NAFTA'S THREAT TO SOVEREIGNTY AND DEMOCRACY:

The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005

Lessons for the Central America Free Trade Agreement

Public Citizen

February 2005

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Key
**Indicates date Notice of Intent to File a Claim was filed, the first step in the NAFTA investor-state process when an investor notifies a government that it intends to bring a NAFTA Chapter 11 suit against that government.
*Indicates date Notice of Arbitration filed, the second step in the NAFTA investor-state process when investor notifies an arbitration body that it is ready to commence arbitration under NAFTA Chapter 11.
The two venues for the adjudication of NAFTA Chapter 11 disputes are the World Bank's International Center for the Settlement of Investment Disputes (ICSID) and the United Nation's Commission on International Trade Law (UNCITRAL).

Corporation or Investor	Venue	Damages Sought (U.S.$)	Status of Case	Issue

Cases & Claims Against the United States

Corporation or Investor	Venue	Damages Sought (U.S.$)	Status of Case	Issue
Loewen Oct. 30, 1998*	ICSID	$725 million	Dismissed	Canadian funeral conglomerate challenged large Mississippi state court damage award granted by a jury in a contract dispute suit by a local company claiming Loewen engaged in anti-competitive, predatory business practices. June 2003 – Claim dismissed on procedural basis. Tribunal found that Loewen's reorganization as a U.S. corporation under U.S. bankruptcy law destroyed the firm's ability to bring the NAFTA claim as a *foreign* investor.
Mondev Sep. 1, 1999*	ICSID	$50 million	Dismissed	Canadian real estate developer challenged City of Boston's actions in development contract dispute and adverse state supreme court ruling that denied the firm compensation on the grounds that city actions were shielded by principle of sovereign immunity. October 2002 – Claim dismissed on procedural grounds. Tribunal found that the majority of Mondev's claims, including of expropriation, were time-barred meaning that the dispute on which the claim was based predated NAFTA and that court rulings were well founded in state law.
Methanex Dec. 3, 1999*	UNCITRAL	$970 million	Pending	Canadian corporation which produces methanol, a component chemical of gasoline additive MTBE, challenges California phase-out of MTBE, which is contaminating drinking water throughout the state. August 2002 – Jurisdictional ruling indicates that because Methanex only produces a component ingredient of MTBE, methanol, not the actual product, company is to "distant" from the MTBE ban to qualify as a firm harmed by it, suggesting that certain MTBE producers may be qualified to bring similar NAFTA suits. Methanex allowed to resubmit claim to demonstrate how the MTBE ban was *specifically* directed toward methanol producers instead of merely affecting them. U.S. government has spent $3 million on legal defense to date on case, which NAFTA supporters are eager to have dismissed permanently on technical grounds for fear of political ramifications if Methanex wins.
ADF Group Jul. 19, 2000*	ICSID	$90 million	Dismissed	Canadian steel contractor challenged U.S. Buy America provision in Virginia highway construction contract. January 2003 – Claim dismissed on procedural grounds. Tribunal found that the basis of the claim constituted "government procurement" and therefore fell under the procurement provisions of NAFTA, Chapter 10, not Chapter 11.

James Baird Mar. 15, 2002**	Arbitration has not yet commenced	$13 billion		Canadian investor challenged U.S. policy of disposing nuclear waste at Yucca Mountain, Nevada site. Investor claims to have patents for alternative waste disposal method and location.
Doman May 1, 2002**	Arbitration has not yet commenced	$513 million		Canadian company seeks damages over May 2002 application by the U.S. of anti-dumping and countervailing duties on Canadian softwood lumber.
Canfor Jul. 9, 2002*	UNCITRAL	$250 million	Pending	Canadian company seeks damages over May 2002 application by the U.S. of anti-dumping and countervailing duties on Canadian softwood lumber.
Kenex Aug. 2, 2002*	UNCITRAL	$20 million	Pending	Canadian hemp production company challenged U.S. Drug Enforcement Agency regulations criminalizing importation of hemp foods. In 2004 the firm won a U.S. federal court case charging that the agency overstepped its statutory authority when issuing the rules. Status of NAFTA case unclear.
Ontario Limited Sep. 9, 2002**	Arbitration has not yet commenced	$38 million		Canadian company seeks return of property after its bingo halls and financial records were seized during an investigation for RICO violations in Florida.
Tembec Dec. 3, 2003*	UNCITRAL	$200 million	Pending	Canadian company seeks damages over May 2002 application by the U.S. of anti-dumping and countervailing duties on Canadian softwood lumber.
Glamis Gold Dec. 9, 2003*	UNCITRAL	$50 million	Pending	Canadian company seeks compensation for California regulation requiring backfilling and restoration of open pit mines that would damage Native American sacred sites.
Albert J. Connolly Feb. 19, 2004**	Arbitration has not yet commenced	Value of expropriated property		U.S. investor claims real estate was expropriated by Canadian government to be used as a park.
Grand River Mar. 10, 2004*	UNCITRAL	$340 million	Pending	Small Canadian tobacco company seeks damages in claim challenging U.S. tobacco settlements due to the requirement that tobacco companies contribute to state escrow funds set up by state law.
Terminal Forest Products Mar. 30, 2004*	UNCITRAL	$90 million	Pending	Canadian company seeks damages over May 2002 application by the U.S. of anti-dumping and countervailing duties on Canadian softwood lumber.
Canadian Cattlemen for Fair Trade Aug. 12, 2004**	Arbitration has not yet commenced	$300 million		Group of Canadian cattlemen and feedlot owners seeks compensation for losses incurred when the U.S. halted imports of live Canadian cattle after the discovery of a case of BSE (mad cow disease) in Canada in May 2003.

Cases & Claims Against Canada

Signa Mar. 4, 1996**	Arbitration never commenced	$40 million		Mexican pharmaceutical manufacturer filed challenge of Canadian patent law which blocked the manufacture of a generic equivalent to CIPRO, the multi-spectrum antibiotic. Little is known with regard to the disposition of this case.
Ethyl Apr. 14, 1997*	UNCITRAL	$250 million	Settled; Ethyl wins, $13 million paid	U.S. chemical company challenged Canadian environmental regulation of gasoline additive MMT. July 1998 – Canada loses NAFTA jurisdictional ruling, reverses ban, pays $13 million in damages and legal fees to Ethyl.

S.D. Myers Oct. 30, 1998*	UNCITRAL	$20 million	S.D. Myers wins, $4.8 million paid	U.S. waste treatment company challenged Canadian ban of PCB exports. Ban was compliant with multilateral environmental treaty on toxic waste trade November 2000 – NAFTA tribunal dismisses S.D. Myers claim of expropriation, but upholds claims of discrimination and equates this violation with a violation of the minimum standard of treatment required by international law. Panel also states that "market share" could constitute a NAFTA protected investment.
Pope & Talbot Mar. 25, 1999*	UNCITRAL	$381 million	P&T wins, $582,000 paid	U.S. timber company challenged Canada's implementation of 1996 U.S.-Canada Softwood Lumber Agreement. April 2001 – NAFTA tribunal dismissed claims of expropriation and discrimination, but held that the rude behavior of the Canadian government officials seeking to verify firm's compliance with Softwood Lumber Agreement constituted a violation of the minimum standard of treatment required by NAFTA for foreign investors. Tribunal also stated that "market access" could be considered a NAFTA-protected investment.
UPS Apr. 19, 1999*	UNCITRAL	$160 million	Pending	UPS claims that Canadian post office parcel delivery service, due to its status as a public service, enjoys NAFTA-illegal subsidies that undermine the market share of foreign private sector competitor UPS.
Sun Belt Oct. 12, 1999*	Arbitration has not yet commenced	$10 billion	Unknown	U.S. water company challenged moratorium by Canadian province (British Columbia) on bulk water exports.
Ketchum and Tysa Investments Dec. 22, 2000**	Arbitration never commenced			U.S. softwood lumber firms challenged Canadian implementation of 1996 Softwood Lumber Agreement. Case later withdrawn, perhaps due to limited success of similar Pope & Talbot case.
Trammel Crow Sep. 7, 2001**	Arbitration never commenced	$32 million	Settled	U.S. real estate company filed complaint regarding discrimination over Canada Post's competitive bidding process. Reportedly settled in 2002.
Crompton Nov. 6, 2001**	Arbitration has not yet commenced	$100 million		U.S. chemical company, producer of pesticide lindane, a hazardous persistent organic pollutant, challenges voluntary agreement established in Canada to restrict production of the chemical.

Cases & Claims Against Mexico

Amtrade International Apr. 21, 1995**	Arbitration never commenced	$20 million		U.S. firm claimed it was discriminated against by a Mexican firm while seeking to bid for pieces of property, in violation of a pre-existing settlement agreement. Little is known with regard to the disposition of this case.
Metalclad Jan. 13, 1997*	ICSID	$90 million	Metalclad wins, $15.6 million paid	U.S. firm challenged Mexican municipality's refusal to grant construction permit for toxic waste dump and governor's declaration of ecological preserve surrounding the site. August 2000 – NAFTA tribunal ruled that the denial of the construction permit and the creation of an ecological reserve are tantamount to an "indirect" expropriation and that Mexico violated the minimum standard of treatment guaranteed foreign investors because the firm was not granted a "clear and predictable" regulatory framework. In October 2000, the Mexican government challenged the NAFTA ruling in Canadian court alleging arbitral error. A Canadian judge ruled that the tribunal erred in part by importing transparency requirements of NAFTA Ch 18 into Ch 11 and reduced award by $1 million. In 2004, the Mexican federal government's effort to hold state financially responsible failed in Mexican Supreme Court.

Azinian, *et al.* Mar. 10, 1997*	ICSID	$19 million	Dismissed	U.S. investors challenged revocation of solid waste collection contract by City of Naucalpan and Mexican federal court decision upholding the revocation. November 1999 – Claim dismissed. NAFTA tribunal held that the firm made fraudulent misrepresentations with regard to its experience and capacity to fulfill the contract and dismissed claims of expropriation and unfair treatment.
Waste Management Sep. 29, 1998* Resubmitted: Sep. 18, 2000*	ICSID	$60 million	Dismissed	U.S. waste disposal giant challenged City of Acapulco revocation of waste disposal concession, also implicated Mexican courts and the actions of Mexican government banks. April 2004 – Claim dismissed. Tribunal found that the investor's business plan was based on unsustainable assumptions and that none of the government bodies named in the complaint failed to accord the minimum standard of treatment, nor did the city's actions amount to an expropriation.
Karpa (Feldman) Apr. 7, 1999*	ICSID	$50 million	Karpa wins, $1.5 million paid	U.S. cigarette exporter challenged denial of export tax rebate by Mexican government. December 2002 – The tribunal rejected an expropriation claim but upheld a claim of discrimination after the Mexican government failed to provide evidence that the firm was being treated similarly to Mexican firms in "like circumstances." Karpa attempted to bring this ruling into Canadian domestic court, but its case was dismissed by a Canadian judge.
Scott Ashton Blair May 21, 1999**	Arbitration never commenced	Value of property he owns		U.S. investor purchased a residence and restaurant in Mexico and claims he was a harassed by Mexican government officials and improperly jailed because he was a U.S. citizen.
Adams, *et al.* Feb. 16, 2001*	UNCITRAL	$75 million		U.S. landowners challenged Mexican court ruling that developer who sold them property did not own land and therefore could not convey it.
Lomas Santa Fe Aug. 28, 2001**	Arbitration has not yet commenced	$210 million		An American real estate development company claimed Mexican government discriminated against him and expropriated land intended for commercial development. Implicated adverse Mexican court decision as well.
Fireman's Fund Oct. 30, 2001*	ICSID	$50 million	Pending	U.S. insurance corporation alleges that Mexico's handling of debentures issued to capitalize a bank was discriminatory.
Francis Kenneth Haas Dec. 12, 2001**	Arbitration has not yet commenced	$17 million		American citizen claimed he was cheated out of his rights in an investment firm held with former Mexican business partners. Implicated state government officials as well.
GAMI Investments Apr. 9, 2002*	UNCITRAL	$55 million	Dismissed	U.S. minority-share investors in Mexican sugar mills challenged failure of government to ensure profitability of mills and September 2001expropriation of five debt-ridden sugar mills. In Nov. 2004, NAFTA panel dismissed all claims after Mexican Supreme Court reversed the challenged expropriations.
Thunderbird Gaming Aug. 1, 2002*	UNCITRAL	$100 million	Pending	Canadian company operating three video gambling facilities in Mexico challenges government's closure of facilities. Most forms of gambling are illegal in Mexico.
Robert J. Frank Aug. 5, 2002*	UNCITRAL	$1.5 million		U.S. citizen challenges government confiscation of vacation property alleged to be his in Baja California, Mexico.
Calmark date not avail.**	Arbitration has not yet commenced	$400,000		U.S. company challenges Mexican domestic court decisions regarding a development project planned for Cabo San Lucas, alleging company was cheated out of property and compensation by various individuals.
Halchette 1995	No public documents available	Unknown		Halchette, a U.S. firm which operates airport concessions in Mexico, filed a notice of claim. Disposition of the case is unknown.

ADM and A.E. Staley Oct. 13, 2003**	Unknown	$100 million		U.S. company is leading producer of high fructose syrup HFCS, a soft drink sweetener. Agribusiness giant seeking compensation against Mexican government for imposing an allegedly discriminatory tax against its subsidiary company and HFCS exports to Mexico.
Corn Products Oct. 21, 2003**	ICSID	$325 million		U.S. company is leading producer of high fructose syrup HFCS, a soft drink sweetener. Agribusiness giant seeking compensation against Mexican government for imposing an allegedly discriminatory tax against its subsidiary company and HFCS exports to Mexico.
Bayview Irrigation Aug. 27, 2004**	Arbitration has not yet commenced	$550 million		17 water rights holders in the United States challenge Mexico's alleged failure to implement 1944 water-sharing treaty governing water in the Rio Grande.

Summary

Total Claims Filed Against All 3 NAFTA Parties:	42 Cases	$28 billion		NOTE: This amount excludes cases where there has been a final award, and includes the Baird and Sun Belt claims, which are disproportionately high. Without Baird and Sun Belt, total claims against all three NAFTA parties is $5 billion.
Total Cases Currently in Active Arbitration:	11 Cases			7 against the United States, 1 against Canada, 3 against Mexico
Dismissed Cases (Won by NAFTA governments):	6 Cases			Loewen, Mondev, ADF, Azinian, Waste Management, GAMI
Cases Won by Investors:	5 Cases	$35 million awarded		Ethyl, S. D. Myers, Pope & Talbot, Metalclad, Karpa (Feldman)

EXECUTIVE SUMMARY

Eleven years ago, the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico went into effect after heated debate.[1] NAFTA was called a trade agreement. Yet, much of it focused on investment issues – establishing rights for foreign investors to acquire, own and operate broad categories of NAFTA-defined "investments" within the NAFTA nations and restricting governments' regulation of such investors and their investments.

The NAFTA debate was characterized by more heat than light. NAFTA's supporters were able to frame the fight in sweeping terms. NAFTA critics who raised concerns about specific provisions were broadly labeled protectionist, fearful, and backward, while proponents promised grand, if vague, benefits from NAFTA. As a result, few people had any idea that NAFTA contained several radical, experimental aspects never before included in a U.S. free trade agreement.

Among the most astounding of these of these surprises was NAFTA's Chapter 11 investment rules. Therein signatory governments are required to provide extensive rights and privileges to foreign investors, and investors are empowered to privately enforce these new rights by demanding cash payment from governments for actions foreign investors claim violate their NAFTA privileges. These cases are decided in private "investor-state" arbitral tribunals operating outside the nations' domestic court system, yet millions in taxpayers dollars can be demanded and awarded. These NAFTA rules grant foreign investors greater rights when operating within the United States than those available to U.S. residents or businesses under the Constitution as interpreted by the U.S. Supreme Court.

This report, **NAFTA Chapter 11 Investor-State Cases: Lessons for the Central America Free Trade Agreement,** provides detailed analysis of the 42 cases and claims to date – many of them not previously publicly known – in which foreign investors have demanded compensation from NAFTA nations. The track record of cases demonstrate an array of attacks on public policies and normal governmental activity at all levels of government − federal, state and local. Even though these NAFTA cases implicate commonplace public policies, the investor-state system is a closed and unaccountable one. Citizens whose policies are being attacked have no avenue of meaningful participation and neither do the state and local officials they elected to represent them. Court decisions can be challenged and jury decisions undermined, yet no judge or jury has standing to participate in the private NAFTA tribunals.

This report is the most comprehensive analysis of NAFTA cases yet published in the United States. To date, foreign investors have been granted monetary compensation in five cases and in six cases, investors' claims have been rejected. Although the number of concluded cases is small it is notable that already $35 million has been awarded to foreign investors by NAFTA tribunals or governments as part of a settlement agreement – often over claims that would not have been allowed under domestic law or in domestic courts. Another $28 billion has been claimed by NAFTA investors (please see "Table of NAFTA Chapter 11 Cases and Claims" at start of report for further details). In addition, the U.S. government has spent millions in legal fees fighting foreign investors' claims under NAFTA.

Our findings demonstrate that NAFTA's model of extensive foreign investor privileges and their private enforcement outside of the domestic court system should not be replicated in future agreements. Over the past several years, as news of some of the more controversial cases has hit the papers, members of Congress, state Supreme Court chief justices, state attorneys general, mayors, other state and local officials and taxpayers have raised an array of serious concerns about the legitimacy of private dispute resolution for matters of public concern.

Yet, currently a NAFTA expansion to six additional countries, called the Central America Free Trade Agreement (CAFTA), is being promoted by the Bush administration.[2] As described in this report, most of the problems Congress and others raised about NAFTA's Chapter 11 foreign investor protection were not remedied in CAFTA's investment chapter (Chapter 10), which would expose the United States to claims from foreign investors – including foreign subsidiaries of U.S. companies – from six additional nations and expose the Central American CAFTA signatories and the Dominican Republic to similar attacks.

NAFTA Provides "Greater Rights" to Foreign Investors to Challenge Government Policies and Decisions

NAFTA's Chapter 11 has been called "an extraordinary legal invention"[3] in large part because it gives significantly greater rights to foreign investors operating on U.S. soil than U.S. firms enjoy. First, the sovereign immunity shield – the long-standing common law principle that governments cannot be sued for certain types of activities – does not apply in NAFTA's private tribunal system. This means that foreign investors are empowered to sue the United States for cash compensation over federal, state and local policies in instances when U.S. residents and companies would have no such right. Second, NAFTA requires signatory governments to provide to foreign investors a variety of substantive rights that go beyond those that the U.S. Supreme Court – in balancing the specific interests of property owners with the broader public interest in public health and safety – has ruled are provided by the U.S. Constitution. This means that under NAFTA, foreign investors operating within the United States must be provided with different – superior from the investor's perspective – treatment than the Constitution requires be provided to U.S. residents and businesses. If such treatment is not provided, the foreign investor may demand cash compensation from the U.S. government for the government's failure to deliver on the foreign investor's NAFTA rights.

Indeed, many of the claims lodged by foreign investors in the NAFTA investor-state tribunals would not be allowed under U.S. law. For instance, the "expropriations" that have been claimed using NAFTA's foreign investor protections are nothing like the "nationalization" or government seizure of real estate that is generally conveyed by the term. Nor are they similar to the "takings" cases that have been adjudicated in the U.S. court system.

The "Takings Clause" of the Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." The takings doctrine has been used to facilitate the construction of roads and highways, public utilities, power lines, sports stadiums and other public facilities. Under this doctrine, the government may take private property for public use if there is a public interest in doing so. The decision is made in a manner that provides due process to the private property owner and the private property owner is compensated. Corporations and conservative anti-environment groups have worked for two decades to broaden the notion of takings to encompass what they call "regulatory takings." Their goal is to require that governments compensate private property owners whenever environmental, land use or other regulations tangentially impact property value so as to create pressure to roll back such public interest measures. For example, these groups have launched legal attacks against the Endangered Species Act (ESA) using a "regulatory takings" theory to argue that they should be compensated if ESA rules limit how they can use their property (e.g., they can't pave over a wetland.) However, these cases have made little headway in the U.S. courts.

The U.S. Supreme Court has placed significant substantive and procedural barriers in the way of property owners who seek compensation for takings. Most importantly, U.S. regulatory takings jurisprudence applies only to real property, (i.e., real estate), and does not apply to intangible personal property (everything that is not land) or more generalized economic interests. Plus, property owners must establish that a regulation has destroyed almost all of the value of the "property as a whole." The Supreme Court has ruled that "mere diminution" of the value of the property by a government action does not qualify as a regulatory takings that must be compensated.

In contrast, under NAFTA's investor protections, foreign investors and corporations are using the NAFTA investment agreement to seek compensation for the very sort of public interest policies that the Congress and U.S. courts have determined *not* to constitute a takings. Under NAFTA, the sorts of property owned by foreign investors that are provided with such protection are defined in the text and expanded upon by NAFTA tribunals in a manner that extends far beyond U.S. law. Not only is the real estate of foreign investors eligible for a regulatory takings claim, but so is their personal property such as stocks, bonds, loans, as well as other generalized economic interests including potentially market access and market share. As described below, CAFTA's terms and definition of investment extends even further to explicitly include items not listed in NAFTA, such as licenses, authorizations, permits and a large number of federal government contracts.

NAFTA's New Investor Rights Give Rise to a Diverse Array of Challenges to Federal, State and Local Policies

Thus, NAFTA Chapter 11 has been widely criticized for undermining the basic public interest protections provided by our federal, state and local governments and these governments' basic abilities to conduct their day-to-day functions by extending a set of rights to foreign investors operating in the United States to attack domestic policies and demand compensation for the basic environmental, land use, health and safety policies under which U.S. businesses operate and upon which citizens rely.

Under broadly worded provisions guaranteeing investors rights to a "minimum standard of treatment" under international law, rights to nondiscriminatory treatment, and rights to protest a wide range of government actions as indirect "expropriations," corporate investors in all three NAFTA countries have used these new rights to challenge a variety of national, state and local policies as violations of the agreement, for instance:

- A Mexican municipal government's denial of a construction permit for the building of a toxic waste facility and the governor's later declaration of an ecological preserve on the site were ruled to be NAFTA-illegal expropriations by a NAFTA tribunal. The Mexican government was ultimately ordered to pay California-based Metalclad company $15.6 million in compensation – a large amount relative to Mexico's environmental protection budget;

- Three times, governments' environmental and health phase-outs of suspected toxins, such as Canada's phase-out of the dangerous pesticide lindane, and California's ban on the gasoline additive and water pollutant MTBE, have been challenged as a takings using the investor-state system. The Canadian government reversed its ban on another gasoline additive, MMT, and paid Ethyl Corporation, which filed a NAFTA Chapter 11 suit against the ban, $13 million. The other cases are still pending;

- Canada's implementation of two international agreements, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the U.S.-Canadian Softwood Lumber Agreement, were both successfully challenged using NAFTA investor-state system and damages were awarded in both cases. When Canada closed its border to trade in toxic PCBs – a practice discouraged by the Basel Convention – a NAFTA panel ordered the Canadian government to pay the U.S. firm, S.D. Meyers, $4.8 million for their lost business opportunities. Another U.S. firm, Pope & Talbot, was awarded $582,000 in damages and legal fees after a NAFTA tribunal ruled that the rude behavior of Canadian officials verifying the firm's compliance with softwood lumber quotas constituted a NAFTA violation;

- Canadian cattlemen are using NAFTA's broadly worded definition of "investor" to challenge the closing of the U.S. border to trade in live cattle after mad cow disease was found in Canada, arguing that the U.S. public health measure has undermined their investment *in Canada*. U.S. water-rights holders are using the investor-state mechanism to challenge Mexico's alleged failure to implement a water-sharing agreement that has limited their access to water on their U.S. properties. In neither case do these investors appear to have an investment outside of their own country, yet NAFTA's broadly worded definitions and prior tribunal rulings may make this type of claim possible;

- Aspects of the state tobacco settlements, which have resulted in a dramatic drop in the rate of teen smoking in the United States, have been challenged as arbitrary and unfair by Canadian tobacco traders. Phillip Morris also has threatened to bring a NAFTA investor-state suit against a proposed groundbreaking Canadian law restricting the claims (such as "light") made on cigarette packages. That measure has still not become law;

- A number of U.S. domestic court decisions have been challenged by foreign investors using NAFTA's investor-state system. A recent ruling in one such case, involving the challenge by Canadian funeral conglomerate Loewen of a Mississippi jury award in a private contract dispute, demonstrates that few domestic court decisions are immune from NAFTA review, not even decisions of the U.S. Supreme Court;

- A variety of other federal, state and local public interest policies, such as Mexico's anti-gambling policy, a U.S. drug enforcement rule criminalizing hemp foods, and the state of California's requirements for open-pit mine reclamation have given rise to new NAFTA cases;

- Parcel delivery by a government service, the Canadian postal service, is being challenged by a U.S. company, United Parcel Service, which argues that the monopoly that the Canadian postal service has on non-express letter delivery creates an unfair subsidy for government parcel delivery. Most nations' postal services have such a monopoly on non-express letter delivery;

- U.S. implementation of anti-dumping and countervailing duties with regard to imports of softwood lumber from Canada are being challenged by four Canadian timber firms using NAFTA Chapter 11 even though these issues have already been litigated in the state-state dispute resolution systems of NAFTA and the World Trade Organization (WTO).

These cases represent an extraordinary attack on normal government activity. In some instances, governments have been ordered by NAFTA tribunals to pay foreign investors over claims that could not have been pursued in domestic courts. In other instances, to the detriment of the public interest, governments have settled foreign investor claims with policy reversals and/or payments. In addition, the enactment of proposed laws that have been threatened with investor-state cases have been chilled. Even when an investor-state challenge is successfully defended by government lawyers, millions in taxpayer dollars are wasted trying to avoid damage to the nation's public interest.

Each new NAFTA investor-state case about which the public becomes aware draws attention and criticism to NAFTA's Chapter 11 foreign investor protections. The number of NAFTA cases attacking environmental policies has caused an uproar in the environmental community and among legal scholars. However, as more NAFTA cases are finally adjudicated, a growing number of interested parties are becoming alarmed. The fact that an increasing number of state and local policies are being challenged has evoked a sharp response from mainstream organizations representing elected officials such as the National Conference of State Legislatures, the Conference of Mayors, the National Association of Attorneys General, the National Association of Counties, the National Association of Towns and Townships and the National League of Cities.[4] Moreover, as more public health measures, such as those involving toxic chemicals or protecting consumers from mad cow disease and tobacco, are subject to NAFTA threats, the public health community, including the American Public Health Association, has become increasingly concerned. Perhaps most significantly, the increasing number of domestic court decisions giving rise to NAFTA claims have jurists, such as those represented by the Conference of Chief Justices, and legal scholars alike questioning the constitutionality of NAFTA tribunals.

NAFTA "greater rights" for foreign investors problem not fixed in CAFTA

For some Republican and Democratic members of Congress who voted for NAFTA, these cases have been an unexpected and unwelcome result of the agreement. Republicans who raised concerns about NAFTA's implications for U.S. sovereignty in a general manner were promised that NAFTA would not undermine state sovereignty and local control. Democrats were promised NAFTA would not undermine domestic environmental and health laws. But the NAFTA Chapter 11 cases have made a travesty of these promises.

As a result, NAFTA's Chapter 11 foreign investor protections became a focus of the 2001-2002 congressional debate about reauthorizing Fast Track trade authority. Fast Track, renamed "Trade Promotion Authority" during the 2001 debate, delegates Congress' exclusive constitutional authority to set the terms of U.S. trade policy over to the executive branch, with Congress' role limited to a yes or no vote with no amendments on completed, signed trade agreements and the changes to U.S. law required to implement them. In providing this extraordinary delegation of authority, Congress sets "negotiating objectives" in the legislation that are to guide U.S. executive branch negotiators regarding future trade agreements that must be brought back for congressional approval. Although these negotiating objectives are not formally binding – in that Congress' only recourse under the current system is to vote down an entire agreement if negotiators ignore Congress' instruction – the specifics of the negotiating objectives included in Fast Track legislation are often subject to intense congressional-White House negotiations because they express Congress' position on the acceptable contents of future agreements.

Thus, in order to narrowly pass the Fast Track legislation, the White House was pressured into agreeing to include a series of congressional demands that Bush administration trade officials were to meet when negotiating investment rules in future trade agreements. The most important element was that foreign investors should have "no greater substantive rights" with respect to investment protections than U.S. residents or businesses in the United States. In addition, other demands for changes to NAFTA's Chapter 11 model were raised during the debate in the House and Senate, especially surrounding the discussion of the "Kerry Amendment" in the Senate, which attempted to align foreign investor rights with the rights provided to U.S. firms under U.S. law.

Despite these clear demands by Congress, Bush administration trade negotiators failed to adequately address these concerns in negotiating recently-adopted and proposed free trade agreements, such as the U.S.-Chile Free Trade Agreement (FTA), the U.S.-Singapore FTA, the U.S.-Morocco FTA, or

CAFTA, nor were they addressed in the newly redrafted U.S. Model Bilateral Investment Treaty (BIT), which is used to extend similar terms on a bilateral basis. Below is a summary of how in CAFTA Congress' demands for changes to the NAFTA foreign investor protection model were given only superficial attention, and few substantive changes relative to NAFTA's foreign investor protections were made.

- ***CAFTA's delineation of property eligible for a regulatory takings claim is significantly broader than under U.S. law:*** In CAFTA, the definition of a compensable investment is not limited to the real property (i.e. real estate) implicated in U.S. regulatory takings jurisprudence. Indeed, most types of investments for which the U.S. government could be sued under NAFTA by foreign investors demanding compensation would not be eligible for regulatory takings claims under U.S. law. Moreover, CAFTA expands, not narrows, the NAFTA definition adding as compensable investments, "the assumption of risk," "expectation of gain or profit," intellectual property rights, licenses, authorizations and permits as well as a large variety of government contracts including natural resource concession contracts;

- ***CAFTA's definition of "expropriation" is broader than takings allowed under U.S. law:*** The scope of what is considered an expropriation remains as expansive in CAFTA as the NAFTA provisions which have resulted in compensation for "regulatory takings" claims that would not be successful under U.S. law. NAFTA guarantees foreign investors compensation from the treasuries of NAFTA governments for any direct government expropriation or any other action that is "tantamount to" an expropriation or an indirect expropriation. CAFTA and the other new FTAs still require compensation for *indirect* expropriations, which is the operative term. Thus, under CAFTA an investor can still force a government to pay compensation for incidental effects on its business resulting from a regulation that would not be subject to compensation under U.S. law;

- ***CAFTA requires less adverse impact on investment than U.S. law***: U.S. negotiators ignored Congress' instructions to conform to the U.S. law standard the degree of adverse impact required on a foreign investor or investment to demonstrate a compensable taking under CAFTA. Under U.S. law, close to 100 percent of the value of the property must be destroyed. NAFTA Chapter 11 cases have suggested that only a "significant" or "substantial" impact on the investment need be demonstrated and despite Congress' demands, U.S. negotiators did not remedy this serious gap between the rights of foreign and domestic investors in CAFTA's text;

- ***CAFTA's standards for scope of review are less stringent than U.S. law:*** U.S. negotiators failed to include in CAFTA a provision that requires that an expropriation analysis examine the property as a whole, not allowing it to be segmented physically or temporally. Adding such a provision would have been necessary to meet Congress' demands that future trade agreements not provide foreign investor rights that go beyond U.S. legal standards. Thus, temporary measures, such as temporary border closings, which have been considered NAFTA violations in past cases, could still be considered CAFTA violations contrary to U.S. takings jurisprudence;

- ***CAFTA's attempt to narrow what constitutes a violation of the "minimum standard of treatment" under international law falls short:*** NAFTA and CAFTA include provisions guaranteeing foreign investors a minimum standard of treatment, including "fair and equitable treatment," from signatory countries with the right to demand compensation if this guarantee is not fulfilled. NAFTA tribunals have varied greatly about what this guarantee requires of governments, in one case ordering compensation for a foreign investor over the rude behavior of government officials. Although Congress explicitly asked for a narrowing of this definition, in

CAFTA what constitutes "fair and equitable treatment" under international law remains a matter for CAFTA panels to define. A 2001 "clarification" by the NAFTA governments attempted to deal with this problem in the NAFTA context by seeking to narrow the application to treatment that is required by "customary" international law. This is the language also used in CAFTA. Yet the notion of customary international law is notoriously broad, providing enormous opportunity for a continuation of an expansive interpretation by trade tribunals;

- ***CAFTA allows a "substantive due process" standard of review forbidden in U.S. law:*** The Fast Track language requiring a narrowing of the guaranteed minimum standard of treatment for foreign investors in future trade agreements specifically mentions conformity to the "due process" requirements of U.S. law. Since the Roosevelt administration, U.S. domestic courts review of government actions regarding claims that a property owner's due process rights have been violated are limited to considering the actual process – did the land owner or business have a right to be heard, for instance. Courts have stayed out of judging the fairness of the underlying policy in question. In NAFTA investor-state cases, panels have engaged in a substantive due process review of economic regulation. This means that like the courts trying to reverse Roosevelt's New Deal policies, NAFTA tribunals are permitted to second-guess the merits of policies set by nations' legislatures and executive branches. A provision was not added to CAFTA, as needed, to shut down this line of review that extends beyond U.S. legal standards;

- ***Non-discriminatory domestic environmental and health regulations remain at risk in CAFTA***: Language in an Annex to the CAFTA investment chapter purporting to limit when nondiscriminatory environmental and health regulations should be considering violations of CAFTA's foreign investor rights does not safeguard such laws from challenge, as described below;

- ***CAFTA does not require due process protections Congress demanded:*** For instance, U.S. trade negotiators failed to require exhaustion of remedies, especially judicial remedies, before starting a CAFTA investor-state complaint;

- ***CAFTA does not include the appeals system Congress demanded:*** U.S. negotiators failed to create an appeals mechanism for investor-state cases in CAFTA's investment chapter as required by the Fast Track legislation. The Office of the U.S. Trade Representative (USTR) does have a proposal for a super-judicial appellate mechanism, but has not said how it will implement it − as part of CAFTA with congressional approval or outside of the legislative process. The current USTR proposal would eliminate the already very limited review rights that domestic courts now have over some investor-state rulings under domestic arbitration law.

Given the failure of the USTR to satisfy Congress' demands to reign in the worst excesses of NAFTA's foreign investor protection model in future trade agreements including CAFTA, a review of the track record of NAFTA investor-state cases is vital before Congress considers whether to extend these investor rights to new nations via CAFTA and a raft of new FTAs currently under negotiation.

Lessons From NAFTA Cases

Although more NAFTA cases are in the pipeline than have been decided, a detailed analysis of the NAFTA tribunal rulings in completed cases and the state-of-play in the pending cases allows us to identify a series of disturbing trends that have developed under the NAFTA foreign investor protection model:

Foreign Investors Will Use the Investor-State System to Seek Compensation for Adverse Domestic Court Rulings: The NAFTA Chapter 11 Loewen case is a prime example of how foreign investors are granted greater rights than domestic firms. The NAFTA panel in the Loewen case issued a remarkable jurisdictional ruling indicating that all adverse domestic court decisions are potentially eligible for NAFTA review as international law violations and may even qualify as "expropriations." This ruling implicates court decisions at every level, even potentially those of the U.S. Supreme Court. In contrast, U.S. firms operating in the United States do not have this second bite at the apple outside of the domestic court system and cannot bring regulatory takings cases based upon domestic court rulings. The case in question involved the Loewen Group, a giant Canadian funeral conglomerate, which had been aggressively acquiring small funeral homes across America. Loewen attempted to use NAFTA's foreign investor protections to "reverse" a multimillion-dollar Mississippi jury's ruling in favor of a small funeral home operator who sued the conglomerate for breach of contract and assorted fraudulent acts. Even though the NAFTA tribunal dismissed Loewen's underlying claims on technical grounds (primarily due to the fact that the bankrupt Loewen corporation had reincorporated as a U.S. firm and thus no longer qualified as a foreign investor), a very different result may have occurred had the firm reincorporated in Canada. First, the NAFTA panel in this case, determined that under NAFTA's terms a jury ruling in a civil contract case qualified as a "government action" against which foreign investors were granted special NAFTA protections. Attorneys representing the United States had argued that specific policies or actions of the government affecting a foreign investor – not the every day function of a domestic court – was what NAFTA's reference to government "measures" covered. The panel's decision further focused on the reference to international law in NAFTA's provisions guaranteeing a minimum standard of treatment for foreign investors, noting that when the conduct of a domestic court does not meet such an international law standard, a NAFTA violation could be found. Remarkably, the panel failed to place any limits on the type of domestic court decision that can be challenged using the investor-state mechanism, except to state that plaintiffs should exhaust domestic court remedies before proceeding to a NAFTA tribunal. Thus, it is no surprise that the Loewen tribunal decision was greeted with great concern in U.S. legal circles. The Conference of Chief Justices (representing Chief Justices from state supreme courts) promptly passed a resolution calling upon the Bush administration to keep court rulings out of trade tribunals.[5] The U.S. Conference of Mayors had earlier issued the same call, yet CAFTA fails to prevent domestic court rulings from being reheard in unaccountable investor-state tribunals.

