. The Tribunal concludes that this is not an "expropriation" case.
(…)

2-2-4-2. Pope & Talbot

(…)

EXPROPRIATION

Contentions of the Investor

81. The Investor claims that Canada's Export Control Regime implementing the SLA "has deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market. The investor points to April 1, 1996 as the "initial date of expropriation," and suggests that "each time Canada reduced the Investment's allocation of fee free quota, a further expropriation occurred. The Investor claims that these actions violate NAFTA Article 1110.

82. Article 111 0(1) provides:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory, or take a measure tantamount to nationalization or expropriation of such investment ("expropriation "), except:

(a)	for a public punpose:
(b)	on a nondiscriminatory• basis
(c)	in accordance with due process of law and Article 1105(1)and
(d)	in payment of compensation in accordance with paragraphs 2 through 6.

83. The Investor claims that Article 1110 "provides the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights. The Investor further claims that there exists a "well-recognized international legal principle that expropriation refers to an act by which governmental authority is used to deny some benefit of property. Under the terms of NAFTA and under general international law, limitations on a state's right to expropriate private property include so-called "creeping" expropriation, a process that has the effect of taking property through staged measures."

84. The Investor reads NAFTA Article 1110 as creating a lex specialis going beyond

customary international law. Specifically, the Investor believes that the phrase "measure tantamount to expropriation" appearing in Article 1 110 comprehends a measure beyond an outright taking or creeping expropriation." It contends that the term includes "even nondiscriminatory measures of general application which have the effect of substantially interfering with the investments of investors of NAFTA Parties.

85. The Investor notes that, since Article 1110 applies to actions against an "investment," the prohibitions bring into play the broad definitions of that term found in NAFTA Article 1139. The Investor concludes that that broad definition "clearly indicates that a wide variety of economic interests, both tangible and intangible, are covered by the scope of Article 1110.

86. The Investor argues that under the proper interpretation of "expropriation" in Article I 110, Canada's Export Control Regime has expropriated its Investment. Specifically, the Investor points to the following limitations on its Investment's ability to carry out its business of exporting softwood lumber to the U.S.:

a) The Regime has limited its ability to run at full capacity and sell a larger volume of softwood lumber;
b) Reductions of the Investment's fee free quota have required it to reduce its business operations significantly;
(…)

Canada's Response

87. In response to the Investor's contentions, Canada argues that the property claimed to have been expropriated is not an "investment of an Investor of another Party" as required by Article 1110, since the "ability to alienate its product to [the U.S.] market" is not a property right. Canada further argues that the Investor has not been deprived of its Investment, since it has exported softwood lumber to the U.S. from the inception of the SLA and continues to do so.

88. Canada also argues that, while there is no definition of the term "expropriation" in NAFTA, international law requires "an actual interference with fundamental ownership rights. "Mere interference is not expropriation: rather, a significant degree of deprivation of fundamental rights of ownership is required.

89. Canada also contests the Investor's view that the term "measure tantamount to

expropriation" expands the protections in NAFTA beyond the customary scope of expropriation under international law. Canada argues that the word "tantamount" simply means equivalent, which is rendered in the equally authentic French and Spanish texts of NAFTA as "equivalent" and "equivalente." Consequently, the term is no broader than the ordinary concept of "creeping expropriation," which is a term not employed in treaty drafting.

90. Canada also asserts that its Regime implementing the SLA is an exercise of regulatory power and that, at international law, a "state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure. Indeed, according to Canada, "at international law, liability is possible only if the measure is discriminatory.
(…)

DECISION

96. Based upon these submissions, as well as the testimony and evidence submitted by the Parties, the Tribunal concludes that the Investment's access to the U.S. market is a property interest subject to protection under Article 1110 and that the scope of that article does cover nondiscriminatory regulation that might be said to fall within an exercise of a state's so-called police powers. However, the Tribunal does not believe that those regulatory measures constitute an interference with the Investment's business activities substantial enough to he characterized as

expropriation under international law. Finally, the Tribunal does not believe that the phrase "measure tantamount to nationalization or expropriation" in Article 1110 broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect.
(…)

100. The next question is whether the Export Control Regime has caused an expropriation of the Investor's investment, creeping or otherwise. Using the ordinary meaning of those terms under international law, the answer must be negative. First of all, there is no allegation that the Investment has been nationalized or that the Regime is confiscatory. The Investor's (and the Investment's) Operations Controller testified at the hearing that the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been

detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.

101. The sole "taking" that the Investor has identified is interference with the Investment's ability to carry on its business of exporting softwood lumber to the U.S. While this interference has, according to the Investor, resulted in reduced profits for the Investment, it continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales.
(…)
104. The Tribunal is unable to accept the Investor's reading of Article 1110. "Tantamount" means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more. No authority cited by the Investor supports a contrary conclusion. References to the decisions of the Iran-U.S. Claims Tribunal ignore the fact that that tribunal's mandate expressly extends beyond expropriation to include "other measures affecting property rights". And. to the extent the Investor is correct in urging that the comments of Dolzer and Stevens suggest that measures "tantamount" to expropriation can encompass restraints less severe than expropriation itself (creeping or otherwise), those comments would not be well-founded under a reasonable interpretation of the treaties that the authors analyze.

105. Based upon the foregoing, the Tribunal rejects the Investor's claim under Article 1110.
(…)

2-2-4-3. Metalclad

(…)

C. NAFTA, Article 1110: Expropriation

102. NAFTA Article 1110 provides that "[n]o party shall directly or indirectly . . . expropriate an investment . . . or take a measure tantamount to . . . expropriation . . . except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . . ." "A measure" is defined in Article 201(1) as including "any law, regulation, procedure, requirement or practice".

103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

104. By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).

(…)

112. In conclusion, the Tribunal holds that Mexico has indirectly expropriated Metalclad's investment without providing compensation to Metalclad for the expropriation. Mexico has violated Article 1110 of the NAFTA.

(…)

*Judicial Review by the Supreme Court of British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:
THE UNITED MEXICAN STATES
PETITIONER
AND:
METALCLAD CORPORATION
RESPONDENT
AND:

ATTORNEY GENERAL OF CANADA and
LA PROCUREURE GENERALE DU QUÉBEC
ON BEHALF OF THE PROVINCE OF QUÉBEC
INTERVENORS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE TYSOE

www.dfait-maeci.gc.ca/tna-nac/metalclad_review-en.asp

(…)
[77] Prior to its consideration of the Ecological Decree, the Tribunal concluded that the actions of Mexico constituted a measure tantamount to expropriation in violation of Article 1110. The Tribunal based this conclusion on its view that Mexico permitted or tolerated the conduct of the Municipality, which amounted to unfair and inequitable treatment breaching Article 1105, and that Mexico therefore participated or acquiesced in the denial to Metalclad of the right to operate the landfill. The Tribunal subsequently made reference to the representations by the Mexican federal authorities and the absence of a timely, orderly or substantive basis for the denial of the construction permit by the Municipality in concluding that there had been indirect expropriation. It is unclear whether the Tribunal equated a "measure tantamount to expropriation" with “indirect expropriation” or whether it made two separate findings of expropriation.

[78] I agree with the submission of counsel for Mexico that the Tribunal's analysis of Article 1105 infected its analysis of Article 1110. I have held that the Tribunal decided a matter beyond the scope of the submission to arbitration when it concluded that Mexico had breached Article 1105. The Tribunal's statement that Mexico took a measure tantamount to expropriation was directly connected to its finding of a breach of Article 1105. The statement that Mexico permitted or tolerated the conduct of the Municipality is a clear reference to the Tribunal's view that Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. Similarly, the Tribunal relied on the absence of a timely, orderly and substantive basis for the denial of the construction permit by the Municipality in making its statement that there had been indirect expropriation. This is also a reference to a lack of transparency.

[79] The Tribunal based its conclusion that there had been a measure tantamount to expropriation/indirect expropriation, at least in part, on the concept of transparency. In finding a breach of Article 1105 on the basis of a lack of transparency, the Tribunal decided a matter beyond the scope of the submission to arbitration. In relying on the concept of transparency, at least in part, to conclude that there had been an expropriation within the meaning of Article 1110, the Tribunal also decided a matter beyond the scope of the submission to arbitration.
(…)

2-2-4-4. Azinian (Abuse of Chapter 11 Process?)