Increasing Questions Regarding the Constitutionality of Investor-State Tribunals: Increasingly, U.S. jurists and legal scholars are questioning the very constitutionality of NAFTA's investor-state foreign investor protection system. Article III of the U.S. Constitution creates an independent judiciary, separate from the legislative and executive branches of the federal government. U.S. Supreme Court Justice Sandra Day O'Connor has questioned the delegation of Article III authority to an increasing number of trade tribunals. "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power,' " said Justice O'Connor.[6] In 1982 the Supreme Court declared that establishment by Congress of federal bankruptcy courts was a delegation of the constitutionally granted power of the judiciary too extreme to pass constitutional muster. Many scholars and jurists believe that the NAFTA Chapter 11 tribunals, which have extraordinary powers to review local, state, and federal policies and decisions as well as judicial decisions including those of the U.S. Supreme Court, represent an even more radical delegation of "the essential attributes" of the judiciary. The Conference of Chief Justices passed a resolution stating "The question of whether the investor-state process is consistent with Article III of the U.S. Constitution raises a sufficiently serious and important issue that deserves prompt, thorough examination as the United States considers negotiating additional trade agreements with various other nations."[7] Despite these serious concerns, CAFTA contains the same system of investor-state tribunals and would extend this system to foreign investors from an additional six nations if CAFTA is implemented by Congress.

Foreign Investors Can Bring "Regulatory Takings" Cases Not Allowed Under Domestic Law: As discussed above, NAFTA's investment rules give foreign investors new rights that go significantly beyond the rights available to U.S. citizens or business under the Takings Clause of the Constitution. In the 1993 *Concrete Pipe* case*,* the U.S. Supreme Court held that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[8] In contrast, NAFTA Chapter 11 tribunals have defined compensable takings as "the incidental interference" with the use of property that need only cause a "significant" or "substantial" impairment of an investment.[9] Thus, in the Metalclad case, a municipality's denial of a construction permit to a U.S. company seeking to expand an existing toxic waste facility on land it had purchased was found to be an indirect expropriation requiring compensation under NAFTA. Rather than fixing the problems caused by NAFTA's loose rules and troubling case history, the USTR has merely made cosmetic changes in the new FTA's foreign investor protection provisions. For instance, one "fix" the USTR attempted in CAFTA was to eliminate the phrase government actions "tantamount to" an expropriation that appears in the NAFTA text as activity requiring compensation. However, that change is merely cosmetic. The new FTAs still require compensation for "indirect" expropriations, which is the operative term NAFTA panels have relied on in finding regulatory takings. Indeed at least two NAFTA panels have held that the "tantamount to" clause in NAFTA is redundant and does not expand upon the scope of NAFTA's terms requiring compensation for direct and indirect expropriation.[10] The Bush administration could have conformed the new FTAs to U.S. law which, among other things, requires the demonstration of a near total takings of the property as a whole before a regulatory takings is found, but failed to do so. The end result is that foreign firms are still being granted substantive and procedural legal rights that go beyond what is provided in the U.S. Constitution as interpreted by the U.S. Supreme Court.

NAFTA Definition of "Investment" Does Not Conform to Compensable Property Under U.S. Law, CAFTA Makes Bad Situation Worse: Under U.S. law, generally only real property (i.e., real estate) can be considered for regulatory takings claims. Personal property (anything other than land) and other generalized economic interests are not eligible for such claims. In NAFTA, the definition of a compensable investment is not limited to the narrow category of real property. Indeed, most types of investments for which the U.S. government could be sued under NAFTA (such as debt security, equity security, loans, contracts, etc.) constitute intangible personal property that would not be eligible for a regulatory takings claim under U.S. law. NAFTA panels have extended the textual definition of "investment" even further by including court decisions and generalized economic concepts such as "market access" and "market share" as compensable investments. CAFTA makes a bad situation worse. CAFTA negotiators failed to heed the calls of Congress to provide "no greater substantive rights" to foreign investors than U.S. firms, and CAFTA expands, rather than narrows, the definition of compensable investment by including: "the assumption of risk," "expectation of gain or profit," intellectual property rights as well as a new category of government contracts including natural resource concession contracts. CAFTA also adds "licenses, authorizations, permits" in the list of covered investments. As this type of measure is often granted by state and local governments, the FTAs are likely to expose many more local government decisions such as those regarding zoning, building permits and licensing of various establishments to challenge under these investment rules.

Potential Cost to the Taxpayers Could Reach the Billions: In the end, it is the taxpayers of the challenged country who must pay the compensation to a foreign investor if it succeeds in its NAFTA suit. In the first 11 years of NAFTA, only 11 cases have been decided or settled. Five times foreign investors have succeeded with at least some of their claims and $35 million has been paid in compensation to foreign investors by governments. Another $28 billion has been claimed by NAFTA investors. While many NAFTA plaintiffs appear to be inflating their demands for compensation,[11] and none so far have succeeded with billion-dollar claims, just a few large awards like the $15.6 million dollar verdict against Mexico in the Metalclad toxic waste case could significantly impact the treasuries of national governments. It could also result in federal governments attempting to hold states hostage for the funds, as was attempted in the Metalclad toxic waste case. In addition, the costs for countries to defend against these NAFTA investor-state claims – money that could be used elsewhere in these times of pinched budgets – is significant in itself. For instance, U.S. lawyers defending the Methenex challenge to California's ban on MTBE have spent $3 million on defense costs so far. With three concluded arbitrations and seven pending against the United States, the NAFTA arbitration defense bill for U.S. taxpayers may quickly reach over $30 million.

The Investor-State Mechanism Eviscerates the Sovereign Immunity Shield: NAFTA Chapter 11 contains no sovereign immunity shield and constitutes a radical revision of U.S. sovereign immunity protections. As one legal scholar put it, "[b]y assenting to the terms of NAFTA, the United States, Canadian and Mexican governments essentially have waived whatever rights of sovereign immunity they may have enjoyed prior to signing."[12] Under U.S. law, Congress can abrogate sovereign immunity only by doing so in express terms on a case by case basis. There is no evidence that Congress intended to grant a blanket waiver of sovereign immunity rights in NAFTA, yet that appears to be what was achieved.

State and Local Governments Are Not Safe From the Reach of Investor-State Tribunals: Not only have federal policies been challenged by foreign investors in NAFTA Chapter 11 tribunals, but an increasing number of measures taken by state, provincial and municipal governments have been challenged as well. These include state and local land use decisions, state environmental and public health policies, adverse state court rulings, and state and municipal contracts. In the Metalclad toxic waste case, the decision of a Mexican municipality to deny a construction permit before a U.S. company could begin expanding a toxic waste facility and a later decision by the governor of the state to create an ecological reserve on the site were both successfully challenged as NAFTA violations and the Mexican government was ordered to pay $15.6 million in damages. While it is true that under NAFTA, a panel cannot directly rescind a law, and it is the federal government that is technically liable for any damages, federal governments currently have a variety of avenues under domestic law to bend state and local governments to their will. For example, federal governments can hold funds for state and local projects hostage until the offending measure is rescinded or until the locality agrees to contribute to the damage award. This was already attempted in the Metalclad case when the Mexican federal government tried to withhold the damage award from the state of San Luis Potosi's federal funding. While in this instance the state fought back in domestic court and was ultimately vindicated by the Mexican Supreme Court, this issue has not yet been addressed by U.S. courts. The federal government can also preempt state policies with a federal law − an effort sure to generate further controversy and constitutional questions. National associations representing state and local governments have begun to express alarm over these investor-state cases. They correctly fear that the international expropriation rules could establish a new regulatory takings norm that not only will apply pressure to states to conform policies in advance, but could eventually be used to justify federal action against states.

Public Disputes, Private Tribunals: When foreign investors demand compensation under NAFTA or the new FTAs with investor-state systems, the cases are heard either at the International Center for the Settlement of Investment Disputes (ICSID), operating under the auspices of the World Bank or at the United Nations Commission on International Trade Law (UNCITRAL). These two arbitration bodies were designed to arbitrate private cases between contractual parties in narrow commercial disputes. Thus, in the past, the fact that these proceedings were strictly confidential with no access for the press or public and no process for public input was of less concern. Now, however, these arbitral bodies are dealing with significant issues of public policy. Under NAFTA these tribunals are empowered to weigh the appropriateness of public policy matters such as California's rules regarding the reclamation of open-pit mines or the California law phasing out the gasoline additive MTBE, which was found to be contaminating drinking water systems throughout that state. Yet, under the investor-state system, citizens of each state must rely on federal government agencies, such as the State Department and the USTR. to defend their laws, which the latter may not support (as in the case of the California mining regulation). The residents of California cannot be party to the cases involving the health and safety of their communities and their elected guardian of state law, the California Attorney General, has no formal role. Yet, it is the public's tax dollars that may one day be awarded to the foreign investor that is demanding millions in compensation. Recent fixes contained in CAFTA and the new FTAs will open tribunal proceedings to public observation, if interested parties can afford to fly to distant venues. However, citizens still cannot be party to a suit and may have limited *amicus* opportunities as the acceptance of *amicus* briefs is at the discretion of the panel. Under NAFTA, these proceedings can still be closed to the public upon the demand of the plaintiff corporation. Questions regarding the appropriateness and the legitimacy of these private arbitration bodies for public interest disputes are made more urgent by the fact that the number of investment cases under NAFTA and various bilateral investment treaties appears to be rapidly accelerating.

Threat of Investor-State Challenge Chills Public Interest Policies: In one of the first NAFTA claims ever filed, the U.S. Ethyl Corporation filed a suit against a Canadian environmental and public health measure restricting the gasoline additive MMT as the ban was being debated in parliament. NAFTA rules require corporations to wait six months after the events that give rise to the claim and then require an attempt to resolve the situation through negotiations before pursuing a NAFTA investor-state case. That a NAFTA tribunal accepted this case, which was a blatant attempt to intimidate a legislative body from taking action, sends an alarming signal. In the end, the government of Canada settled the case by revoking the ban on the gasoline additive and paid the company $13 million before the NAFTA tribunal had issued a final ruling. More recently, in 2004, an all-party committee of the provincial government of New Brunswick, Canada, recommended that the province develop its own public auto insurance program. The committee was responding to a public outcry over skyrocketing auto insurance premiums. The committee recommended a plan that would achieve average premium reductions of approximately 20 percent over existing plans due to the not-for-profit mandate and other cost savings. The proposal was scuttled, however, after critics pointed out that the proposal could trigger legal action on the part of foreign firms that might consider a public auto insurance plan an "expropriation" of the their market share under NAFTA Chapter 11. Lessons from this auto insurance debacle can just as easily be applied to many state programs to expand health care coverage to more Americans. An untold number of NAFTA Chapter 11 threats may be chilling public interest policies at all levels of government.

Number of Investor-State Cases Against Public Services Could Increase: One firm that has used NAFTA rules, not to claim an "expropriation" but to utilize other NAFTA rules for strategic rather than defensive purposes, is United Parcel Service (UPS). UPS is arguing that because Canada Post provides public mail services, it should not also be providing integrated parcel and courier services. UPS claims that Canada Post's vast infrastructure − including its pensions, vehicles, mailboxes and even mail carriers − constitutes a NAFTA-illegal subsidization of its parcel and courier services and gives Canada Post an unfair advantage in the marketplace. In an era when public and commercial service delivery is often commingled, few public services including health care and education would be immune to similar corporate challenges. The UPS case encapsulates one of the most disturbing trends in the NAFTA foreign investor protection cases taken as a whole, which is that many corporations seem to be moving from the defensive (protecting themselves against alleged expropriations) to the offensive − using NAFTA's investor-state tribunals in an attempt to carve out move favorable market conditions for their firms. CAFTA contains no language to safeguard nations from this type of case.

Environmental Text Has Not Protected Investor-State Environmental Measures: The preamble of NAFTA states that countries will undertake their obligations in a manner "consistent with environmental protection and conservation." Further language in Article 1114 of the investment chapter purports to protect the environment and prevent a race to the bottom in environmental standards. These provisions of NAFTA have been given such short shrift by NAFTA tribunals as to render them meaningless. In the Metalclad toxic waste case, there was no evidence that the tribunal weighed NAFTA's environmental provisions at all before reaching their final decision. The ruling does make clear that no weight was given to the environmental concerns of the community, which was the reason that local officials tried to block the dump. Further, the panel set a number of disturbing precedents. It not only equated the denial of a municipal construction permit and the creation of an ecological reserve with an "expropriation" under NAFTA, but it broadened the definition of "expropriations" to include "incidental" interference with the value of a property, thus opening the door for all sorts of legitimate zoning actions by a sub-national government to be challenged under NAFTA. In the S.D. Myers PCB case, Canada's obligations under an environmental treaty that regulates trade in hazardous waste called the Basel Convention was considered by the NAFTA tribunal, but in the end was completely discounted.

No Appeals in NAFTA, Appellate Proposal for CAFTA Deeply Flawed: Unlike in the WTO, there is no standing appellate body or mechanism in NAFTA. Thus, NAFTA parties are subject to ad hoc rulings by an ever-changing cast of ad hoc panelists who may or may not have had any experience with NAFTA rules or prior NAFTA cases. As a result, there have been contradictory rulings on a variety of issues. In the Fast Track legislation, Congress specifically demanded an appellate procedure be developed for future trade agreements to bring consistency to investor-state tribunal rulings. The CAFTA text includes a provision for establishing such a mechanism one year after the formation of a negotiating group, but the signed CAFTA text does not create the mechanism called for by Congress. The U.S. State Department recently proposed a framework for an appellate mechanism that falls short of the Fast Track requirements. While Fast Track requires "coherence," the State Department proposal calls for an ad hoc appellate mechanism that draws panelists from a roster, not a standing appellate body. The lack of permanent professional staff will ensure that panels will continue to strike out on their own in interpreting the complex investment rules, a recipe for further arbitrary, contradictory rulings. Moreover, given that the proposal is that the decisions of the appellate panels would have no precedent within the appellate mechanism itself or any future arbitration proceedings − conformity will not be attainable. The appellate proposal also appears to eliminate any slim chance of domestic court review of the tribunal award in the nation where the tribunal was seated, under narrow grounds contained in the federal arbitration laws of that nation or under various conventions governing arbitrations. This has been attempted in only three NAFTA cases,[13] only one resulting in a slight modification of the final award, but the narrow avenue into domestic court was considered enough of a wild card to prompt supporters of the NAFTA investment model to try to eliminate the option entirely. Finally, it is unclear how the appellate mechanism will be attached to the agreement. CAFTA has already been approved by the CAFTA nations, and was formally ratified by El Salvador in December 2004. It is hard to believe that after having explicitly required an appellate mechanism, Congress would now be willing to simply hand this vast project over to the executive branch, empowering the USTR to create a super-judicial mechanism that, among other powers, will have the authority to rule that U.S. Supreme Court decisions are violations of international law.

Conclusion

Supporters of NAFTA claimed that these extensive investor protections and their private enforcement mechanism were necessary to protect investors from state seizure of private property (i.e., nationalization). Mexico, which nationalized foreign oil refineries in 1938, was the prime target of these concerns.[14] However, investor-state cases filed to date have had little to do with government seizure of property. Instead, the cases challenge laws, regulations, court decisions and other government actions at the national, state and local level.

The expansive rights granted to corporations under NAFTA were just one of the factors that went largely unnoticed by Congress and the media during the debate surrounding NAFTA in the early 1990s. This occurred for several reasons. First, in the United States, NAFTA was approved under the Fast Track procedure. The use of Fast Track for NAFTA demonstrates how the exclusionary, closed process can obscure meaningful analysis of a proposed agreement's actual, binding terms. But also, given that no past U.S. "trade" agreement had ever contained such provisions, many in Congress dismissed those who raised concerns about NAFTA's investment and other terms as uninformed or "protectionist." In this context, many of NAFTA's potential implications for the basic functioning of all levels of government and the basic public health, safety, land use and environmental responsibilities upon which citizens rely were overlooked.

Now, eleven years after its implementation, NAFTA's actual track record provides a cautionary tale. Yet, the tweaks included in CAFTA and recent bilateral trade agreements to the NAFTA investment model fail to fix the model's core problems and may have created a raft of new problems. For instance, as Georgetown University Law School Professor Mathew Porterfield points out, under CAFTA Article 10.12 regarding "Denial of Benefits," the convoluted language appears to establish the right of a company to use its subsidiary in another nation, a nation that is a party to the agreement, to attack its home-state laws. The only requirement is that the subsidiary must have "substantial business activities" outside of the home state. In other words, the language change in CAFTA could allow Phillip Morris, for instance, to use its Costa Rican subsidiary to attack U.S. tobacco laws as long as that subsidiary had substantial business interests in Costa Rica or any other Central American nation (i.e., was not a post-office box).

What constitutes "substantial business interests" is not defined, and given past NAFTA Chapter 11 decisions this is a cause for grave concern. In the S.D. Myers PCB investor-state case, the NAFTA tribunal ordered Canada to pay $4.8 million even though it was very unclear what S.D. Myers' business interest was in Canada. The company did not even have a long, established track record of importing PCBs into the United States. This did not concern the NAFTA tribunal, which, as noted above, creatively designated S.D. Myers' potential "market share" in Canadian toxics treatment a sufficient investment to generate a NAFTA claim.

This granting of new "standing" rights to U.S. subsidiaries to attack U.S. laws in CAFTA tribunals is an astonishing usurpation of congressional powers to set the laws of the land. On numerous occasions, Congress has rejected bills that would allow regulatory takings cases to be brought more easily in U.S. courts. Now, if the CAFTA signed by the Bush administration is passed, it would grant large multinational firms such rights via an international "trade" agreement approved under Fast Track rules that prevent Congress from striking such a provision. Moreover, these rights would extend only to U.S. firms large enough to have foreign subsidiaries. Most U.S. businesses are not multinational, but operate in their local communities or on a state-wide basis. These small and medium-sized firms, the backbone of the U.S. economy, are thus doubly disadvantaged under CAFTA. Both foreign investors and giant U.S.

multinationals are granted greater rights and powers *vis-à-vis* operations within the United States than U.S. firms have in U.S. domestic courts under the Constitution.

If the implications of this NAFTA provision were not alarming enough, a recent jurisdictional ruling in a case decided in one of the same venues CAFTA would use (ICSID) gave even more encouragement to firms seeking to pursue investor-state cases against their home countries. The case involved a group of Ukrainian investors that incorporated a legal entity in Lithuania and then used that entity to invest back into Ukraine. They later availed themselves of investor protections under the terms of a Lithuania-Ukraine BIT.[15] Two panelists in the case, Dan Price (a former U.S. trade official who negotiated NAFTA Chapter 11) and Italian Professor Piero Bernardini, ruled that the claim should move forward, arguing that the origin of the capital was not relevant.[16] However, the chairman of the tribunal, respected French law Professor Prosper Weil, issued a sharp dissenting opinion. He argued that the ICSID investment system was established to arbitrate *international* claims and encourage *foreign* investment. He stated that the majority opinion cast doubt upon the "integrity" of the ICSID system and was "at odds with the purpose of the ICSID Convention and could jeopardize the future of the institution."[17] Shortly thereafter he resigned from the case, marking the first time any ICSID tribunal chairman had done so.[18] Under CAFTA, it is only a matter of time before a creative American investor will utilize a subsidiary to bring a constitutionally prohibited regulatory takings attack on U.S. law, thus bypassing U.S. legislative and judicial processes.

Even without the extraordinary provision found only in CAFTA granting standing to U.S. subsidiaries to bring an investor-state case against the United States, NAFTA Chapter 11 contains broad rules and expansive definitions that allow firms to bring as many creative investor-state cases as their pocketbooks can support. Whenever these cases are filed, U.S. taxpayer money is wasted because U.S. government attorneys must launch defenses on an array of cases and claims, the majority of which would not be allowed under U.S. law. Millions in taxpayer dollars have already been eaten by these investor-state cases. Meanwhile, some of the NAFTA panels have served to make a bad situation worse by rewarding investors making outrageous claims. Investors are not only bringing regulatory takings and other cases that are contrary to U.S. law, but have launched investor-state cases covering services (i.e., the UPS case challenging aspects of the Canadian postal service) and trade in goods (i.e. Canadian softwood lumber companies challenging the United State's imposition of countervailing duties) that were never intended for private investor-state arbitration.

Despite this track record, the Bush administration has rejected demands from Congress and a large number of interested parties, such as associations representing states, attorneys general, mayors, counties, townships, jurists and citizens to "fix" the deep flaws in the NAFTA investor-state model in new agreements. The modest tweaks to the NAFTA investment model contained in CAFTA and other FTAs fail to remedy the fundamental problems and thus will result in more challenges to public interest policies at the federal state and local level. Moreover, the Bush administration has failed to answer key questions posed by scholars and policymakers alike about the NAFTA investment mechanism. Is it constitutional? Are such extra-judicial tribunals necessary, much less appropriate, in a nation with a fully developed judicial system?

Public Citizen recommends:

- The investor-state mechanism should be kept out of future agreements. Commercial disputes arising under the terms of international agreements between nations should be dealt with by the governments themselves on a state-state basis. There is precedent for this approach, as an investor-state enforcement mechanism was not included in 2004 U.S.-Australia FTA.

- NAFTA is overdue for a thorough review with an overarching question of whether it should be continued. In the interim, however, the radical regulatory takings provisions that give foreign investors greater rights than U.S. investors under U.S. law should be excised from NAFTA and kept out of future agreements. Other aspects of the NAFTA model of investor protection model require significant change to ensure that foreign investors are not granted greater substantive or procedural rights than U.S. firms operating under U.S. law.

- Trade agreements should focus on traditional trade matters − the terms of exchange between countries − not countries domestic regulatory system, investment regime or other internal policies. All non-discriminatory environmental, health, safety and other public interest policies, as well as state and local matters and domestic court decisions must explicitly be kept from the coverage of investor protection rules.

- If pressured to accept such investor-state enforcement as part of a free trade agreement or a bilateral investment treaty, developing countries should work to ensure that such enforcement is a temporary measure only.

- When Fast Track expires in 2007, this outdated procedure for trade policymaking must be replaced by a more open, accountable procedure giving all potentially interested parties a voice in the process.

The NAFTA investor-state track record that this report exposes offers lessons that careful analysis of a pact’s specific requirements and potential consequences must surround the debate about the future course of U.S. trade policy and be examined in the context of what values the United States wishes to export around the world.

I. BACKGROUND

> "If Congress had known that there was anything like [Chapter 11] in NAFTA they would never have voted for it."
>
> Abner Mikva, former U.S. federal judge and NAFTA panelist in the Loewen case[19]

The North American Free Trade Agreement (NAFTA) is an international commercial agreement between the United States, Mexico, and Canada that took effect in 1994. Unlike the trade agreements that preceded it, NAFTA's scope extended far beyond traditional trade matters, such as tariffs and quotas for trade in goods, and instead included entire chapters on foreign investor rights, the ownership and domestic regulation of services, and even how tax dollars can be spent on procurement. NAFTA's Chapter 11 contains NAFTA's rules regarding investment. Chapter 11 was designed to grant special legal protections and new rights to corporations from one NAFTA country that do business in another NAFTA country. NAFTA's Chapter 11 is unusual because it provides for the private enforcement of these investor rights by the investors themselves outside of a nation's domestic court system and in private trade tribunals. This private enforcement mechanism is called an "investor-state" dispute resolution system. It contrasts with the state-state dispute resolution system of the World Trade Organization (WTO) and other multilateral agreements, in which only the nations signing the agreements can take action to enforce the terms of the agreements.

Corporate investors have used NAFTA's investor-state enforcement system to challenge domestic court rulings, local and state environmental policies, municipal contracts, tax policy, federal controlled substances regulations, federal and state anti-gambling policies, emergency efforts to prevent the spread of mad cow disease, a federal government's alleged failure to provide water rights, and even the provision of public postal services. In most instances, challengers have sought millions of dollars in damages, claiming that regulatory measures and government actions that negatively affected their profitability. At least one NAFTA corporation has succeeded in winning $15.6 million in a "regulatory takings" case that would not have been possible under the U.S. Constitution. If a NAFTA investor prevails in its NAFTA claim, the losing nation is obliged to compensate the firm from the national treasury.

The investor-state system was designed to operate behind closed doors. NAFTA investor-state cases are litigated in special international commercial arbitration bodies that have generally been closed to public participation, observation and input. The decisions made in these bodies, which provide no appeals process, are binding upon national governments. Two arbitral bodies, which are described below, are listed in NAFTA's Chapter 11 as venues for private enforcement of NAFTA's terms: the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank's International Center for Settlement of Investment Disputes (ICSID). These two venues do not provide the basic due process or openness guarantees afforded in national courts. During the proceedings, documents can be restricted, local officials whose policies are challenged have no standing to participate, and the public and press have no right to observe proceedings. Rather, three-person panels composed of professional arbitrators meet to hear arguments in cases, most often in venues far distant from the location where the case arose. Instead of acting as conciliators, the tribunal members become judge and jury and can rule that a NAFTA member nation must pay an unlimited amount of taxpayer dollars in compensation to the corporation whose NAFTA rights the three arbitrators conclude have been impaired. No sovereign immunity shields apply in this system, and thus foreign investors are allowed to bring suits against governments not allowed in U.S. law.

Moreover, as more corporations have used NAFTA's Chapter 11 to attack federal, state and local policies, NAFTA's investor protections and its private enforcement mechanism are drawing increased scrutiny to the NAFTA investment model. This model, with only modest changes, was incorporated into recent bilateral agreements, including the 2003 U.S.-Chile and U.S.-Singapore Free Trade Agreements (FTAs) as well as the 2004 FTA with Morocco. The Bush administration has been eager to extend it to additional FTAs, including the pending Central America Free Trade Agreement (CAFTA), which would expand NAFTA to five Central American nations and the Dominican Republic, as well as the Free Trade Area of the Americas (FTAA), a proposed NAFTA expansion to 31 countries in the hemisphere. In addition, NAFTA-style investment rules form the basis of the U.S. Model Bilateral Investment Treaty (BIT) and proposed BITs.

Given that the NAFTA investment model now has a 11-year track record, it is essential to take a close look at the NAFTA cases that have been adjudicated to date before extending the investment model to more nations. This report focuses on the details of the 42 known NAFTA cases and claims, because the track record of investors utilizing the investor-state enforcement system provides the best evidence of the threat the NAFTA model of investor rights poses to democratically achieved policies, democratic governance and the rule of law.

Rather than including such expansive investor rights in new trade agreements, a wide range of interested parties are calling upon the Bush administration to simply leave them out. This approach has precedent. Facing pressure from the Australian Congress, (which was itself under enormous domestic political pressure), the Bush administration did not include an investor-state mechanism in the 2004 U.S.-Australia FTA. The U.S.-Australia FTA does contain many of the same substantive rights and privileges for foreign investors and allows the two governments to revisit the use of investor-state enforcement in the future. Still, the exclusion of the mechanism was a significant development, no doubt related to the fact that Australian firms have significant investments in the United States and visa versa, opening up the possibility of wide-ranging attacks on domestic laws and regulations.

The next fight over the appropriateness of the NAFTA model is likely to be in the U.S. Congress over CAFTA. The Central American agreement is slated for a vote in 2005. Thus, a careful review of the NAFTA investment rules 11-year record may provide the most prudent means to evaluate the model's usefulness for CAFTA and future FTAs.

In this "Background" section of the report, we begin our analysis by describing: NAFTA's extraordinary investor rights; the private enforcement mechanism developed to enforce these rights and secure cash compensation; a failed effort by NAFTA trade ministers to "fix" NAFTA's worst excesses; the failure of the USTR to respond to congressional dictates to prevent foreign investors from enjoying greater rights than U.S. investors under U.S. law; the increased questions that have been raised by jurists and scholars regarding the constitutionality of the NAFTA Chapter 11 mechanism. In the sections that follow, we review major NAFTA cases of public interest, new NAFTA claims of public interest, and other NAFTA cases and claims that have been filed.

Investors and Their New NAFTA Rights and Privileges

Under NAFTA rules, an "investor" who is empowered to use the NAFTA Chapter 11 enforcement system is one who makes an "investment" as defined by NAFTA. A long list of business activities constitutes an "investment" under NAFTA's definition, including:

- an enterprise (defined as a private or publicly held legal entity, including any corporation, trust, partnership, sole proprietorship, joint venture or other association),
- equity security of an enterprise,

- debt security of an enterprise,
- a loan to an enterprise,
- interest in an enterprise that entitles the owner to income or profits,
- real estate or other property used for business purposes, and
- certain interest arising from the commitment of capital.[20]

Under NAFTA's investor-state dispute resolution system, only the "parties" to NAFTA can be sued. This means that the responsibility to defend the cases brought by NAFTA investors lies with the federal governments of Mexico, Canada and the United States. However, an array of state and local laws and policies are exposed to challenge by investors under NAFTA Chapter 11's new investor guarantees. A government "measure" that can be challenged under NAFTA as infringing on investor rights includes "any law, regulation, procedure, requirement or practice" at any level of government.[21] State and local governments whose policies are challenged as violating NAFTA must rely on federal governments to defend their interests, whether the federal government agrees with the state policy or not.

NAFTA's Chapter 11 contains a number of special protections for investors. There are five primary NAFTA investor rights and privileges that investors have claimed have been violated in the investor-state cases reviewed in this report:

- NAFTA Article 1110 guarantees foreign investors compensation from the treasuries (i.e., from the taxpayers) of NAFTA governments for any direct government expropriation (i.e., nationalization) or any other action that is "tantamount to" an expropriation or an "indirect" expropriation.[22] This article is the basis of "regulatory takings" claims that have occurred under NAFTA Chapter 11.

- NAFTA Article 1102 includes a "national treatment" provision that requires governments to treat foreign investors from a NAFTA signatory country no less favorably than domestic investors with respect to all phases and aspects of investment, from the initial establishment of an investment to the sale of the investment.[23]

- NAFTA Article 1103 provides for "most favored nation" (MFN) treatment, a provision that requires governments to give foreign investors from signatory nations no less favorable treatment than the best treatment given to investors of another signatory nation or even nonsignatory nations, even if that treatment is better than that given to domestic investors.[24] This rule can and has been interpreted to mean that any investment right that the host nation grants to *any* country under *any* treaty must be granted to all nations to whom the host country has MFN obligations.[25]

- NAFTA Article 1105 contains a "minimum standard of treatment" provision, which requires that investors must be given treatment "in accordance with international law" including "fair and equitable treatment and full protection and security."[26] This vague catch-all clause has been used in several investor-state cases to dramatically expand NAFTA's corporate investor protections.

- NAFTA Article 1106 forbids the use of "performance requirements," which is a term describing conditions on investment, such as rules requiring goods to be manufactured containing a certain level of domestic content, or the employment of locals or the development of local infrastructure. These measures are geared toward shaping the terms of foreign investment to ensure local economies, and not just foreign investors, benefit from the foreign direct investment.[27]

While NAFTA provides an array of legally binding constraints on government regulatory action, rights and privileges for foreign investors and strong private enforcement of these rules, NAFTA's terms concerning the environment or other public interest concerns are meager. Notably, the non-binding preamble of NAFTA states that the parties resolve to strengthen the development and enforcement of environmental laws and regulations as well as promote sustainable development. In addition, Article 1114 of NAFTA's investment chapter contains language purporting to protect the environment. Article 1114.1 states that nothing in Chapter 11 shall prevent a party from maintaining measures to ensure that investment is undertaken in an environmentally sensitive manner. Article 1114.2 states that parties "should" not encourage investment by relaxing or waiving or derogating their domestic health, safety or environmental measures in order to encourage investment. Of course, unlike NAFTA's investor rights rules, this clause is permissive, not mandatory. The term "shall" is used to establish investor rights, while environment terms "should" be met. Both clauses are worth noting because they have been almost entirely disregarded by the investor-state NAFTA tribunals when weighing environmental protection against investor rights under NAFTA.

If a company or investor believes that a government has violated these NAFTA rights and protections, the investor can use the investor-state system to initiate a binding dispute resolution process and seek monetary damages outside the country's court system. In a departure from many previous investment agreements, both parties need not consent to the arbitration, but an investor can initiate a case, thereby forcing the respondent country to decide whether or not to participate in the arbitration (it would be foolish for a nation not to).[28]

Although a NAFTA panel in an investor-state dispute cannot directly order a NAFTA country to rescind the law or policy in question, nations are under tremendous pressure to do just that to shield themselves from being ordered to pay further awards of cash damages to investors because of the policy. Indeed, in the very first NAFTA investor-state case ever initiated, which involved the U.S. Ethyl Corporation, Canada moved to rescind its environmental measure regulating a gasoline additive developed by Ethyl even before the final NAFTA tribunal ruling in an effort to avoid a large damage award. In addition, when a state or local measure is challenged successfully under NAFTA, the federal government bears the liability − creating enormous incentive to pressure state and local governments into rescinding such policies. The federal government could attempt to use lawsuits, promulgate a new federal law to preempt the challenged state policy or withhold federal funds otherwise available to the state to force compliance. If a federal government refused to abide by the final award, a panel could be convened under the traditional state-state dispute resolution mechanism called for in Chapter 20 of NAFTA, but this has not happened in a NAFTA Chapter 11 case to date.[29]

NAFTA Corporate Dispute Resolution: Private Enforcement of a Public Treaty

NAFTA's Chapter 11 lists two international arbitration bodies in which NAFTA investor-state disputes can be heard. These two bodies operate with similar rules and procedures which exclude the public while providing investors with a sympathetic ear. The International Center for the Settlement of Investment Disputes (ICSID) operates under the auspices of the World Bank. It first began operation in 1966 as the implementation arm for an international treaty called the Convention on the Settlement of Investment Disputes. The Convention assigned ICSID the role of administering a new arbitration system established for handling disputes between countries that signed the convention and private foreign investors from signatory nations. For the most part, the new system was intended to handle cases involving specific contractual disputes between governments and corporate contractors. It was not created to adjudicate broad questions of public policy and the appropriate use of governmental regulatory authority.[30]

The institutional scope of ICSID increased with the adoption of the ICSID "Additional Facility Rules" in 1978. These rules allowed proceedings when either the investor's home country or the country against which a case was brought did not belong to the ICSID Convention. In 1994, ICSID took on a new role when it was chosen by NAFTA negotiators as one of two arbitral bodies that could hear investor disputes under NAFTA's Chapter 11. Since neither Mexico nor Canada is an ICSID member country, any NAFTA cases involving parties from the United States and one of those two countries would have to be brought to ICSID under the Additional Facility Rules. Meanwhile, any NAFTA investor-state cases involving both Canada and Mexico must be brought under the UNCITRAL rules.