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

BETWEEN:

ROBERT AZINIAN. KENNETH DAVITIAN, & ELLEN BACA
Claimants

and

THE UNITED MEXICAN STATES
Respondent

AWARD

Before the Arbitral Tribunal
Constituted under Chapter Eleven of
the North American Free Trade
Agreement, and comprised of:

Mr. Benjamin R. Civiletti
Mr. Claus von Wobeser
Mr. Jan Paulsson (President)

Date of dispatch to the parties:
November 1, 1999

http://www.dfait-maeci.gc.ca/tna-nac/azinian-en.asp

(…)

I. THE PARTIES

A. The Claimants

1. The Claimants, Mr Robert Azinian of Los Angeles, California, Mr Kenneth Davitian of Burbank, California, and Ms Ellen Baca of Sherman Oaks, California, have initiated these proceedings as United States (hereinafter "U.S.") citizens and shareholders of a Mexican corporate entity named Desechos Solidos de Naucalpan S.A. de C.V. (hereinafter "DESONA"). DESONA was the holder of a concession contract entered into on 15 November 1993 (hereinafter "the Concession Contract") relating to waste collection and disposal in the city of Naucalpan de Juarez.

(…)

II. ESSENTIAL CHRONOLOGY

4. In early 1992, the Mayor of Naucalpan and other members of its Ayuntamiento (City Council) visited Los Angeles at the invitation of the Claimants to observe the operations of Global Waste Industries, Inc., a company said by the latter to be controlled by them.

5. On 7 October 1992, Mr Azinian, writing under the letterhead of Global Waste Industries Inc. (hereinafter "Global Waste") as its "President," sent a letter to the Mayor of Naucalpan containing a summary of the way "we expect to implement … the integral solution proposed for the solid waste problem" of the city. (…)

7. (…) In support of the project, Mr Ariel Goldenstein, a close business associate of the Claimants, and the future general manager of DESONA, said that "our company has been working in the U.S. for more than 40 years." Naucalpan's Director of Economic Development said "that's why we chose Global Waste." Naucalpan's Mayor referred to the Claimants' "more than 40 years experience in this area, in the city of Los Angeles, in a county that as you know has more than 21 million inhabitants." (…)

9. On 15 November, the Concession Contract was signed. Two days later DESONA commenced its commercial and industrial waste collection, using two reconditioned front-load vehicles.

10. On 13 December, DESONA commenced residential waste collection for the Satelite section of Naucalpan but did not supply the five rearload vehicles as provided for by the schedule of operations under the Concession Contract. Until the termination of the Concession Contract, the two initial front-loaders remained the only units of the 70 "state-ofthe-art" vehicles called for under the Concession Contract to be put into service by DESONA.
(…)
13. In mid-February, the Ayuntamiento sought independent legal advice about the Concession Contract. It was advised that there were 27 "irregularities" in connection with the conclusion and performance of the Concession Contract.
(…)
17. On 21 March, despite a protest from DESONA on 16 March, the Ayuntamiento decided to annul the Concession Contract. The Claimants were notified of this decision two days later.
(…)
23. On 18 May 1995, the Federal Circuit Court ruled in favour of the Naucalpan Ayuntamiento, specifically upholding the Superior Chamber's judgment as to the legality of the nine bases accepted for the annulment.
(…)
III. OVERVIEW OF THE DISPUTE
(…)

29. There are some immediately apparent difficulties with the claim. It must be said that this was not an inherently plausible group of investors. They had presented themselves as principals in Global Waste, with approximately 40 years' experience in the industry. In fact Global Waste had been incorporated in Los Angeles in March 1991, but put into bankruptcy in May 1992 – 14 months later. Global Waste owned no vehicles, and in the year preceding its bankruptcy had had revenues of only US$ 30,000.
(…)

30. As for the other Claimants: Mr Azinian had no relevant experience, had a long record of unsuccessful commercial litigation, and had been declared personally bankrupt in 1991. (…) Mr Goldenstein was never a shareholder in Global Waste but addressed Mexican authorities on its behalf.
(…)
31. None of this background was disclosed to the Naucalpan authorities. The Naucalpan authorities thus entrusted a public service to foreign individuals whom they were falsely led to believe were part of an experienced concern possessed of financial and

technological resources adequate for the job.
(…)

V. RELIEF SOUGHT

75. The Claimants contend that "the City's wrongful repudiation of the Concession Contract violates Articles 1110 ("Expropriation and Compensation") and 1105 ("Minimum Standard of Treatment") of NAFTA" (…)
(…)
VI. VALIDITY OF THE CLAIM UNDER NAFTA
(…)
C. The contention that the annulment was an act of expropriation
(…)
The logical starting point is to examine the asserted original invalidity of the Concession Contract. If this assertion was founded, there is no need to make findings with respect to performance; nor can there be a question of curing original invalidity.
(…)
121. By way of a final observation, it must be said that the Claimants' credibility suffered as a result of a number of incidents that were revealed in the course of these arbitral proceedings, and which, although neither the Ayuntamiento nor the Mexican courts would have been aware of them before this arbitration commenced, reinforce the conclusion that the Ayuntamiento was led to sign the Concession Contract on false pretences. It is hard to ignore the consistency with which the Claimants' various partners or would-be partners became disaffected with them.
(…)
123. The credibility gap lies squarely at the feet of Mr Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with. Whether the issue was how non-U.S. nationals could de facto operate a Subchapter S corporation, how the importer of vehicles might identify the ostensible seller and the ostensible price to the customs authorities, or how a cheque made out to an official – as reimbursement of a luncheon – but endorsed back to the payer might still be presented as evidence of payment under a lease, Mr Goldenstein seemed to believe that such conduct is not only acceptable in business, but a sign of worldly competence.
(…)
124. The Arbitral Tribunal obviously disapproves of this attitude, and observes that it comforts the conclusion that the annulment of the Concession Contract did not violate the Government of Mexico's obligations under NAFTA. (…)

2-2-4-5. Feldman

From the U.S. State Department Website
http://www.state.gov/s/l/c3751.htm

Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States

Marvin Feldman, a U.S. citizen, has submitted claims on behalf of CEMSA against Mexico under the ICSID Additional Facility Rules. The notice asserts that CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico since 1990, was allegedly denied the benefits of a law that allowed certain tax refunds to exporters. Feldman claims expropriation under NAFTA Article 1110 based on Mexico's refusal (1) to implement a 1993 Mexican Supreme Court decision in CEMSA's favor ordering a refund of taxes paid, and (2) to refund taxes on cigarettes CEMSA exported in 1997. CEMSA claims approximately US$40 million in damages.

Prior to CEMSA's claims being submitted to arbitration, the United States and Mexico agreed pursuant to NAFTA Article 2103, which governs taxation measures, that one of CEMSA's claims, which was based on certain Mexican tax legislation, could not be pursued.

On December 16, 2002, the tribunal issued an award dismissing the investor's claim of expropriation but upholding the claim of a violation of the national treatment obligation.

(…)

International Centre for Settlement of Investment Disputes
AWARD (DEC. 16, 2002)

(…)

H. MERITS
(…)
H1. Expropriation: Overview of the Positions of the Disputing Parties

89. In this proceeding, the Claimant’s key contention is that the various actions of Mexican authorities, particularly SHCP, in denying the IEPS rebates on cigarette exports to CEMSA, resulted in an indirect or “creeping” expropriation of the Claimant’s

investment and were tantamount to expropriation under Article 1110. They were also arbitrary, confiscatory and discriminatory, a violation of the Claimant's right to due process (see memorial, Introduction and Summary, p. 6; first Swan's affidavit, paras. 30-34). The Claimant asserts that the "measures" he has complained about may also be characterized as a "denial of justice" (one aspect of denial of due process) under article 1110 (memorial, paras. 189-203). Nor does the Claimant believe that the Mexican government policy of limiting cigarette exports is justified by public policy concerns, particularly in light of the stated purpose of the IEPS law in 1980, which was to encourage Mexican exports (memorial, para. 189, quoting Statement of Purpose of IEPS Law for 1981, Diario Oficial, Dec. 30, 1980).
(…)

H2. Applicable Law: NAFTA Article 1110 and International Law
(…)

100. Most significantly with regard to this case, Article 1110 deals not only with direct takings, but indirect expropriation and measures "tantamount to expropriation," which potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights. The Tribunal deems the scope of both expressions to be functionally equivalent. Recognizing direct expropriation is relatively easy: governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control. However, it is much less clear when governmental action that interferes with broadly-defined property rights -- an investment" under NAFTA, Article 1139 – crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line.