Despite the rapid growth in bilateral investment agreements in recent years, the number of cases brought to ICSID was limited until recently. In the past eight years, however, in the words of the ICSID Deputy Secretary-General, "the floodgates then seemed to open."[31] More than three-fourths of ICSID's case load has been instigated since the beginning of 1997; 127 cases have been registered since then – over three times more than in ICSID's entire previous history.[32]

Arbitral tribunals for ICSID cases are appointed on a case-by-case basis, and there is no requirement for the arbitrators to have served in any similar capacity before. Most strikingly, the parties to the case generally appoint the members of the tribunal. This system may have been suited for private contractual disputes, but is not appropriate for matters of public policy.

Most often, including under NAFTA, the investor and the country involved each appoint one arbitrator, and the two initial arbitrators then choose a third who serves as the presiding arbitrator. If the parties can't agree on a third arbitrator, the ICSID Secretary-General can choose the third from an ICSID "panel" of arbitrators appointed by member countries. [33] In addition, there is no provision for *amicus* participation by outside interested parties, and there is no standard appeals process such as that found in domestic courts.[34] ICSID does provide for the annulment of final awards on narrow grounds, but this is not an appeals process.[35]

UNCITRAL is the United Nations Commission on International Trade Law. It adopted a set of Arbitration Rules in 1976 that parties from any country can use.[36] Since neither Mexico nor Canada are members of the ICSID Convention, any NAFTA investor rights cases in which both parties are from these two countries must be brought under the UNCITRAL rules. Any other Chapter 11 dispute can also be brought under UNCITRAL.

The UNCITRAL rules for the arbitration proceedings themselves are very much like those of ICSID, and the rules for the selection of arbitrators are similar as well. However, unlike ICSID, UNCITRAL only provides a set of rules. UNCITRAL has no professional staff to provide any administrative oversight for arbitration proceedings. It does not collect or compile final decisions in arbitration cases and therefore cannot make them available to the public. In fact, UNCITRAL does not collect and therefore does not make public even basic information about pending and concluded cases, although they are sometimes made public by the plaintiffs. Therefore, a case can proceed under UNCITRAL rules for years without the public being aware of it, and the history of cases brought under UNCITRAL rules is not known. Since UNCITRAL has no staff to oversee cases, there is no provision to annul arbitral decisions as there is in ICSID. Thus, the process under UNCITRAL provides even less transparency and public participation than under the ICSID rules, which themselves fall far short of domestic court due process and access to information standards.

Because these rules were created to arbitrate private contract disputes between investors and host states, the arbitration process in ICSID and UNCITRAL is a closed and unaccountable one. For instance, ICSID Additional Facility rules state that "[t]he deliberations of the Tribunal shall take place in private and remain secret,"[37] thus traditionally only minimal information is available to the public about cases. ICSID does post on its Web site basic information such as names of the parties, date of complaint and names of arbitrators, but UNCITRAL does not provide even this basic information. Neither institution is permitted to release information about final awards without the consent of both parties. ICSID often posts information about final awards on its Web site, but UNCITRAL does not.[38]

Moreover, potential for conflict of interest in NAFTA Chapter 11 disputes is serious. Having parties to the suits appoint arbitrators raises potential problems as illustrated in the NAFTA Chapter 11 Methanex case regarding California's ban of the gasoline additive MTBE. Panelist Warren Christopher resigned from the case when the Methanex firm protested the close relationship between the former Secretary of State and then-Governor Gray Davis of California, whose actions were at issue in the case. Also, major law firms advertise their attorneys as both counsel for the plaintiff and as NAFTA panelists − suggesting that this joint expertise − as advocate and judge − is especially valuable to clients in need of Chapter 11 counsel.[39]

The lack of transparency and public participation in ICSID and UNCITRAL, combined with the vast powers of tribunals to grant an infinite number of taxpayer dollars to corporations that successfully bring NAFTA suits, have raised significant questions about the appropriateness and the legitimacy of these private venues for the adjudication of significant issues of *public* concern. In response to mounting criticism, ICSID itself has proposed a variety of reforms in the areas of providing a mechanism for injunctive relief, greater public access to awards, *amici* participation, disclosure rules for panelists and an appeals procedure.[40] The ICSID convention can be amended only if all 140 contracting states ratify the amendment, but there is an easier process for amending Additional Facility Rules. At this point it is not clear how much opposition the reforms may face, what avenue for adoption they may take, or how long such a process may take. As the cases described in detail in this report demonstrate, this closed-door process has already benefited foreign investors to the detriment of the public interest.

As Criticism of Chapter 11 Builds, NAFTA Trade Ministers Issue a "Clarification"

Responding to a rash of press and mounting criticism of NAFTA's closed-door, investor-state process, on July 31, 2001, the NAFTA Free Trade Commission, composed of three NAFTA country trade ministers, issued a "clarification" related to NAFTA Chapter 11:[41] NAFTA Article 1131 (2) allows for the Free Trade Commission to issue "interpretations" of NAFTA rules if agreed to by consensus. The clarification was issued as criticisms of the NAFTA investment process by environmental and consumer groups mounted and NAFTA tribunals continued to issue contradictory and controversial rulings. It is important to discuss this clarification and analyze its intended "fixes" of NAFTA because similar language has now been included in newly negotiated FTAs, such as CAFTA.

The NAFTA Commission's 2001 Chapter 11 clarification dealt with two issues. First, in response to a firestorm of criticism with regard to NAFTA's closed-door process, the trade ministers turned their attention to the transparency issues. The clarification states that the NAFTA parties (i.e., the NAFTA nations) "agree to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal," except for confidential business information, information that is privileged or otherwise protected from disclosure under the party's domestic law, and "information which the Party must withhold pursuant to the relevant arbitral rules as applied."[42] This last clause is the pertinent one. The problem with the clarification is that it does not change the underlying arbitration rules, such as those at both ICSID and UNCITRAL which grants plaintiff investors the right to closed-door proceedings. At best, the NAFTA clarification is the signatory government's assertion that if it is allowed to do so by the plaintiff, it will attempt to have open oral arguments. However, under the clarification it remains possible that serious matters regarding the public interest will be adjudicated behind closed doors under NAFTA.

Also in the clarification, the NAFTA signatory governments declare that "Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."[43] This represents a declaration by the NAFTA signatory governments that they will make NAFTA Chapter 11 arbitration documents publicly available, and it appears that they generally have. All three NAFTA governments have set up Chapter 11 Web sites for posting arbitral material,[44] and they appear to be posting key documents such as "Notice of Arbitration" (the legal brief by the plaintiff that initiates an arbitral proceeding), the statement of defense by the governments, and transcripts of hearings. However, the U.S. government does not post "Notices of Intent to Submit a Claim to Arbitration," which is the first step in bringing a complaint and would provide the public and the press timely notice of new cases. In addition, even though future proceedings may still be closed, at least two tribunal hearings (in the Methanex and UPS cases) have been open to the public, and in the Methanex case, the NAFTA panel agreed to receive two *amici* briefs by public interest groups. However, the public's right to participate in a limited way through *amici* briefs is not assured. NAFTA panels get to decide on a case-by-case basis whether or not they will allow *amici* briefs.

It is important to note that as a practical matter, the clarification does little to remedy the access problems. Citizens and other interested parties, such as state and local elected officials, have no standing and no right to participate substantively as parties to the proceedings. For the citizens of California concerned about MTBE contamination of their wells and the potential impact of a NAFTA case, the fact a NAFTA tribunal in a far away Washington D.C. location had opened oral arguments to the public gives them little comfort. The fate of their property values − greatly affected by whether a home has access to affordable drinking water protected by California's ban on MTBE − and a significant state policy will be determined in an obtuse, exclusive arbitration system which operates outside of the basic due process protections and other substantive and procedural rights provided by the U.S. Constitution.

In addition, the NAFTA Commission's 2001 Chapter 11 clarification also attempted to clear up what was meant by the guarantee of a "minimum standard of treatment" under international law provided for in Article 1105 of NAFTA, which had been given vastly different interpretations by NAFTA panels. The clarification simply states that Article 1105 provides those rights and protections afforded by "customary" international law. Unfortunately, the language that the trade ministers issued conflicts with the plain language of NAFTA and does not define what is encompassed in the rubric of "customary" international law. As a result, although we are instructed that a traditional interpretation is intended, we do not know what body of law is included, leaving in place what amounts to an extremely vague and open-ended standard that can be used to challenge efforts to protect the environment and other public interest policies.

In addition, the interpretation attempted to put a stop to NAFTA claims that a NAFTA panel's finding of a breach of another treaty, such as a WTO agreement, constitutes a breach of 1105 minimum standard of treatment under international law. The text states that "a determination that there has been a breach of another provision of NAFTA or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1)." This language may pare down the number of claimants attempting to import other treaty obligations via Article 1105, but it does not shut down the possibility of firms using NAFTA Chapter 11's "most favored nation" rule to import more favorable obligations from other treaties. This has been attempted successfully in bilateral investment treaty cases heard at ICSID and it may be only a matter of time before a firm is successful in this endeavor in the NAFTA context. [45]

One reason for the political shift that precipitated the Trade Minister's clarification was the looming threat of rulings against governments on a number of cases due to a broad interpretation of NAFTA Article 1105's minimum standard of treatment. Most notably, the United States was worried that it could loose the pending billion dollar California MTBE case if the 1105 standard was not tightened. One concern, however, is that it will be up to each individual NAFTA tribunal to decide whether the clarification is a legitimate interpretation or an inappropriate effort to amend NAFTA after the fact. Some legal scholars have pointed out that had the NAFTA authors intended to add the word "customary" to the NAFTA text − they would have, and the action of the Ministers is better described as an inappropriate attempt to insert a contradictory view. This view is supported by an affidavit sworn out by the former Principal Legal Counsel for International Trade Negotiations in Mexico's Ministry of Foreign Trade, Guillermo Aguilar Alvare. Alvare, who negotiated the Chapter 11 text on behalf of Mexico, stated that Mexico explicitly rejected the construct of "customary" international law, largely due to the fact that this term encompassed mostly United States and European jurisprudence.[46] With only a small number of post-clarification rulings, so far it appears that NAFTA tribunals are being guided by the clarification.

Meanwhile, in issuing this limited clarification, the trade ministers from the three NAFTA nations refused to deal with the core problems of Chapter 11 that have been raised by legislators and policy analysts in all three nations. The regulatory takings provisions of Article 1110 have drawn the most fire. However, the trade ministers refused to provide an interpretation of the provision or in any way limit its use. As well, the ministers refused to deal with the ever-expanding definition of both government "measure" and "investment," which have generated numerous new cases based on expectations of future profitability and market share.

New Investment Rules in CAFTA/ FTAs Fail to Meet Congressionally Required "No Greater Rights" Standard

While the NAFTA trade ministers were tinkering with the various aspects of NAFTA's investment rules, Congress decided to take matters into its own hands. In the U.S. Senate, where procedural rules make it easier for members of the minority party to obtain floor votes on their proposed amendments, senators fought to prevent some of the most damaging elements of the NAFTA investment model from being included in future trade agreements during the debate surrounding the "Bipartisan Trade Promotion Authority Act of 2002," better known as "Fast Track."[47] The Fast Track procedure delegates away Congress' exclusive constitutional control over trade policy, authorizing the president to negotiate the terms of trade agreements, write the implementing legislation and give Congress only a yes/no vote on the completed package. While the Fast Track mechanism itself is controversial and passed only by a narrow margin, a key issue in the 2002 Fast Track debate was NAFTA Chapter 11's investment rules.

Both the House and the Senate debated the track record of Chapter 11 in undermining public interest policies and granting foreign investors regulatory takings rights that were not enjoyed by U.S. businesses. As amendments on the issue gained support, the Bush administration added some language to the bill aimed at addressing congressional dissatisfaction with the performance of Chapter 11. Between the meager language in the final Fast Track statue and the clearly articulated demands for deeper change found in amendments that did not pass, a series of demands were proposed for the Bush administration to meet before including investment rules in future trade agreements. The key requirement that made it into the final Fast Track statue was that foreign investors should have "no greater substantive rights with respect to investment protections than U.S. investors in the United States."[48]

Congressional concern was justified because NAFTA Chapter 11, the enforceable investor-state terms of CAFTA and many of the post-Fast Track FTAs appear to dispense completely with the sovereign immunity shield enjoyed by the federal government *vis-á-vis* claimants in U.S. courts. As one legal scholar put it, "[b]y assenting to the terms of NAFTA, the United States, Canadian and Mexican governments essentially have waived whatever rights of sovereign immunity they may have enjoyed prior to signing."[49] While some foreign investors may argue that Congress waived federal sovereign immunity when it passed NAFTA, this is a hard argument to make since most members of Congress were not even aware of the existence of NAFTA Chapter 11 due to its approval under the Fast Track procedure, which circumvents the normal deliberative process. Moreover, the NAFTA implementing legislation states in part that when there is a conflict between U.S. law and NAFTA, U.S. law will prevail.[50] This buttresses the argument that Congress did not intend to waive sovereign immunity. The point may be an academic one; however, as NAFTA investors are proceeding to bring suits that are accepted and adjudicated by NAFTA tribunals that would not be allowed under U.S. law. Under U.S. law, both foreign and domestic firms can sue under the Due Process or Equal Protection Clauses of the Constitution for injunctive relief, but they are not allowed to sue for monetary relief.[51] Under NAFTA Chapter 11 and the investment rules of post-Fast Track FTAs; however, foreign investors can sue for monetary relief on similar grounds regarding national treatment (anti-discrimination) and fair and equitable treatment and thus enjoy greater rights than U.S. citizens and firms.

Additionally, in the final Fast Track statute, Congress identified several specific attributes that future agreements should contain, including:

- establishing "standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice,"
- establishing "fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process,"
- establishing "mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims,"
- "providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements,"
- "ensuring that all requests for dispute settlement are promptly made public…all proceedings, submissions, findings, and decisions are promptly made public; and…all hearings are open to the public,"
- "establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and nongovernmental organizations."[52]

The USTR has systematically failed to meet these clear demands by Congress. In the recently completed Model Bilateral Investment Treaty, a proposed BIT with Uruguay, and in recently completed and proposed FTAs, including CAFTA, these issues have been given only superficial attention, and few, if any, real changes have been made.

Regulatory Takings Cases Allowed Under CAFTA and Recent FTAs That Would Not Be Allowed Under U.S. Law

The Takings Clause of the Fifth Amendment to the U. S. Constitution requires the government pay compensation if it takes property for public use. Takings typically involve the physical seizure of property by the government for the construction of power lines, parks, public facilities and other public purposes. In the past decade, various conservative "property rights" groups have tried unsuccessfully to expand on the limited doctrine of "regulatory takings." In theory, there are limited circumstances under which "regulatory takings" may occur – situations where government regulations so completely destroy a property's value that a court will determine that a taking has occurred. If such a determination is made, the government will be required to pay for the property. However, in practice, U.S. courts almost never find that regulatory takings have occurred, making the doctrine more or less moot in contemporary takings jurisprudence. The situation is different under NAFTA Chapter 11, however, where a number of aspects of the agreement facilitate, rather than discourage regulatory takings claims.

> "In particular, we are troubled that a claim by a foreign company that a local government's regulation or zoning law constitutes a taking against the company will make it impossible for the locality to enforce that specific regulation or law against the company. Equally troubling, such an action would appear to favor foreign companies over domestic companies, which would in all likelihood have to comply with the local regulation or law."
>
> National Association of Towns and Townships, Apr. 4, 2002 letter to Congress

Categories of Property Eligible for a Takings Claim Far Broader than Under U.S. Law: Under U.S. law, generally only real property (i.e., real estate) can be considered for regulatory takings claims. Personal property (anything other than land), other generalized economic interests, and concepts such as "market access" are not eligible for such claims. Rather than comply with Congress' "no greater rights" requirements and narrow the range of property that can be the appropriate subject of a takings claim, shortly after the Fast Track bill passed, the USTR moved in the opposite direction. The USTR outlined its position in a paper submitted to the WTO that "investment agreements must have a broad, open-ended definition that includes all types of investment." The USTR wrote that in the context of that institution's debate about whether or not to conduct multilateral negotiations on an investment treaty.[53]

Thus, it is not surprising that the USTR *broadened* rather than narrowed the definition of investment in recent FTAs and CAFTA. The USTR characterizes investments in these agreements in terms that would not be sufficient to establish the existence of a protected property right under the Takings Clause, including "the commitment of capital or other resources, the expectations of gain or profit, or the assumption of risk."[54] Moreover, the USTR has now made clear that even more types of investments qualify for NAFTA's investor protections. CAFTA, for instance, now includes "licenses, authorizations, permits" in the list of covered investments. As these are measures often granted by state and local governments, the FTAs are likely to expose more local government decisions such as those regarding zoning, building permits and licensing of various establishments to challenge under these investment rules.

Plus, the powerful pharmaceutical lobby succeeded in making sure that "intellectual property rights" are now listed as a protected investment in the FTAs. This means that a pharmaceutical company that believes its intellectual property rights are affected by a public health policy that may negatively impact its profitability could use the investment rules to bring a regulatory takings claim. Such a suit already has been threatened by Phillip Morris against proposed Canadian regulations that would forbid the use of such descriptors as "light" and "mild" on cigarette packaging. Phillip Morris noted at the time that this was a violation of its intellectual property rights under the WTO and NAFTA. The broadened definition of investment means that the firm does not have to convince the U.S. government to press its claim using the state-state enforcement mechanism; rather, it has been granted explicit permission to attempt an investor-state suit under the FTAs if another country covered by the broader investment definition passed such a law.

Other examples of investor protections providing greater rights than U.S. businesses are allowed under the constitution involve NAFTA cases in which claimants have challenged regulations governing toxic substances, as in the Methanex case, where a Canadian chemical company is challenging California's law banning MTBE which has been found to be polluting scarce water resources across the state. Under the U.S. Supreme Court holding in *Lucas v. South Carolina Coastal Council*, pollution that harms public or other properties is a nuisance that can be regulated by states without compensation.[55] Thus, chemical pollutants are unlikely to qualify as "property" eligible for a regulatory takings claim. The investment rules in the recent FTAs fail to ensure that a government action to prevent a public nuisance is not treated as an expropriation − a failure sure to generate further investor-state claims by chemical companies attempting to combat environmental regulation.

> "The vague nature of international agreements such as NAFTA that define "expropriation of property" to include "indirect expropriation" or "tantamount to expropriation" can give rise to interpretations that are inconsistent with the United States Constitution. It is our view that the "no greater rights" language must specifically reference the United States Constitution as interpreted by the Supreme Court in order to ensure that international businesses do not receive preferential treatment when compared to domestic businesses."
>
> National Conference of State Legislatures, Council of State Governments, U.S. Conference of Mayors, National League of Cities, Sept. 23, 2003 letter to USTR

In addition to failing to limit the definition of investment, the USTR also failed to prevent future trade panels from extending the textual definition of investment even further to even more intangible economic interests. For instance, in the S.D. Myers PCB case, the tribunal found "market share" to be a legitimate investment, and the Pope & Talbot softwood lumber tribunal declared that "market access" constituted an investment.[56] The USTR could have, but failed to clarify that these generalized economic interests were not encompassed under the definition of investment in the new FTAs. Instead, new language in the definitions section regarding "the expectation of gain or profit, or the assumption of risk" extends the categories of generalized economic interests that are investor-state enforceable.

Finally, it is important to highlight new language in the "definitions" section of certain of the FTAs. For instance, CAFTA contains a Section C under definitions that extends the investor-state dispute resolution system to corporations that have a "written agreement" with a federal government with regard to "natural resources or other assets that a national authority controls." This means the new FTAs explicitly allow foreign investors to avoid the domestic court system and bring disputes over government contracts straight into binding international arbitration. The language of the text implicates an incalculably broad array of assets controlled by the federal government. For instance, investors could bring arbitral challenges over oil and gas, mining and water contracts without first having to resort to domestic legal remedies. In the United States, firms with concession contracts or other contracts with the federal government regarding the management of public lands or other public assets would not be allowed to avoid U.S. courts if involved in a contract dispute.

Definition of Expropriation Broader: In CAFTA and the post-Fast Track FTAs, the USTR also failed to limit the expansive definition of expropriation, which under NAFTA has led to the compensation of foreign investors for "regulatory takings" that would not be eligible for such a claim under U.S. law. Congress wanted to ensure that of foreign investors could not seek compensation for measures that were less than true expropriations.

NAFTA Article 1110 guarantees foreign investors compensation from the treasuries (i.e., from the taxpayers) of NAFTA governments for any direct government expropriation (i.e., nationalization) or any other action that is "tantamount to" an expropriation or an "indirect" expropriation.

One change the USTR made in the FTAs was to replace the words "tantamount to" a nationalization or expropriation with "equivalent to" an expropriation or nationalization in the section delimiting when expropriations would be eligible for compensation.[57] However, this change is merely cosmetic. The new FTAs still require compensation for "indirect" expropriations, which is the operative term.[58] Indeed some NAFTA panels have held that "tantamount to" is redundant and does not expand upon the scope of direct and indirect expropriation.[59] This means that an investor can still force a government to pay compensation for incidental effects on its business resulting from an environmental, labor, or other public interest regulation.

Another mechanism Congress sought to include in future FTAs to ensure "no greater rights" for foreign investors was to require trade tribunals to follow U.S. law in determining if an expropriation had occurred. The post-Fast Track FTAs give further guidance regarding what constitutes an expropriation, and this language includes a list of factors to be considered in determining if a takings has occurred that were generated by the U.S. Supreme Court case of *Penn Central Transportation Co. v. New York City*.[60] However, the *Penn Central* factors are relevant only when considered in the context of over 25 years of judicial interpretation – interpretation that has made it extremely difficult to find a taking. Outside of the U.S. jurisprudence defining them, terms such as the "character of the government action" are meaningless. Unless the FTAs require that U.S. jurisprudence be adhered to, the dispute tribunals will be able to interpret the list of *Penn Central* factors in any number of ways, without being bound by decades of U.S. court precedence about what these terms mean.

Lesser Degree of Adverse Impact Required: The protections accorded foreign investors under NAFTA Chapter 11 greatly surpass those provided by the Takings Clause in another important way. The degree of adverse economic impact required for an expropriation to be found under the trade agreements' investment rules is apparently much lower than the near total destruction of the value of the property required by Supreme Court interpretations of the Takings Clause. In the 1978 *Penn Central* case, the Supreme Court rejected the notion of "conceptual severance" − the idea that harming one part of the property or one use of the property eliminated the value of the property or parcel as a whole. In addition, Congress has repeatedly rejected property rights bills that would have permitted conceptual severance.

Yet in the NAFTA Chapter 11 Metalclad toxic waste case, an investor-state tribunal ruled that even though the investor may have been left with economically beneficial use of the land, potentially including "the exploration, extraction or utilization of natural resources," a municipality's denial of a construction permit constituted a compensable takings.[61] Moreover, the panel failed to conduct an analysis of whether the property in question had other economically beneficial uses than the one denied to the investor.[62] Such a consideration would be routine under U.S. law, and a finding of other beneficial uses would defeat a takings claim. Yet, such claims are clearly permitted under NAFTA, and the USTR has failed to rule out such claims in CAFTA and recent FTAs.

In addition, the U.S. Supreme Court has rejected the notion of "temporal severance," the idea that a temporary restriction on the use of property constitutes a takings. In the 2002 case *Tahoe-Sierra Preservation Council, Inc. vs. Tahoe Regional Planning Agency*, the Supreme Court held that a three-year moratorium on development was not a categorical taking because it deprived property owners of the use of their property for only a portion of the property's entire useful life. The court upheld a complete ban on new development in the Tahoe basin. Yet, in the S.D. Myers NAFTA Chapter 11 case, the NAFTA panel ruled that Canada's temporary ban on trade in PCBs was a NAFTA violation worthy of compensation and indicated that temporal severance may be appropriate in certain instances.[65]

> "Our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[63]
>
> -U.S. Supreme Court
>
> "[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property… but also covert or incidental interference with the use of property which has the effect of depriving the owners in whole or significant part, of the use or reasonably to be expected economic benefit of property."[64]
>
> NAFTA Metalclad tribunal

In the 1993 case *Concrete Pipe and Products vs. Construction Laborers Pension Trust,* the U.S. Supreme Court characterized its position on regulatory takings cases by stating that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[66] In contrast, NAFTA Chapter 11 tribunals have declared that a measure need only cause "significant" or "substantial" impairment of an investment's value to qualify as a takings. For instance, the Metalclad tribunal stated that "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property… but also covert or incidental interference with the use of property which has the effect of depriving the owners in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property."[67]

The USTR could have ensured that the trade pacts did not provide greater rights than the basic tenant of U.S. property rights law by including specific language in CAFTA and the recent FTAs to require that a total takings must be deemed to occur before an expropriation is found to ensure that, but it failed to do so.

Language in CAFTA Investment Annex Fails to Protect Against Regulatory Takings*:* In response to criticism that investment rules in new FTAs allow for broad regulatory takings claims, the USTR will likely point to one new provision included as an Annex to the new FTAs that reads: "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[68] While this language attempts to calm concerns that legitimate public health and safety regulations will be the basis for expropriation claims, it has precisely the opposite effect.

Under U.S. law, public interest regulations governing personal property are considered a legitimate exercise of police powers and are exempt from regulatory takings claims.[69] Thus, the language in the Annex does precisely opposite of what is purportedly intended: it enshrines the right of foreign investors to bring cases involving a wide array of public health and safety regulations. Furthermore, the USTR will have absolutely no ability to ensure that such cases are brought only in "rare" circumstances. Given the numerous NAFTA cases involving toxic substances, the Phillip Morris threat with regard to proposed Canadian tobacco control law, and the Canadian cattlemen's initiation of a NAFTA case over the U.S. actions to prevent mad cow disease from entering the United States, the "rare circumstances" language is of little effect, as deciding whether to award damages for normal environmental and health policies remains with investor-state tribunals on a case-by-case basis. Moreover, when deciding such cases, tribunals will reference other specific provisions of the agreements expanding foreign investor rights that directly conflict with this general language. Had the USTR truly wanted to protect public health and bring consistency with U.S. takings law, it would have created a binding article within the core text of the agreement simply and explicitly prohibiting such cases.

Investors Enjoy "Substantive Due Process Review" Under CAFTA and Recent FTAs Not Allowed Under U.S. Law

NAFTA Article 1105 contains a "minimum standard of treatment" provision, which requires that investors must be given treatment "in accordance with international law" including "fair and equitable treatment and full protection and security." This vague catch-all has been used in several investor-state cases to dramatically expand NAFTA's corporate investor protections. CAFTA and the recent FTAs also continue to guarantee foreign investors protection through a vague standard of "fair and equitable treatment" under international law. This provision clearly goes beyond the due process standard under U.S. law.

Prior to 1937, the U.S. Supreme Court regularly subjected economic regulations to a "substantive due process review" and invalidated many New Deal statutes, such as a New York minimum wage law. This so-called "Lochner era" (named for a New York baker whose conviction for breaking wage and hour laws was reversed) has been widely repudiated by legal scholars and later courts for overstepping separation of powers and unconstitutionally tying the hands of the legislative branch of government.

Today, U.S. courts do not apply a substantive due process test, but rather use a "minimum rationality standard," which means that the economic regulation will be upheld as long as it bears some rational relation to the legislative objective. U.S. courts are very deferential to the decisions of legislatures and are prohibited from second-guessing them under modern jurisprudence.[70] Instead of second-guessing whether a policy is "fair," U.S. courts limit their due process review to whether parties obtained the procedural safeguards to which they were entitled, such as whether or not they were granted a hearing.

However, the notion of substantive due process review and second-guessing are alive and well in NAFTA Chapter 11 tribunals. The USTR failed to prohibit such behavior in CAFTA and the new FTAs. Under the vague and open-ended standard of fair and equitable treatment, investor-state trade tribunals have been given tremendous leeway to take apart government decisions and define for themselves what constitutes "fairness." In the NAFTA Metalclad toxic waste case, the S.D. Myers PCB case and the Pope & Talbot softwood lumber case, governments were found to have violated the fair and equitable treatment standard after NAFTA panels engaged in excessive second-guessing of government actions. For instance, the Pope & Talbot tribunal found that the rude and overly zealous behavior by Canadian officials attempting to verify the company's softwood lumber quotas was a violation of NAFTA's fair and equitable guarantees. It is notable that the panel did not find a violation of international law, customary law or even domestic law in the government's conduct and carved out its own definition of "fair and equitable."

The USTR added new language in CAFTA and the FTAs linking "fair and equitable" to the obligation not to deny justice "in accordance with the due process embodied in the principal legal systems of the world."[71] However, this language will fail to address the problem of trade panels extending their purview beyond due process considerations and into substantive economic review. First, this language leaves unclear what legal systems are being referred to. Moreover, by defining due process in terms of unnamed nation' legal systems rather than linking it to U.S. law and jurisprudence, the USTR "fix" flies in the face of the congressional requests to provide "no greater rights."[72]

No Exhaustion of Remedies Required by CAFTA and Recent FTAs

There is no finality requirement or exhaustion of local remedies requirement in the CAFTA or new FTAs as there is under U.S. law.[74] The Supreme Court has long held the reasonable standard that "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[75] This means there must be a final determination of the permissible property uses by the relevant authority before a claim for expropriation can be brought. The fact that there is no similar requirement in NAFTA led to the Metalclad ruling, where the denial of a municipal construction permit was found by a NAFTA tribunal to be a takings even though the plaintiff had not exhausted its remedies with the municipality or the domestic courts. The USTR failed to ensure that such a requirement was included in CAFTA and the new FTAs, nor did it heed calls of groups representing jurists and local officials to keep domestic court decisions out of investor-state dispute resolution altogether.

> "The United States Conference of Mayors urges conferees on the Trade Promotion Act of 2001 to include language providing that decisions and other orders of the courts of the United States including the U.S. Supreme Court and the highest courts of states cannot be challenged before international arbitration panels as violations of investment provisions in trade agreements."[73]
>
> U.S. Conference of Mayors Resolution on Fast Track trade bill

The USTR failed to require exhaustion of remedies even after the NAFTA Chapter 11 tribunal in the Loewen case ruled that an investor bringing a investment challenge over a court ruling should be required to exhaust all available judicial remedies before seeking NAFTA arbitration − a ruling that saved the United States from potentially millions of dollars in damages. However, the Loewen decision has no precedential effect and thus, is not binding on future tribunals. Rather than making the Loewen ruling a permanent fixture and enshrining it in new trade rules to narrow the range of court decisions that can be considered NAFTA violations, the USTR simply failed to address the issue in CAFTA or the new FTAs.

Proposal for Super-Judicial Appellate Mechanism Falls Short In CAFTA

Besides demanding "no greater rights" for foreign investors, Congress included various other expectations in the 2002 Fast Track bill, which the USTR has largely failed to address adequately. For instance, Congress specifically demanded an appellate procedure for investor-state cases to bring consistency to tribunal rulings. The new FTAs do not fulfill this congressional charge. The U.S.-Chile FTA calls for the creation of an appellate mechanism within three years, and CAFTA calls for the creation of one a year after the formation of a negotiating group.[76] Neither agreement actually creates the mechanism called for by Congress.

In a letter to the USTR, Senator Max Baucus expressed his discontent with the appellate issue, stating, "The current CAFTA text, however, does not include an appellate mechanism. Rather, it merely states the parties' intentions to discuss the creation of such a mechanism at an indefinite future time."[77]

The U.S. State Department recently proposed a framework for an appellate mechanism that falls short of the Fast Track requirements. While this plan is not yet available in writing, it was presented to a group of investment and takings experts, some of whom noted the following problems.

- ***Design Does Not Promise Coherence:*** While Fast Track calls for a mechanism to bring "coherence" to investor-state rulings, the State Department proposal calls for an ad hoc appellate procedure that draws panelists from a roster, not a standing appellate body. The lack of permanent professional staff will ensure that panels will continue to strike out on their own in interpreting the complex investment rules, a recipe for further arbitrary, contradictory rulings. Moreover, given that under the proposal, decisions of the appellate panels would have no precedent within the appellate mechanism itself or any future arbitration proceedings, the proposed system is simply not designed to improve coherence.

- ***Current Limited Domestic Court Review Would Be Eliminated:*** Unbelievably, the current proposal also eliminates the existing last resort − domestic court review of panel rulings. Under NAFTA, in extremely limited circumstances, arbitration panel decisions can be brought to domestic courts and be reviewed by domestic judges under federal law governing arbitration or under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention). The narrow grounds for review under domestic law focus on issues such as corruption or fraud on the part of plaintiff, misconduct by panelists, procedural irregularity, or panelists who exceed their authority in the final award. The New York Convention also allows for an analysis of whether or not the result of the arbitration is in contravention to public policy. The State Department's proposal for an appellate system seems geared to eliminate even this slim chance for domestic court review. The proposal is either to amend the Federal Arbitration Act or the New York Convention or to require that parties utilizing investor-state arbitration proceedings waive any rights they have under these measures as a condition of obtaining access to the investor-state process. This limited backstop on arbitral decisions is in place to ensure that domestic courts retain their designated role as the ultimate arbiters of public policy issues, including constitutional issues.

- ***Very Narrow Grounds for Bringing Appeal:*** The proposal would only allow cases to be reviewed utilizing a very high standard of review such as "manifest errors of law" or a "clearly erroneous" standard. Currently, NAFTA tribunal decisions are subject to review on narrow grounds, but these grounds include a review for consistency with "public policy" of the NAFTA nation under the New York Convention. Instead of removing this backstop for misguided arbitral decisions, USTR should maintain or expand the scope of domestic court review of arbitral decisions as another means to encourage conformity to U.S. law and practice.

- ***Would Appellate Body be Subject to Congressional Approval?:*** Finally it is not clear how the State Department's plan would be implemented, i.e., whether or not the Bush administration would seek to get an agreement to add it to CAFTA before congressional approval or if it will somehow implement the system after CAFTA has been passed by Congress. After having explicitly required an appellate body in CAFTA, it is unlikely that Congress will be willing to hand over this vast project to the executive branch and grant the State Department and USTR the power to create a super-judicial procedure which, among other powers, will have the authority to rule that U.S. Supreme Court decisions are violations of international law.

In sum, the proposed appellate mechanism is what one scholar called a "costly and redundant second bite at the apple" that will not achieve what Congress set out to achieve and will not be subject to domestic court review, yet will have direct impacts on U.S. domestic law as well as potentially enormous impacts on the U.S. treasury.[78]

Transparency Improvements in CAFTA and Recent FTAs

Traditionally, NAFTA tribunals have operated in secret, even though the decisions have enormous effects on public policy and the U.S. treasury. The rules of ICSID and UNCITRAL, where the NAFTA cases are arbitrated, do not provide for public hearings, *amicus* briefs or even the publication of the final award without the consent of the parties. In the past ten years, significant criticism was leveled by the public, the press, state and local officials and other interested parties on the closed-door nature of NAFTA tribunals. Many members of Congress were also astonished and offended to learn about the absolute secrecy which shrouded most NAFTA proceedings. Thus, it is not surprising that a key congressional demand was that any future trade agreements which include and investor-state mechanism require greater transparency.

In a victory for all those who raised these issues with Congress, CAFTA and the new FTAs do offer improvements with regard to transparency. For citizens who can afford to travel to sometimes distant locations, tribunal hearings will now be open to the public. Furthermore documents are to be made available to the public in a timely fashion during the course of the proceedings. In additions, tribunals have the explicit authority to consider whether or not to accept *amicus curie* briefs, though it is not required that they do so. However, the new transparency rules do have exceptions for "protected information" and "confidential business information" that allow an investor to designate material as "protected," at which point it would be kept from the public eye.[79] There is no mechanism by which the public could challenge such a designation, and there appears to be no requirement that the confidential business information definition conforms to the definition under U.S. law. It remains to be seen whether this loophole will be exploited by investors in order to keep tribunal proceedings secret.

Frivolous Lawsuits Addressed in CAFTA and FTAs

One issue of concern raised in Fast Track that was dealt with in a forthright manner was the establishment of a mechanism to deal with challenges that do not fall within the tribunals' competence. CAFTA and the new FTAs outline a procedure for an expedited review of issues of jurisdiction and competence and require plaintiffs who are judged to have filed a frivolous claim to pay reasonable costs and attorneys' fees.[80] The complication with this provisions is that to date, NAFTA Chapter 11 panels have found it extremely difficult to separate issues of jurisdiction from issues of merit. NAFTA panelists have seemed loathe to dismiss claims, perhaps because the NAFTA investor-state mechanism is still fairly new, lacking an appellate system and is not guided by a large body of cases. It is quite likely that this state of affairs will continue with cases under the recent FTAs and panelists will be reluctant to reject any case without a thorough review of the merits, leading to costly reviews of cases on grounds of both jurisdiction and merit.

Greater Procedural Rights Still Allowed in CAFTA and FTAs

While Fast Track did not explicitly address the issue, it should be noted that foreign investors continue to receive greater procedural rights in the new FTAs than under U.S. law.

First, foreign investors are allowed a second chance to litigate the same claim if they choose to pursue a claim in the U.S. court system and are unsuccessful. In contrast, U.S. businesses must abide by the rulings of U.S. courts. NAFTA Chapter 11 has generated a large number of claims that challenge domestic court decisions as expropriations or discriminatory acts. NAFTA tribunals are being asked to rehear extremely complicated cases where the investor failed to prevail in the domestic court system. While most of these cases are still pending, NAFTA Article 1121 explicitly allows this second bite at the apple in a more investor-friendly setting. In addition, the recent Loewen decision made clear that no court is exempt from this second-guessing, potentially not even the U.S. Supreme Court.

The new FTAs also allow investors to avoid U.S. state courts, which have traditionally been skeptical of takings claims. In the United States, federal courts defer to state courts on takings cases as property rights are generally defined by state law.[81] Congress has repeatedly refused to grant the property rights movement the right to avoid state courts. However, foreign investors pursuing investor-state takings claims have been granted the right to bypass U.S. state courts and proceed directly to a trade tribunal under NAFTA and the FTAs.

> "Our objection to the investor state provision stems from our concern that investors from nations with well developed legal systems have abused such FTA provisions to challenge the authority of U.S. state and local governments. The *Methanex* and *Loewen* cases in particular have reinforced our concern that the provision will be abused by investors who simply hope to circumvent established legislative and judicial procedures."
>
> National Conference of State Legislatures
> Feb. 12, 2004 letter to USTR

CAFTA and the new FTAs provide for more of the same. Instead of respecting the will of Congress as indicated by the Fast Track negotiating objectives, the USTR has failed to make systematic and substantive changes to the serious problems that have been identified in NAFTA's investment chapter. The USTR has negotiated additional agreements granting extensive rights to foreign investors while paying only superficial attention to the demands of Congress or the critical feedback by a growing list of groups representing attorneys general, other state and local officials, judicial groups and the public at large.

Increasing Questions Regarding the Constitutionality of NAFTA Chapter 11 Tribunals

While USTR negotiators tinker with cosmetic changes to NAFTA's investment model to satisfy congressional critics and others, the steady drumbeat of controversial NAFTA decisions has generated an increased level of scrutiny from the media, policymakers, scholars and the public at large. An increasing number of jurists, state and local officials and academic experts have cut to the heart of the issue and have begun to question the very constitutionality of the NAFTA tribunals. Legal scholars have cited a number of concerns.

The primary issue raised by scholars is that the executive branch-negotiated and congressionally authorized investor-state tribunals conflict with the separation of powers doctrine, the core premise of which is an independent judiciary.[82] Article III of the U.S. Constitution creates this independent judiciary, separate from the legislative and executive branches of the federal government. U.S. Supreme Court Justice Sandra Day O'Connor wrote in 1997: "Article III of our Constitution reserves to federal courts the

> "Our recent experience under NAFTA demonstrates how drastically such provisions in international trade agreements can depart from American constitutional standards."
>
> California Attorney General Bill Lockyer[83]

power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.' "[84] Whether a delegation of judicial authority includes such "essential attributes" determines if this delegation is unconstitutional. Three factors are considered: the scope of the delegation, the importance of the claims, and the purpose of the delegation. In the case of investor-state tribunals contained in NAFTA, CAFTA and other trade agreements, Chapter 11 tribunals, each of these factors weighs against constitutionality. The scope of issues dealt with by tribunals is very broad, potentially implicating countless federal, state or local government policies. The claims are certainly important, involving issues at the core of U.S. constitutional law jurisprudence. In a filing in support of allowing *amicus* briefs in the Methanex MTBE case, the U.S. government argued "NAFTA's Chapter Eleven plays an important role in settling investment disputes in the NAFTA territories, and in developing generally applicable principles of state responsibility under international law."[85] Finally, the purpose of the delegation is relatively weak, in that there are other available means to secure the same ends. In fact, in 1982 the Supreme Court declared unconstitutional the federal bankruptcy courts as then established by Congress, arguing that the system violated Article III of the U.S. Constitution.[86] Surely, the Chapter 11 tribunals, and the vast array of public policy matters adjudicated under them, constitute as great or greater a delegation of power than the unconstitutional bankruptcy courts.

In the summer of 2004, the Conference of Chief Justices passed a resolution stating in part: "The question of whether the investor-state process is consistent with Article III of the U.S. Constitution raises a sufficiently serious and important issue that deserves prompt, thorough examination as the United States considers negotiating additional trade agreements with various other nations."[87] These jurists also called upon the Bush administration to ensure that judgments and other rulings of U.S. state and federal courts are not subject to challenge in investor-state arbitration proceedings under U.S. trade agreements. The U.S. Conference of Mayors made similar requests in 2001 when it urged the House and Senate conferees on the Trade Promotion Authority Act "to include language providing that decisions and other orders of the courts of the United States, including the U.S. Supreme Court and the highest courts of states, cannot be challenged before international arbitration panels as violations of investment provisions in trade agreements."[88]

There is also a growing concern among legal scholars that an action by the federal government to force state compliance with a NAFTA investor-state tribunal ruling would be unconstitutional. A Chapter 11 tribunal award against the United States would be binding on the federal government as the signatory to the agreement and not on the state or local government involved in the alleged violation. The federal government is required to ensure conformity of all levels of government to the terms of the agreement. Thus, the federal government could pre-empt the state or local law on the grounds that it violates a trade agreement's investment rules as interpreted by an investor-state tribunal.[89] Yet, a growing number of legal scholars believe such pre-emption by the federal government would be unconstitutional, first because it would pose a separation of powers issue.[90] If the federal government attempted to enforce a tribunal's award with regard to a regulatory takings case, by preempting state law with a new federal policy, Congress would be exercising power allocated to the judicial branch. It is the duty and responsibility of the judiciary, not the Congress, to define the substance of the U.S. Constitution regarding takings of property.

Second, such a preemption would violate Article V of the Constitution, which dictates the procedures for amending the Constitution.[91] Essentially, such preemption would serve the purpose of changing the substance of the Takings Clause without going through the proper procedures to do so. In fact, Congress previously had tried to pass legislation that would similarly affect the Takings Clause. However, that legislation was attacked as being unconstitutional by many, including the Attorneys General of thirty-seven states who argued in a letter that: "Congress lacks the power to substantively re-define constitutional limitations on the states."[92] The same argument would apply to federal efforts to enforce Chapter 11 rulings upon states.

The constitutionality question has also been raised even more actively on the other side of the border.[93] In Canada, a lawsuit is under way challenging the constitutionality of NAFTA investor-state tribunals and the Canadian laws that implement them.[94] The Council of Canadians and the Canadian Union of Postal Workers together filed suit in the Superior Court of Ontario, and oral arguments will be heard in January of 2005. They argue that investor-state tribunals undermine the independence of Canadian courts by improperly delegating authority to adjudicate matters reserved to them by the Constitution Act, infringe on the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and exceed the treaty making powers of government under Canadian and international law. If successful, the suit will nullify the Canadian laws that implement the Chapter 11 investor-state tribunals and raise enormous questions about the constitutionality of such mechanisms under the constitutions of other nations.

Another Canadian lawsuit was filed by Democracy Watch (a Canadian citizen group) and the Canadian Union of Public Employees against the Attorney General of Canada.[95] The plaintiffs in this case argue that the Chapter 11 investor-state tribunals are inconsistent with freedom of the press and freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms, because the tribunals are conducted in private without public input or knowledge. The suit seeks a declaration that the administrative order bringing NAFTA Chapter 11 into existence is of no force or effect.

The fact that USTR has failed to fix the expansive investment rules in CAFTA and in recently negotiated FTAs ensures that new cases will generate new controversy. Greater scrutiny will be brought to bear by policymakers and jurists with regard to the appropriateness of this mechanism and the constitutionality of what is in effect a parallel judicial system for large multinational businesses.

Below we detail the track record of NAFTA investment cases. In NAFTA's first eleven years, 42 cases and claims have come to light. This number is sure to increase exponentially in coming decades, as investor rules are included in an ever-increasing number of FTAs and BITs with implications for public interest policies, democratic governance and the rule of law, unless radical rights and privileges contained in the NAFTA investment model and their private enforcement mechanism are eliminated or altered.

II. MAJOR NAFTA CHAPTER 11 CASES

What follows is a detailed discussion of seven important NAFTA Chapter 11 cases of significant public interest that have been completed or are currently under way.

ETHYL v. CANADA – MMT GASOLINE ADDITIVE

Ethyl Corporation is a Virginia-based chemical company with a long and controversial history. In 1922, Ethyl started to produce tetraethyl lead, the additive used to make leaded gasoline, to enhance auto engine performance.[96] Shortly after production started, many of the workers at its New Jersey plant began hallucinating and experiencing acute convulsions.[97] Eventually, five of the workers died.[98] It wasn't until 50 years later that the U.S. federal government took action to eliminate lead from gasoline. By then, numerous studies had demonstrated that lead from gasoline exhaust and spills was contaminating soils and surface water and creeping into the food chain.[99] Lead from automobile exhaust was even getting into the brains of American children, causing neurodevelopmental impairment.[100]

In the 1950s, Ethyl Corporation developed a new gasoline additive called methylcyclopentadienyl manganese tricarbonyl (MMT).[101] MMT, an anti-knocking agent used to improve engine performance, contains manganese − a known human neurotoxin.[102] A concentrated form of MMT is produced in the United States, then imported into Canada by the Ethyl subsidiary there, Ethyl Canada, where it is diluted at a plant in Ontario and sold to Canadian gasoline refiners.[103]

PUBLIC INTEREST

In 1977, MMT was banned from use in unleaded gasoline by California, which has its own state-level clean air law, and then by the U.S. Environmental Protection Agency (EPA) due to environmental and public health concerns until an adverse domestic court ruling in 1995.[104] Although little was known about the specific dangers posed to the public from manganese particles coming out of the tail pipes of cars burning fuel containing MMT, the dangers of inhaling manganese have been known since the 1800s.[105] Airborne manganese has been found to cause disabling neurological impairments and symptoms similar to Parkinson's disease in manganese miners.[106] A series of occupational studies of battery plant workers, steelworkers and other workers conducted in the 1990s was characterized in a public health journal as "compelling evidence of neurotoxicity associated with low-level occupational exposure" to manganese in the air.[107]

Against this background of health studies and U.S. government action, the Canadian Parliament imposed a ban in April 1997 on the import and inter-provincial transport of MMT.[108] Because the United States was the only NAFTA partner country that produced MMT, and given that environmental regulation was a role shared by the national and provincial governments, the transport ban was an effective mechanism for removing MMT from all Canadian gasoline. Canada took this action for a number of reasons. First, while Canada was working to tighten vehicle emissions standards, auto manufacturers were recommending against the use of MMT because of concerns that the product damaged the proper functioning of catalytic converters and other devices in automobiles that help control auto emissions.[109] Canadian officials were concerned that MMT could undermine the Canadian government's efforts to control air pollution, and could contribute to the build-up of greenhouse gases that contribute to global warning.[110] Second, Canadian officials were concerned about the potential health effects of exposing workers and drivers to airborne manganese particles via MMT.[111] Although the potential hazards to human health were not fully-known, Canada acted in a precautionary manner until more information was available, as had the state of California and the U.S. EPA.

NAFTA ATTACK

On September 10, 1996, while the prospective ban was being debated in the Canadian Parliament, Ethyl Corporation notified the government of Canada that it would instigate an investor-state suit for compensation under NAFTA's investment chapter if restrictions were placed on MMT. The Parliament disregarded these threats and passed the ban a year later in April 1997.[112] That same month, Ethyl filed a NAFTA Chapter 11 investor-state claim against the Canadian government for $250 million in damages at the UNCITRAL.[113] Ethyl argued that NAFTA granted it new rights and privileges *vis-à-vis* the Canadian government and that the Canadian MMT ban amounted to a NAFTA-forbidden indirect expropriation of its assets as defined in NAFTA Article 1110. Further, Ethyl argued that the ban was a violation of NAFTA's Article 1102 rules requiring national treatment for foreign investors, because the legislation in question banned imports, but not local production of MMT.[114] Finally, the corporation argued that the ban was a "performance requirement" seeking to regulate how a foreign investor operated, which is forbidden under NAFTA Article 1106. The company's logic underlying the performance requirement claim was that the law would effectively require Ethyl to build a factory in every Canadian province to comply with the transport ban if it sought to make an MMT investment in Canada.[115]

OUTCOME

A NAFTA panel was constituted at UNCITRAL to hear the Ethyl case. Initially, Canada objected to the NAFTA suit, claiming that the MMT ban was not a "measure" covered by NAFTA Chapter 11 and that Ethyl had failed to wait the requisite six months after the ban was passed and implemented before filing a claim.[116] On June 24, 1998, however, the NAFTA panel rejected Canada's jurisdictional claims, clearing the way for the case to move forward on the merits.[117] Shortly after this initial ruling, the government of Canada decided to settle with Ethyl. On July 20, 1998, Canada reversed its ban on MMT, paid $13 million in legal fees and damages to the Ethyl Corporation, and issued a statement for Ethyl's use in advertising, declaring that "current scientific information" did not demonstrate MMT's toxicity nor that MMT impairs functioning of automotive diagnostic systems.[118]

IMPLICATIONS

Pay the Polluter: Ethyl Corporation's claim that Canadian regulations on MMT "expropriated" the company's investment. The Canadian government argued that NAFTA Article 1110 "deals with the taking of property and not with regulation."[119] The NAFTA tribunal's decision to accept the claim and allow it to proceed on the merits constitutes a significant and potentially dangerous new limit on the exercise of basic government functions. Governments must maintain the ability to regulate a product because of environmental or public health concerns without having to pay a corporation that imports the substance for the right to exercise this normal government function. The Ethyl case foreshadowed the new "regulatory takings" rights for NAFTA investors that exceed the rights investors have under domestic law and that would continue to be at the heart of the NAFTA Chapter 11 controversy.

Intimidation Chills Innovation: By threatening to initiate a NAFTA suit before the law was even passed and by circumventing domestic avenues for challenging a law or regulation, Ethyl hung the threat of future monetary damages over the heads of lawmakers and public health officials. While the Canadian Parliament did not give in to the early pressure in this instance, the number of threats of corporate "trade challenges" is increasing. The record of similar threats at the WTO shows that they have had a chilling effect on prospective public interest policies and innovations in public policy being considered by governments and often result in governments preemptively conceding and changing a policy to avoid a trade challenge − as Canada did in this instance.[120]

Undermining the Government's Ability to Exercise Precaution: In this case, NAFTA was used to undercut a strong, domestic public interest protection. Cognizant of the parallels between the two organometallic compounds − tetraethyl lead and MMT − and not wanting to repeat the devastating health and environmental problems caused by leaded gasoline, the Canadian Parliament acted in accordance with the Precautionary Principle. The Precautionary Principle is generally understood to mean that in cases where there is a risk to public health or the environment, but the current data is insufficient to fully quantify or assess that risk, government has a right and a responsibility to err on the side of safety. The principle is based on the fact that science does not always provide the information necessary for authorities to *avert* public health or environmental threats in a timely manner. As the leaded gas example illustrates, sometimes it takes years and numerous long-term studies to fully understand the dangers of a new product. NAFTA and WTO rules turn the Precautionary Principle on its head and in effect require the governments to compile proof of harm before regulatory action can be taken, rather than requiring companies seeking to market a product to prove that the product is safe. Both Canada and the United States are now undertaking the long-term studies needed to better understand the dangers posed by MMT. In the meantime, consumers in both nations are being exposed to the potentially dangerous compound.

LOEWEN v. UNITED STATES – FUNERAL HOME CONGLOMERATE

The Loewen Group was a Canadian-based funeral conglomerate that had aggressively acquired more than 1,100 funeral homes across Canada and the United States.[122] The Loewen NAFTA case arose in the context of increasing consolidation in the U.S. funeral home market as a handful of large conglomerates have acquired or pushed out of business small, independent firms. This phenomenon has drawn public attention because of subsequent consumer abuses and several high-profile investigations of anti-competitive business practices. A 1996 Time Magazine investigation into the funeral industry charged that "Loewen and a handful of other large death-care companies are racing to buy up as many independent funeral homes as possible ─ not out of any desire to share the resulting economies of scale and cut the cost of funerals ─ but rather to boost prices still higher."[123]

> "Article III of our Constitution reserves to federal courts the power to decide cases and controversies and the U.S. Congress may not delegate to another tribunal 'the 'essential attributes' of judicial power."[121]
>
> Justice Sandra Day O'Connor,
> U.S. Supreme Court

PUBLIC INTEREST

In 1994, Loewen was sued in Mississippi state court by a Biloxi businessman named Jeremiah O'Keefe. O'Keefe alleged that Loewen, as part of a strategy to dominate the local funeral market, had committed various unlawful, anti-competitive and predatory acts designed to drive O'Keefe's local funeral and insurance companies out of business in violation of state law.[124] This was neither the first nor the last time Loewen would land in U.S. court. In 1996, Loewen settled a case concerning a similar breach of contract claims for $30 million.[125] The Massachusetts attorney general became so concerned about Loewen's near monopoly status in the Cape Cod area that it ordered the company to divest itself of a number of funeral homes.[126]

After a trial reviewing O'Keefe's claims, a Mississippi jury agreed with O'Keefe. Angered by the examples of Loewen's behavior that had been presented as evidence in the trial, the jury came back with a verdict of $260 million.[127] According to one juror, "The Loewen Group ... clearly violated every contract it ever had with O'Keefe. ... If there was ever an indefensible case, I believe this was it."[128] Because the jury decided on an amount during the judgment phase of the trial and not during the penalty phase, Loewen had the choice of accepting the jury's verdict or going back to the same jury for the penalty phase of the trial. Loewen chose to go back to court, but this time the jury upped the damages to $500 million.[129] Ironically, O'Keefe's attorneys had attempted to settle the case even before the trial began. Five million dollars was the number they had in mind, but they were authorized to go even lower.[130]

Loewen decided to appeal the jury verdict to a higher court. Before proceeding with the appeal, the company sought to be exempted from a long-standing rule of civil court procedure.[131] The state rule, which is identical to a national rule of civil procedure, requires that losing defendants who wish to pursue an appeal without beginning to pay damages to the plaintiff must buy a bond worth 125% of the damages owed. The purpose of the rule is to prevent defendants from using the lengthy appeals process to hide assets or otherwise evade liability. Loewen's request to be exempt from the rule was rejected, and Loewen appealed this specific issue to the Mississippi Supreme Court. In 1996 the Mississippi Supreme Court rejected Loewen's demand to be exempted from posting bond. Rather than post the large bond or pursue other legal avenues, Loewen decided to settle the case with O'Keefe, and on January 29, 1996, the company settled for approximately $150 million, 30 percent of the jury verdict and more than 30 times what the company could have settled for when the case began.[132]

NAFTA ATTACK

The settlement was not the end of the story in this breach of contract case between two private businesses, however. On October 30, 1998, Loewen filed an investor-state suit against the United States in ICSID under NAFTA's investment chapter.[133] Although Loewen paid only a fraction of the original jury award, the company demanded $725 million in compensation from U.S. taxpayers, arguing that the jury verdict, the punitive damages and trial court's refusal to reduce the bond violated its new investor rights guaranteed under NAFTA.[134] Specifically, the company claimed that the judge allowed the plaintiff's attorney to appeal to the "anti-Canadian, racial and class biases" of a Mississippi jury in violation of national treatment rules in NAFTA Article 1102.[135] (In response to these allegations, the U.S. government has argued that comments by a private attorney in a private contract dispute did not constitute a government "measure" covered by NAFTA rules, noting that Loewen never objected to these comments at trial.)[136] The company also claims that the bond requirement and the trial courts failure to reduce the bond effectively forced Loewen to settle and thus denied Loewen its right to appeal, in violation of Article 1105 requiring fair and equitable treatment.[137] Finally, Loewen argued that "the excessive verdict, denial of appeal, and coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA."[138]

OUTCOME

Loewen is the first instance in which a jury ruling has been challenged under NAFTA. In March 1999, ICSID formed a NAFTA panel to hear the case. The panel included former Congressman and former Chief Judge U.S. Court of Appeals for the District of Columbia circuit Abner J. Mikva. The U.S. Department of Justice responded to the initiation of proceedings with a brief challenging the basic jurisdictional premise of the case: NAFTA's Chapter 11 provides rights to foreign investors *vis-à-vis* "government actions" while in this case the controversy in question was a civil law dispute between two private companies. The U.S. government called for the case to be dismissed. On January 9, 2001, the panel issued an interim decision rejecting a variety of U.S. arguments that the case should be dismissed and instead found that NAFTA's foreign investor rights extended to the civil court context, surprising many observers. Further, the tribunal appeared to place no limits on what types of court action or decision it considers covered by NAFTA rules. This initial decision opened up the possibility that all court decisions, even those of the U.S. Supreme Court, are now open to review by unaccountable NAFTA tribunals.

The case proceeded to the merits. Meanwhile, in 1999, Loewen Group, Inc. and more than 850 of its U.S. subsidiaries filed for bankruptcy under the U.S. bankruptcy code. Loewen's Canadian subsidiaries did the same under Canadian bankruptcy law. In January 2002, as part of its reorganization, the massive Loewen empire was reincorporated in the United States (not Canada) under the name of a U.S. subsidiary, Alderwoods Group, Inc. In March 2002, the U.S. government submitted documents to the NAFTA tribunal arguing that this reorganization destroyed the company's NAFTA claims, as it is no longer a Canadian company.[139] To the contrary, Alderwood's attorneys argued that the critical date for determining nationality and jurisdiction is on the day the case is submitted, not many years down the road. Just in case, Alderwoods set up a shell corporation in Canada called "Nafanco" to pursue its NAFTA claim.

The NAFTA tribunal rendered a decision against Loewen on June 26, 2003. However, in reference to Loewen's claims of anti-Canadian bias under Articles 1102 and 1105, the tribunal found Loewen's claims of discrimination were valid.[140] Citing the class-based, race-based and nationality-based appeals to the jury by O'Keefe attorneys, the NAFTA tribunal characterized the trial as a "disgrace" and a violation of due process.[141] However, the tribunal dismissed Loewen's Article 1102 claims because it found no evidence in the record to enable it to compare how Loewen was treated versus other parties "in like circumstances."[142] Therefore, the tribunal could not determine whether the United States had treated Loewen "no less favorably than it accords in like circumstances to its own investors."[143]

On a related issue, the United States had argued that Loewen was barred from bringing such claims of discrimination, since it had not objected to any discriminatory statements during trial. The United States tried to persuade the NAFTA panel that they should then not hear these claims of discrimination. Under most U.S. state court rules, a party is prohibited from raising issues on appeal that it did not object to during trial – therefore, in order to preserve the right to appeal an issue, a party must object during the trial first. Contrary to the U.S. request and longstanding domestic court practice, the NAFTA tribunal deliberated at length on the claims of discrimination and the statements by O'Keefe's attorneys, which had not been objected to at trial. Even more surprisingly, the panel in its ruling took upon itself the job of speculating about the reasons why Loewen attorneys did not object during trial.[144]

On the bond issue, Loewen had argued that the Mississippi trial court's failure to reduce the $625 million bond was a violation of Articles of 1105 − minimum standard of treatment and Article 1110 − uncompensated expropriation. However, the tribunal found that the trial court's denial was within its discretion and could not be considered an error.[145] Nonetheless, the tribunal did imply that had Loewen challenged a Mississippi court rule that allows judges to set bonds of up to 125 percent of the original judgment, instead of challenging the trial court's refusal to reduce the bond, then the tribunal may have found some merit to Loewen's claim that its rights under NAFTA Article 1105 and 1110 had been violated.[146]

Further, the tribunal ruled that in judging whether or not there was an 1105 violation, the panel needed to consider the entire judicial process available to Loewen, not merely the trial.[147] Citing the international law principle of "exhaustion of local remedies," the NAFTA panel argued that all state judicial action should be considered as a single action from beginning to end. The tribunal found that Loewen failed to pursue all judicial avenues available to the firm because it did not appeal the trial court's decision and instead settled the claim.[148] Absent a final judgment on Loewen's various claims from the court of last resort, including the U.S. Supreme Court, the tribunal ruled that Loewen's NAFTA claim was brought prematurely.[149] For this reason, Loewen's other 1105 claims were dismissed, and since its claim of expropriation arose from its 1105 claim, that was dismissed as well.

After this long discussion on the merits of the specific claims, the tribunal also concluded that because Loewen had been reorganized as a U.S. corporation after its bankruptcy, the NAFTA tribunal lacked jurisdiction in the case.[150] In order to commence and maintain a NAFTA lawsuit, the claimant and respondent must be citizens of two different NAFTA parties. Even the fact that Loewen had set up a shell corporation in Canada for the sole purpose of pursuing its NAFTA claim did not mitigate the reality that the present real beneficiary of the claim was an American corporation. The Loewen tribunal decided that applicable rules of international law suggest that "there must be continuous national identity from the date of the events giving rise to the claim through the date of the resolution of the claim."[151] (Because the *stare decisis* precedent system does not apply to these tribunals, a different NAFTA tribunal could rule differently on this question) Similarly, the panel dismissed a NAFTA Article 1117 claim (a claim by an investor on behalf of an enterprise) that named Loewen's founder, Ray Loewen. The panel found that Mr. Loewen did not own or control the newly reorganized corporation when the claims were submitted to arbitration.[152]

In August, 2003, U.S. lawyers submitted a letter to the tribunal, raising the fact that it had failed to specifically dismiss Mr. Loewen Article 1116 claim (his claims as an individual investor on behalf of himself) from the case.[153] Following the U.S. submission, Mr. Loewen quickly made a submission, stating that the tribunal had overlooked his individual claim and that he is entitled to return to the tribunal for a supplementary decision on the merits.[154] On August 17, 2004, the NAFTA tribunal ruled that it in fact had dealt with the Article 1116 claims in the final award, and Ray Loewen's request for a supplementary decision was denied, thus ending the NAFTA case against the United States. It has yet to be seen if the unpredictable and aggressive Mr. Loewen will somehow attempt to bring this case back to U.S. domestic court alleging arbitral error.

IMPLICATIONS

Loewen Case Attacks Independence and Integrity of U.S. Judicial System: The Loewen NAFTA Chapter 11 case definitively established that U.S. court cases, even cases heard by state supreme courts or the U.S. Supreme Court, are open to challenge in NAFTA's closed-door investor-state system. Even though the tribunal found against Loewen because the company failed to reincorporate as a Canadian firm, exhaust his domestic legal remedies, and provide evidence of the sort of discrimination protected against under NAFTA, the Loewen decision was greeted with great concern in U.S. legal circles. As Chief Justice Ronald M. George of the California Supreme Court stated: "There are grave implications here. It is rather shocking that the highest courts of the state and federal governments could have their judgments circumvented by these tribunals."[155] In 2004, his colleagues at the Conference of Chief Justices concurred. The judicial body passed a resolution that flatly stated: "Judgments and other rulings of U.S. state and federal courts should not be the basis for claims against the United States in investor-state arbitration proceedings under U.S. trade agreements."[156] The state justices argued that subjecting judicial decisions to NAFTA Chapter 11 review "undermines the finality of U.S. court rulings, threatens the independence of U.S. courts, and detracts from the judiciary's coequal status within our system of separated powers."[157] Further, the state justices reminded us that the United States originally argued in Loewen that the NAFTA panel had no jurisdiction because judicial actions in cases between private parties are not actionable "measures" within the meaning of Chapter 11. Absent a major rewrite or the elimination of NAFTA's Chapter 11, it is just a matter of time before a U.S. Supreme Court decision will be reviewed in a NAFTA Chapter 11 tribunal and U.S. citizens will learn to their shock that the Supreme Court is no longer the highest court in the land.

Common Trial Tactics Considered International Law Violation: The Loewen NAFTA tribunal spent a great deal of time discussing the tactics of the O'Keefe attorneys at trial, noting that "the O'Keefe case was presented by counsel against an appeal to home-town sentiment, favoring the local party against an outsider. To that appeal was added the element of the powerful foreign multinational corporation seeking to crush the small independent competitor who had fought for his country in World War II."[158] The NAFTA tribunal held that the class-based and nationality-based appeals of the O'Keefe attorneys were discriminatory. The tribunal only narrowly escaped determining that a NAFTA violation had not occurred because Loewen had failed to demonstrate in the course of the NAFTA proceeding that it was treated differently than other plaintiffs in Mississippi court system. Had the Loewen lawyers done this, a very different verdict may have emerged from this case. Even as it stands, the Loewen NAFTA tribunal's final ruling is an alarming one for trial judges and attorneys everywhere. Whether the defendant is from the next town, the next state or a neighboring country, lawyers frequently resort to presenting them as "outsiders." Now this common court tactic could constitute a NAFTA violation if the plaintiff happens to be Canadian or Mexican.

NAFTA Tribunal Heard Claims That Were Not Objected to During Trial: The NAFTA tribunal also held that the trial court judge's failure to reign in the behavior of the O'Keefe lawyers at trial was an error "so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law."[159] They came to this conclusion *even though* Loewen's lawyers themselves did not object to class-based and nationality-based statements during the trial. This is an extremely important principle of state and federal trials − if a party does not object during trial, that party cannot then raise an objection during an appeal because the appellate body has no ability to read the mind of the trial judge to guess how he or she might have ruled. Thus, the right to object is considered waived. By allowing Loewen lawyers to raise issues they did not object to at trial and by going so far as to offer excuses as to why they failed to object, the Loewen NAFTA tribunal demonstrated blatant disregard for a bedrock principle of domestic court procedure. Worse, this aspect of the ruling encourages lawyers representing foreign investors in judicial proceedings to do the same in preparation for a second bite at the apple in a NAFTA tribunal.

METALCLAD v. MEXICO − TOXIC WASTE FACILITY

In 1990, the Mexican federal government authorized a Mexican company called Coterin to operate a hazardous waste transfer station in the state of San Luis Potosi.[160] Coterin wanted to expand the site to be a hazardous waste landfill but was denied a municipal construction permit in 1991 and again in 1992 by the local municipality of Guadalcazar.[161] In 1993, Metalclad Insulation Corporation ('Metalclad'), a California-based corporation, bought Coterin and the transfer station. For 30 years, Metalclad's primary work involved installing insulation and removing asbestos for industrial, commercial and public agency clients on the West Coast of the United States.[162] In Mexico, Metalclad soon took up Coterin's efforts to expand

> "There is no judicial, political, or moral reason for the federal government to demand the government of San Luis Potosi to pay restitution for the $16 million indemnification paid to Metalclad…San Luis Potosi did not sign NAFTA."
>
> Fernando Silva Nieto, the Governor of the Mexican state of San Luis Potosi

the transfer station into a toxic waste processing plant and landfill. Metalclad secured the requisite Mexican state and federal permits but, as had occurred during Coterin's attempts, failed to secure a local municipal construction permit.[163]

PUBLIC INTEREST

Under Coterin's management, the site was contaminated with 55,000 drums, or 20,000 tons of toxic and potentially explosive waste.[164] The geology of the region involves a complex hydrology with active sinkholes and subterranean streams.[165] Studies indicate that the site's soils are very unstable, which could permit toxic waste to infiltrate the subsoil and carry contamination via deeper water sources as well as the intermittent surface streams that form only in the rainy season.[166] In 1991, the local community, motivated by environmental and public health concerns mobilized to stop the dumping.[167] They blocked trucks, called the federal authorities and succeeded in getting the facility shut down.[168] Several years after this successful effort, the local community was still concerned about the environmental and health hazards posed by the site and strongly opposed reopening it.[169]

In 1994, the local municipality of Guadalcazar ordered Metalclad to cease construction on the new toxic waste facility due to the absence of a municipal construction permit.[170] Metalclad applied for the permit but continued construction while the permitting process was pending.[171] In 1995, the company paid for an environmental assessment supervised by federal environmental authorities.[172] The assessment found the site suitable for the project, but the report was quickly contested by Greenpeace Mexico and a local environmental group.[173] The construction project was completed in March of 1995, still without the proper municipal permit, but the company was prevented from opening and operating the site due to continued local opposition and public demonstrations.[174] In December 1995, the municipal government denied Metalclad's request for a permit, reprimanding the company for moving forward without proper authorization.[175] In October 1996, Metalclad notified Mexico that it intended to sue under NAFTA's Chapter 11.[176] On September 23, 1997, the governor of San Luis Potosi declared the site part of a special ecological zone for the preservation of the area's unique biological diversity and several species of rare cacti.

NAFTA ATTACK

On January 2, 1997, Metalclad sued the government of Mexico under NAFTA's investment provisions, demanding \$90 million in compensation.[177] Metalclad claimed that the actions of the municipal government in denying the permit amounted to expropriation without compensation that was forbidden under NAFTA Article 1110.[178] In addition, the company claimed that the government of Mexico had failed to provide fair and equitable treatment in accordance with international law as required by NAFTA Article 1105.[179]

OUTCOME

On August 30, 2000, a special NAFTA tribunal, operating under ICSID's Additional Facility Rules, awarded Metalclad \$16,685,000.[180] The tribunal held that the denial of the construction permit, as well as the creation of an ecological reserve, constituted "indirect" expropriations in violation of NAFTA Chapter 11.[181] In addition, the tribunal held that Mexico violated the minimum standard of treatment provision of NAFTA because the company was led to believe that the federal and state permits it secured allowed for the construction and operation of the landfill.[182] The tribunal decided that by tolerating the actions of the municipality and by tolerating the actions of state and federal officials who failed to sufficiently clarify the situation for Metalclad, Mexico failed in its duty to provide "a transparent, clear and predictable framework for foreign investors."[183] (As one observer has noted, the NAFTA tribunal in effect created a duty for the federal government of Mexico to take the company by the hand and walk it through the complexities of Mexican municipal, state and federal law. Plus, the Mexican federal government was required to ensure that officials at the various levels of federal, state and local government never gave contradictory advice − an extraordinary task for any government.)[184]

In reaching its conclusions regarding transparency, the panel imported into Chapter 11 the transparency obligations appearing in NAFTA's preamble (Art. 102) and in NAFTA's Chapter 18.[185] Remarkably, the panel also presumed an expansive competency and ruled that under Mexican *domestic law*, the municipality's insistence on and denial of a construction permit was improper.[186] Using circular reasoning, the panel not only argued that a domestic law violation had taken place, but it equated this perceived violation of domestic law with an international law violation under NAFTA Article 1105, an interpretation that would significantly broaden what has already been criticized as Article 1105's open-ended catch-all nature. In addition, the panel ruled that the same facts that created a violation of Article 1105 also constituted an expropriation under Article 1110, thereby equating a process violation with an expropriation.