101. By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation. If the measures are implemented over a period of time, they could also be characterized as "creeping," which the Tribunal also believes is not distinct in nature from, and is subsumed by, the terms "indirect" expropriation or "tantamount to expropriation" in Article 1110(1). (…)

102. Ultimately, decisions as to when regulatory action becomes compensable under article 1110 and similar provisions in other agreements appear to be made based on the facts of specific cases. This Tribunal must necessarily take the same approach.
(…)

H3. Respondent's Actions as an Expropriation Under Article 1110.
(…)

110. No one can seriously question that in some circumstances government regulatory activity can be a violation of Article 1110. For example, in *Pope & Talbot*, Canada argued that "mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required." That tribunal rejected this approach:

> Regulations can indeed be characterized in a way that would constitute creeping expropriation... Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation. (*Id., para.* 99.)

However, the *Pope & Talbot* tribunal failed to find a violation of Article 1110 in that case. This Tribunal finds the legal arguments against a finding of expropriation more persuasive, for reasons described in detail below, and reaches the same conclusion on facts very different from those in *Pope & Talbot*.

111. This Tribunal's rationale for declining to find a violation of Article 1110 can be summarized as follows: (1) As *Azinian* suggests, not every business problem experienced by a foreign investor is an expropriation under Article 1110; (…) (3) at no relevant time has the IEPS law, as written, afforded Mexican cigarette resellers such as CEMSA a "right" to export cigarettes (...); and (4) the Claimant's "investment," the exporting business known as CEMSA, as far as this Tribunal can determine, remains under the complete control of the Claimant, in business with the apparent right to engage in the exportation of alcoholic beverages, photographic supplies, contact lenses, powdered milk and other Mexican products--any product that it can purchase upon receipt of invoices stating the tax amounts-- and to receive rebates of any applicable taxes under the IEPS law. While none of these factors alone is necessarily conclusive, in the Tribunal's view taken together they tip the expropriation / regulation balance away from a finding of expropriation.
(…)

2-2-4-6. Methanex

Methanex Corp. v. United States of America

http://www.state.gov/s/l/c5818.htm (From the U.S. State Department's Website)

Methanex Corporation, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL rules on its own behalf for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE.

Methanex contended that a California Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claimed damages of $970 million.

A hearing on jurisdiction and admissibility was held in July 2001. On August 7, 2002, the Tribunal issued a First Partial Award on issues of jurisdiction and admissibility. A hearing on the merits was held in June 2004.

On August 9, 2005, the Tribunal released the Final Award, dismissing all of the claims. The Tribunal also ordered Methanex to pay the United States' legal fees and arbitral expenses in the amount of approximately $ 4 million. The award and other documents appear on this page.

(…)

PART IV - CHAPTER D
ARTICLE 1110 NAFTA

(…)

(3) THE TRIBUNAL'S DECISION REGARDING ARTICLE 1110 NAFTA

(…)

7. In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign

investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.
(…)
9. No such commitments were given to Methanex. (…) Methanex appreciated that the process of regulation in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists. Methanex itself deployed lobbyists. Mr Wright, Methanex's witness, described himself as the government relations officer of the company.

10. Methanex entered the United States market aware of and actively participating in this process. It did not enter the United States market because of special representations made to it. Hence this case is not like *Revere*, where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured.
(…)

15. For reasons elaborated here and earlier in this Award, the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.
(…)

2-3. Amicus Brief

2-3-1. Methanex

http://www.state.gov/s/l/c5818.htm

I - INTRODUCTION

1. On 25th August 2000, a petition was submitted to the Tribunal by the International Institute for Sustainable Development requesting permission to submit an amicus curiae brief to the Tribunal (the "Institute Petition"). On 6th September 2000, a joint Petition was submitted to the Tribunal by (i) Communities for a] Better Environment and (ii) the Earth Island Institute for permission to appear as amicus curiae (the "Communities/Earth Island Petition").

2. On 7th September 2000, the requests contained in these petitions were addressed by the Claimant and the Respondent at the Second Procedural Hearing, which was also attended by the legal representative from Mexico. At this point, only the Claimant had filed written submissions on the issue of intervention (on 31st August 2000), and these were directed to the Institute Petition only. The Tribunal decided not to rule upon the Petitions at the Hearing. Under Item 3 of the Minutes of Order of that Hearing, as modified on 10th October 2000, the Tribunal laid down a timetable for written submissions on the issue of intervention by third persons as amicus curiae, to be decided by the Tribunal as a general principle.
(…)

II - SUMMARY OF THE PETITIONERS' REQUESTS

5. The Institute: The Institute Petition contained requests for permission (i) to file an amicus brief (preferably after reading the parties' written pleadings), (ii) to make oral submissions, (iii) to have observer status at oral hearings. Permission was sought on the basis of the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region. It was also contended that the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable

development; and that the Institute could assist the Tribunal in this respect. A further point was made that participation of an amicus would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA. As to jurisdiction, it was argued that the Tribunal could grant the Petition under its general procedural powers contained in Article 15 of the UNCITRAL Arbitration Rules, and that there was nothing in Chapter I 1 to prevent the granting of the permission requested by the Institute. Reference was also made to the practice of the WTO Appellate Body and courts in Canada and the United States.

(…)

III - SUMMARY OF SUBMISSIONS BY MEXICO AND CANADA

9. Mexico: Mexico stressed that Chapter 11 of NAFTA did not provide for the involvement of persons other than the Disputing Parties and NAFTA Parties on questions of the interpretation of NAFTA pursuant to Article 1128. It contended that if amicus curiae submissions were allowed, the amici would have greater rights than the NAFTA Parties themselves because of the limited scope of Article 1128 submissions. Such a result was clearly never intended by the NAFTA Parties; and it could lead to the abrogation of Article 1128 by NAFTA Parties submitting amicus briefs where they wished to make submissions on issues other than the interpretation of NAFTA. Mexico argued that the Tribunal's authority to appoint experts was limited by Article 1133 of NAFTA (i.e. subject to the disapproval of the Disputing Parties). In any event, amici were not to be confused with independent experts. In addition, Mexico noted that the there was no power under Mexican law for its domestic courts to receive amicus briefs. The Chapter 11 dispute settlement mechanism established a careful balance between the procedures of common law states, Canada (at least in part) and the United States, on the one hand and on the other a civil law state, Mexico. The existence of a specific procedure in one Party's domestic state court procedure did not mean that it could be transported to a transnational NAFTA arbitration.

10. Canada: Canada adopted a different approach from Mexico. In its written submissions, Canada stated its support for greater openness in arbitration proceedings under Chapter 11 of NAFTA. Although mindful of the confidentiality obligations imposed by Article 25(4) of the UNCITRAL Arbitration Rules, Canada supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible. Canada contended that in this case, without prejudice to its position in other arbitration under NAFTA Chapter 11, the Tribunal should accept the written submissions of the Petitioners, notwithstanding that only NAFTA Parties have the right to make submissions

on questions of the interpretation of NAFTA Canada also stated that it would be asking its NAFTA partners to work together on the issue of amicus curiae participation as a matter of urgency in order to provide guidance to arbitration tribunals under Chapter 11.

IV - SUMMARY OF SUBMISSIONS BY THE DISPUTING PARTIES

11. The Disputing Parties responded differently to the Petitioner's requests for intervention, The Respondent, as summarised later below, requested the Tribunal to accept part of the Petitioner's requests. The Claimant sought the dismissal of these petitions under three principal headings: (i) confidentiality, (ii) jurisdiction, (iii) fairness of process.

(i) The Claimant

12. Confidentiality: As to confidentiality, the Claimant relied on Article 25(4) of the UNCITRAL Arbitration Rules to the effect that hearings are to be held in camera.
(…)
13. Jurisdiction: As to jurisdiction, the Claimant argued that the Tribunal had no jurisdiction to add a party to the proceedings without the agreement of the parties.
(…)
14. Fairness: As to fairness, the Claimant contended that the protection of the public interest was ensured by Article 1128 of NAFTA. Private interest groups wishing to put their views before an arbitration tribunal could convey their information to the NAFTA Parties, who had the right to intervene where there was a question of interpretation of NAFTA. Further, any of the Disputing Parties would be in a position to call upon the Petitioners to offer their testimony as evidence in the proceedings, whereas if the Petitioners were to appear as amici curiae, the Disputing Parties would have no opportunity to test by cross-examination (in particular) the factual basis of their contentions. In addition, granting to the Petitioners amici status would substantially increase the costs of proceedings and require the Claimant to respond to the submissions of others in a way not contemplated by NAFTA. An undesirable precedent would be set and other groups might be encouraged to seek to appear as amici in arbitration under Chapter 11 of NAFTA.
(…)

(ii) The Respondent

16. The Respondent contended (i) that the procedural rules governing the arbitration permitted the acceptance of amicus submissions, and (ii) that amicus submissions were suitable when likely to assist the Tribunal and should then be allowed by the Tribunal.