In an unprecedented move in October 2000, the government of Mexico challenged the NAFTA tribunal decision in a Canadian Court, alleging arbitral error.[187] Under NAFTA, in extremely limited circumstances, arbitration panel decisions can be brought to domestic courts and reviewed by domestic judges under federal law governing arbitration or under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention). The narrow grounds for review under domestic law focus on issues such as corruption or fraud on the part of plaintiff, misconduct by panelists, procedural irregularity, or panelists who exceed their authority in the final award. This recourse to domestic courts should not be confused with an appellate system. In this instance, the Mexican government's petition was initiated in British Columbia because under Vancouver was chosen as the tribunal's 'place of arbitration' under ICSID rules. Thus, the applicable arbitration statutes were the British Columbia Commercial Arbitration Act and the British Columbia International Commercial Arbitration Act.[188]

In a narrow ruling that did not question the basic legitimacy of utilizing a NAFTA commercial arbitration process for determining the broad policy issues in question in this case, Justice David Tysoe of the Supreme Court of British Columbia issued a split decision. On May 2, 2001, Judge Tysoe held that the NAFTA panel erred when it imported the transparency provisions of NAFTA's Chapter 18 into Chapter 11.[189] As a consequence, Judge Tysoe struck down most of the panel's arguments with regard to Article 1105, relating to the actions of the municipality and Mexico's obligations to create a clear and predictable environment for investors. But the judge did so solely because the panel made a technical error basing these arguments on the wrong sections of NAFTA. Consequently, he struck down the panel's finding that a violation of Article 1105 constituted a violation of Article 1110.[190] However, the judge agreed with the NAFTA panel on the merits that the actions of the governor in declaring the area to be an ecological zone constituted expropriation. As a consequence, the judge reduced the award due to Metalclad by post-dating the calculation of the award to the date the governor issued the decree that made the area an ecological zone.[191] Mexico initially announced that it would appeal the decision to a higher Canadian court,[192] but on June 13, 2001, Metalclad announced that Mexico agreed to pay the $15.6 million ordered by Judge Tysoe.[193]

Confirming the fears of concerned state and local officials in all three NAFTA nations, the Mexican federal government attempted to withhold federal funds from the state of San Luis Potosi in an effort to force the state to pay for the Metalclad damage award. The state fought back. Declaring that, "[t]here is no judicial, political, or moral reason for the federal government to demand the government of San Luis Potosi to pay restitution for the $16 million indemnification paid to Metalclad," the governor of San Luis Potosi challenged the federal action in Mexico's domestic court system.[194] On March 3, 2004, the Mexican Supreme Court ruled unanimously in favor of the state, ruling that the federal government did not have the right to withhold federal funds from San Luis Potosi and is exclusively responsible for the multi-million dollar award.[195] This incident should provide a cautionary tale to state and local governments in the United States as this issue has never been ruled upon by U.S. courts.

IMPLICATIONS

Metalclad Would Not be a Takings Under U.S. Law: The NAFTA tribunal in the Metalclad case defined expropriation as not only "open, deliberate and acknowledged takings" of property such as outright seizure, but also "covert or incidental interference" with the use of property."[196] This definition of a takings is much broader than what is allowed by U.S. courts. U.S. property rights jurisprudence requires that to find a regulatory taking, close to 100 percent of the value of property must be destroyed by a regulation and no other viable economic use of the property remains. In other words, if Metalclad had been able to operate a non-toxic waste treatment facility or even open a McDonalds on the property, the firm would not succeed in a takings claim in U.S. courts. In stark contrast, the Metalclad NAFTA tribunal ruled even though Metalclad may have been left with an array of economically beneficial uses of the land, potentially including "the exploration, extraction or utilization of natural resources," a takings requiring compensation still took place.[197] Indeed, the panel failed even to conduct an analysis of whether the property in question had economically beneficial uses other than the one denied to the investor.[198] The fact that the firm succeeded in a regulatory takings claim that would have failed in a U.S. court sent alarm bells through national associations representing state and local officials and Congress. As a result, in the 2002 bill establishing Fast Track trade authority, the Congress instructed the USTR to ensure that future trade agreements would not permit this type of regulatory takings claim. To date, USTR has failed to meet this congressional objective that foreign firms do not obtain greater regulatory takings rights under new trade agreements than they have under U.S. law.

Undermining Local Control Over Zoning, Land Use and More: In reviewing the NAFTA tribunal decision, Canadian Judge Tysoe noted that the tribunal's definition of "expropriation" was "sufficiently broad to include a legitimate re-zoning by a municipality or other zoning authority." However, he concluded that "the definition of expropriation is a question of law with which this court is not entitled to interfere."[199] Yet permit requirements, zoning decisions and environmental land use controls at the local level are common in all three NAFTA countries. This case prompted the National Association of Counties to write to the USTR: "NACO is concerned that broad interpretations of Chapter 11 by international arbitration panels may have a chilling effect on local decision making, subrogate legal protections of U.S. citizens to foreign investors, and result in the ultimate preemption and nullification of local government laws and regulations."[200]

Deciding Issues of Domestic Law: The NAFTA panel felt competent to decide complicated issues of Mexican domestic law; i.e., whether a municipal permit was required. Not only did the panel find that the municipal government's actions amounted to expropriation, but the panel went further to say the municipality "acted outside its authority" in denying the construction permit based on environmental concerns. The NAFTA tribunal made a ruling on the substance of Mexican domestic law, declaring that the "exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government."[201] Worse, when faced with the choice between Metalclad's interpretation of Mexico's domestic law or the Mexican government's interpretation of its own law, the NAFTA panel chose the corporation's interpretation. The proper place for such a substantive dispute over the meaning of a domestic law is a domestic court.[202]

Disregard for Environmental Provisions of NAFTA: While the NAFTA tribunal imported language from NAFTA's preamble to support its convoluted reasoning in the case, it is striking that the tribunal completely ignored other language in the preamble supporting sustainable development and environmental protection. The panel also ignored environmental provisions within Article 1114 of Chapter 11, which purports to protect NAFTA nations from a race to the bottom in environmental standards. On the contrary, the Metalclad panel stated that even though it found that the governor's Ecological Decree constituted further grounds for a finding of expropriation, the panel decided it "need not consider the motivation or intent for the adoption of the Ecological Decree."[203]

METHANEX v. UNITED STATES – MTBE GASOLINE ADDITIVE

Methanex Corporation, a Canadian-based firm, is the world's largest "producer and marketer" of Methanol.[205] Methanol is used to produce formaldehyde, acetic acid and other chemicals and is used in the manufacture of resins, adhesives, paints, inks, foams and plastic bottles.[206] Methanol is also the key ingredient in methyl tertiary-butyl ether (MTBE), a gasoline oxygenate designed to reduce harmful auto emissions. Notably, Methanex does not produce or manufacture MTBE, which is the substance at issue in the California drinking water regulation that is the target of this NAFTA challenge. Methanex claims to "indirectly" own 100 percent of the shares of two U.S.-based companies, Methanex Methanol Company in Texas, which appears to be a marketing operation, and Methanex Fortier in Louisiana, which once produced Methanol.[207]

> "This case will act to discourage environmental and health regulations whether the United States wins or loses. If, as expected, the United States wins, it will have spent nearly $3 million of US taxpayers' money just to have an obviously frivolous claim dismissed; the decision will do nothing to prevent foreign manufacturers of harmful substances from insisting on compensation before their products can be banned. If the United States loses, such extortion will be codified as the law throughout North America."[204]
>
> Martin Wagner, Earthjustice

PUBLIC INTEREST

On March 25, 1999, the governor of California issued an Executive Order providing that MTBE use be phased out by 2002 from gasoline sold in the state. The decision came after the gasoline additive had been found to have contaminated drinking water wells and systems throughout the state.[208] California's decision to phase out MTBE was based on a 1998 University of California-Davis report that found "significant risks and costs associated with water contamination due to the use of MTBE."[209] The report found that MTBE posed unique threats because it 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.[210] In addition to the significant environmental problems of water contamination, MTBE has been associated with human neurotoxicological effects, such as dizziness, nausea and headaches.[211] It has been found to be an animal carcinogen with the potential to cause human cancer.[212] Because water contaminated with MTBE has a strong odor and taste, Santa Monica, California, had to shut down its municipal wells when MTBE leeched into its drinking water. Dozens of other California municipal water supplies have been affected,[213] and at least 17 states have banned or in the process of restricting MTBE.

NAFTA ATTACK

On December 3, 1999, Methanex filed a NAFTA Chapter 11 investor-state case challenging the California Executive Order that implemented the environmental policy.[214] In effect, Methanex demanded that MTBE be allowed in gasoline sold in California or that the company be paid $970 million if MTBE was banned. In its NAFTA submissions, the corporation cited WTO principles to argue that the California phase-out was not the "least trade restrictive" method of solving the water contamination problem (suggesting that the state should fix leaking tanks instead) and therefore violated NAFTA's guarantee of fair treatment for foreign investors under international law (Article 1105).[215] Further, Methanex alleged that the U.S. company Archer Daniels Midlands (ADM), a principal producer of a competing gasoline oxygenate called ethanol, had "secret meetings" with California Governor Gray Davis' and contributed $155,000 to his campaign fund seven months prior to the issuance of the Executive Order.[216] Methanex does not say the campaign contributions were illegal per se, but that the process by which the decision to phase out MTBE was reached was a violation of NAFTA's "fair and equitable" treatment guarantees.[217] Finally, Methanex claims that the ban improperly discriminates against MTBE in favor of the U.S.-produced gasoline additive ethanol and therefore gives preferential treatment to a domestic firm in violation of the national treatment provisions of NAFTA Article 1102.[218] Finally, the company claims that the California measure constituted an expropriation under Article 1110 because it prevented Methanex from maintaining its market share and, in effect, transferred that market share to U.S. ethanol producers.[219]

OUTCOME

Methanex is pressing its case under UNCITRAL rules. The U.S. government argued in its defense that Methanex's claims are not within the jurisdiction of a NAFTA tribunal. In its Statement of Defense filed August 20, 2000, the United States argued: 1) that no final regulation banning MTBE has taken effect so the California actions were not "measures" under NAFTA;[220] 2) that Methanex lacks standing to bring the case because the California actions are directed at MTBE and not methanol, the Methanex product;[221] 3) that Methanex has not demonstrated that it has an investment in the United States (versus that it seeks to import a product to the United States) because its plant in Louisiana had ceased production and its office in Dallas has no significant assets and earns no significant income;[222] and 4) that the company's claims of violation of "fair and equitable treatment" are without merit because California's actions were taken in a democratic fashion after days of public comment and testimony and were based on ample scientific findings.[223] Methanex based its large $970 million damage claim on the decline in its market value.[224] In response, the U.S. government argued that the decline in Methanex's share price began in 1995 and was due to market forces, not California's regulatory actions.[225]

On August 6, 2002, the NAFTA tribunal in this case issued an interim ruling on jurisdiction.[226] Many NAFTA critics had predicted that the tribunal would find some way to rule against the company, because a ruling in favor of the company and against a democratically achieved state law with a strong public purpose would have explosive political implications at a time when the Fast Track trade legislation, a controversial mechanism that delegates Congress' constitutional power to set terms of trade policy to the president, was still being debated in the U.S. Congress. In its interim decision, the NAFTA tribunal indicated that it was considering just such a ruling to make this case go away.

The panel did not rule on any of Methanex's substantive claims of NAFTA Article 1102, 1105 or 1110 violations. It dealt only with the more narrow issue of whether it had the jurisdiction to even hear the case, and it dismissed most of the company's claims. The panel upheld the U.S. government's argument that the MTBE law was too distant from a company that produced only methanol, not MTBE itself, to justify a NAFTA case. The United States had argued that NAFTA Article 1101 (1), which states that NAFTA Chapter 11 applies to measures adopted by one NAFTA government "relating to" the investors of another NAFTA government, required a legally significant connection between the measure and the investor. It would not be sufficient (as Methanex had argued) for the measures merely to "affect" the investor of another NAFTA government because an endless number of parties could be potentially affected by any government measure.

However, in its ruling, the panel left a window open for the revival of Methanex's claims on the merits by giving the firm 90 days to prove that the ban was somehow directed specifically at Canadian methanol producers, a significantly high hurdle for the company to meet.

The positive part of this jurisdictional decision is that it could narrow the number of investors who can bring a claim to those directly impacted by a measure, as opposed to those incidentally affected by a measure. However since NAFTA tribunal decisions have no legally binding impact on future panels, this positive aspect could be reversed by future NAFTA panels. But, this aspect of the ruling is overshadowed by a significant concern. The ruling implies that if Methanex had produced MTBE itself and not one of the major component parts, the case would have proceeded notwithstanding the other important arguments raised by the U.S. government in the jurisdictional phase. The panel ignored U.S. arguments that the ban was achieved in a nondiscriminatory manner via a democratically sound process with a clear public purpose. These arguments should have been sufficient to put an end to this controversial case. Methanex decided to accept the panel's 90-day offer to re-submit and did so in November 2002. A hearing was held on the re-submission in March of 2003, and a decision on its new claim is still pending.

In a further indication that the Methanex panel is very aware of the controversial nature of this case and the political sensitivity of dealing with this type of popular state law, the NAFTA tribunal has made a number of moves to open the hearing process and thereby calm critics. Back in 2001, the Methanex tribunal had signaled that it might be willing to allow the submission of *amici* briefs by non-governmental organizations (NGOs) that had been petitioning the panel for this right, including the Canadian NGO International Institute for Sustainable Development (IISD) and the California-based Earthjustice public interest law firm.[227] However, in its August 2002 decision, the tribunal held that it had no power to accept the petitioners' request for access to materials generated during the arbitration or to allow them to attend the hearings.[228]

In January 2003, the petitioners kept seeking to define the parameters of their *amicus curiae* status. They continued to request access to the arbitration proceedings, noting that in the UPS NAFTA case, a NAFTA tribunal had agreed to open proceedings to the public.[229] In response to the NGOs, Methanex argued that since the Methanex tribunal had not received the consent of the disputing parties, it could not accept the submissions. Methanex also sought in the alternative to limit the scope of information supplied in the *amici* briefs by the petitioners. Specifically, it aimed to limit the submissions only to the legal issues and urged the tribunal to reject submissions that raise issues of fact.[230] Presumably, the submission of factual issues would allow the petitioners to introduce into the record information pertaining to the environmental and health consequences of MTBE, whereas a submission limited to legal issues would preclude this discussion. Methanex argued that the submission of *amici* briefs containing factual issues is prohibited by NAFTA Article 1133, which permits the tribunal to appoint experts at the consent of the disputing parties or on its own initiative. Methanex further argued that allowing such a submission would be inequitable because it would have to respond to all of the allegations, and that would be too burdensome and costly. In February 2004, in a win for the NGO petitioners, the Methanex tribunal ruled that it would accept *amici* briefs, make public all documents related to the case and allow proceedings to be open to the public. The *amicus* brief submitted by the IISD is available at www.iisd.org/publications/publication.asp?pno=608 and the *amicus* brief submitted by Earthjustice is available at www.iisd.org/publications/publication.asp?pno=608. In June 2004, these groups won another concession from the panel when a panel hearing on the Methanex case was open to the public at the ICSID offices in Washington, D.C.

IMPLICATIONS

Ruling Invites a New Case by MTBE Manufacturers: The Methanex NAFTA tribunal's jurisdictional ruling that a methanol producer was "too distant" from an MTBE ban to qualify as a firm harmed by the ban has both positive and negative implications. Clearly, it is a positive ruling for the state of California, because it may result in a United States win in this specific case. However, the implication is that if a Canadian MTBE producer and not a methanol producer had brought the suit, the NAFTA tribunal would have allowed the case to proceed on the merits. Traditionally in trade disputes there are two questions of utmost importance: 1) is the measure non-discriminatory (i.e., does it apply to domestic and foreign firms alike); and 2) was it developed in a transparent and democratic fashion. Clearly the MTBE ban, which applies to foreign producers and domestic producers alike, and was fully debated by the legislature, which commissioned a study and held public hearings, would pass these tests. Yet NAFTA Chapter 11 allows foreign firms to pursue other grounds for complaint that bypass these tenets of trade law and allow outlandish claims of expropriation and unfair treatment even when there is no discrimination between domestic and foreign firms.

Tribunal Rulings, Standards Inconsistent − Methanex Tribunal Requires Proof of "Intent": In its interim ruling on jurisdiction, the NAFTA tribunal dismissed most of the company's claims. However, the panel gave the company the opportunity to prove that the ban was somehow a direct effort to harm Canadian methanol producers. In other words, the tribunal is asking Methanex to prove intentional discrimination against their product. This not only sets a high bar, it is extremely rare in a trade dispute. Both under NAFTA and the WTO, evidence of a discriminatory *impact* upon the plaintiff is usually sufficient to win a national treatment claim or minimally to flip the burden of proof to the defendant, who must prove the negative. For instance, in the NAFTA Chapter 11 Karpa (Feldman) case described below, the mere showing of differential treatment regarding a cigarette tax rebate shifted the burden to the government to prove otherwise. Because Mexico failed to do so, the plaintiff prevailed under Article 1102's antidiscrimination rule. The motivated Methanex lawyers have taken up the challenge and announced plans to seek discovery, including deposing Governor Gray Davis and ADM, in an attempt to garner evidence to prove that the two conspired to advantage domestically produced ethanol and disadvantage methanol.[231] (The firm is allowed to do this in the U.S. domestic courts system because of a federal law that allows federal district courts to issue subpoenas on behalf of tribunals.) However, it seems unlikely that future NAFTA panels will follow the Methanex tribunal's lead and narrow cases by beginning to require proof of discriminatory intent. Some observers view this aspect of the ruling as more evidence that the panel is trying to make this case "go away."

Methanex Would Not Have a Takings Case Under U.S. Law: The U.S. Supreme Court has held that a regulation could constitute a compensable taking if it "denies *all* economically beneficial or productive use" of the property in question.[232] It has also ruled that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[233] In the Methanex case, only a part of Methanex's market was impacted by the California regulation. The firm is free to sell its product in many other states and nations. Because the firm would be "laughed out of federal or state court,"[234] in the words of the California Attorney General, it bypassed the U.S. courts and headed straight to a NAFTA Chapter

11 tribunal. However, U.S. firms are not allowed to avoid skeptical U.S. courts when pursuing a takings claim.

GAMI, CORN PRODUCTS, ADF & STALEY v. MEXICO – SWEETENERS CASES

GAMI Investments, Inc: GAMI Investments, based in Las Vegas, Nevada, is an affiliate of Equity Group Investments, a privately held investment firm in Chicago. GAMI is also a minority shareholder with 14.18 percent ownership interest in *Grupo Azucarero México, S.A. de C.V*. (GAM), a Mexico City-based sugar producer and owner of a number of Mexican sugar mills.[235] The similarity in names is coincidental.

Corn Products International: Corn Products International, Inc., based in Westchester, Illinois, is a leading worldwide producer of sweeteners and starches from the corn-refining process, including high-fructose corn syrup. Corn Products had net sales of $2.1 billion in 2003, has 36 plants in 19 countries, and "is the only North American corn refiner with full-scale sweetener and starch facilities in all three NAFTA countries."[236] *Arancia Corn Products, S.A. de C.V*., a Mexican HFCS company, is a wholly owned subsidiary of Corn Products with a number of locations in Mexico.[237]

Archer Daniels Midland Company & A.E. Staley Manufacturing Company: Archer Daniels Midland Company (ADM), based in Decatur, Illinois is one of the largest agricultural processors in the world with net sales of $36.2 billion in 2004.[238] In addition to processing corn, soybeans, wheat and cocoa, it is a leading producer of high fructose corn syrup (HFCS). ADM has been mired in controversy for the past decade. In 2004, it settled a federal price-fixing claim concerning HFCS for $400 million.[239] A.E. Staley Manufacturing Company is a U.S. firm based in Illinois, that is also an indirect wholly owned subsidiary of a British corporation, Tate and Lyle PLC. Both firms make HFCS in the United States and ship it to Mexico. Plus, ADM and Staley each have a 50 percent investment in *Alimidones Mexicanos, S.A. de C.V* (ALMEX), a wet corn milling facility located in Jalisco, Mexico, that produces HFCS as well as starch, syrup, oil, sugar and byproducts including gluten feed and meal.[240]

PUBLIC INTEREST

The constantly fluctuating price of sugar on the world market has generated a great deal of political controversy and direct state intervention in sugar producing nations, including Mexico and the United States. Mexico's sugar industry is among the country's most important sectors in terms of employment, directly providing more than 300,000 jobs − and indirectly supporting another 1.9 million jobs.[241] As a result, sugar is the subject of a wide range of public interest laws and regulation.

Mexico's sugar industry is governed by several tripartite committees, which include sugarcane workers, mill owners and the government, that administer the law and resolve conflicts within the industry. These committees take measures to maintain high prices for domestic sugar, including establishing agreements to penalize overproduction and failure to meet export quotas, and creating a system to give incentives to sugarcane workers to grow a certain amount of sugar when world prices are low and weather is bad.[242]

The Mexican sugar program was confronted with a number of changes under NAFTA. The trade agreement included a tariff rate quota for Canadian and Mexican sugar imports that was supposed to be phased out over 15 years (a tariff rate quota is an agreement to allow certain amounts of a good to be imported under preferential terms while amounts over that quota would face higher tariffs). Under the original NAFTA agreement, Mexico was permitted to export 27,557 tons of sugar annually to the United States for the first six years, increasing to 165,000 tons on October 1, 2000 and rising by 10 percent annually thereafter until the elimination of restrictions in 2008. In addition, the original agreement stipulated that these limits were to be waived after 2000 if Mexico achieved "net surplus producer" status – calculated by subtracting domestic consumption of sugar from production. [243] By this definition, Mexico was a "net surplus producer" as of 1995-96.[244]

The United States, however, had attached a "side letter" on sugar to the NAFTA agreement just hours before President Clinton submitted implementing legislation to Congress in November 1993.[245] This "side letter," signed by the trade representatives of both countries on Nov. 3, 1993, changed the definition of Mexican sugar "consumption" to include both sugar and high fructose corn syrup (HFCS). The "side letter" effectively reduces the amount of sugar that Mexico can export to the United States, since Mexico imported and consumed a great deal of HFCS from the United States in the late 1990s. The altered formula in the side letter clearly favors U.S. sugar producers to the detriment of their Mexican counterparts. One study shows that Mexico might have been eligible to export as much as 550,000 tons of sugar in FY2002 under the original NAFTA agreement, while this amount is reduced to nearly one-third that amount under the side letter's provisions. [246]

The side letter has provoked a fairly significant controversy, since the English and Spanish language versions of the letter differ. In the English version, the side letter refers narrowly to Mexican *consumption* of HFCS, while the Spanish version leaves open the possibility that Mexico's domestic *production* of HFCS would be included in calculating the "net surplus producer." Additionally, the Mexican Senate never approved the side letter, leading Mexico to contest its validity.[247]

In 1996, when Mexico sought to export its surplus sugar to the United States, as it was entitled to under the Mexican government's understanding of NAFTA's sugar provisions, the duty-free imports were blocked by the United States. When Mexico filed a NAFTA complaint, the United States refused to nominate judges to a NAFTA dispute resolution panel and proceeded to export huge volumes of highly subsidized HFCS into the Mexican market.[248] In 1997, the Mexican government imposed duties on HFCS imports from the United States, after finding that these were selling for below the cost of production, a practice illegal under the WTO and known as dumping.[249] The United States retaliated by filing a dispute with the WTO, which in 2000 ruled in favor of the United States and against Mexico's attempts at safeguarding their flagging industry.[250]

Meanwhile, the post-NAFTA influx of U.S. HFCS significantly displaced Mexican sugar sales, causing a loss of jobs in the sector.[251] Sugar mills, feeling the squeeze between forced pay-outs to farmers and an inability to control market prices, have fluctuated between barely surviving and deep, unsustainable debt.[252]

Having failed to find a remedy at the WTO, the Mexican government instituted a variety of other policy measures. First, in September 2001, Mexico expropriated 27 debt-ridden mills – including five owned by the Mexican company GAM – to get the industry's massive debt under control and ensure that the workers were paid.[253]

Second, Mexico's Congress attached a luxury tax to the 2001 federal budget, including a 20 percent tax on beverages and syrups that use sweeteners other than cane sugar.[254] The tax effectively halted both imports of U.S. HFCS and production at HFCS plants in Mexico. In March 2004, the United States filed another WTO case against Mexico for the tax and later threatened retaliatory taxes on

Mexican tequila and other imports.[255] In the meantime, Mexico's interventions in the sugar industry have worked, and the industry has finally begun to rebound.[256]

NAFTA ATTACK

The U.S. company GAMI filed its NAFTA investor-state case against Mexico at UNCITRAL on April 9, 2002.[257] GAMI claims it paid $30 million for its minority investment in the Mexican company GAM and its five sugar mills in the late 1990s. GAMI alleges that shortly thereafter, Mexican regulatory decisions, actions and inactions resulted in three years of losses for the mills, which resulted in the expropriations of the sugar mills in 2001. Specifically, GAMI contends that the government failed to properly implement this legal regime and took other actions that harmed GAMI's investment including: 1) increasing the price that sugar mills were required to pay to farmers for sugarcane without regard for the market price; 2) failing to enforce export requirements for surplus production on all mills equitably; 3) failing to determine each mill's base production level in a timely and transparent fashion that would enable enforcement of the export provisions; and 4) discriminating against GAM in the restructuring of GAM's debt. The investor is charging that these actions violated NAFTA Article 1102 (national treatment), Article 1105 (fair and equitable treatment) and Article 1110 (expropriation). GAMI is asking for $55 million in damages.[258]

Corn Products International filed its NAFTA investor-state Chapter 11 claim at ICSID in October 2003.[259] Corn Products asserts that Mexico's HFCS tax violates foreign investors' national treatment guarantee under NAFTA Article 1102, the prohibition on performance requirements in NAFTA Article 1106, and the prohibition on indirect expropriation in NAFTA Article 1110. Corn Products seeks damages in excess of $325 million.[260]

ADM and Staley filed a notice of their intent to bring a NAFTA investor-state claim on October 13, 2003.[261] The firms' HFCS production at their plant in Mexico dropped significantly and exports of the sweetener from their U.S. plants into Mexico ended in 2003.[262] Like Corn Products, they argue that the HFCS tax violates Mexico's national treatment obligations under NAFTA Article 1102, the prohibition on performance requirements in NAFTA Article 1106, and the prohibition on indirect expropriation in NAFTA Article 1110. They seek damages of approximately $100 million.[263]

These three NAFTA sweeteners cases represent an extraordinary two-pronged attack on the Mexican government's sugar program by foreign investors. On the one hand, Mexico is being attacked by the U.S. investor GAMI for doing too little to regulate the industry to insure the profitability of the sugar mills. On the other hand, Mexico is being attacked by Corn Products, ADM and Staley for doing too much and for implementing the HFCS tax, even though that tax has had a major impact on restoring the profitability of the Mexican sugar market. The Mexican government is caught between a rock and a hard place in trying to please two foreign investors with completely divergent interests in its sugar industry.

OUTCOME

On Nov. 15, 2004, an UNCITRAL tribunal dismissed the claims brought by GAMI against Mexico in their entirety. In the text of its Final Award, the UNCITRAL tribunal first dealt with two important jurisdictional issues. The panel established that GAMI had the right to invoke Chapter 11 and bring a claim under NAFTA Article 1117 (on behalf of the enterprise) even though the U.S. investment firm was a minority, non-controlling shareholder of GAM. The panel ruled that the fact that Mexico did not explicitly seize or interfere with the actual shares of ownership was not the issue; rather, the issue was whether a breach of NAFTA sufficiently damaged GAMI's investment to be deserving of compensation.[264] The panel also ruled that the U.S. investor GAMI had the right to proceed under NAFTA Chapter 11 even though the Mexican firm GAM had sought and obtained a reversal of the 2001 expropriation. In February 2004, in the middle of the NAFTA suit, the Mexican courts ruled in a domestic court case brought by GAM that the expropriation of three of GAM's plants were improper (the other two expropriations were not challenged). While generally NAFTA does not allow a claim to proceed in domestic court and a NAFTA tribunal at the same time, this NAFTA panel decided that GAMI's NAFTA claim should not be impaired because the controlling shareholder sought relief in domestic courts.[265] This first-of-its kind jurisdictional ruling opens up the possibility of a diversity of shareholders making a diversity of claims simultaneously in international arbitral bodies and in domestic courts, a situation NAFTA Article 1121 was intended to prevent by generally requiring investors to waive their rights to proceed in domestic court at the same time as in a NAFTA tribunal.

On the minimum standard of treatment claim, the panel ruled that Mexico may have indeed failed to implement key elements of its sugar program. However, quoting from the Waste Management decision, the panel ruled that GAMI failed to make the case that the specific failures of the sugar program were "an outright and unjustified repudiation" of the relevant regulations or that these failures were the government's responsibility alone.[266] Macroeconomic factors as well as actions by the tripartite commissions, unions and the private sector likely played a role as well.

As for the claims under Article 1102, the tribunal found that GAMI's claim that its investments in GAM had not been accorded national treatment did not hold in this case, because GAMI did not prove that the expropriation of GAM's mills was related to the fact that its minority shareholder was an American company. Finally, GAMI's claims under Article 1110 were rejected on the basis that it was GAM, not GAMI, which had its assets expropriated. Because those assets were later returned, and because GAMI failed to take this into account and continued to stake its claim on the assertion that the wrong done to it constituted the total destruction of the value of its investment when that was patently not true, the panel rejected GAMIs claim of expropriation.[267] (Notably, the panel left undecided whether only "*partial* destruction of shareholding interests may be tantamount to expropriation" if such measures are financially demonstrated, a loophole that may have to be closed if similar cases are brought in the future.)[268]

The Corn Products case and the ADM/Staley case are still in arbitration. The claims by both firms amount to a staggering $425 million.

IMPLICATIONS

Countering Economic Social Instability: Mexican agriculture has felt the bite of key NAFTA trade provisions in the past. Prior to NAFTA, Mexico imported corn only when production by its small farms fell short of domestic needs. Within two years of NAFTA's coming into effect on January 1, 1994, the Mexican government decided to no longer collect tariffs owed to it on imported corn under the NAFTA tariff schedule.[269] Subsequently, U.S. corn exports to Mexico have more than doubled, causing a 70 percent drop in the real prices paid to Mexican farmers for their corn[270] and displacing an estimated 1.5 million small farmers and farm workers who have been pushed into city slums or into immigrating over the border to the United States.[271] The surge in NAFTA corn imports led to massive rural dislocation and growing social unrest. A campesino protest movement, called "El Campo No Aguanta Más" or "the Countryside Will Take No More," closed down major highways and other transportation arteries in February 2003, when it marched on Mexico City with tens of thousands of farmers and the support of dozens of rural organizations. The Mexican Congress was invaded by campesino protesters, including one on horseback. Riot police were called in to beat back workers and their children. The coverage of the crisis on television began to mobilize Mexican urban residents to join the protest.[272] Now the entire scenario of economic dislocation and social turmoil is set to repeat itself if Mexico is required to lift its tax on HFCS and U.S. corn sweeteners continue to flood the Mexican market. The Mexican government created its sugar regulatory framework and the HFSC tax to foster rural employment and avoid further NAFTA-related poverty and mass dislocation. While controversial, the Mexican actions have kept unemployment from rising to a rate it otherwise would have reached, and the sugar sector is beginning to rebound.

U.S. Agribusiness Giants Exploit Farmers' Situation on Both Sides of the Border: Corn, used to make HFCS, is one of the most subsidized agricultural crops in the United States. The elimination of tools to manage crop inventory in the 1996 and 2002 Farm Bills have resulted in vast structural overproduction that, barring bad weather or crop diseases, has depressed U.S. grain prices by as much as 40 percent since 1996.[273] Market prices for corn in 2001 were 23 percent below the cost of production.[274] These artificially low prices helped put over 38,000 small U.S. farmers out of business between 1993 and 2000, despite taxpayer subsidies. The subsidies come in the form of income support for farmers. Some call the payments "serf subsidies" because they provide farmers with enough cash to live on to allow them to survive through another growing season so they can produce another crop. Basically, these taxpayer funds compensate for the agribusiness companies' refusal to pay farmers a price above the cost of production. Low commodity prices benefit giant agribusiness corporations that purchase huge amounts of corn for their animal factories and the production of HFCS in both the United States and Mexico. These firms undercut both smaller U.S. sweetener producers and any competing manufacturers in foreign markets where they operate. Prior to Mexico's imposition of the HFCS import tax in 2001, cheap HFCS imports flowed into Mexico from the United States and were produced in plants located in Mexico, displacing the Mexican domestic sugar used in soft drinks and forcing down the price of sugar on the Mexican domestic market.[275] The Mexican HFCS import tax effectively put an end to HFCS dumping.

POPE & TALBOT v. CANADA – SOFTWOOD LUMBER

Pope & Talbot, Inc. is an Oregon-based timber company that operates three sawmills in British Columbia, Canada. The company exported timber from British Columbia into the United States. A portion of these shipments entered duty-free up to a limit set by the government of Canada under an overall quota determined by a U.S.-Canada Agreement on Trade in Softwood Lumber.[276]

PUBLIC INTEREST

The U.S.-Canada Agreement on Trade in Softwood Lumber was a managed trade arrangement that ended in March 2001 when it was not renewed by the parties, although the United States had sought renewal. The agreement set a maximum quota of softwood lumber imports that could enter the United States duty-free from the four major timber-exporting Canadian provinces. The pact was signed in 1996 to avert a trade war over U.S. industry complaints that Canada was unfairly subsidizing logging companies. The crux of the on-going dispute between the nations over soft wood lumber has centered on the effects of the different timber policies employed by Canada and the United States on the lumber industries in the respective countries. The U.S. International Trade Commission has contended that the Canadian government subsidizes lumber production by setting the price lumber companies pay for harvesting rights (known as "stumpage fees") from public land at artificially low levels.[277] The government set prices largely determine the price of lumber in Canada because nearly all (93 percent) of Canadian forests are owned by the government.[278] In contrast, more than half (58 percent) of the timber land in the United States is privately owned, and thus the U.S. government has no control over the price charged for access to this wood.[279] Environmentalists also have argued that Canada's lumber policies promote intensive harvesting of Canada's forests and sales of lumber at a fraction of its real value.[280]

NAFTA ATTACK

On March 25, 1999, Pope & Talbot filed a NAFTA Chapter 11 investor-state suit at UNCITRAL alleging that the manner in which Canada implemented the lumber agreement violated the company's rights under NAFTA. Specifically, the company claimed that the quota system established in the U.S.-Canada Agreement on Trade in Softwood Lumber violated the national treatment and minimum standard of treatment guarantees provided for foreign investors in NAFTA Articles 1102 and 1105 and imposed performance requirements on a foreign-owned company, which is forbidden under NAFTA Article 1106.[281] The company argued that its investment had been "expropriated" in violation of NAFTA Article 1110 to the amount of $507 million, an amount later reduced to $381 million.[282] The complicated argument boils down to an allegation that, while Pope & Talbot obtained treatment similar to other companies in British Columbia, it was treated less favorably than logging companies that operate in other parts of Canada that are not subject to the quotas of the agreement.

OUTCOME

On June 26, 2000, a special tribunal operating under UNCITRAL rules issued a partial ruling. The tribunal held that further hearings were necessary on Pope & Talbot's claims regarding national treatment and minimum standards of treatment, but dismissed other claims, including claims of expropriation.[283] On April 10, 2001, the panel issued its final ruling.[284] Although the panel held that Canada had acted reasonably in response to most of the allegations raised by the corporation with regard to the country's implementation of the agreement, the panel still found against Canada. The issue underlying the ruling was the behavior of Canadian government officials when the Canadian government sought to verify Pope & Talbot's compliance with the requirements of the agreement. During the period in question, Canada knew it was being sued by the company under NAFTA, and the panel stated that relations between the company and the government "were more like combat than cooperative regulation."[285] The tribunal found that Canada acted unreasonably when it asked the company to produce information verifying its quota allocation *in Canada* versus making the information available. The tribunal held that these and other actions that boil down to rude treatment of a foreign investor by government officials were a violation of the fair and equitable treatment provisions of NAFTA.[286] The panel eventually awarded the firm $582, 000 in damages and legal fees.

IMPLICATIONS

Market Access Considered an "Investment" Under NAFTA: The Pope & Talbot softwood lumber tribunal may be best remembered for declaring that "market access" constituted an investment protected by NAFTA's rules. Even though the panel found that the effect of the Softwood Lumber Agreement upon the firm was not significant enough to constitute a takings, the panel concluded that "the Investment's access to the U.S. market is a property interest subject to protection under Article 1110…"[287] Taken as a whole, the Softwood Lumber cases discussed here and below demonstrate how trade-in-goods cases (that would otherwise only be considered in traditional state-state dispute resolution) can be dragged into investor-state dispute resolution as well.