17. Power. The Respondent argued that there was an inherent flexibility in the UNCITRAL Arbitration Rules, to be applied in the context of the particular dispute. The powers under the UNCITRAL Arbitration Rules should be exercised in a manner commensurate with the public international law aspects of the case and the fact that it implicated substantial public interests.
(…)

20. Similarly, the Respondent contended that there was nothing in Chapter 11 of NAFTA to prohibit the acceptance of amicus submissions. Article 1128 of NAFTA gave rights to Non-Disputing Parties, leaving untouched the question of how the Tribunal might exercise its discretion to permit submissions from other non-parties. There was therefore no question of amici being granted greater rights than the NAFTA's State Parties. In this respect, the Respondent referred to the rejection of a similar argument in the WTO context: Hot-Rolled Lead and Carbon Steel, paragraph 41 [WT/DS 138/AB/R]. In
addition, it was contended that Articles 1126(10) and 1137(4) of NAFTA recognised the public interest involved in NAPA arbitrations in demonstrating that the NAFTA Parties expected the substance of each Chapter 11 dispute and most awards to be made publicly available. Responding to the argument raised by Mexico that the Tribunal's authority to appoint experts was limited to Article 1133 of NAFTA, the Respondent maintained that amid did not fulfill the same function as Tribunal appointed experts; and Article 1133 was therefore irrelevant.
(…)

V - THE TRIBUNAL'S REASONS AND DECISION

(…)
Article 15(1) of the UNCITRAL Arbitration Rules grants to the Tribunal a broad discretion as to the conduct of this arbitration, subject always to the requirements of procedural equality and fairness towards the Disputing Parties. It provides, broken down into numbered sub-paragraphs for ease of reference below, as follows:
“[1] Subject to these Rules, [2] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, [3] provided that the parties are treated with equality and that at any stage in the proceedings each party is given a, full opportunity of presenting its case. "

This provision constitutes one of the essential "hallmarks" of an international arbitration under the UNCITRAL Arbitration Rules, according to the travaux preparatoires. Article 15 has also been described as the "heart" of the UNCITRAL Arbitration Rules: and its terms have since been adopted in Articles 18 and 19(2)of the UNCITRAL Model Law on International Commercial Arbitration, where these provisions were considered as the procedural "Magna Carta" of international commercial arbitration. Article 15(1) is plainly a very important provision.
(…)

(i) The General Scope of Article 15(1) of the UNCITRAL Arbitration Rules

(…)
30. However, in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration.
(…)
31. The Tribunal considers that allowing a third person to make an amicus submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules. The warding of the subparagraph numbered [2] of Article 15(1) suffices, in the Tribunal's view, to support its conclusion: but its approach is supported by the practice of the Iran-US Claims Tribunal and the World Trade Organization.
(…)
(ii) Safeguarding Equal Treatment

35. The Tribunal notes the argument raised by the Claimant to the effect that a burden will be added if amicus submissions are presented to the Tribunal and the Disputing Parties seek to make submissions in response. That burden is indeed a potential risk. It is inherent in any adversarial procedure which admits representations by a non-party third person.

36. However, at least initially, the burden in meeting the Petitioners' written submissions would be shared by both Disputing Parties; and moreover, that burden cannot be regarded as inevitably excessive for either Disputing Party. As envisaged by the Tribunal, the Petitioners would make their submissions in writing, in a form and

subject to limitations decided by the Tribunal. The Petitioners could not adduce the evidence of any factual or export witness; and it would not therefore be necessary for either Disputing Party to cross-examine a witness proffered by the Petitioners: there could be no such witness. As to the contents of the Petitioners' written submissions; it would always be for the Tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of those submissions were arguably to constitute written "evidence", the Tribunal would still retain a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight. Of course, if either Disputing Party adopted a Petitioner's written submissions, the other Disputing Party could not then complain at that burden: it was always required to meet its opponent's case; and that case, however supplemented, can form no extra unfair burden or unequal treatment.

(…)

(iv) Other UNCITRAL Arbitration Rules

(…)

(Confidentiality)

46. This is however a difficult area; and for present purposes, the Tribunal does not have to decide the point. Confidentiality is determined by the agreement of the Disputing Parties as recorded in the Consent Order regarding Disclosure and Confidentiality, forming part of the Minutes of Order of the Second Procedural meeting of 7th September 2000. As amid have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any rights at all), they are to be treated by the Tribunal as any other members of the public. Accordingly materials may be disclosed only as allowed in the Consent Order. Of course, pursuant to paragraph 3 of that Order, either party is at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain (subject to redaction of Trade Secret Information). That is however a matter for the Disputing Parties and not the Tribunal.

(…)

VI - THE TRIBUNAL'S ORDER

53. For the reasons act out above, pursuant to ,Amide 15(1) of the UNCITRAL Arbitration Rules, the Tribunal declares that it has the power to accept amicus written submissions from the Petitioners; whilst it is at present minded to receive such submissions subject to procedural limitations still to be determined by the Tribunal (to be considered with the Disputing Parties), it will make a final decision whether or not to receive them at a later stage of these arbitration proceedings; and accordingly the Petitions are accepted by the Tribunal to this extent, but otherwise rejected.

(…)

2-3-2. UPS

http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp

THE REQUESTS

1. The Canadian Union of Postal Workers (the Union) and the Council of Canadians (the Council) have petitioned the Tribunal requesting

> (i) standing as parties to any proceedings that may be convened to determine the claim made by UNITED PARCEL SERVICE OF AMERICA, INC. (UPS) in this matter;
>
> (ii) in the alternative, should the status as party be denied to one or both Petitioners, the right to intervene as amicus curiae in such proceedings to be accorded on terms that are consistent with the principles of fairness, equality and fundamental justice;
>
> (iii) disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal;
>
> (iv) the right to make submissions concerning the place of arbitration;
>
> (v) the right to make submissions concerning the jurisdiction of this Tribunal, and, once they are fully known, the arbitrability of the matters the disputing investor has raised; and,
>
> (vi) an opportunity to amend this Petition as further details of this claim become known to the petitioners.

(…)

THE TRIBUNAL'S OPINION AND CONCLUSION ON THE POWER TO ADD PARTIES

35. The Tribunal is established under and has the powers conferred by NAFTA, particularly Section B of Chapter 11. (…)

36. None of those provisions confers authority to add parties to the arbitration either generally or in the present circumstances. The disputing parties have consented to arbitration only in respect of the specified matters and only with each other and with no other person. (…)

63. We consider that article 15(1) supports a power to allow submissions by amici curiae.

64. In support of that conclusion, we call attention to the practice mentioned by the Methanex Tribunal of the Iran – US Claims Tribunal and the WTO Appellate Body which supports a power (but no duty) to receive third party submissions : Iran v United States case A/15 Award No. 63 – A/15 – FT; 2 Iran – US CTR 40, 43; and Hot Rolled Lead and Carbon Steel, order of the Appellate Body of the WTO. (..)

65. We do not see as decisive for the existence of the power in article 15 the presence or absence of amicus rules in the domestic law of the NAFTA Parties. The matter is to be determined under international law, especially NAFTA incorporating the UNCITRAL rules. Nor do we see the existence of the power as trenching on the rights of the NAFTA Parties. To repeat, the particular matter which is subject to arbitration remains unchanged. The disputant parties' rights remain unchanged. In particular their rights to fairness and equal treatment under article 15(1) remain and the power of the Tribunal to control the arbitral process, within the limits placed on it by NAFTA and other relevant rules, also provides safeguards.
(…)

THE REQUIREMENT OF EQUALITY AND OF THE FULL OPPORTUNITY OF PARTIES TO PRESENT THEIR CASE

The requirement of equality and the parties' right to present their cases do limit the power of the Tribunal to conduct the arbitration in such manner as it considers appropriate. That power is to be used not only to protect those rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner. The power of the Tribunal to permit amicus submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process (…)

THE TRIBUNAL'S ORDER

73. The Tribunal declares that it has power to accept written amicus briefs from the Petitioners. It will consider receiving them at the merits state of the arbitration following consultation with the parties, excersing its discretion in the way indicated in this decision and in accordance with relevant international judicial practice. In all other respects the Petitions are rejected.
(…)

2-4. Other Procedural Issues

2-4-1. Res judicata

Waste Management, Inc.
v.
United Mexican States

(ICSID Case No. ARB(AF)/00/3)

Mexico's Preliminary Objection concerning the Previous Proceedings

Decision of the Tribunal

http://www.dfait-maeci.gc.ca/tna-nac/waste_manage-en.asp

Background from the US State Department Website
http://www.state.gov/s/l/c3753.htm

Waste Management, Inc. v. United Mexican States

In 1998, USA Waste Services, Inc. (now Waste Management, Inc.), a U.S. waste disposal company, filed claims against Mexico under the ICSID Additional Facility Rules alleging breaches of NAFTA Articles 1105 and 1110. The notice of arbitration asserted that the State of Guerrero and the municipality of Acapulco granted a 15-year concession to USA Waste's Mexican subsidiary, Acaverde, in 1995 for public waste management services (street cleaning, landfilling, etc.), but failed to comply with payment and other obligations set forth in the concession agreement despite full performance by Acaverde. It also asserted that Banobras, a Mexican bank that had issued an unconditional guarantee for the payment, arbitrarily refused to honor the payment guarantee. Waste Management claimed damages of US$60 million.

A jurisdictional hearing was held in the case on January 31, 2000. The Tribunal issued an

award on June 2, 2000, dismissing the investor's claim for lack of jurisdiction. The Tribunal held that Waste Management had failed to submit a valid waiver and that the case therefore was improperly before the Tribunal.

Waste Management resubmitted its case, which ICSID registered on September 27, 2000. Following a jurisdictional hearing in early February 2002, the Tribunal issued an unanimous award on June 26, 2002, rejecting Mexico's objections to the Tribunal's jurisdiction over Waste Management's resubmitted case.
(…)

2. This was the second occasion on which the Claimant had brought proceedings in respect of its claim. On the first occasion a Tribunal (consisting of Mr. Bernardo Cremades, President; Messrs. Keith Highet and Eduardo Siqueiros T.) held by majority that it lacked jurisdiction. The reason was a breach by the Claimant of one of the requirements laid down by NAFTA Article 1121 (2) (b) and deemed essential in order to proceed with submission of a claim to arbitration; viz., the waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA, which waiver has to be included in the submission of the claim to arbitration. The Tribunal held that the waiver deposited with the first request did not satisfy Article 1121 and that this defect could not be made good by subsequent action on the part of the Claimant.

3. In these second proceedings (as we will call them), the Claimant’s submission was accompanied by an unequivocal waiver in terms of Article 1121. The Respondent now argues, however, that the effect of the first unsuccessful proceedings is to debar the Claimant from bringing any further claim with respect to the measure that is alleged to be a breach of NAFTA. (…)

The principle of res judicata

38. Alternatively, the Respondent argued that, even if the first Tribunal had not actually considered the merits of the claim, it had nonetheless effectively dealt with the merits in dismissing the claim for want of jurisdiction. This decision was res judicata and bound the Claimant in the present proceedings. The Claimant on the other hand argued that the principle of res judicata only applies to those questions which the first Tribunal actually decided, and that its decision was limited to the interpretation of Article 1121 and the effect of an invalid waiver.

39. There is no doubt that res judicata is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice. Indeed both parties accepted this. However, a judicial decision is only res judicata if it is between the same parties and concerns the same question as that previously decided.
(…)

43. Thus there is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction.44 The same is true of decisions concerning inadmissibility. As Amerasinghe notes:
"the success of an objection based on the [exhaustion of local remedies] rule has never been regarded as rendering the case res judicata, as might otherwise be logically required if the rule is considered truly one of substance pertaining to the merits of the case. The success of such an objection has always had the effect of delaying the justiciability of a claim on the basis that it is inadmissible because of a defect in the procedure of litigation…"

It is not necessary for present purposes to explore the distinction between "substance" and "procedure", which is not necessarily the same as the distinction between jurisdiction or admissibility on the one hand and the merits of a claim on the other. The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute res judicata as to those merits.
(…)

46. The difficulty for the Respondent in the present case, however, is that there is no indication in the Award of the first Tribunal that it considered any issue pertaining to the merits, let alone that it decided any such issue. It is true that the first Tribunal considered aspects of the proceedings brought by the Claimant in Mexico. But it did so only with a view to determining the relation between those proceedings and the NAFTA claim, and only for the purpose of deciding on the validity of the waiver. In the circumstances, therefore, there was no decision by the first Tribunal between the parties which would constitute a res judicata as to the merits of the claim now before us.

47. In reaching this conclusion, the present Tribunal in no way denies the value of the principle of res judicata, nor its potential application in the present proceedings to the extent that any issue already decided between the parties may prove to be relevant at a later stage. In this respect it draws attention to what was said in Azinian v. United

Mexican States: a NAFTA tribunal does not have “plenary appellate jurisdiction” in respect of decisions of national courts, and whatever may have been decided by those courts as to national law will stand unless shown to be contrary to NAFTA itself.
(…)

2-4-2. Waiver

CASE Num. ARB(AF)/98/2
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

BETWEEN:
WASTE MANAGEMENT, INC.
Claimant
and
UNITED MEXICAN STATES
Respondent

ARBITRAL AWARD

Before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement, and comprised of:

Mr. Keith Highet
Mr. Eduardo Siqueiros T.
Mr. Bernardo M. Cremades (President)

Date of dispatch to the parties: June 2, 2000

http://www.dfait-maeci.gc.ca/tna-nac/waste_manage-en.asp

(…)
§7 The question of this Arbitral Tribunal's jurisdiction arises from the point in time when the Claimant deemed that, in the terms submitted, the waiver conformed in all respeects to the provisions of NAFTA Article 1121, and the Mexican Government, on the contrary, deemed that said waiver had not been couched in the form required by said Article nor had the Claimant's subsequent contduct been consistent with the terms of such waiver.
(…)
C. CONDITIONS PRECEDENT TO SUBMISSION OF A CLAIM TO ARBITRATION

§14 Under NAFTA Article 1121 a disputing investor may submit to arbitration proceedings, to quote literally, "Only if" certain prerequisites are met, comprising, in general terms, consent to and waiver of determined rights.

In the light of this Article, it is fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration held in accordance with the dispute settlement procedure established under Chapter XI of said legal text. Accordingly, it thus falls to this Tribunal: to monitor the production, both of the consent and of the waiver, in the terms laid down by NAFFA Article 1121; and, in addition, when it comes to ascertaining the existence of a genuine show of intent in line with the terms required in the waiver, to evaluate the conduct of the waiving party vis-à-vis effective compliance therewith.

§15 However, this Tribunal is unable to agree with the assertions put forth by the Mexican Government to the effect that the purported function of the Arbitral Tribunal, in view of Article 1121, is to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding, in order to comply with the procedure established under NAFTA Chapter XI Section B, and, in this manner, validate or perfect the consent to said Treaty. This Tribunal cannot but reject such an interpretation, since it lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one.

In this case, it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals.

a. Consent to arbitration by the Parties to the dispute

§ 16 The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.

In light of this affirmation, this Tribunal deems it necessary to analyse, albeit only briefly, the treatment that NAFTA Chapter XI accords to consent of the parties, when it comes to submitting a claim to arbitration under the dispute settlement procedure established therein.

NAFTA Article 1122, paragraph one, reads as follows:

> "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

From the literal tenor of this Article, it is understood, for those effects of interest to us at present, that fulfilment, inter alia, of the prerequisites laid down in Article 1121, would translate as consent by NAFTA signatory parties to the dispute settlement procedure established under NAFTA Chapter XI, Section B.

§17 On the basis of the above, it is the understanding of this Tribunal that any analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 calls for the utmost attention, since fulfilment thereof opens the way, ipso facto, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to said international treaty.

Accordingly, this Arbitral Tribunal proposes to undertake a detailed analysis of the scope and content of the waiver required under NAFTA Article 1121.

b. Waiver required under NAFTA Article 1121

(i) Concept and scope of the waiver

§18 The act of waiver per se is a unilateral act, since its effect in terms of extinguishment is occasioned solely by the intent underlying same. The requirement of a

waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.

Whatever the case, any waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which is at all dubious.

On the basis of the foregoing, any waiver submitted pursuant to the provisions of NAFTA Article 1121(2)(b) must, depending upon the petition or request filed, be clear in all its terms with regard to abdication of given rights by the party proposing to make said waiver.