Rudeness Falls Into the "Fair and Equitable" Catch-All: This case also highlights a major issue of controversy: What sort of government conduct rises to the level of violating NAFTA-provided investor guarantees of fair and equitable treatment? The ruling in this case suggests rudeness is a NAFTA violation. It also suggests that NAFTA guarantees some specific level of conduct toward foreign investors, versus simply equal treatment with domestic firms. In a submission to the Canadian domestic court review of the Metalclad Chapter 11 case, Canada made a strong argument that the jurisprudence built up under bilateral investment disputes has established the precedent that for a "minimum standard" violation to be found, the conduct in question must be egregious and amount to "a willful neglect of duty or an insufficiency of governmental action that every reasonable and impartial person would recognize as insufficient."[288] To make its point, Canada cited numerous ICSID cases where compensation was ordered for violations of minimum standards of treatment only after foreign property was looted or destroyed in other nations by government forces while involved in armed conflict. The point was that it took extreme circumstances of government conduct for a government to be held liable for failing to meet the minimum standard of treatment.[289] The Pope & Talbot panel rejected this formulation and instead considered the allegations of rude and overly zealous behavior by Canadian officials attempting to verify that Pope & Talbot's quotas were sufficient. The panel did not find a violation of international law or even domestic law in the government's conduct. Instead, by declaring that the actions of government officials in this case violate NAFTA's guaranteed "minimum standard of treatment" for foreign investors, the panel expanded the concept of "fair and equitable treatment" to include almost any behavior a corporation might consider unfair. A 2001 "clarification" by the NAFTA governments attempted to deal with this problem by seeking to narrow the application to treatment that is required by "customary" international law. This is the language also used in CAFTA. Yet the notion of customary international law is notoriously broad, providing enormous opportunity for a continuation of the expansive interpretation by the tribunals.

NAFTA Cases Complicate Already Intractable Trade Disputes: The U.S. Canadian Softwood Lumber Agreement has sparked a variety of NAFTA Chapter 11 cases on both sides of the border. After the Softwood Lumber Agreement ended in March 2001, the U.S. International Trade Commission, in response to an anti-dumping petition, issued a determination in May 2002 that the U.S. softwood lumber industry was threatened with injury due to the influx of Canadian softwood. As a result, the United States instituted countervailing duties to make up the dumping margin. Canada promptly and successfully challenged these U.S. tariffs in the state-state dispute resolution systems of the WTO and NAFTA. Meanwhile, at least four softwood lumber firms launched their own trade complaints utilizing NAFTA Chapter 11 and more suits may follow (see, Softwood Lumber Cases, p. 65). This throng of NAFTA investor-state cases further complicate a monumental trade dispute that already is being heard in a variety of venues at once: in previous NAFTA Chapter 11 tribunals, at the U.S. International Trade Commission, the WTO and the NAFTA state-state dispute resolution mechanism. One of the criticisms of the investor-state process is that it allows a narrow private interest to trump what might be a contrary public interest. When a government considers initiating a state-state enforcement proceeding, it must consider how the action could implicate other national goals or interests and balance the immediate potential commercial gain for U.S.-based business interests against long-term, broader interests – such as the possibility of creating jurisprudence that might be turned against the country in a later dispute. Not so with investor-state proceedings. It is quite possible that NAFTA governments may issue another "clarification" to keep these types of cases out of investor-state dispute resolution.

S.D. MYERS v. CANADA – PCB TREATMENT

S.D. Myers, Inc., an Ohio-based waste treatment company, claimed to have an investment in Canada, variously referred to as S.D. Myers Canada and Myers Canada. In the early 1990s, the company sought to import polychlorinated biphenyls (PCBs) from Canada to the United States for processing in its Ohio facility and pressed for permission to do so from U.S. and Canadian government officials. Canadian law at the time favored the domestic treatment and disposal of PCBs. However, Canada's 1990 PCB Waste Export regulations allowed for exports to the United States if the U.S. Environmental Protection Agency (EPA) gave prior approval.[291] In the United States, the 1976 Toxic Substance Control Act prohibited imports of PCBs, with very narrow exceptions, such as imports from U.S. military bases overseas.[292] In October 1995, however, the EPA decided to allow S.D. Myers and nine other companies to import PCBs into the United States for processing and disposal.[293] In 1996, the EPA moved to make this informal policy a federal regulation and issued a final Import for Disposal Rule that opened the U.S. border to PCB imports for processing and disposal.[294] In November 1995, one month after the EPA opened the border, Canada issued an Interim Order banning exports of PCBs.[295] Canada declared that it sought time to study the contradictory legal situation in the United States (the law prohibiting imports and the regulation allowing them) and review its international obligations concerning PCB trade. Canada is a signatory to the Basel Convention, a multilateral environmental agreement concerning transboundary trade in toxic waste, which calls for the processing of hazardous waste as close as is possible to where it is produced, so as to minimize transport of such material.[296]

> "Each Party shall take the appropriate measures to: … Ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes and other wastes that shall be located to the extent possible within it whatever the place of their disposal…"
>
> The Basel Convention[290]

PUBLIC INTEREST

PCBs were used as coolants and lubricants in transformers, capacitors and other electrical equipment because they are good insulators and weatherproofers.[297] PCBs were banned for production in the United States in 1977 because of evidence that they built up in the environment and caused health effects.[298] Over the years, the U.S. EPA studied PCBs and determined them to be toxic to humans and hazardous to the environment. "PCBs enter the body through lungs, gastrointestinal tract, and skin and can circulate throughout the body and can be stored in fatty tissue. PCBs are absorbed and stored in the fatty tissue of higher organisms as they bioaccumulate up the food chain through invertebrates and mammals... PCBs may cause developmental toxicity, reproductive effect and oncongenicity [cancer] in humans."[299] PCBs are persistent contaminants – meaning they do not readily or quickly lose their environmental and health-threatening qualities.

Because of the unique dangers posed by PCBs and other highly toxic substances, the Basel Convention sets rules regarding their transport and disposal.[300] Canada and Mexico are parties to the 1989 convention. The United States has signed but never ratified the agreement. The Basel Convention strongly encourages countries to limit exports of hazardous waste, to develop the capacity to treat hazardous waste domestically and to promote production processes that limits the creation of toxic wastes. When issuing its Interim Order that banned the export of PCBs, Canada announced that it needed to assess its obligations under the Basel Convention, which encourages countries: 1) not to engage in trade in toxic waste with non-parties; 2) to ensure PCBs are disposed of in an environmentally sound manner; and 3) to develop a viable, long-term strategy to dispose of such waste at home.[301]

In addition, in deciding to issue the order that temporarily halted PCB exports, Canada took into consideration that U.S. law prohibiting the importation of PCBs and correctly questioned whether the EPA's "enforcement discretion" was in compliance with U.S. law.[302] Following the assessment, Canada then moved to develop permanent regulations that would reopen the border and allow the export of Canadian PCB waste to the United States under certain conditions.[303] The new Canadian regulations took effect on February 4, 1997, and S.D. Myers imported seven shipments of Canadian PCB waste into the United States.[304] However, on July 20, 1997, the U.S. border was permanently shut for PCB trade by a U.S. judge after the environmental group Sierra Club successfully challenged the EPA's new Import Disposal Rule in a U.S. federal court as a violation of the U.S. Toxic Substance Control Act.[305]

NAFTA ATTACK

On October 30, 1998, S.D. Myers sued Canada for $20 million in compensation to cover its lost profits during the 16-month period that the EPA allowed for imports of PCBs while they were blocked by Canada.[306] The company argued that the Canadian Interim Order was a violation of NAFTA's investment chapter because it damaged the company's ability to recoup future expected profits from the company's plan to import Canadian PCBs for disposal in the United States. Specifically, S.D. Meyers claimed that its NAFTA privileges for foreign investors were violated because the Canadian ban on PCB trade under its Interim Order constituted "disguised discrimination" aimed specifically at S.D. Myers in violation of NAFTA's national treatment rules (Article 1102).[307] The company also claimed that the Interim Order's ban was designed and implemented in a "discriminatory and unfair manner which constituted a denial of justice and violation of good faith" contrary to NAFTA rules guaranteeing foreign investors fair and equitable treatment (Article 1105).[308] In addition, S.D. Myers argued that the temporary export ban effectively required the company to dispose of PCBs in Canada, which, by conditioning the company's investment on certain ways of operating, constituted an illegal performance requirement that is forbidden under NAFTA's Article 1106.[309] Finally, the company argued that the interim ban deprived the corporation of the benefits of its investment in Canada and thus constituted a measure "tantamount to an expropriation" as defined by NAFTA Article 1110, which requires compensation from the government.[310]

OUTCOME

On November 13, 2000, a NAFTA UNCITRAL tribunal ruled in favor of S.D. Myers. Although the tribunal dismissed S.D. Myers' claims regarding expropriation and performance requirements, the panel upheld the company's other claims. The tribunal found that Canada had violated the national treatment rules of NAFTA's investment chapter in a variety of ways.[311] The tribunal noted that even though Canada had a "legitimate goal" in seeking to develop a domestic PCB treatment industry, the tribunal ruled that Canada was obliged to do so in a manner "consistent with NAFTA investment rules," which the panel ruled the Interim Order and assessment was not.[312] Thus, the panel suggested, to promote its Basel Convention commitments and policy goals, Canada should have used government contracts and subsidies to encourage a domestic PCB disposal system rather than issue an export ban.[313]

In addition, the tribunal decided that S.D. Myers' share of the Canadian PCB market constituted a legitimate investment under NAFTA, adding yet another form of investment to the long list already explicitly covered in the "definitions" section of NAFTA's investment chapter.[314] Using a similar analysis to that employed by the Metalclad panel, but reaching the opposite conclusion, the S.D. Myers panel also ruled that Canada's violation of S.D. Myers' national treatment rights constituted a minimum standards violation and thus no further injustice under international law had to be established.[315] Accordingly, Canada was ordered to compensate S.D. Myers for the profits it could have made had it been allowed to import PCBs during the 16 months in question. On October 21, 2002, the tribunal ruled that the firm was entitled to $4.8 million in compensation from the Canadian Treasury.

Canada unsuccessfully appealed the tribunal's decision to the trial division of the Canadian federal court.[316] The Canadian Arbitration Act permits domestic courts to set aside arbitral awards when an award deals with matters "beyond the scope of the submission to arbitration" or is "in conflict with the public policy of Canada."[317] Canada had argued strongly throughout the case that it had long been its public policy under various domestic laws and international agreements to dispose of PCB waste domestically. On January 13, 2004, however, the federal court dismissed the Canadian government's request for review in its entirety. In response to Canada's argument that the NAFTA tribunal had no jurisdiction to hear the claim upon which it decided, the court held that Canada's opportunity to file objections based upon jurisdiction had lapsed because all jurisdictional objections should have been addressed as a preliminary matter, prior to the tribunal's hearing on the merits.[318] Additionally, the court found that contrary to Canada's argument, allowing the S.D. Myers award to stand was not in contravention to Canadian public policy.[319] Lastly, the court declined Canada's contention that it should exercise an expansive standard of review that would permit the court to basically review the record in its entirety for mistakes of law and fact instead of the ordinary standard of review for international arbitration awards, which is accorded a high degree of deference.[320]

IMPLICATIONS

Market Share Considered a NAFTA-Protected "Investment": The S.D. Myers case indelibly broadened the definition of "investor" and "investment." S.D. Myers was a cross-border service provider with the waste treatment services provided at the company's Ohio plant, not in Canada. As the government of Canada argued in its statement of defense in the case, it is not clear what S.D. Myers' "investment" was in Canada.[321] The U.S. company claimed to have a joint venture with Myers Canada, which was owned by a Myers family member. However, it is not clear if this Canadian company had assets damaged by the closing of the border. Clearly S.D. Myers' long-term efforts to obtain a share of the Canadian PCB market are not comparable to Metalclad's investment via the construction of a multi million-dollar facility in Mexico. However, the NAFTA tribunal equated these two situations, going so far as to suggest that S.D. Myers could be considered a NAFTA investor merely because it sought a share of the PCB market in Canada. This case opens the door for an investor whose business was stopped before it could become established to succeed in claims for lost future profits.[322] This lesson may have been learned by the Canadian mining firm Glamis Gold who is bringing a NAFTA suit over a California law that allegedly blocks a planned open-pit gold mine (see below, p. 52). In addition, the logic used by the tribunal in the S.D. Myers case may have encouraged new cases by investors interested in using investor-state challenges as a strategy for attaining greater market share. The most notable of these cases UPS case against the Canadian postal service (see below, p.45).

Investor Rights Trump International Environmental Obligations: In this case, Canada explicitly raised its obligations under a multilateral environmental agreement (the Basel Convention) as a justification for its Interim Order, temporary PCB export ban and attempts to develop domestic PCB treatment capacity. This case proves a concern raised by environmentalists during the debate about NAFTA's approval: what would happen when NAFTA's expansive rules required governments to act in violation of their obligations in the scores of environmental treaties that many countries, including the NAFTA nations, have signed? Sierra Club trade specialist Christine Elwell called the decision "a devastating blow not only for a country's domestic ability to set its own standards, but for the Basel

Convention as well."[323] This case sends an alarming signal about what happens generally under NAFTA when investor "rights" come in to conflict with countries' environmental policies and obligations.

International Tribunals Second-Guess Governments, Limit Policy Options: It is also striking that the tribunal in the S.D. Myers case felt competent to decide what policy the Canadian government should use to carry out its environmental objectives. The tribunal, which had no expertise in environmental policy and apparently little expertise in NAFTA, designated Canada's goal of fostering a Canadian PCB industry as legitimate and did not find that the Canadian approach to meeting its goals was unreasonable. Rather, the panel decided that Canada was obliged to adopt a means of obtaining its goal that was most consistent with open trade, or "least trade restrictive" in WTO parlance, and recommended that the government use its procurement policy as an alternative avenue to promote the domestic PCB treatment industry. Ironically, NAFTA's procurement rules forbid giving preference to domestic service providers over foreign providers, so in fact the panel's suggestion would itself violate NAFTA rules, demonstrating how NAFTA limits policy options.

Don't Bother Me with the Law: Finally, while acknowledging the fact that at all times S.D. Myers sought to ship PCBs across the border, such PCB imports were illegal under U.S. law- a fact that the NAFTA tribunal did not consider relevant to the case.[324] In other words, even if it was illegal to bring PCBs over the U.S. border, the fact that Canada halted such trade was ruled to be a Canadian NAFTA violation.

UPS v. CANADA – FEDERAL POSTAL SERVICES

The United Parcel Service of America, Inc. (UPS) is based in Atlanta, Georgia, and is the world's largest express carrier and package delivery company.[326] The company was founded in 1907, employs 330,000 people and delivers more than three billion packages and documents a year in the United States, Canada, Mexico and 200 other countries.[327] UPS Canada has been in operation since 1975.

> "When our jobs our pension and our public postal service are put on trial we should have the right to defend them."
>
> Deborah Bourque, vice president of the Canadian Union of Postal Workers[325]

PUBLIC INTEREST

In 1981, the Canadian postal system was transformed from a government department to a "Crown Corporation," which is a publicly owned corporation.[328] The organization, called Canada Post, often uses corporate terminology to describe its activities, but remains a public service that has been designated by the Canadian government as the universal provider of postal services.[329] In 1993, Canada Post bought Purolator Courier, Canada's leading overnight courier company.[330] The joint entity employs approximately 64,000 workers, making the postal system the fifth largest employer in Canada.[331]

NAFTA ATTACK

On April 19, 2000, UPS filed an investor-state suit under NAFTA Chapter 11 for $160 million dollars. UPS claims that Canada Post's operations violate UPS' foreign investor rights under Chapter 11 and also violate provisions of NAFTA Chapter 15 on competition policy, monopolies and state-run enterprises. NAFTA Articles 1502 (3) (a) and 1503 (2) require that government monopolies and state-run enterprises act in accordance with NAFTA Chapter 11 rules. Citing this provision, UPS alleges that Canada Post abuses its special monopoly status as Canada's first class mail delivery status by utilizing its infrastructure to "cross-subsidize" its parcel and courier services. According to UPS, this NAFTA-illegal cross-subsidization takes the form of postal boxes, retail postal outlets, ground and air transports, pensions and even letter carriers, and constitutes a violation of NAFTA's fair and equitable treatment rules (Article 1105) as well as NAFTA's requirements that domestic businesses not receive favorable treatment (Article 1102).[332] In addition, UPS claims that Canada Post gets preferential service for package importation, customs clearance and customs fees in violation of NAFTA's national treatment rules (Article 1102).[333] Finally, UPS says that NAFTA's Article 1105 "fairness" guarantees have been violated, because after a governmental review found that Canada Post was behaving in an anti-competitive way, the government failed to take action.[334] In an unusual move, the company also alleges discriminatory treatment under Article 1202 of NAFTA, which is the national treatment provision of the NAFTA Chapter dealing with cross-border service trade. The amount of damages claimed is calculated on revenue lost by UPS since NAFTA went into effect in 1994, plus an estimated two years for the life of the NAFTA dispute.[335] This is the first NAFTA investor-state case against a public service, and the case could have significant consequences for all public services in the three NAFTA nations.

OUTCOME

This case is proceeding under UNCITRAL rules. The Canadian Union of Postal Workers, whose members' lives and livelihoods would be most affected by an adverse NAFTA ruling, attempted to intervene in the case and sought standing as parties. But their petition was denied by the NAFTA tribunal in 2001. The tribunal did rule, however, that it could receive *amicus* briefs, but it postponed the decision on whether or not it would accept *amicus* briefs to a later date.

Public Citizen filed a Freedom of Information Act (FOIA) request in 2001 asking the U.S. government to provide its own citizens with information about the case, as per the requirements of U.S. domestic law. Public Citizen was notified by the Department of State that the UPS Statement of Claim had been classified in the interest of "national security" and was therefore exempt from FOIA. As it was very difficult to imagine what "national security" interests could be implicated in the corporation's claim, Public Citizen challenged the denial decision in the U.S. court system. After almost two years of legal arguments and counter arguments and on the verge of a U.S. court decision in this case, in 2002, UPS finally decided to release its amended NAFTA investor-state claim voluntarily and open the hearings on the matter to the public. This was the first time that a NAFTA tribunal proceeding was open to public scrutiny.

On November 22, 2002, the tribunal rendered an initial decision regarding Canada's challenges to whether an investment tribunal had jurisdiction to hear UPS' Article 1105 claim stemming from alleged violations of Chapter 15, which contains limits on competition policy, monopolies and state-run enterprises. Some aspects of Chapter 15 are Chapter 11 enforceable and some are not. In addressing whether Canada's treatment of UPS comported with customary international law, the tribunal found that there was no customary international law prohibiting or regulating anticompetitive behavior[336] and dismissed the claims arising under Articles 1105, but UPS' other claims are still being heard.

IMPLICATIONS

Threat to Public Services: UPS is arguing that because Canada Post provides public mail services on a monopoly basis, it should not be permitted to offer integrated parcel and courier services on a competitive basis. In an era when public and commercial service delivery is comingled in most sectors, few public services would be immune from similar corporate challenges. For instance, public hospitals obtain certain government benefits deemed necessary for them to function as universal providers to those unable to pay, even as they also provide fee-for-service healthcare to those with insurance or the ability to pay fees otherwise. If UPS is successful with this case, it may be just a matter of time before a Canadian or Mexican company launches a similar suit against a U.S. public service.

From Defense to Offense: Rather than claiming an expropriation due to some specific act of the Canadian government, UPS appears to be using NAFTA Chapter 11 provisions in a strategic offensive to secure a greater share of the Canadian parcel and courier delivery market. UPS is claiming that the very existence of Canada Post, a public sector competitor, violates its rights under NAFTA. In addition, the corporation backdates this claim to the day NAFTA, January 1, 1994. If UPS's claim is successful, one can anticipate many more such claims against government services dating back to the moment corporations were granted these unprecedented new NAFTA investment protections.

Corporate Rights v. Worker Rights: If UPS is successful in its claim, the government of Canada may be forced to restructure the manner in which it provides postal services to avoid future NAFTA suits. Yet the postal workers who would be most directly affected by an adverse decision have no standing in the NAFTA case. Even though corporations are not formal "parties" to NAFTA and have no obligations under the treaty as do governments, they are in effect elevated to the status of parties under Chapter 11's investor-state provisions, which permit private enforcement of a public treaty. However, citizens and workers who would be affected by these decisions cannot be parties and must beg individual NAFTA tribunals for the opportunity to be heard under very limited and limiting circumstances, and can have such a role only at the discretion of the tribunal.

III. NEW NAFTA CLAIMS OF PUBLIC INTEREST

What follows are short summaries of recent NAFTA claims where only a "Notice of Intent to Submit a Claim to Arbitration" has been made publicly available. A "Notice of Intent" is an official notification by the investor to a NAFTA government that it intends to bring a NAFTA Chapter 11 case at ICSID or UNCITRAL. It gives the parties a 90-day window to settle the case. After 90 days, the investor can then file a "Notice of Arbitration" at ICSID or UNCITRAL. No arbitration has yet commenced with the cases listed below, but these cases are sure to generate controversy as they move through the process.

CANADIAN CATTLEMEN FOR FAIR TRADE v. UNITED STATES – MAD COW DISEASE

In August 2004, a group calling itself "Canadian Cattlemen for Fair Trade" (CCFT) announced that it was bringing a NAFTA Chapter 11 suit against the United States for its May 2003 decision to close the U.S.-Canadian border to beef and cattle after a case of mad cow disease was discovered in a cow in Alberta, Canada.[337] CCFT is a newly formed group of Canadian feedlot operators[338] who claim that their industry has suffered devastating losses as a result of the border closure. Lawyers for the group are actively soliciting more clients to initiate Chapter 11 action in the manner of a class action suit.[339] CCFT has filed 100 more claims totaling a reported $300 million, and the liability may rise even higher.[340] As the status of the border closure is under active review by the U.S. government, these NAFTA claims constitute a timely effort to pressure the U.S. Department of Agriculture (USDA) to ignore the differing disease status of the two nations and open the border once again to trade in live cattle.

PUBLIC INTEREST

In 1986, a troubling disorder was identified in dairy cows in the United Kingdom. Called Bovine Spongiform Encephalopathy (BSE) by the scientists, later dubbed "mad cow disease" by the tabloids, the disease is marked by progressive degeneration of brain tissue leading to behavioral changes, abnormal posture, difficulty rising or walking, and finally death. While scientists worked steadily for 10 years to identify the cause of the disease and control for the risk factors that contributed to its spread, U.K. government officials continued to assure the public that the meat supply was safe. Some scientists theorized that like a rare disorder found among New Guinea islanders some 50 years ago, the disease might be caused by cannibalistic feeding practices. In a precautionary move to prevent the potential spread of the disease, the United States stopped importing meat, cattle and most rendered protein products used in cattle feed from the U.K. in 1989.[342] Although millions of cattle were destroyed in the U.K. in an attempt to eradicate the disease, it was later discovered to have taken hold in many European nations via the importation of live animals as well as contaminated animal feed. The disease would eventually be detected in 25 nations. However, it could be present in many others because the U.K. continued to ship potentially contaminated feed to some 80 nations before the practice was stopped in the mid-1990s.[343]

> "By entering into NAFTA, the United States no longer has the right to protect its domestic cattle industry from contamination."
>
> Gilles Stockton, Western Organization of Resource Councils[341]

In 1996, what had been a puzzling animal health crisis became an explosive human health issue when U.K. health officials announced that BSE had jumped the species barrier. Scientists revealed the link between BSE and a new form of Creutzfeldt-Jakob disease (CJD) in humans. Given the name "new variant" CJD (vCJD) by scientists, vCJD is a fatal, brain-deteriorating disease for which there is no known cure. To date, some 157 people,[344] mostly British, have been diagnosed with the disease and most have perished. Due to the long incubation period characteristic of both BSE and vCJD, the full human toll of the disease is not yet known.[345]

In 1993, a single case of BSE was discovered in Canada in an animal later determined to have been imported from Britain.[346] Thus, Canada did not suffer the severe long-term trade repercussions it would have if it had been an indigenous case. The first reported case of indigenous BSE in Canada was found in Alberta, on May 20, 2003. On May 29, 2003, the USDA, acting in accordance with U.S. animal disease control policy and legally required administrative law procedures, issued an emergency rule closing the U.S.-Canadian border to imports of Canadian beef and cattle retroactive to May 20.[347] This action was consistent with U.S. law and trading practices. Since 1989, the United States has not accepted any cattle or beef from nations with even one indigenous case of the disease. Thus, previously the United States had closed the border to imports from Austria, Finland, Greece and Israel after the discovery of a single case of BSE in each nation.

In August 2003, in a controversial move contrary to the USDA's prior practice, the USDA issued a press release announcing that it would partially lift the ban on boneless cuts of Canadian beef from cattle under 30 months of age.[348] The USDA also said it would "accept applications" for certain other, previously banned, ruminant meat products as well.[349] Following this announcement, the USDA was required by law to implement rulemaking to open the border to these cuts of meat. On November 4, 2003, the USDA issued the proposed rule that would result in the opening of the border sometime after January 5, 2004.[350]

Before rulemaking was completed, however, the USDA illegally began to allow in certain cuts of meat from Canada, including meat that was not even permitted under its proposed policy. It was estimated that some 33 million pounds of banned product came into the United States.[351] This importation was brought to light and stopped by U.S. cattle producers who took the matter to court and obtained an injunction against the USDA, ensuring that the border was kept closed until rulemaking was complete. The illegal border opening has prompted an investigation by the USDA's Inspector General, who is charged with making sure USDA employees follow the law.[352]

The November 2003 proposed USDA rule indicated that the USDA planned to change its regulations to introduce a newly defined category of regions that would be eligible to export beef to the United States, regions that present a "minimal risk" of introducing BSE. Interestingly, only Canada qualified under this new designation. It is also notable that this categorization was contrary to the international categories promulgated by the Office of International Epizootics (OIE) in Paris and recognized as the world's "trade-legal" standards under the WTO. Under OIE standards, Canada is categorized as a "moderate risk" nation, a higher category of risk than "minimal" and the second worst of five categories.[353] The U.S., in contrast, is categorized as "BSE free." The USDA's plans to open the border and downgrade the risk from Canada suffered a setback just two months later. Rather than presenting a "minimal" risk to the U.S. cattle industry, to the contrary, Canada posed a significant risk as the first case of imported mad cow disease in the United States was found in December 2003. The BSE positive cow was quickly traced back to a herd in Alberta, Canada, but the damage was done as some 53 nations quickly closed their borders to imports of U.S. beef and cattle.

It is important to note that neither the United States nor Canada have done all they can to prevent mad cow disease. Consumer groups have been pushing both governments for years to close regulatory loopholes that could incubate the disease, but governments have been slow to act.[354] Worse, even after the discover of a diseased cow in the United States, on March 8, 2004, the USDA reissued its proposed rule to open the Canadian border.[355] Currently the USDA is planning on opening the border on March 7, 2005. In the meantime, even with a limited testing system, two more diseased cows were found in Canada in January 2005.

NAFTA ATTACK

CCFT filed its first NAFTA Chapter 11 claim on August 12, 2004.[356] The CCFT claimants allege violations of NAFTA Article 1102 stating that the United States is discriminating against Canadian feedlot operators by providing less favorable treatment to the Canadian cattlemen than it has to U.S. cattlemen who own Canadian cattle.[357] In its filings, CCFT notes that the United States has failed to make any effort to round up or trace Canadian cattle that had already crossed the border before the closing. What the petition fails to mention is that the United States currently has no traceability system for doing so.[358] They also allege that USDA officials, by indicating on a number of occasions that they would move forward to lift the border closure then "intentionally or negligently making and then failing to observe its commitments to eliminate its temporary ban on the importation of live cattle,"[359] have breached the U.S. government's obligation to provide a minimum standard of treatment under international law and NAFTA Article 1105 (1). They assert that this international law principle includes the obligation to pay restitution "for reasonable but detrimental reliance on government conduct or statements."[360]

Canadian beef producers, whose businesses have unquestionably been devastated by the border closing, estimate their losses due to the closing at $2-3 billion.[361] While the initial claim was for $75 million, more recently, up to 100 claims have been filed reportedly amounting to $300 million. NAFTA Article1125 provides for the consolidation of claims in certain circumstances, and that may be what happens in this case. The United States is faced with a number of possible scenarios. It might agree to open the border to settle the claims. However, if dozens of cattlemen are involved in the claim, all may not agree to the terms and may proceed with their NAFTA cases. In that instance, the United States could be faced with the unpleasant possibility of having agreed to open the border − and expose U.S. consumers to increased risk − while later facing the possibility of being forced to pay damages to Canadian cattlemen for losses incurred during the period that the border was closed.

OUTCOME

The claim(s) have recently been filed. Arbitration has not yet commenced.

IMPLICATIONS

No Foreign Investment Necessary to Bring a NAFTA Complaint?: If the Canadian cattlemen are permitted to move forward with their case, a bedrock principle of NAFTA's investment chapter will have been discarded. NAFTA Chapter 11 will no longer even have the pretense of being a series of investor protections in a discriminatory and unstable investment climate. Rather, Chapter 11 will be unveiled as a deregulatory rendering machine best suited to shredding the laws and regulations that protect public health and the environment. While the U.S. government has argued that the cattlemen do not have a claim because they have no "investment" in the United States,[362] this position is contradicted by language in NAFTA. The definition section of NAFTA (Article 1139) defines an investor of a Party as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment" – period. It does not say "that seeks to make, is making or has made an investment *in the territory of the other Party*" the way that later FTAs (such as CAFTA) do – a potentially costly omission. NAFTA claimants do not state that they have actual businesses or property in the United States, but they argue that they have made "substantial investment in order to compete, and profit from participation, in the North American cattle industry" and therefore qualify as investors.[363] In addition, given that recent NAFTA panel decisions suggest that "market access" as well as "market share" could be considered legitimate NAFTA investments, the U.S. government has cause for concern regarding this unusual NAFTA case.[364]

Democratic, Administrative Procedure is Not a Trade Barrier; It's the Law: The Canadian cattlemen allege that the USDA by dragging its feet is doing the bidding of protectionist U.S. cattlemen. Far from being "captured" by protectionist producers, it has been widely publicized that the USDA is thoroughly dominated by pro-free trade stalwarts from the head of the Department on down. [365] The Bush administration has hired numerous cattle industry lobbyists for key positions at the USDA. The National Cattlemen's Beef Association (which is dominated by meat packing firms that prefer cheaper Canadian beef) and the ardently pro-free trade USDA both wanted the border opened and the matter disposed of quickly. Fortunately, U.S. law does not allow USDA officials merely to follow their own inclinations. The USDA must follow its own binding regulations, which prohibit the importation of live ruminants and certain ruminant products from regions in which BSE is known to exist[366] and separately require that the public be given notice, and a chance to comment before any nation is struck from the list of nations that are not allowed to import such products.[367] The NAFTA claimants appear to be amazed and offended that the U.S. government "chose" to utilize "tedious" rulemaking, calling it "unnecessary" and a "potent and effective trade barrier," [368] when in fact it is mandatory. The NAFTA claimants are also astonished that the United States paused for four months to reconsider its plan to open the border after the discovery of BSE in the United States. Rather than seeing this delay as a reasonable response to a significantly changed situation − with grave implications for public health and potentially catastrophic implications for the U.S. cattle industry − the NAFTA claimants argue that USDA "chose to continue a regulatory policy based upon protectionist politics rather than science."[369] They blame a lawsuit by U.S. producers for keeping the border closed, when in fact this producer group merely used the courts to force the USDA to abide by U.S. law and regulation and keep the border closed until rulemaking is finalized. It is worth noting that no other nation has opened its borders to trade in live cattle from Canada. Though it may be cold comfort to Canadian cattlemen whose businesses have been unquestionably devastated, the United States before opening any border it had closed due to animal disease must pursue a deliberate and open regulatory process per the requirements of U.S. law. The cattlemen should consider suing their own government for the lax rules that incubated the disease, not U.S. taxpayers.

NAFTA Claim Riddled with Errors: Underlying the Canadian cattlemen's claim is the premise that the United States is acting in a protectionist manner and is failing to act on "sound science." Yet the filing making these claims is filled with errors and does an extremely poor job of understanding the science behind the BSE-related measures both governments have taken. First, the cattlemen ignore the fact that the United States receives only two percent of its live cattle from Canada − far from the "fully integrated North American cattle industry" they claim has been disrupted.[370] Second, while citing OIE reports applauding the U.S. and Canada for their handling of the epidemiological investigations, the claimants completely ignore the fact that the U.S. and Canada enjoy very different BSE designations under international rules promulgated by OIE. The U.S. still enjoys the status of a "BSE free" nation under OIE rules, while Canada is a "moderate risk" nation, the second worst of five categories. It has long been the policy of both nations to import beef and cattle *only* from "BSE free" countries. [371] Third, CCFT repeatedly claims that the USDA's administrative actions were "arbitrary" and punish the Canadian cattlemen "by mere dint of their location relative to the scientifically artificial U.S.-Canadian border."[372] They allege that the risk of BSE infection remains small "and the border has nothing to do with it,"[373] when in fact the United States has been successful for years in preventing the importation of BSE *because* of strict border controls first applied in 1989. Fourth, CCFT alleges that the USDA had "no valid reason to make a distinction between processed beef and live cattle"[374] when it proposed the border opening in

November 2003, even though it is clearly far easier for the United States to inspect incoming meat and limit imports to low risk cuts of meat than it is to implement a currently non-existent traceability system to keep track of live Canadian cattle for many years before they are slaughtered. Finally, CCFT asserts that the U.S. BSE-positive cow made it into the food chain and the Canadian cow did not, when the opposite may well be true. The U.S. government claims that even though the U.S. cow was rendered, it was successful in halting the distribution of all the meat and bone meal from the sick cow.[375] However, the Canadian Broadcast Corporation recently uncovered through a Freedom of Information request that the Canadian cow was sent to a rendering plant and turned into poultry feed, which was later fed by farmers to cattle.[376] In short, CCFT is demanding the U.S. to engage in a radical departure from prior food safety measures and change long-term trading practices based solely on a threatened damage claims that could amount to $300 million or more.