(ii) Time at which the waiver comes into force

§19 NAFTA Article 1121, paragraph three, provides that the waiver shall be included in the submission of a claim to arbitration.
In this regard, NAFTA Article 1137(1)(b) states:

> " 1. A claim is submitted to arbitration under this Section when:
>
> > b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General;"

In light of these rules, it is evident that submission of the waiver must take place in conjunction with that of the notice mandated by Article 2 of the Additional Facility Arbitration Rules, and that from this date it will come into full force and effect with regard to the commitment acquired by the waiving party to comply with all the terms thereof.

In the case in point, and for the purposes hereof, WASTE MANAGEMENT submitted notice of request for arbitration to the Secretary-General of ICSID on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.

(iii) Formal requirements of the waiver submitted by WASTE MANAGEMENT

§20 Any waiver, and by extension, that one which is now the subject of debate, implies a formal and material act on the part of the person tendering same. To this end, this Tribunal will therefore have to ascertain whether WASTE MANAGEMENT did indeed submit the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.
(…)

§22 A distinction has traditionally been drawn between so-called ad substantiam or ad solemnitatem and ad probationem formalities. The former are those that require a class of legal act in order to exist or come into being. In their case, form is substance, in that the transactions, dealings or acts do not exist as such, unless they are executed in the legally regulated form.

The ad probationem form is only required as evidence of legal transactions, dealings or acts. It in no way conditions the effectiveness of legal acts, other than in the sense of being thoroughly "legitimated", whereby it is established that it may only be proved by means of the legally prescribed form. However, the actual existence and validity of the dealing or act is unimpaired by the lack of its observance.

The subsumption of the above considerations into the terms of NAFTA Article 1121 translates as the need for any waiver submitted by an aggrieved investor to comply with certain formal or ad substantiam requisites clearly set out in paragraph three:

"A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. "

§23 This Article is clear when it comes to establishing the formalities for said waiver: presentation of the waiver in writing, delivery to the disputing party and inclusion in the submission of the claim to arbitration. All these requisites were duly complied with by the Claimant, as is evident from the written text that was dispatched by same to the disputing Party and registered on 30 June 1998, and subsequently included in the notice of request for arbitration dated 29 September of that same year.
(…)

(iv) Material requirements of the waiver submitted by WASTE MANAGEMENT.

§24 As has been pointed out by this Arbitral Tribunal, the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued.

Indeed, such a declaration of intent must assume concrete form in the intention or resolve whereby something is said or done (conduct of the deponent). Hence, in order for said intent to assume legal significance, it is not suffice for it to exist internally. Instead, it must be voiced or made manifest, in the case in point by means of a written text and specific conduct on the part of the waiving party in line with the declaration made.
(…)

§25 Hence, by subjecting the Claimant's conduct to scrutiny, this Arbitral Tribunal will hereupon proceed to verify the public manifestation of the declaration of intent that said Claimant expressed in the waiver referred to in NAFTA Article 1121.

In the following order of consideration and by means of an analysis of the statements and documentation furnished by the Parties, this Arbitral Tribunal deems the following points of fact proven with respect to internal proceedings initiated by ACAVERDE prior and/or subsequent to the tendering of the NAFTA Article 1121 waiver:
(…)

(v) Conduct prohibited by waiver of Article 1121 of the NAFTA

§26 Finally, and given the Claimant’s interpretation concerning actions that it may bring before other courts or tribunals without violating the content of the waiver estaiblished in Article 1121 of the NAFTA, this Arbitral Tribunal deems it necessary to define the conduct proscribed by that Article, even thoug its wording is clear and should not lead to any confusion or deviation.
(…)

§27. It remains clear that at no time did WASTE MANAGEMENT intend to abandon the domestic proceedings, rather, on the contrary, its manifest intention was to continue legal proceedings against BANOBRAS and ACAPULCO, as revealed by the communication sent by the Claimant's representative to the Mexican Government's representative on 10 February 1999, in which it is established that:

"...Regarding your request about the ongoing arbitration proceeding in Mexico, we do not believe that our client is required to suspend any proceedings in Mexico that it is

otherwise entitled to institute."
(…)

§28 In conclusion, an interpretation such as the one proposed by the Claimant and which, as seen by the documentation provided, has been used, conflicts with the purpose of the waiver established in NAFTA Article 1121, the wording of which clearly sets forth the spirit and intent of said waiver, which expressly proscribes the initiation or continuation of proceedings under the law of either party with respect to a measure allegedly breaching the provisions referred to in Article 1116 of NAFTA. It is clear that the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings.
(…)

§30 Based on the foregoing, it is clear that the Claimant issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121, since it continued with the proceedings initiated against BANOBRAS after the date of submission of the waiver, 29 September 1998, until all avenues of recourse had been exhausted. Likewise, it has also been shown that subsequent to submission of this claim for arbitration, ACAVERDE initiated arbitral proceedings against ACAPULCO, which are still ongoing today, although ACAVERDE requested the return of documents based on its action of 7 July 1999, as revealed by the documentation accompanying its memorial, despite the fact that the pertinent forum, i.e. the Arbitral Tribunal, had not declared the arbitral proceeding closed.
(…)

IV. ARBITRAL AWARD

On weighing up all that has been set forth hereinabove, the documentary exhibits and pleadings drawn up by the parties, this Arbitral Tribunal is compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA, the aforesaid being in overall accordance with the provisions of said legal text and the ICSID Additional Facility. (…)

III. Reservation

Source: International Trade Strategies Pty Ltd, NAFTA Chapter 11 – Issues and Opportunities, Research paper on NAFTA Chapter 11 and its use for illuminating debate on investment provisions in an Australia-US FTA, July 2002

http://www.apec.org.au/docs/fta2mcm.pdf

Table 1. Sectoral Reservations to NAFTA Chapter 11, by country.

Canada	Mexico	United States
Cultural Industries; air transport; social services and agriculture.	Energy; air transport; rail transport; agriculture; post services; media ownership; and social services.	Maritime transport; air transport, radio communications; social services and agriculture.

Table 2. Reservations in the Annexes to NAFTA as they pertain to Chapter 11.

Annex Number	Pertains to Chapter Eleven	Chapter 11 Articles Covered	Extent of Coverage
1	Yes	National Treatment (1102) MFN (1103), local presence (1105), performance requirements (1106) , and nationality requirements (1107).	Existing, non-conforming measures maintained (2 years for states and provinces to add their own restrictions).
2	Yes	Same as above.	Existing, non-conforming measures maintained and reservations of right to adopt new or more restrictive measures in sectors and activities listed.
3	Yes	Blanket Coverage.	Constitutional restrictions reserving complete control of certain sectors for the Mexican state.
4	Yes	MFN (1103).	Existing international arrangements, any international agreements negotiated within two years, and any future agreements dealing with aviation, fisheries, maritime matters, and telecommunications.
5	Yes	None.	Existing, non-discriminatory measures which the parties commit to trying to liberalize (1 year for states and provinces to add restrictions).

6	No	None. (Pertains to Various Articles in Chapter 12 – Cross Border Provision of Services).	-
7	No	None. (Various Articles in Chapter 14 – Financial Services).	-

Source: Alan M Rugman and Michael Gestrin, "The Investment Provisions of NAFTA", in Steven Globerman and Michael Walker, eds., *Assessing NAFTA: A Trinational Analysis* (Vancouver: Fraser Institute, 1993) pp. 271-92.

IV. Additional Resources and References (Optional Reading)

4-1. Comparative Approach

4-1-1. WTO Investment Regime

Investment and competition: what role for the WTO?
http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey6_e.htm

Work in the WTO on investment and competition policy issues so far has largely taken the form of specific responses to specific trade policy issues, rather than a look at the broad picture.

New decisions reached at the 1996 ministerial conference in Singapore change the perspective. The ministers decided to set up two working groups to look more generally at the relationships between trade, on the one hand, and investment and competition policies, on the other.

The working groups' tasks are analytical and exploratory. They will not negotiate new rules or commitments. The ministers made clear that no decision has been reached on whether there will be negotiations in the future, and that any discussions cannot develop into negotiations without a clear consensus decision. Both working groups must report to the General Council which will decide at the ed of 1998 what should happen next.

The ministers also recognized the work underway in the UN Conference on Trade and Development (UNCTAD) and other international organizations. The working groups are to cooperate with these organizations so as to make best use of available resources and to ensure that development issues are fully taken into account.

An indication of how closely trade is linked with investment is the fact that about one third of the $6.1 trillion total for world trade in goods and services in 1995 was trade within companies — for example between subsidiaries in different countries or between a subsidiary and its headquarters.

The close relationships between trade and investment and competition policy have long been recognized. One of the intentions, when GATT was drafted in the late 1940s, was for

rules on investment and competition policy to exist alongside those for trade in goods. (The other two agreements were not completed because the attempt to create an International Trade Organization failed.)

Over the years, GATT and the WTO have increasingly dealt with specific aspects of the relationships. For example, one type of trade covered by the General Agreement on Trade in Services (GATS) is the supply of services by a foreign company setting up operations in a host country — i.e. through foreign investment. The Trade-Related Investment Measures Agreement says investors' right to use imported goods as inputs should not depend on their export performance. (…)

Investment measures: reducing trade distortions

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#investment

The Agreement on Trade-Related Investment Measures (TRIMS) applies only to measures that affect trade in goods. It recognizes that certain measures can restrict and distort trade, and states that no member shall apply any measure that discriminates against foreigners or foreign products (i.e. violates "national treatment" principles in GATT). It also outlaws investment measures that lead to restrictions in quantities (violating another principle in GATT). An illustrative list of TRIMS agreed to be inconsistent with these GATT articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements"). It also discourages measures which limit a company's imports or set targets for the company to export ("trade balancing requirements").

Under the agreement, countries must inform the WTO and fellow-members of all investment measures that do not conform with the agreement. Developed countries have to eliminate these in two years (by the end of 1996); developing countries have five years (to end of 1999); and least developed countries seven.

The agreement establishes a Committee on TRIMS to monitor the implementation of these commitments. The agreement also says that WTO members should consider, by 1 January 2000, whether there should also be provisions on investment policy and competition policy.

4-1-2. MERCOSUR Investment Regime

General Considerations

http://www.sice.oas.org/cp061096/english/03090100.asp#mer

Agreements exist in respect of inter-zone and foreign investment. (Colonia Protocol and the Protocol of Buenos Aires.) Agreement on the treatment of intra-Mercosur investment was reached in August, 1994 (MERCOSUR\CM\DEC NO 11/93) and further agreement was reached on treatment of third country investments on in December, 1994 (MERCOSUR/CMC/DEC NRO. 11/94).

In January 1994 Mercosur State Parties signed a reciprocal investment promotion and protection agreement known as the Colonia Protocol, by which, it is understood, they committed to provide national treatment and most-favoured nation treatment to investors from the region. As a general rule, the agreement also prohibited the use of performance requirements. Common investment regulations contain provisions preventing expropriation, except on public interest grounds, as well as non-discriminatory treatment with respect to due process and prompt and fair compensation.

The Colonia Protocol on the Promotion and Protection of Reciprocal Investment in Mercosur also forbids restrictions on capital repatriation and profits in convertible currencies. It is understood that State Parties have identified a number of transitory exceptions in their coverage. Argentina has exempted from the agreement border real estate, air transportation, shipbuilding, nuclear power generation, uranium mining, insurance and fisheries. Brazil, it is understood, has exempted the exploration and exploitation of minerals, hydroelectric power, health care, telecommunications, rural property, banking and insurance services, construction and shipping. Both countries have reserved their right to maintain performance requirements in the automobile sector.

Under the dispute settlement provisions of the Brasilia Protocol, if a dispute arises between an individual investor and the host country government, the investor may seek relief under a host country court or an international arbitration mechanism. It is also understood, that the investor’s choice will be definitive and rulings with be obligatory and indisputable. With respect to Argentina, it is understood that Decree 1853 served to implement Public Law 21382 to regulate foreign investment. Argentine regulations do not require either previous authorization or registration and provides national treatment for foreign investors. Argentina has negotiated a number of bilateral investment treaties and

has adhered to the Multilateral Investment Guarantee Agency. In August of 1994, the Council adopted the Protocol of Buenos Aires for the Promotion and Protection of Investments Originating in Third Countries.

Dispute Resolution

http://www.sice.oas.org/cp061096/english/03090200.asp#mer

Provisions for State-to-State and Investor-State dispute settlement are contained in the Decisions. With respect to the Colonia Protocol on Intra-zone investment contains dispute settlement provision with respect to State-to-State disputes (Art. 8) and Investor-State disputes (Art. 9). In the case of the former, Article 8 states that disputes between Member States will be settled according to the terms and conditions set out in the Protocol of Brasilia as agreed on 17 December, 1991.

With respect to Investor-State dispute settlement, Article 9 provides in the first instance for amicable negotiations (Para 1.). If the dispute is not settled in six months (Para 2), an investor may seek resolution via national legal means (Sub-para I), international arbitration (Sub-para ii), or by a system of permanent dispute settlement that will be established under the framework of the Treaty of Asuncion (Sub-para iii). In the case of international arbitration, the investor may choose (a) CIADI or (b) the United Nations system for the settlement of investment disputes. Under Para 6, the rulings of arbitration panels are definitive and binding on the parties to the dispute. Article 10 also stipulates that the dispute settlement provisions apply to all investments made prior to the entry into force of the Agreement. Article 2, paragraphs g) and h) of the Protocol of Buenos Aires stipulates the dispute settlement mechanisms applicable between the Members and between a Member and a third country investor. For the latter, the Article provides recourse to a Tribunal from the recipient country or international arbitration (ad-hoc tribunal or an international arbitration institution).

4-1-3. Free Trade Area of the Americas (FTAA)

Second Draft Agreement, Investment Chapter

http://www.ftaa-alca.org/ftaadraft02/eng/ngine_1.asp
(…)

Article 6 FAIR AND EQUITABLE TREATMENT

[1. [Each Party] [A Party] [Each Contracting Party] [shall accord] [shall at all times ensure] [to the investments of the investors of another Party] [to the investments of investors of the other Contracting Parties made in its territory] [to covered investments of investors of the other Parties] [to the investments of another Contracting Party] [to the investors of another Party and their investments] [treatment in accordance with international law, including] fair and equitable treatment [as well as full protection and security] [as well as juridical protection and security within its territory] [in accordance with the norms and principles of international law] [in accordance with principles of international law] [and shall not impair their management, maintenance, use, enjoyment or disposal through unjustified or discriminatory measures].]

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

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

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

[4. While a smaller economy shall extend fair and equitable treatment to foreign investors at all times, any treatment less favourable than that extended to investors of other smaller economies shall not constitute an abrogation of this principle]

(…)

Article 10 EXPROPRIATION AND COMPENSATION

[1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of the other Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

(a) for a public purpose [or for reasons of public order [and] [or] social interest] [, as provided in the annex to this article] [in accordance with the national legislation of the Parties];

(b) on a non-discriminatory basis;

(c) in accordance with due process of law [and Article] [on Fair and Equitable Treatment] [__ (Minimum Standard of Treatment)]; and

(d) on payment of compensation in accordance with [paragraphs 2 through 4] [paragraphs 2, 3, 5 y 9].]

[1. No Party shall adopt measures to nationalize or expropriate, or any measure having the same effect, investments in its territory owned by investors from other Parties, unless such measures are adopted in the public or social interest, on a non-discriminatory basis and in accordance with due process of law. Such measures shall include provisions for the payment of a prompt, adequate and effective compensation.]

[1. Investments or returns of investors of a Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of another Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. The extent of such compensation is to be determined through negotiation between the Party concerned and the affected investor and shall seek to provide fair recompense for the action taken.]

[1. No Party shall expropriate or nationalize the investments of investors of another Contracting Party that are established in its territory nor enforce measures with equivalent effects, unless such measures are adopted in the cases provided for in the Political Constitutions of the Contracting Parties in accordance with the Law, on a non-discriminatory basis and upon prompt, adequate and effective compensation.]

[2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before [any expropriation measure, adopted, or in the process of being adopted, is announced or published or made known publicly in any other way.] [the expropriation took place (date of expropriation), and shall not reflect any change in value occurring because the intended expropriation had become known earlier]. Valuation criteria may include going concern value, asset value, including declared tax value of tangible property and other criteria, as appropriate, to determine fair market value.]

[2. The amount of such compensation shall be based on the market value of the expropriated investment immediately before the nationalization or expropriation was made public and shall include interest from the date of the expropriation until the date of payment.]

[2. The compensation referred to in the previous paragraph shall be equivalent to the fair price of the investment immediately before the measures were adopted or before the measures were made public, whichever is earlier, and shall include interest accrued between the date of expropriation and the date of payment. Such compensation shall be freely realizable in accordance with the article on Transfers in this Chapter.]