GLAMIS GOLD v. UNITED STATES – MINING & CULTURE

Glamis Gold, Ltd. ("Glamis") is a Canadian corporation based in Vancouver and engaged in the exploration, development and extraction of precious metals in North and Central America.[378] Under the 1872 U.S. Mining Law, only U.S. citizens can mine on federal lands.[379] Therefore, Glamis Gold, Ltd. established two subsidiaries, Glamis Gold, Inc. and Glamis Imperial, to act as corporate citizens on its behalf.[380] With its U.S. entities, the Glamis firms can acquire claims for mining on U.S. federal lands free of cost and can then mine the land for profit without paying any royalties to the U.S. government or any other government under the 1872 Mining Law.[381] In 1994, Glamis acquired 100 percent ownership of mining interests and mill sites in California in a business venture called the Imperial Project, which is composed of 187 mining claims and 277 mill sites and covers 1,500 acres of federal public lands[382] that are managed by the U.S. Department of the Interior, Bureau of Land Management (BLM).[383] Glamis alleges that its rights in the Imperial Project entitle it to use these lands for the purpose of prospecting, exploration and extraction of valuable minerals.[384] As such, the Imperial Project was intended to be a large open-pit, cyanide heap-leach[385] gold mine. The project would require that approximately 422 tons of rock be mined, processed or stored for each ounce of gold produced.[386] Approximately 88 acres of woodland would be destroyed and 389 million gallons of water would be consumed annually from the desert groundwater aquifer.[387]

> "Chapter 11 punishes States for doing the right thing. States like California that develop cutting-edge protections for the environment, human health or local communities are finding their efforts undermined by foreign investors challenging standards that are needed to prevent serious harm."[377]
>
> David Waskow, Friends of the Earth

PUBLIC INTEREST

The Imperial Project is located in a California Desert Conservation Area[388] near tribal lands, which included sacred and ancestral sites of the Quechan Indian Nation.[389] The Quechan Indian tribe is the largest land-based tribe in California, consisting of 3,000 members residing on 45,000 acres of land.[390] It practices its religion in this area and sacred trails used in religious observances would have intersected with the Imperial Project.[391]

For the portion of the conservation area for which it was responsible, BLM was required to prepare and implement a comprehensive, long-range plan for the management, use, development and protection of the public lands. So that it could obtain approval to begin mining operations, in 1994, Glamis filed a "plan of operation" with the BLM and Imperial County, which it alleges included backfilling and reclamation proposals to restore the land.[392] After preparing environmental impact statements/reports in 1996 and 1997, the BLM ultimately approved the project.[393] However, in 1999, the federal Advisory Council on Historic Preservation recommended that the U.S. Interior Department deny approval of the project because of "serious and irreparable degradation" of an area that is sacred and historic to the Quechan Indian Nation Tribe."[394]

Open-pit cyanide mining is extremely hazardous and costly. It involves digging huge earth pits or tearing down mountainsides to extract microscopic particles of gold. These particles of gold are then leached from the earth by saturating it with cyanide, a process that could contaminate the area's scarce water resources. Open-pit cyanide mining is so destructive that Montana banned it in 1998 and other states have attempted to do so as well. In San Ignacio, Honduras, Glamis' subsidiary, *Minerales Entre Mares*, has had an open-pit cyanide mine in operation since 1999.[395] Local residents contend that *Minerales Entre Mares'* mining activities have devastated the forests and dried up water sources. In October 2002, 700 San Ignacio residents protested Glamis' open-pit mining activities and the destructive impact it has had upon their community.[396]

In this context, the Solicitor of the Interior Department under the Clinton administration concluded in a legal opinion that if a project were to result in "undue impairment," under BLM regulations the project could be denied.[397] After this opinion was rendered, the BLM reversed its previous conclusions and recommended that the Department of the Interior deny the plan of operation for the Imperial Project, not only because of the impact that it would have upon the Quechan Indian Nation but also due to the negative environmental impact that would have resulted from the project.[398] On January 17, 2001, after six years of study, the Interior Department formally denied the project on the basis that it was within a Native American spiritual pathway that extended 130 miles and that the proposed mining activities would impair the ability of the Native Americans to travel this pathway.[399]

In 2001, President Bush came to office and new officials took over at the Interior Department. After only a few months deliberation, the new Interior Solicitor rescinded the prior Solicitor's legal opinion and denial of the Imperial Project.[400] The Solicitor's opinion was based on his conclusion that the "Secretary [of Interior] is not authorized to prevent degradation caused by mining that is necessary and due."[401]

In response to the sudden federal government reversal, in 2002, the California State Mining and Geology Board (CMGB) adopted an emergency regulation requiring the backfilling of all future open-pit mines in the state to achieve the approximate original contours of the land prior to mining.[402] The emergency regulation also required that all mined material that is not used to backfill the pit must be removed so that no material would lay more than 25 feet above the original topography.[403] In 2003, then-Governor Gray Davis of California memorialized this emergency regulation into Senate Bill 22, with the caveat that such requirements would be limited to projects that are located within one mile of any Native American sacred site.[404] Following the passage of the bill, CMGB adopted the emergency regulations as final and made them applicable to any project that had been pending as of December 12, 2002.

NAFTA ATTACK

Rather than pursuing a case against the California mining regulation in U.S. domestic courts, on December 9, 2003, Glamis Gold Ltd. filed a Notice of Arbitration for a NAFTA investor-state case in UNCITRAL raising claims using NAFTA Chapter 11 foreign investor protections to attack California's mining law and the Interior Department's earlier decision.[405] Specifically, Glamis alleges that it failed to receive the minimum standard of treatment required by NAFTA Article 1105 because the U.S. Interior

Department failed to promptly approve the company's plan of operation as required by law, and unreasonably and arbitrarily delayed its mining operations.[406] Glamis also argues that the California regulation made its mining operation so costly as to be uneconomical, thereby "expropriating" the investment in violation of Article 1110.[407] Glamis is demanding $50 million in compensation.

IMPLICATIONS

First Chapter 11 Case Involving Indigenous Rights and Culture: This is the first NAFTA case in which a state law that was intended in part to protect indigenous peoples' cultural interests has been challenged as a NAFTA violation. When signing the mining bill into law, California Governor Gray Davis stated that "this measure sends a message that California's sacred sites are more precious than gold."[408] The governor believed that the proposed mine would irreparably harm the Quechan's spiritual trail, called the "Trail of Dreams." If Glamis succeeds in this case and California is forced to repeal or modify its new mining legislation, it would set a precedent that could leave cultural, religious and historical sites vulnerable to NAFTA Chapter 11 attacks by corporations seeking to reap a profit. Nothing in NAFTA provides protective exemptions for cultural, religious or historical treasures.

Glamis Capitalizes on an Expansive Definition of "Investment": Glamis alleges that if forced to comply with the backfilling requirement, its future open-pit gold mining operation would be economically unviable. Glamis does not have an established business − a "going-concern" at the Imperial Project site − it just has mining rights and a plan of operation. Yet the rulings in past NAFTA investor-state cases suggest that this may be enough for the Glamis tribunal to conclude that an investment protected under NAFTA exists. For instance, in the S.D. Myers case, the company successfully sought damages for a temporary ban on PCB imports even though it did not have an established business and when the legality of its intended business activities were in doubt.

NAFTA Provides Greater Rights for Foreign Investors than U.S. Domestic Property Law: Glamis used the NAFTA investor-state system to avoid bringing this regulatory takings claim before a U.S. court, which would be highly skeptical of such a takings claim and would require the firm to demonstrate that close to 100 percent of the value of the property has been destroyed and that there is no other economically viable use of the property. Under NAFTA however, some tribunals have held that only "significant" or "substantial" impact on the value of a property may constitute a takings – providing foreign investors greater rights than those provided to U.S. citizens or business under the U.S. Constitution as interpreted by the U.S. Supreme Court. [409] The U.S. Trade Representative has not fixed this problem in CAFTA or other post-Fast Track FTAs despite Congress' instructions.

Relying on the Federal Government to Defend a Policy it Opposes: In this case, both the claimant and respondent share the same viewpoint reflecting a disregard for cultural and environmental preservation. The Bush administration has clearly indicated through the actions of the Solicitor General that it disagrees with the previous administration's ruling to deny the Imperial Project. Therefore, the Bush administration, which is exclusively authorized to defend against Glamis' attack – allegedly representing the interests of U.S. citizens – *agrees* with Glamis' plan to destroy the environment and threaten the religious grounds of the Quechan Indian Tribe. Yet, because the NAFTA investor-state system does not grant the public a role in the proceedings, nor guarantee representation of the state whose law is also being attacked, there will be no representative during this arbitration to vocalize the concerns of the Quechan Indian Tribe and its cultural and environmental concerns.

Domestic Court Interpretation of Law Undermined: This case also demonstrates the quagmire presented when a NAFTA tribunal is given the power to interpret a domestic law before the domestic court system itself has had an opportunity to do so. This claim regarding the Interior Department's decision hinges upon whether the U.S. mining law permits the federal government to reject a project based upon cultural and/or environmental consequences. Instead of this question being taken through the U.S. court system for resolution, NAFTA's Chapter 11 investor-state mechanism allows one economically interested party, Glamis, to bypass the normal process and adjudicate its complaint outside the domestic court system, the body best able to understand the history and intricacies of the matter at hand. This parallel system created by NAFTA Chapter 11 assaults a long-standing principle – that Congress creates the law and U.S. courts interpret the law – by permitting a private tribunal to interpret U.S. laws before a domestic court has had an opportunity to do so.

GRAND RIVER v. UNITED STATES – U.S. TOBACCO SETTLEMENTS

Grand River Enterprises Six Nations, Ltd., ("Grand River") is a Canadian company engaged in the licensing, manufacturing, packaging, production, importation and sale of tobacco.[410] Its headquarters are located in Oshweken, Ontario. Grand River began production in 1996 and has more than doubled its production of tobacco products every year since 2001. The company estimates its assets, including plant, equipment, equipment on order, and cash, at $43 million.[411] Although located in Canada, it exports approximately 80 percent of its tobacco products to the United States.[412] Other claimants in this NAFTA suit include Canadian citizens Jerry Montour, Kenneth Hill and Arthur Montour, who have ownership rights in Grand River and various cigarette trading operations in the United States. They argue that their investment in the United States has been harmed by the tobacco settlements in the late 1990s between U.S. states and large U.S. tobacco firms.[413]

PUBLIC INTEREST

In 1998, 46 U.S. states entered into a settlement agreement with Philip Morris Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company ("tobacco defendants") to resolve claims that the states had filed seeking to recoup medical expenses incurred for treating smoking-related illnesses of indigent smokers and to pay for smoking reduction programs.[414] The 1998 settlement agreement followed close on the heels of similar agreements reached by four individual states, Mississippi, Florida, Texas and Minnesota. The agreements resulted in a combined settlement of $240 billion through 2025.[415] This money was to be used to pay state costs that were incurred in the treatment of indigent patients suffering from tobacco-related illnesses, to fund educational programs, and to restrict marketing directed at children.[416]

Also as part of the settlements, states decided to make the provisions of the settlement agreements applicable to all tobacco companies, including non-defendant tobacco companies, such as Grand River.[417] Non-defendant tobacco companies had 90 days to opt in or out of the tobacco settlements, and more than 35 firms opted in. If firms opted out, they had to contribute a percentage of their sales to escrow accounts set up in each state by statute.[418] Funds in the escrow accounts would be used to pay judgments in the event the states decided to sue these tobacco companies. If states took no action, the funds would revert back to the companies. States also began enacting complementary legislation or "contraband legislation," which barred non-defendant tobacco company's products from being sold in these states and subjected the companies to monetary penalties if they did not comply with the escrow statutes.[419]

NAFTA ATTACK

On March 12, 2004, the Grand River petitioners filed a NAFTA investor-state claim, seeking $340 million in compensation for alleged violations of NAFTA Chapter 11 at UNCITRAL.[420] The petitioners argue in a general way that the major tobacco firms conspired to ensure that non-defendant firms were covered by the terms of the settlement and secured terms that are more favorable to defendant tobacco firms than non-defendant firms in an effort to force the smaller firms out of business and corner the market. Specifically, the petitioners are arguing that the requirement to make payments into state escrow accounts constitute an expropriation in violation of NAFTA Article 1110.[421] The firm has been the target of multiple state lawsuits for non-payment, and the firm claims that it has already paid $1,100,000 in escrow and penalties to states.[422] The petitioners argue that their investment is being expropriated because their cigarettes cannot be sold in states where the firm does not comply with state escrow laws.[423] The petitioners also allege they were deprived of fair and equitable treatment under Article 1105 because they were not notified of the settlement negotiations, nor were they allowed to participate in negotiations, yet they are bound by the terms of the settlement.[424] Grand River also argues that it is being discriminated against in violation of Article 1102 because domestic firms that participated in the settlements are operating in the United States without contributing to an escrow fund.[425] Lastly, Grand River claims that the United States has violated Article 1103's most favored nation provision because other foreign firms (presumably selling other products than tobacco) are not required to maintain an escrow account while doing business in the United States.[426]

IMPLICATIONS

Public Health Achievements Undermined: Largely due to the tobacco settlements advertising restrictions, public education campaigns and related price increases in cigarettes, the percentage of teens who smoke is plummeting in the United States. While not all the funds from the settlements slated for public education has been spent as intended, there have been some impressive developments. Today, 22 percent of U.S. high school students report being smokers, compared to 36 percent in 1997.[427] Since most adults start smoking as teens, these statistics could translate into a big drop in the number of adult tobacco-related illnesses and a significant decrease in tobacco-related medical costs, which are often borne by U.S. taxpayers. Yet these successes and future gains that might result from further lawsuits may be frustrated if Grand River and other non-defendant tobacco companies are allowed to use NAFTA to evade responsibility for the harms caused by their products.

NAFTA Threatens to Undercut State Authority: U.S. state attorneys general united and fought vigorously for the tobacco settlements in an effort to reduce states' costs related to tobacco use, prevent smoking-related death and illness, and decrease the use of tobacco use by minors. Most attorneys general are popularly elected by citizens of their respective states and are charged with acting as representatives of the public interest. Yet state attorneys general have no standing in the NAFTA investor-state dispute resolution process. They must rely on the federal lawyers to defend their interests potentially behind closed doors in a NAFTA trade tribunal. If a NAFTA tribunal rules in favor of the Grand River petitioners and finds the settlement agreement violates foreign investors' NAFTA rights, state sovereignty and democratic governance will be grossly undermined by a body that was not elected by state citizens, yet is directly impacting state law and public policy.

NAFTA Tobacco Firms Evade Justice?: There are approximately 1,000 state lawsuits against tobacco companies such as Grand River that were not named as defendants in the tobacco settlement lawsuits and that have failed to contribute to state escrow funds. Non-defendant tobacco firms have regularly lost these cases. Grand River first fought the escrow account issue in U.S. federal court and failed. Now Grand River is attempting a second bite at the apple by using NAFTA Chapter 11, an option that is not available to U.S. firms that must abide by U.S. court decisions. A NAFTA tribunal decision in favor of Grand River would give Mexican and Canadian firms a back door out of the successful tobacco settlements, erasing the level playing field for U.S. tobacco firms and undermining the settlements as a whole.

THUNDERBIRD GAMING v. MEXICO – GAMBLING

International Thunderbird Gaming Corporation, ("Thunderbird") is a Canadian company with a business office in San Diego involved in gaming and entertainment operations in Latin America.[428] It claims assets worth nearly $17 million.[429] In the 1990s, Thunderbird was involved in Indian gaming operations in California.[430] The company has since shifted its focus to Latin America and now owns and operates gaming facilities in Panama, Venezuela, Guatemala, and Nicaragua.[431] Between 2000 and 2001, Thunderbird established three gaming facilities in Mexico that are the subject of this dispute.[432]

PUBLIC INTEREST

Casinos have been illegal in Mexico since 1934,[433] and in 1947, the Mexican government banned all forms of gambling.[434] This decision was based on public policy and in recognition of the fact that gambling was often linked with crime. Today, opponents of attempts to allow gambling point to Mexico's high poverty rate and the tendency of gambling to exacerbate the problems associated with poverty.[435]

In August 2000, Thunderbird petitioned *Gobernacion* (the Mexican Ministry of Government with authority over gaming) for permission to operate various "skill machines" in Mexico, mechanisms very similar to slot machines. In the request, Thunderbird referred to their machines as "games of skill and ability" that award prizes based on skill and "in no way as the result of chance."[436] However, the distinction between skill machines and slot machines is not as clear-cut as presented by Thunderbird. Many U.S. states define games that incorporate a skill element as gambling devices, and the Thunderbird games would likely be considered as such in the United States.[437]

In response to the petition, *Gobernacion* issued a letter stating that it would have no authority to prohibit the use of such machines if they were truly skill machines.[438] However, the letter indicated that the machines might not be allowed if the principal factor of operation was luck or gambling.

Thunderbird proceeded to establish gaming facilities in three Mexican cities, Nuevo Laredo, Matamoros and Reynosa.[439] Shortly thereafter, there was a change in the composition of the federal government and a new director of gaming was appointed.[440] *Gobernacion*, under the new leadership, conducted a site visit plus an administrative hearing and determined that Thunderbird's games were not based on skill but that the games were − in the words of one official − "*tragamonedas*" (money-swallowers).[441] *Gobernacion* decided that the gaming facilities violated Mexican law prohibiting gambling and ordered the facilities to shut down.

NAFTA ATTACK

On August 1, 2002, Thunderbird filed a NAFTA investor-state claim at UNCITRAL, seeking damages in excess of $100 million for alleged violations of NAFTA Chapter 11.[442] Specifically, the company is alleging that Mexico has allowed Thunderbird's competitors to continue gaming operations while forcing Thunderbird to shut down, thus violating the national treatment and most favored nation treatment provisions of Chapter 11 (Articles 1102 and 1103).[443] Thunderbird cites the "arbitrary and non-transparent manner" in which it believes it was treated by the Mexican government as the basis for the alleged violation of Article 1105.[444] Thunderbird further states that such treatment was not fair or equitable and that the treatment did not provide the standard of "full protection and security" as required by NAFTA.[445] Finally, Thunderbird is arguing that the closure of its facilities is "tantamount to expropriation" of its investments that, without compensation, is in violation of NAFTA Article 1110.[446]

IMPLICATIONS

Compensation for illegal activity?: Thunderbird is claiming compensation for its failed attempts to engage in activities long prohibited by Mexican law. If Thunderbird is successful in obtaining payment for this claim, it effectively will have end run a public policy in existence for over half a century and will profit from prohibited gambling activity. Further, the determination about whether Thunderbird's games fall under Mexican anti-gambling laws and whether these games should be banned is a decision that should be made by the Mexican government – not a private NAFTA tribunal. If Thunderbird is compensated simply because the government is unwilling to allow them to engage in an illegal activity, the door would be open for an array of NAFTA investor-state challenges every time a foreign corporation is ordered not to undertake activities deemed illegal by national law.

NAFTA Promotes a Regulatory Freeze: Thunderbird's claim is that it relied on the Mexican government's tepid and qualified letter, which did not strictly prohibit skill machines, as a go-ahead for their business operations. The firm protests the change in policy implemented by a new regulatory official who made a special trip to physically examine their operation. An increasing number of NAFTA cases, including the California MTBE case, the Glamis mining case, the Kenex hemp food case, and others involve corporations demanding damages over a change of regulatory policy. Whether because of new factual findings, changes in values, or simply the different preferences of a newly elected government, policy changes are an inevitable and healthy part of any democracy. This important governmental right would be compromised if corporations are able to claim damages for any change in policy. Until NAFTA Chapter 11 provided the investor-state challenge mechanisms, such governmental policy changes were calculated as the cost of doing business. Now such normal activity is grounds for seeking sometimes an extraordinary amount of compensation, holding governments hostage to past policies and attempting to cement a regulatory status quo in the face of pro-consumer, pro-public interest policy changes.

IV. OTHER NAFTA CHAPTER 11 ARBITRATIONS

What follows are short summaries of other NAFTA cases that have been adjudicated or are in arbitration.

ADF Group v. United States – Buy America Contract: ADF Group, Inc. is a structural design and engineering firm based in Quebec, Canada. The company owns ADF International, which is based in Florida and is a wholly owned subsidiary.[447] In March 1999, ADF International signed a sub-contract with a U.S. firm called Shirley Contracting Corporation to work on the Springfield Interchange in Northern Virginia, a key section of highway where a number of important arteries meet. The Springfield Interchange, or "Mixing Bowl" as it is referred to locally, was being revamped through a multi-year federally funded highway construction project designed to improve safety. ADF International was the subcontractor in charge of designing and fabricating the steel superstructure for nine highway interchanges at the Mixing Bowl.[448]

At issue is a "Buy America" provision in the main contract between the Virginia Department of Transport (V-DOT) and the primary contractor, Shirley Contracting. The V-DOT Buy America provision was required in the contract by the Federal Highway Administration (FHA) as a prerequisite to granting federal funds for the Mixing Bowl Project. The FHA administers the federal Buy America policy.[449] This law was developed in the 1980s to recycle taxpayer funds back into the U.S. economy in a sector – steel – that was considered vital for U.S. infrastructure and national defense. The policy requires not only that steel be bought from the United States, but that fabrication work on the steel be performed in the United States. The Buy America law contains a waiver that can be triggered in certain limited circumstances. ADF stated that it was willing to use 100 percent U.S. steel, but insisted that it needed to do certain fabrication work including cutting, welding, punching holes and milling at its plant in Canada, but was prohibited from doing so.[450] ADF was forced to use one of its facilities in Florida to conduct some of this fabrication work and to sub-contract out other work, increasing the cost of the project for the firm.

On July 19, 2000, ADF brought a NAFTA investor-state challenge against the United States over its Buy America requirements. Specifically, ADF claimed that the federal law was designed to favor U.S. investments and investors and as such is discriminatory and in violation of NAFTA Article 1102.[451] In addition, ADF alleged that the Buy America policy, and the decisions of U.S. officials implementing the regulation and denying the waiver, violated the company's right to fair and equitable treatment as guaranteed under NAFTA Article 1105.[452] Further, ADF claimed that the Buy America requirements constituted an illegal performance requirement under NAFTA Article 1106. Article 1106 forbids performance requirements "to achieve a given level or percentage of domestic content" or "purchase, use or accord a preference to goods produced or services provided in its territory" – categories under which the Buy America requirements would likely fall.[453] Later the company also alleged a violation of Article 1103, guaranteeing most favored nation treatment to parties and their investors under NAFTA Chapter 11. The corporation claimed damages of $90 million.[454]

In January 2003, the NAFTA tribunal rendered a decision in the ADF case. Significantly, the tribunal first ruled against ADF on the Article 1102 claim, finding that the imposition of domestic content and performance requirements by federal and sub-federal entities was not a violation of the anti-discrimination rule. The tribunal noted ADF's failure to submit evidence demonstrating that it was discriminated against by having to comply with the domestic content requirements. It explained that all contractors foreign and domestic were required to abide, and had abided by the domestic content requirements, not just non-American companies.[455] Therefore, since ADF had failed to present any evidence of discrimination through the submission of, for example, information regarding U.S. firms exempt from the requirement or a comparative cost analysis demonstrating that fabrication in United States vs. fabrication in Canada significantly impairs the operations of Canadian firms, the tribunal could not find that the U.S. actions were in violation of NAFTA Article 1102.[456]

Then the tribunal dismissed all other claims. Most importantly, the tribunal rejected ADF's argument that Chapter 11 and Article 1106 banning performance requirements applied to the federal Buy America law due to the fact, the plaintiff argued, that the U.S. had failed to exempt this policy under NAFTA Article 1108 (entitled "Reservations and Exceptions.") Rather, the panel accepted the U.S. government's argument that NAFTA's procurement chapter, Chapter 10, was the relevant chapter. The United States argued that Chapter 10 applied to federal procurement undertaken by specific, listed federal agencies, one of which is the Department of Transportation.

One NAFTA observer has charged that in coming to this decision, the panel engaged in some convoluted reasoning, first by deciding that a federal grant somehow constituted "procurement," then by deciding that NAFTA Article 1106 (1) (c), which explicitly prohibits countries from providing preferences for services provided within its territory, did not apply to this case.[457]

The debate over whether the matter was properly classified as procurement or investment also elicited an interesting side argument on the role of V-DOT and state procurement.[458] ADF's arguments did not focus on the role of the state, apparently because the company was aware that state procurement was not covered under either chapter of NAFTA. (While NAFTA Article 1024 provides for the addition of states to a specific annex of the procurement chapter, evidently these negotiations were never undertaken. No states are listed in the annex. Thus the tribunal found that states are not bound by NAFTA's procurement chapter. Moreover, Article 1108 (1) exempts states from the anti-discrimination rule, most favored nation rule and performance requirement rule of NAFTA's investment chapter. Thus, ADF was prohibited from making these claims against the state of Virginia.) Rather, ADF argued that the federal Buy America policy in effect "forced" Virginia to take the actions it did in a NAFTA-illegal manner. The tribunal rejected this argument as well, finding that the Commonwealth of Virginia adopted and applied the U.S. measures "on its own."[459]

Azinian v. Mexico – Municipal Waste Disposal Contract: The Azinian case was the first NAFTA Chapter 11 ruling by a NAFTA tribunal. The investors in the case, including Robert Azinian, were U.S. citizens who were shareholders of a Mexican corporate entity named *Desechos Solidos de Naucalpan S.A.* (DESONA). In August 1993, DESONA won a multimillion-dollar contract with the Mexican city of Naucalpan to implement a solid waste collection, transportation and processing system.[460] The investors claimed to represent a U.S. parent company called Global Waste Industries, Inc., which was alleged to have 40 years of experience and to have provided similar services to the residences, businesses and industries in the Los Angeles area.[461] On March 21, 1994, the city of Naucalpan annulled the agreement after receiving independent legal advice that there were 27 irregularities with the contract. DESONA filed suit against the city for breach of contract and eventually lost in a Mexican federal court. On March 17, 1997, DESONA filed a NAFTA investor-state suit in ICSID, claiming that the cancellation of the contract was a violation of their foreign investor rights guaranteed in Articles 1105 and 1110 of NAFTA. DESONA demanded up to $19 million in damages.[462] On November 1, 1999, an ICSID panel dismissed the case.

The proceedings focused on certain representations by the firm, namely that Global Waste did not have 40 years of experience, but was founded in 1991 and went into bankruptcy 14 months later;[463] that DESONA provided only two reconditioned vehicles and not the 70 state-of-the-art disposal trucks promised;[464] and that a variety of other representations made by the investors, including promises to build a power plant, were "so unreasonably optimistic as to be fraudulent."[465] The panel concluded that "the claimants entered into the Concession Contract on false pretenses, and lacked the capacity to perform it."[466]

Even though the panel did not address the NAFTA claims at length, its reasoning in the case has been cited in a few NAFTA cases, such as the Waste Management case, to narrow the allowable scope of NAFTA investor challenges. The Azinian panel ruled that a breach of contract in and of itself was not sufficient to establish a NAFTA claim;[467] that NAFTA's dispute settlement system should not be considered a court of appeal for every investor who is disappointed by an adverse ruling in domestic courts,[468] and that any Article 1105 claim regarding failure to provide a minimum standard of treatment must include a clear violation of international law independent of other provisions of NAFTA.[469] Finally, in reasoning one can only hope will be applied to future NAFTA cases, the panel held that:

> [A] foreign investor entitled in principle to protection under NAFTA may enter into contractual obligations with a public authority and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities and disappointed again when national courts reject their complaints... NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.[470]

Crompton v. Canada – Pesticide Phase-Out: Crompton Corporation, Inc., formerly known as Uniroyal Chemical Company, produces a variety of specialty chemicals used in agriculture, housing and automotive products.[471] Crompton's World Headquarters is located in Greenwich, Connecticut. Crompton also owns a Canadian company, Crompton C./Cie, which is incorporated in the province of Nova Scotia. It has a manufacturing facility in Elmira, Ontario, which produces the chemical pesticide lindane under the registered trademark name of Vitavax and other products.[472] In technical terms, lindane is known as gamma-hexachlorocyclyhexane (g-HCH). It is used for preventing fungus on seeds, as an insecticide on foliage of fruit and nut trees, for killing insects in wood and for the eradication of lice and scabies on humans and animals.

Lindane is one of the few chemicals still remaining on the market in the same chemical class as DDT. Both are persistent organic pollutants (POPs) in the organochlorine class.[473] According to the U.S. Environmental Protection Agency (EPA), animal studies have demonstrated that lindane can cause liver cancer when ingested by mice.[474] The EPA considers lindane a possible human carcinogen, regulates lindane products under six separate statutes and has restricted most uses since 1983.[475] Lindane has long been a source of trade tensions between the United States and Canada. While Lindane was permitted as a seed treatment for canola in Canada, the United States allows lindane for seed treatment of 13 other crops, but not canola.[476] American canola growers have complained that the higher cost of lindane substitutes puts them at a disadvantage, and Canadian canola growers were worried that Washington might block their imports.[477]

Beginning in 1998, the Canadian Pesticide Management Regulatory Agency (PMRA) and canola growers represented by the Canadian Canola Council[478] organized an effort to persuade companies that sell products containing lindane to agree voluntarily to remove canola claims from product labels by December 31, 1999.[479] This would mean that it would no longer be legal to produce new lindane products for canola seed treatment or to treat canola seeds for sale. While PMRA believed it had Crompton's assent to the voluntary canola phase-out plan, Crompton claimed otherwise and alleged that it was harmed by various PMRA actions to implement the agreement.

On November 6, 2001, Crompton filed a notice with the Canadian government that it intended to bring an investor-state suit under NAFTA Chapter 11 based on four alleged violations of its NAFTA-granted investor protections. Crompton claimed that it was being treated differently, in violation of NAFTA article 1102, than its Canadian competitors, because they produce low-cost, lindane substitutes in Canada and would not be as affected by the change in policy.[480] Crompton further alleged that Canada unfairly reneged on a deal with the corporation by not undertaking a promised scientific review, in violation of NAFTA's fair and equitable treatment rules.[481] Crompton also claimed that the government of Canada is instituting a NAFTA-illegal "performance requirement" in violation of NAFTA Article 1106 that negatively impacts Crompton but helps Canadian companies that produce substitutes.[482] Finally, Crompton charged that the Canadian government, by banning the use of lindane after July 1, 2001, has "expropriated" the company's property in violation of NAFTA Article 1110.[483] The company demanded \$100 million in damages from the Canadian government to compensate for the alleged violations of its NAFTA investor rights.[484] In 2002, the firm filed an amended Notice of Intent, adding additional facts and charges.[485] While no arbitration seems to be underway as of yet, in January 2005, a Crompton spokesperson told Public Citizen that the firm was involved in a proceeding at PMRA examining the appropriateness of the regulatory agency's actions, but they were still pursuing their NAFTA lawsuit.[486]

Fireman's Fund Insurance Company v. Mexico – Bank Capitalization: Fireman's Fund Insurance Company, a U.S. corporation that sells personal and business insurance, is based in Novato California**.**[487] According to its NAFTA complaint, Fireman's Fund purchased \$50 million (dollar-denominated) in debentures from GF BanCrecer, for the purpose of capitalizing a subsidiary bank.[488] A debenture is a security device (usually a bond) issued by a firm or government in return for long or medium term investment of funds. GF BanCrecer also sold similar debentures denominated in Mexican pesos and equivalent to the amount sold Fireman's Fund to Mexican investors.[489] Various financial crises affected the new bank, including the 1997 peso crisis, and Mexican regulators stepped in.[490] Fireman's Fund alleges that the authorities approved a deal that reimbursed the Mexican investors but not U.S. investors.[491]

On July 17, 2003, the tribunal rendered a jurisdictional decision, which dismissed Fireman Fund's claims under Articles 1102, 1105 and 1405.[492] Mexico filed a jurisdictional objection alleging that the tribunal lacked competence to hear the matter because the claim should be covered by NAFTA Chapter 14, which covers financial services, instead of Chapter 11, which is only applicable to investments.[493] The tribunal determined that the financial holding company that caused the alleged injury, GF BanCrecer – which invests in banks and insurance companies – was a financial institution within the meaning of Chapter 14 and that the debentures were "regulatory capital" also under the purview of Chapter 14.[494] However, the tribunal noted that since some provisions of Chapter 14 are incorporated into Chapter 11, in particular Article 1110, the expropriation claim survives. A final decision on the expropriation claim is still pending.[495]

Karpa (Feldman) v. Mexico – Cigarette Excise Taxes: A U.S. owner of the Mexican firm *Corporacion de Exportaciones Mexicanas, S.A.* (CEMSA) filed a NAFTA Chapter 11 investor-state suit against Mexico in April 7, 1999, alleging that Mexico failed to rebate cigarette excise taxes to the corporation between 1992 and 1997 and this amounted to a "creeping expropriation" of its investment.[496] Marvin Roy Feldman Karpa claimed that Mexico's actions were specifically targeted against CEMSA and intended to shut down its cigarette exporting business and to give [Mexican] producers a monopoly on exports.[497] Karpa claimed that Mexican law entitled his corporation to these rebates and that Mexico's refusal to pay the tax rebates was tantamount to expropriation in violation of Articles 1105 and 1110 of NAFTA.[498] Karpa filed his NAFTA suit at ICSID and claimed \$50 million in damages.[499]

On December 16, 2002, the tribunal found against Karpa on the Article 1110 expropriation claim, but found in his favor on the Article 1102 national treatment claim.[500] The tribunal found that, although Karpa's firm had been harmed in that it was no longer in the business of exporting cigarettes, the business was nonetheless still functioning and consequently no expropriation had occurred.[501] However, in reference to Karpa's national treatment claim, the tribunal found that in fact, Mexico had failed to accord Karpa the same treatment as investors in "like" circumstances.[502] Additionally, the tribunal noted the lack of evidence presented before it by the respondent Mexico in defense of the actions alleged to be violative of national treatment requirements.[503] The tribunal was largely swayed by Mexico's failure to submit any evidence contradicting the facts presented by Karpa. Claiming it could not reveal confidential business information Mexico did not present evidence demonstrating that it had treated Karpa accordingly under the national treatment provisions, nor did it present evidence that would have explained the disparity in treatment.[504] Therefore, the tribunal awarded Karpa $2 million in damages.[505] Mexico sought a review of the award with the Ontario Superior Court of Justice to set aside parts of the Tribunal's award.[506] The Mexican government has this opportunity because the case had been legally situated in Canada. On December 3, 2003, the judge dismissed Mexico's application.[507] Mexico appealed the decision with the Court of Appeal for Ontario, which also dismissed the case citing the high degree of deference given to arbitral decisions in Canadian law.[508]

Kenex v. United States – Drug Enforcement Policy: Kenex Limited of Ontario, Canada, is a producer of bulk hemp products, including hemp oil, seed and fiber.[509] Kenex Canada is the owner of Kenex U.S., Ltd., incorporated in Delaware. Kenex products are used in a variety of hemp foods commonly sold in U.S. health-food stores, including energy bars, chips, pretzels, veggie burgers and salad oils. Hemp is harvested from cannabis sativa plant, varieties of which are used in the production of marijuana. Currently, hemp production is legal in 33 countries. In the United States, however, the legal status of hemp has a convoluted legislative and common law history. Even though some imports of hemp products have been allowed, legal hemp production is essentially non-existent in the United States.

At issue in the Kenex NAFTA case are three new regulations issued simultaneously on October 9, 2001, by the U.S. Drug Enforcement Agency, which banned all hemp food products containing *any* amount of Tetrahydrocannabinol (THC).[510] THC is the chemical substance in marijuana that gives it psychoactive properties. Trace amounts can be present in hemp food products even though hemp is bred to have less than 1 percent of THC.[511] The new regulations put THC on the list of the most dangerous and addictive drugs such as heroin and phencyclidine (PCP). The DEA rule was effective immediately, instantly criminalizing the entire hemp food industry. Since the publication of the rule, no person in the United States has been allowed to manufacture, sell or even eat hemp products.

In its NAFTA claim, Kenex argues that the regulation was arbitrary and unfair. The firm alleges that it is being accorded treatment less favorable than its competitors, such as poppy seed producers or producers of flax oil, in violation of NAFTA Articles 1102, 1103, 1104 and 1105.[512] Kenex also seeks to import into NAFTA U.S. obligations under the WTO's Sanitary and Phytosanitary Agreement (WTO SPS), which governs trade in food, animal and plant life. Under NAFTA Article 1105, Kenex charges that the United States had an obligation under the WTO SPS to base its measure on "sound science" and to ensure the measure was no more trade restrictive than necessary.[513] Kenex is seeking $20 million in damages from U.S. taxpayers for the business it has lost as a result of the U.S. action. The case was filed at UNCITRAL on August 2, 2002.

In addition to pursuing a NAFTA claim, Kenex and other hemp companies challenged the regulation in the U.S. domestic court system. Simultaneous domestic court and NAFTA cases are allowed when the plaintiff is seeking injunctive relief. On March 8, 2002, the U.S. Court of Appeals for the 9th

Circuit granted a stay blocking enforcement of the new rule. On February 6, 2004, the U.S. Court of Appeals for the 9th Circuit granted the hemp firms a victory when it ruled that the current Controlled Substances Act allows the sale of hemp foods and only an act of Congress can change the law.[514] When the Bush administration declined to appeal this decision to the U.S. Supreme Court, Kenex secured its domestic court victory. After winning their domestic court case, it is unclear if Kenex will continue to pursue its NAFTA case.