[3. a) Compensation shall be paid without delay and be fully realizable.]
[3. b) If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.]

[4. The amount paid as compensation shall be no less than the equivalent amount that, according to the rate of exchange prevailing on the date of the determination of the fair market value, would have been paid on such date to the investor subject to the expropriation, [in a freely usable currency in which the investment would have been made] [in a freely convertible currency in the international financial market.] Compensation shall include payment of interest from the date on which the investor has been dispossessed of [the expropriated asset] [the expropriated investment] until the date of payment, which shall be based on an average deposit rate of interest in the national banking system of the Party where the expropriation is carried out.]

[5. Upon payment, compensation shall be freely transferable as provided in Article ___ (Transfers).]

[5. Payments shall be freely transferable at the current exchange rate.]

[6. The investor affected shall have a right, under the law of the Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment or returns.]

[6. An investor whose investment was subject to the measures referred to in this article shall be entitled to a review of his case and an assessment by the competent authorities of the Contracting Party that adopted it.]

[7. For purposes of this article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of [a debt instrument] [a debt security] or loan covered by this chapter solely on the ground that the measure imposes costs on the debtor that results in default on the debt.]

[8. If one Party or one of its agencies makes a payment to an investor of a Party pursuant to an insurance against non-commercial risks to an investment of that investor, the Party in whose territory the investment was made shall recognize the subrogation of the Party, or of any of its agencies, having made such payment, to the rights or titles of the investor, for the purposes of obtaining the relevant compensation.]

[9. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.]

[10. Nothing in the provisions of this Agreement shall prevent, in accordance with the Law and to serve the public or social interest, the establishment of monopolies with the discretion to allocate revenue, subject to compensation of the investors that are deprived of their exercise of a licit economic activity. The provisions of this article shall apply in such cases.]

[11. In the event of an expropriation occurring at a time of impending foreign exchange crisis, smaller economies may be granted flexibility with respect to Aprompt, adequate and effective@ compensation and therefore a longer time period for payment, with a waiver from payment of interest rates during the extension.]
(…)
Article 13 DISPUTE SETTLEMENT

[1. The application of dispute settlement mechanisms shall be limited to acts or events that occurred or began after the entry into force of the Agreement.]

[2. Disputes that arise as a result of direct or indirect governmental administrative decisions of a regulatory or enforcement nature shall not be subject to the dispute settlement provisions of this Agreement, provided that such decisions are consistent with the legislation of the respective Party and with the articles of this Agreement regarding national treatment and most-favored-nation treatment.]

[3. Smaller economies shall be allowed access to technical assistance and an extended time period, where necessary, for dealing with state-to-state and investor-state disputes.]

[Article 14 STATE-TO-STATE DISPUTES

1. Disputes which may arise between Parties regarding the interpretation or application of the Agreement shall, to the extent possible, be settled by diplomatic channels.
If a dispute cannot be settled through diplomatic channels within a reasonable period of time, of no less than six months, the matter shall be submitted to the general dispute settlement mechanism to be established in the framework of the FTAA.]

[2. Where a large or developed State submits a dispute to the general settlement mechanism, at least half of the legal costs incurred by the smaller economy State should be borne by a Regional Integration Fund or some other hemispheric technical assistance/cooperation scheme.]]

Article 15 INVESTOR-STATE DISPUTES

[1. For purposes of this Agreement, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to investment agreement or alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.]

[2. Where an investor of a large or developed economy is involved in a dispute with a smaller economy State and the matter is submitted to arbitration, at least half of the legal costs incurred by the State should be borne out of a Regional Integration Fund.]

[2. Objective

Without prejudice to the rights and obligations of the Parties [under the Chapter on Dispute Settlement] [under Chapter XX (Dispute Settlement Procedures)] [Without prejudice to the provisions of the Negotiating Group On Dispute Settlement], this section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity [as well as due exercise of the right to a hearing and defense within the legal process before an arbitration tribunal.] [, and due process before an impartial tribunal].] (…)

4-2. Conventions (Treaties) Relating to Chapter 11

ICSID CONVENTION (CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES)

http://www.worldbank.org/icsid/basicdoc/basicdoc.htm

ICSID ADDITIONAL FACILITY RULES

http://www.worldbank.org/icsid/facility/facility.htm

UNCITRAL ARBITRATION RULES

http://www.uncitral.org/en-index.htm

4-3. Relevant Literatures

- Gloria L. Sandrino, The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective, Vanderbilt Journal of Transnational Law (1994).

> "In this Article, a less flattering view of Mexico's participation in NAFTA emerges, one that perceives the Mexican government as repudiating not only its role as guiding hand in its own economy, but also its place as the leading proponent of the Third World cautionary approach to foreign investment."

- Noemi Gal-Or, Private Party Access: A Comparison of the NAFTA and the EU Disciplines, Boston College International and Comparative Law Review (1998).

> "Private party direct access, whether to arbitration or to formal adjudication, represents an important step in enhancing trust in the established trade regime. The extent to which NAFTA offers this access is presently limited to one or two trade sectors. In this respect, the EU is significantly more advanced, but has also enjoyed a significantly longer history in which to experiment with this issue. It remains to be seen, however, if this difference will affect the economic success of both the EU and NAFTA."

- International Trade Strategies Pty Ltd, NAFTA Chapter 11 – Issues and Opportunities, Research Paper on NAFTA Chapter 11 (2002), http://www.apec.org.au/docs/fta2mcm.pdf

> "NAFTA Chapter 11's provisions have led to much controversy; however, it is not apparent that all the concern is warranted as of present. While the Chapter has broad provisions, there are specific requirements that breaches of the most controversial articles be based in fact, and that they demonstrate not simply legitimate government regulation, but discriminatory or confiscatory action. The cases which have handed down awards have worked on a narrow but pertinent interpretation of these provisions."

- Jürgen Kurtz, A General Investment Agreement in the WTO?: Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, Jean Monnet Working Paper 6/02, http://www.jeanmonnetprogram.org/papers/02/020601.html

> "The most difficult issue which WTO negotiators will need to address is the way in which a national treatment norm should apply in an investment context. The NAFTA experience and the MAI approach have followed the long-standing practice in BITs of importing the national treatment norm from the GATT. However, little attention to date has been given to the potentially broad application of the concept of de facto discrimination in the investment context. It is essential that a WTO investment agreement manage the task of delineating the coverage of de facto discrimination in such a way as to preserve core components of regulatory autonomy."

- Howard Mann, International Institute for Sustainable Development, Konrad von Moltke, International Institute for Sustainable Development, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment (1999), http://www.iisd.org/trade/chapter11.htm

> "The investor protections provided in NAFTA's Chapter 11 have been used repeatedly to challenge environmental laws and administrative decisions that have negative economic impacts for foreign investors. As a consequence, the provisions designed to ensure security and predictability for the investors have now created uncertainty and unpredictability for environmental and other regulators, impacting on broad range of public values and threatening to determine the public perception of the entire agreement."

- Stephen L. Kass, NAFTA's Chapter 11: Regulatory Taking Revisited, Newsletter of the North American Institute, Issue No. 27 (2000/2001), http://www.northamericaninstitute.org/naminews/nn27/kass.htm

> "While litigation of substantive domestic legal issues in arbitration proceedings does seem awkward and subject to non-appealable error, it may also be implicit in the NAFTA Parties' agreement that private investors may arbitrate directly against foreign governments if they relinquish their right to pursue such claims in domestic courts. Nevertheless, there is a difference between determining whether governmental conduct constitutes a taking and delineating the boundaries among federal, state and local environmental laws; future arbitrators, as well as the NAFTA Parties, should consider procedures to permit the latter to be determined by appropriate domestic tribunals."

- Ari Afilalo, Constitutionalization through the Back Door: A European Perspective on

NAFTA’s Investment Chapter, New York University Journal of International Law and Politics (2001).

> “My basic premise is that, because of the inevitable overlap between investment and trade, there exists no solution that will isolate completely "pure investment" cases from "pure trade" cases. Borrowing from language coined in the WTO context, the purpose of the exercise that I am advocating is to identify the "aim and effect" of the measure and to evaluate the extent to which it relates to a legitimate policy unrelated to economic protectionism. (…)As an "incomplete contract" setting forth broad standards, Chapter 11 should be given the chance to evolve through a common law, case-by-case process, out of which a workable framework may emerge.”