Mondev v. United States – City Development Dispute: According to its NAFTA submission, Mondev International of Montreal Canada has been a major developer of commercial real estate both in Canada and the United States for 30 years.[515] In December 1978, Mondev entered into an agreement with the city of Boston to build several shopping complexes and a hotel in downtown Boston. The agreement – called the Tripartite Agreement – was signed by the city of Boston, the Boston Redevelopment Authority (BRA) and Lafayette Place Associates (LPA), a limited partnership owned and controlled by Mondev.[516] The agreement provided for a multi-phase, multi million-dollar project to revitalize a dilapidated section of downtown Boston bordering on the "combat zone," a crime-infested red light and pornography district. Phase I of the project consisted of a straightforward real estate development deal. Mondev built a mall, an underground garage and a hotel.[517] Phase I was completed, named "Lafayette Place" and opened in 1986. However, Phase II, which involved the construction of an office building and department store, was never completed after the city announced that it had other plans for the parcel even though Mondev retained an option to buy it. The story of Phase II entails a 13-year saga including a seven-year legal battle that went all the way to the U.S. Supreme Court before ending up in a NAFTA tribunal.

In 1992, LPA sued the BRA and the city of Boston in the Massachusetts Superior Court for breach of the Tripartite Agreement.[518] In 1994, a jury found for LPA, awarding it and its Canadian partner Mondev $16 million in damages. The jury also found that the BRA had intentionally interfered with the contract and that LPA was entitled to recover $6.4 million for this second offense.[519] However, a judge later held that the BRA was a public employer and therefore as a matter of law immune from suit for tort claims, and reduced the verdict to $9.6 million.[520] Both LPA and the city of Boston appealed the $9.6 million verdict. In May 1998, the Massachusetts Supreme Judicial Court reversed and annulled the $9.6 million breach of contract judgment, holding that LPA had failed to demonstrate that it was willing and able to perform its own contractual obligations and agreeing that the BRA was statutorily immune under the doctrine of sovereign immunity.[521] In March 1999, the U.S. Supreme Court denied a re-hearing of the case, thereby upholding the state supreme court ruling.[522]

On September 1, 1999, Mondev filed an investor-state suit under NAFTA Chapter 11 in ICSID. Mondev claimed that its failure to obtain damages through the U.S. judicial system amounted to discriminatory expropriation without compensation, and that its loss was at least $50 million in non-realized profits.[523] Specifically, Mondev claimed that the Massachusetts Supreme Court's reversal of the jury award and application of the doctrine of sovereign immunity constituted a substantive and procedural denial of justice in violation of the minimum standards of treatment guaranteed foreign investors under NAFTA Article 1105.[524] Further, Mondev argued that the actions of the Massachusetts Supreme Court constituted expropriation without compensation, in violation of NAFTA Article 1110.[525] Finally, Mondev alleged that comments by BRA staff and the Boston City Council demonstrated an anti-Canadian bias and discriminatory intent in violation of NAFTA Article 1102 national treatment guarantees.[526]

In response to Mondev's expropriation claim, the tribunal found that any expropriation that may have occurred predated NAFTA and was therefore inapplicable. Mondev had argued that in essence, the torts were "continuing torts" that allowed its claim to fall within the time requirements of NAFTA.[527] However, the tribunal declined to adopt such an expansive interpretation of the alleged expropriation. It found that if the 1989 expiration of the option to purchase was to be considered the expropriation event that caused the alleged injury, then the claim was time-barred because it occurred 10 years before Mondev filed its Notice of Intent in 1999.[528] Alternatively, if the loss of LPA and Mondev's rights as a result of the foreclosure were to be deemed the date of injury, the claim also would have expired because it occurred in 1991.[529]

However, the tribunal did decide to consider whether the actions of Massachusetts Supreme Judicial Court could be considered the act that constituted an expropriation.[530] Although the panel held out the possibility that a court's application of the doctrine of sovereign immunity could in certain circumstances violate NAFTA's minimum standard of treatment requirements,[531] ultimately, in regards to the court claims, the tribunal found against Mondev on both the claims of minimum standard of treatment and expropriation. The tribunal found that Mondev's rights were not expropriated because the reason Mondev lost its rights to the property was that it failed to exercise its right of option to purchase the property within the requisite time period.[532] The tribunal further found that the court's decision recognizing the city of Boston's sovereign immunity was well-founded in Massachusetts' law of contracts.[533]

Softwood Lumber Firms v. United States − Antidumping and Countervailing Duties: Since the U.S.-Canadian Softwood Lumber Agreement ended in March 2001 and the United States instituted anti-dumping cases and their countervailing duties against Canadian softwood lumber in May 2002, at least four Canadian lumber companies have weighed in with a new set of NAFTA investor-state cases based on these actions. Doman Industries is based in Duncan, British Columbia, Canada.[534] It is engaged in the business of logging and wood processing. Doman Industries is publicly traded on the Toronto Stock Exchange.[535] Until recent financial problems, it claims to have employed approximately 4,200 people.[536] Doman's largest market for lumber sales is the United States.[537] Canfor Corporation is headquartered in Vancouver, British Columbia, Canada. It is an integrated forest products company that sells timber throughout North America.[538] It operates 19 sawmills in Canada and also has a U.S. subsidiary – Canfor, U.S.A.[539] Canfor earns approximately $2.95 billion annually and employs 10,300 people.[540] Terminal Forest Products, Ltd. is incorporated in Richmond, British Columbia, Canada. It is a privately owned corporation that is wholly owned by Terminal Sawmills, Ltd.[541] Terminal Forest Products, Ltd. produces, processes and sells western red cedar lumber products.[542] It owns three U.S. enterprises: Terminal Lumber Sales, Inc., Terminal Forest Products, Inc. and South Everson Lumber Co. Inc.[543] Tembec, Inc. based in Quebec is a Canadian forestry products firm with over 50 pulp, paper and wood product manufacturing units in Canada and assets of approximately $4 billion. It also has four subsidiaries in the United States.[544]

These firms are pursuing almost identical claims against the United States under NAFTA Chapter 11 for $514 million, $250 million, $200 million and $90 million respectively.[545] The companies allege that the U.S. anti-dumping and countervailing duties measures violate their foreign investor rights under NAFTA Articles 1102, 1103, 1105 and 1110. The U.S. government contends that only NAFTA Chapter 19, which provides only for state-state dispute settlement of countervailing duties cases, can be used to adjudicate these disputes – not Chapter 11.[546]

The Canfor tribunal will likely have the opportunity to decide this issue, as that case has moved the furthest, although it has not yet produced a jurisdictional ruling. Given the complexity and domestic political sensitivity of anti-dumping policy and that possible new rules are now being negotiated globally at the WTO, the notion that one NAFTA tribunal constituted in a private enforcement action would be empowered to decide the question of competing jurisdictions between two very controversial chapters of a highly controversial agreement is an extraordinary development that could lead to another "clarification" by NAFTA governments. In addition, these NAFTA cases further complicate the monumentally confusing softwood lumber issue that is being heard in at variety of venues at once: in NAFTA Chapter 11 tribunals and at the U.S. International Trade Commission, as well as the state-state dispute resolution systems of the WTO and the NAFTA.

Waste Management v. Mexico – Municipal Waste Disposal Contract: Waste Management, Inc. the private waste disposal giant based in Houston, Texas, initially filed its NAFTA investor-state case on September 29, 1998.[547] This case was dismissed by an ICSID panel on June 2, 2000, on the grounds that the company had not properly waived its right to pursue the case in the Mexican court system. Under the rules of NAFTA, a claimant cannot generally pursue a case in two venues at the same time, and *ACAVERDE, S.A.,* Waste Management's subsidiary in Mexico, was concurrently pursuing the same issues in Mexican court. When its efforts failed in the domestic court system, it pursued compensation over the same issues in a NAFTA tribunal.

Waste Management re-filed its case at ICSID on September 18, 2000.[548] The NAFTA claim stems from a concession agreement between Acapulco City, Mexico of the State of Guerrero and *Acaverde*, a wholly-owned subsidiary of Waste Management.[549] Under the 1995 concession agreement, *Acaverde* received the exclusive right to provide waste disposal and street cleaning services to the city of Acapulco.[550] In order to comply with the monthly payments under the concession agreement, the city of Acapulco received a line of credit from a Mexican Bank, partially owned by the federal government, *Banco Nacional de Obras y Servicios Publicos, S.N.C.* ("*Banobras*").[551] The parties to the line of credit agreement were the state of Guerrero, the city of Acapulco and the bank. *Acaverde* alleges that throughout the duration of the concession contract, the City of Acapulco failed to make monthly payments, illegally granted other businesses and individuals overlapping rights that conflicted with *Acaverde's* rights, and failed to secure additional funding for additional projects *Acaverde* deemed necessary to fulfill the concession agreement.[552] The company argued that Mexico via the municipality, the state, *Banobras* and the failure of the court system denied Waste Management the minimum standard of treatment in violation of NAFTA Article 1105. Further, Waste Management argued that Mexico's failure to compensate it constituted an expropriation in violation of Article 1110.

In response, Mexico filed a Memorial on Jurisdiction, contending that Waste Management was precluded from resubmitting the claim because Chapter 11 does not provide for re-submission of claims and that further, the resubmitted claim was barred by the doctrine of *res judicata* ("the issue has been decided"). The tribunal found that Chapter 11 does not expressly preclude the resubmission of a defective claim.[553] In light of Chapter 11's silence on the issue, the tribunal, relying upon international law, found that "if a jurisdictional flaw can be corrected, there is in principle no objection to the claimant State re-commencing its action."[554] The tribunal then considered Mexico's argument that the resubmitted claim was barred by the legal doctrine of *res judicata*, which means that a claimant may not make a second claim against the same party arising out of the same set of circumstances once the first claim has been decided. The purpose of the doctrine is to prevent parties from receiving "two bites at the same apple" once they have had the opportunity to litigate an issue and the issue has been resolved. The tribunal determined that in fact, *res judicata*, although a significant principle, did not apply in this case because the first panel did not decide any issues on the merits – it merely determined whether it was competent to exercise jurisdiction.[555] Therefore, no claims arising out of the original suit had been determined yet and there was no bar to the resubmitted claim.

A decision was rendered in the Waste Management NAFTA investor-state case on April 30, 2004. The tribunal found that none of the three governmental bodies acting on behalf of Mexico had failed to accord the claimant the minimum standard of treatment under NAFTA Article 1105.[556] The tribunal found that *Banobras* did not breach its duty to provide a minimum standard of treatment to the claimant because it was not a party to the concession agreement and was therefore not obligated to loan money to the claimant.[557] Therefore, the denial of credit or the denial of an increase in credit could not be interpreted as unfair treatment. Similarly, the state was not in breach of Chapter 11 because it was not party to the agreement nor a guarantor. The tribunal focused on the conduct of the city and acknowledged that the city failed in a number of respects to fulfill its contractual obligations. However, the panel found that the city made serious efforts to comply with the contract but was disadvantaged by such factors as the residents' unwillingness to pay a separate fee for waste disposal services, the Mexican peso crisis, and by *Acaverde's* poor business plan and "heavy handed" approach to clients.[558] Moreover, the tribunal noted that in contrast to some bilateral investment treaties, NAFTA contains no "umbrella clause" or specific obligation for government to live up to contractual commitments. The tribunal stated, "[I]t is sufficient to say that even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem."[559] Thus, the panel determined that the city did not breach its obligation under Article 1105.[560] Further, the tribunal found that the Mexican federal court system did not breach its duty under Article 1105.[561] The tribunal found that the federal court and Mexican arbitration tribunal were justified in their decisions and that the claimant had been provided opportunity to appeal these decisions and did.[562] Therefore, the claimant was not denied justice or treated unfairly. Finally, the tribunal found that the city's failure to pay the claimant did not amount to a direct or indirect expropriation, the enterprise was not seized, its business was not blocked by the seizure of key items or property but as a result of contractual faults the operation was "persistently uneconomic." The panel concluded:

> [I]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance. A failing enterprises is not expropriated just because debts are not paid or other contractual obligations are not fulfilled.[563]

This is the second time a municipal service contract case was dismissed by a NAFTA tribunal; Azinian was the earlier case. One NAFTA observer noted that the facts of this case are in line with a number of other investment disputes that involve a public unwillingness to pay for the provision of formerly public services by foreign investors.[564]

V. OTHER NAFTA CHAPTER 11 CLAIMS

What follows are short summaries of other NAFTA Chapter 11 claims where a Notice of Intent to Submit a Claim to Arbitration has been filed but no arbitration appears to have yet commenced. A full account of how many claims have been filed or disposition of claims will not be known until the NAFTA governments start to post claims on their web pages. Because many of these claims involve small investors, it is unlikely that they have the financial resources to adjudicate these disputes in the costly investor-state system. In the Methanex case, for instance, the firm claimed lawyers fees of $11 million while the United States claimed lawyers fees of $3 million.

Adams, et. al. v. Mexico – Land Dispute: On February 16, 2001, a group of U.S. citizens sued Mexico using NAFTA's Chapter 11 investor-state system, alleging illegal expropriation of their vacation homes and rental properties in the State of Baja California, Mexico.[565] In 1995, a Mexican Federal District Court ruled that the developer who sold the properties to the U.S. investors did not own the land.[566] After much legal wrangling and negotiation between the investors and the Mexican landowners, on October 30 and 31, 2000, Mexican authorities allegedly physically removed the investors from the land without promise of compensation.[567] The case was filed at UNCITRAL, and the Americans are claiming damages amounting to $75 million.[568] This is the first "class action" style claim that has been filed under NAFTA Chapter 11. The case has reportedly been bogged down due to Mexico's refusal to acknowledge the validity of the claim.[569] This delaying tactic can work only for so long, however, as panels can be appointed and arbitrations move forward without the agreement of the respondent government, though it is unlikely that a respondent government would let a case get under way without their participation.

Amtrade International v. Mexico – Oil Contracts: Amtrade International, Inc. filed a NAFTA investor-state claim against the Mexican government on April 21, 1995. Amtrade is a U.S. company located in San Diego. In 1994, Amtrade and *Petroleos Mexicanos*, a government-owned oil firm, entered into a settlement agreement concerning a penalty charged against an Amtrade agent who had made an unauthorized bid.[570] Little information is available about this bid or the type of business transaction that gave rise to the claim. As part of the settlement agreement, *Petroleos Mexicanos* had to allow a subsidiary of Amtrade, *InversaMex Capital, Ltd*., to make a customized bid for unspecified "items" owned by *Petroleos Mexicanos*.[571] Amtrade contends that *InversaMex* attempted to bid on certain lots that *Petroleos Mexicanos* had published for bidding; however, the lots were later removed from bidding.[572] Nonetheless, *InversaMex* submitted its bid and *Petroleos Mexicanos* accepted but refused to publish an auction date for the items.[573] Despite repeated requests by *InversaMex* and Amtrade, *Petroleos Mexicanos* would not publish an auction date and eventually suspended all public bids for the rest of the year.[574] Amtrade International is seeking $20 million from Mexico arising from *Petroleos Mexicanos'* alleged failure to satisfy the terms of the settlement agreement and for violating Articles 1102, 1103, 1104, 1105 and 1106.[575] They also allege that *Petroleos Mexicanos* has violated NAFTA Chapter 15 [Article 1502] prohibiting government monopolies and state enterprises from abusing their status.[576] No arbitration is known to have commenced in this case.

Bayview Irrigation District, et. al. v. Mexico – Water Rights: A group of 17 Texas irrigation districts, plus farmers, ranchers and others who hold water rights in the Rio Grand River on the border between the United States and Mexico, filed a "Notice to Submit a Claim to Arbitration" on August 27, 2004, alleging that Mexico is wrongfully diverting water from the river in violation of the suing entities NAFTA Chapter 11 rights.

The claimants allege they hold "fully adjudicated" legal right to withdraw 1.2 million acre-feet of water annually from the lower Rio Grand (called Rio Bravo in Mexico).[577] They claim that Mexico "captured, seized and diverted" one million acre-feet of water from the Rio Grand into a series of reservoirs from 1992-2002.[578] This diversion benefited farmers in Mexico as indicated by rising imports of fruits and vegetables, and has injured farmers and others in Texas, as indicated by a reduction in irrigated acreage in the U.S. counties nearest the river. The claimants argue that this seizure of water is "tantamount" to an expropriation under Article 1110, discriminatory under Article 1102 and not in accordance with the minimum standard of treatment under Article 1105. They estimate the value of their lost water to be between $265-554 million dollars and request compensation in this range.[579] The plaintiffs also estimate that 30,000 jobs have been lost on the U.S. side of the border due to the water shortage.[580]

This is a novel NAFTA Chapter 11 case, because it is unclear how a domestic water claim – even one based on international water allocations – constitutes a NAFTA "investment" south of the border. This will no doubt be one of the first issues a NAFTA tribunal will have to resolve if one is constituted in the case.

Even though the Rio Grand originates in the United States, it is primarily fed by a half a dozen rivers all originating in Mexico. The plaintiffs allege that Mexico is violating commitments it made in a 1944 water-sharing treaty between Mexico and the United States that gave the United States rights to 1/3 (or a minimum of 350,000 acre-feet per year) of the water in the Rio Grand.[581] In return, Mexico received 1.5 million acre-feet from the Colorado River. Officials in Mexico have dismissed the claim as "unfounded" noting that Mexico's average water payments have been greater than those called for in the treaty.[582]

Water scarcity is an issue of major concern in the southwestern United States and through most of Mexico. In recent years, increased attention has been paid to an extremely serious water crisis in Juarez and other Mexican border towns that are growing at unsustainable rates and may run out of fresh water in the next five years. The water crisis has prompted numerous high-level meetings between the nations including meetings of the presidents. The severe shortage of water in Mexico is considered by many to be a national security issue. The latest NAFTA dispute is sure to exacerbate tensions on both sides of the border. Due to the recent filing of this claim, arbitration has not yet commenced in this case.

Scott Ashton-Blair v. Mexico – Land Dispute: Scott Ashton-Blair is an attorney from Arizona who filed a NAFTA investor-state claim against the Mexican government on May 21, 1999.[583] Mr. Blair claims to have purchased land in Puerto Peñasco, Mexico to build a residence and a restaurant.[584] He claims that he was beaten and jailed by a Mexican businessman in an attempt to prevent him from opening what would be a competing restaurant.[585] While in jail, he was denied access to a lawyer, the right to speak with his wife and medical attention.[586] He also alleges that he has been continuously harassed by Mexican police officers and zoning officials.[587] He is seeking the purchase back of his property at fair market value by the Mexican government for violating Articles 1105, 1102 and 1105(1). No arbitration is known to have commenced in this case.

James Russel Baird v. United States – Nuclear Waste Disposal Patent: The only document available about this case is the Notice of Intent to Submit a Claim to Arbitration, which is on file with Public Citizen. James Russell Baird is a Canadian investor who has filed a notice with the U.S. government stating that he intends to sue the United States using the investor-state mechanism of NAFTA Chapter 11 because the U.S. Congress chose to deposit nuclear waste at Yucca Mountain, Nevada, rather than in subducting tectonic plates.[588] The Canadian investor claims to be an inventor and businessman who holds patents in the United States and Canada for a method of disposing nuclear and toxic waste that involves sub-seabed disposal and subducting tectonic plates.[589] While patents are arguably investments under NAFTA, CAFTA removed all doubt by explicitly including "intellectual property rights" in the list of protected investments. Baird's theory, would allow for nuclear waste disposal in cave-like repositories under the ocean floor in subducting tectonic plates, such as the Pacific plate, which is slowing moving beneath the state of California. According to Mr. Baird's theory the waste material would descend over time with the tectonic plate into the mantel of the earth. The Canadian investor claims that when the U.S. Department of Energy chose Yucca Mountain and issued site suitability guidelines in December 2001, the agency ruled out sub-seabed disposal and other options and put an end to the investor's attempts to turn a profit his patent.[590] He argues that the United States is in violation of NAFTA Articles 1102, 1103, 1104, 1005, 1106 and 1110 because the U.S. action was arbitrary, discriminatory and tantamount to an "expropriation" of his investment and future profits and is demanding $13 billion dollars in compensation. Baird filed the Notice of Intent on March 15, 2002.[591] No arbitration is known to have commenced in this case.

Calmark Commercial Development v. Mexico – Land Dispute: Calmark Commercial Development ("Calmark") is a California-based development company. The company claims to have entered into a "joint venture contract" with an American citizen named Robert Bisbee and a Mexican citizen named Bibiana Betina Bacon to develop 6.9 acres of land located in Cabo San Lucas, Baja California Sur, Mexico.[592] Calmark claims to have paid Bacon $25,000 in 1989 for the right to develop a tourist attraction on the site.[593] In addition, Calmark paid $180,000 to Bacon's bank, which had a lien on the property.[594] In exchange, Bacon was to have conveyed the land into a trust to Calmark. Instead, Bacon allegedly conveyed the land in trust to Robert Bisbee.[595] Calmark promptly hired lawyers and sued in Mexico's domestic court system. Calmark won its case, dissolving the trust in the Fourth Civil Court in Tijuana and in appellate court. What happened next, however, is an extremely complicated tale involving multiple lawsuits, parties named and unnamed, and allegations of fraud and forgery. In short, Calmark alleges that a renegade attorney from the firm representing the company in Mexico settled the case and assigned Calmark's rights to pursue litigation to a third party for $400,000, leaving Calmark with no compensation and no land.[596] This prompted more than one criminal complaint by Calmark's true attorneys and a civil complaint by Calmark.[597] In the end, Calmark failed in its efforts to punish the renegade lawyer for perpetrating an alleged fraud and receiving compensation for the funds it paid for the property. Now the company is using NAFTA's investor-state process to seek compensation by charging that the Mexican domestic court system violated Calmark's NAFTA foreign investor rights. Calmark claims that the Mexican courts have violated NAFTA Articles 1105, 1109 and 1110. (NAFTA Article 1109 forbids the NAFTA parties from interfering with the transfer of capital, and Calmark alleges the Mexican judiciary failed in assisting the company in securing and transferring the money that was owed them in this case.)[598] Calmark is asking for $400,000 in compensation.[599] It is extremely hard to imagine how a NAFTA tribunal will be able to unravel the numerous criminal and civil cases described above and "rehear" these complex issues. The Calmark claim is not dated. Apparently, no arbitration has commenced in this case.

Connolly v. Canada – Land Dispute: The only document available about this case is the Notice of Intent to Submit a Claim to Arbitration, which is on file with Public Citizen. Albert Connolly is the owner of Brownfields Holding, Inc., an Atlanta, Georgia firm. Connelly alleges he owned property in Canada, which was expropriated for the purpose of building a park as part of Ontario's Living Legacy Program.[600] Connolly alleges that the province of Ontario, through its Ministry of Northern Development and Mines, refused to "give credit" for a timely submitted professional report, which caused the expropriation to occur.[601] Because the filing in this case is very brief and the investor refuses to comment, it is hard to discern the specifics of these allegations. No arbitration is known to have commenced in this case.

Robert J. Frank v. Mexico – Land Dispute: According to the Notice of Intent, an American investor named Robert Frank claims to have acquired rights to waterfront property in Baja California, Mexico, from another American in 1989.[602] Frank claims to have spent more than $100,000 fixing up the property, and in 1992 petitioned the Mexican government to annex neighboring property.[603] In 1996, the ownership of nearby property changed hands, and the new owner claimed to also own all of Frank's property. In 1999, Frank received a notice from the Mexican government dated August 20, 1999, questioning his right to own the property and giving him 10 days to respond.[604] Six days later, government officials took possession of the property, removing the investor's guests.[605] Later a sign was posted marking the property as owned by the government, but the investor contends the property is being developed for commercial use in conjunction with the new neighbor who claimed ownership of the land.[606] Frank is charging violations of NAFTA Articles 1102, 1105 and 1110 and is asking for $1,500,000 in compensation. Apparently, Frank did not take this case to the Mexican judicial system before pursuing his NAFTA claim as there is no mention of a domestic lawsuit in his notice. Frank filed a Notice of Arbitration at UNCITRAL on August 5, 2002.

Francis Kenneth Haas v. Mexico – Investment Partnership Dispute: The only publicly available document related to this case is a Notice of Intent filed December 12, 2001. Francis Kenneth Haas, an American citizen, alleges that he was cheated out of a business investment that he owned with former Mexican partners in Chihuahua, Mexico. He alleges that collectively, his former partners, their lawyers and public notaries used coercion and force in an effort to destroy evidence of his legal ownership of approximately 75 percent interest in the firm's shares and then legally registered the firm in their names.[607] He further contends that the state of Chihuahua, via its alleged incompetence and procedural irregularities[608] violated his rights as an investor under NAFTA of receiving fair and equitable treatment under Article 1105. He seeks $17 million in compensation. No arbitration is known to have commenced in this case."

Lomas Santa Fe Investments v. Mexico – Land Dispute: The only publicly available document related to this case is a Notice of Intent filed on August 28, 2001. Lomas Santa Fe is a Mexican limited partnership owned by the Lomas Santa Fe Group, an American corporation located in San Diego. Lomas Santa Fe Group engages in real estate development including residential, recreational and commercial development.[609] Lomas Santa Fe Investments owned a piece of property in Mexico and intended to develop the property for commercial purposes but was prevented from doing so by the Mexican government. It alleged that on November 10, 2000, the property was expropriated by the Mexican government in violation of NAFTA Article 1110.[610] Lomas Santa Fe further claimed that it was discriminated against and denied national treatment under Article 1102, as other Mexican developers were allowed to develop property in the same zone. The company seeks either the restoration of the property to its previous state plus $30 million or $210 million if the property is not restored. No arbitration is known to have commenced in this case.

Ontario Limited v. United States – RICO Investigation: The only document available about this case is the Notice of Intent to Submit a Claim to Arbitration, which is on file with Public Citizen. Gordon Paget and Philip L. Furtney are Canadian residents and 800438 Ontario Limited is a Canadian corporation, specializing in real estate investment.[611] Paget and Furtney are both shareholders of Ontario Limited. On September 9, 2002, Paget, Furtney and Ontario Limited filed a lawsuit arising out of alleged violations of NAFTA Chapter 11. Ontario Limited claims to have operated three subsidiaries in Florida that collectively sold or leased a total of 13 charity bingo halls.[612] Ontario Limited alleges that between 1994 and 1995, the state of Florida accused it of violating the Racketeer Influenced and Corrupt

Organizations Act (RICO) for allegedly allowing illegal games to be played in its bingo halls and also subjected Ontario Limited to a tax audit. As a result, the state of Florida seized Ontario Limited's property, including financial records and shareholder information and bank accounts.[613] Two forfeiture proceedings took place, which Ontario Limited alleges did not result in a judgment in the state's favor.[614] Yet, it contends that the state of Florida refused to return its property.[615] Ontario Limited has sought the return of property and compensation from the state of Florida; however, it has been told by a Florida court that all claims against the state caused by the actions of prosecutors are barred by the Doctrine of Sovereign and Prosecutorial Immunity.[616] Additionally, Ontario Limited alleges that many of the Florida state agencies involved have either destroyed or misappropriated their financial records and property. Ontario Limited seeks $38 million in damages under NAFTA, alleging that the United States violated Article 1110 for expropriating its bingo halls, financial records, bank accounts and other business property. Additionally, it claims the United States violated Articles 1102, 1103, 1104 and 1105 because American bingo halls that operated the same types of games were not subject to the same treatment as Ontario Limited. Apparently, no arbitration has yet commenced in this case.

Signa v. Canada – CIPRO Antibiotic Patent: On March 4, 1996, Signa, a Mexican pharmaceutical manufacturer based in Tolucca, Mexico, filed the first ever NAFTA investor-state claim.[617] The firm was involved in a joint venture with Apotex, Inc. of Ontario to produce ciprofaloxacin hydrochloride, better known as CIPRO, a powerful multi-spectrum antibiotic. Signa attempted to challenge the Canadian patent law that permitted Bayer (the patent holder) to block the manufacture of a generic equivalent to CIPRO for three years.[618] Signa charged that Bayer did not have a valid patent, yet the Canadian law allowed Bayer to block the generic manufacture of CIPRO without any preliminary judicial consideration of the contested patent.[619] Signa charged that the Canadian law was a violation of Article 1105's fair and equitable treatment rules as well as a measure "tantamount to an expropriation" under Article 1110. The firm also alleged that the patent law was not in compliance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Signa demanded $40 million in lost profits and the long-term loss of its Canadian market share. The issue never went to arbitration and little else is known about the case or whether an agreement was reached with Canada over the patent laws. Interestingly, the Canadian government temporarily overrode Bayer's patent of CIPRO during the anthrax scare of 2001. Apotex was tapped to mass produce the drug, but a last-minute deal with Bayer prevented the patent override from going into effect.[620]

Sun Belt v. Canada − Bulk Water Shipments: Sun Belt Water, Inc. is a bulk water importer/exporter based in Santa Barbara, California. In the late 1980s, California was in the midst of a drought, and the city of Santa Barbara and neighboring towns expressed an interest in acquiring bulk water delivered by marine tanker. In 1990, Sun Belt claims that it embarked on a "joint venture" with the Canadian firm Snowcap Waters Limited, which possessed a limited license to export bulk water from Canada.[621] The companies planned to take the unprecedented step of exporting British Columbia river and lake water to California in oil tankers, and filed for an expanded water export license.[622]

At a time when more of the world's people are living in areas where fresh water is a scarce resource, Canada holds 20 percent of the world's fresh water supply.[623] Over the years, a number of investors have looked at Canada's vast fresh water resources as a potential profit-making enterprise. In the early 1990s, the British Columbia government issued six export licenses for sale of a limited amount of bulk water and Snowcap received one of them.[624] Dozens of applications for new and expanded licenses followed, and strong public opposition to bulk water exports quickly mounted.[625] In 1991, the British Columbia government was forced by public protest to impose a temporary moratorium on the granting of new or expanded licenses for the export of fresh water.[626] Many Canadians feared that if any province in Canada started to sell bulk water, water would become treated as a commodity under

NAFTA, and thus NAFTA's investor rights and service sector market access provisions would kick in, making it impossible to limit the amount of water taken from the Great Lakes. This temporary ban was extended and made permanent in 1995, when British Columbia imposed a moratorium on water exports.[627] In 1993, both Sun Belt and Snowcap sued the British Columbia government in domestic court.[628] In July 1996, a settlement for $245,000 was reached with Snowcap, which already held a water export license it could no longer use, but no settlement was reached with Sun Belt.[629]

On October 12, 1999, Sun Belt filed a "notice of claim and demand for arbitration" in UNCITRAL for damages in excess of $10.5 billion for the company's future expected losses given its permanent lost business opportunity due to the water moratorium.[630] In its NAFTA submissions, Sun Belt argued that by reaching a legal settlement with Snowcap, which held the export license, and refusing to settle with Sun Belt, the Canadian government violated the NAFTA investor national treatment provisions requiring equal treatment for domestic and foreign investors under Article 1102.[631] In addition, the company claims that Canada violated NAFTA's minimum standard of treatment guarantee for foreign investors by infringing upon its due process rights (Article 1105) amounting to an expropriation under Article 1110.[632] Finally, since Sun Belt could not argue that the 1991 water export moratorium violated NAFTA (which was signed in 1992 and adopted in 1994), it seems to have argued that the moratorium violated the 1989 Canada-U.S. Free Trade Agreement (CUSTA), which was rolled into NAFTA. The firm also expanded its claim to incorporate the 1995 permanent regulation.[633] As of January 2005, the Canadian Department of Foreign Affairs and International Trade Web site claims that no valid claim has been submitted and no arbitration is proceeding. Even though the investor occasionally claims the case is active, apparently there has never been a panel constituted to hear this case, perhaps due to the fact that the key actions in the case preceded NAFTA.

Trammel Crow Company v. Canada – Federal Postal Contract: The Notice of Intent in this suit was filed September 7, 2001, but has subsequently been withdrawn.[634] Trammel Crow is a U.S. company based in Texas with a Canadian subsidiary "Trammel Crow Canada."[635] The company's expertise is real estate management. The NAFTA case involves the company's unsuccessful efforts to secure a contract with Canada Post Corporation for the management of facilities nationwide. Trammel Crow stated in its claim that the Canadian government issued a request for proposal (RFP) in order to solicit bids for this major service contract. Trammel Crow claims to have spent a great deal of time and money preparing a bid for the contract.[636] The company charges however, that instead of engaging in a competitive bidding process, Canada Post instead met "in secret" with Trammel Crow's competitors and decided to cancel the RFP and extend an old contract, shutting Trammel Crow out of the process.[637] In its Notice of Intent, Trammel Crow charged violations of NAFTA Article 1102 and 1105 and demanded compensation in the amount of $32,000,000. This case was reportedly settled in 2002. No further details are available.

VI. THREATENED NAFTA CHAPTER 11 CASES

In addition to NAFTA cases in arbitration and NAFTA claims that are awaiting arbitration, there have been a number of threatened NAFTA cases worthy of note. Of course, the full number of NAFTA investor-state cases being threatened privately is unknown and could be quite substantial.

Chemical Company Threatens NAFTA Case Against U.S. Ozone Protection Measures: Atofina Chemicals, Inc. produces high-performance chemicals and polymers. Atofina is the North American subsidiary of the French Total Group, the world's forth largest oil and gas company. Atophina is headquartered in Philadelphia and is incorporated in multiple U.S. states as well as Canada and Mexico.

Hydrochlorofluorocarbon (HCFC) 141b is a chemical used in foam insulation and has the highest ozone-depleting potential of all HCFCs in commercial use.[638] In 2000, the EPA proposed banning HCFC-141b use in foam blowing applications while allowing grandfathered uses until 2005, citing the availability of alternatives that do not deplete the ozone layer.[639] The proposal was part of the Significant New Alternatives Policy, which allows for review and approval of alternatives to ozone-depleting agents.[640] Atofina currently manufactures HCFC-141b in the United States and has opposed the EPA proposal.[641] Atofina has argued against the ban on numerous grounds, including that a ban would violate NAFTA's Chapter 11. Atofina claims that the domestic grandfather exemption would result in discriminatory treatment of investors seeking to import similar products from Mexico, thereby violating NAFTA Articles 1102 and 1103.[642] Atofina also claims that a ban would constitute an expropriation in violation of NAFTA Article 1110.[643]

It should be noted that Atofina has apparently not filed a NAFTA claim as of yet, but its comments on the record to the EPA hint that one could come if the EPA bans HCFC-141b. Although Atophina is a U.S. company with French parentage, it may attempt to use a subsidiary to advance a NAFTA Chapter 11 suit on the U.S. law.

Tobacco Firm Delays Anti-Tobacco Legislation in Canada: A March 16, 2002, article in the Toronto *Globe and Mail* surprised Canadian health officials who were preparing to issue a new regulation on cigarette labeling. The newspaper reported that Philip Morris, the U.S. tobacco giant, was considering a Chapter 11 investor-state suit under NAFTA because of a proposed public health rule that would ban the words "light" and "mild" from cigarette packaging, terms that have misled smokers into believing that they were using a safer product.[644]

In a submission to the Canadian government, Philip Morris argued that the proposed ban of the descriptors "light" and "mild" would be "tantamount to an expropriation" of its tobacco trademarks containing those words in violation of NAFTA Article 1110, because it had invested millions "developing brand identity and consumer loyalty."[645] The company also asserted that the ban would be unfair and inequitable under NAFTA Article 1105.[646] Philip Morris argues that government officials in Canada and the United States "actively encouraged" tobacco companies to develop and market low-yield cigarettes, and it is unfair of them now to chart a new course.[647]

Many nations are considering this type of legislation, not just Canada. In the United States, recent developments have added to pressure for the U.S. government to implement similar policies. First, on March 22, 2002, just one week after the company filed its NAFTA claim, the company was ordered to pay $150 million in punitive damages in a lawsuit brought by the family of Michele Schwarz, who died of lung cancer in 1999 at the age of 53.[648] The verdict by a jury in Portland, Oregon, was the first in the nation to find that a tobacco company marketed low-tar cigarettes as a healthier alternative, even though industry officials knew that they were just as dangerous as regular cigarettes.[649] According to the *Associated Press*, there are similar class action lawsuits pending against Philip Morris and other tobacco companies in at least 11 U.S. states.[650] In addition, a November 2001 monograph by the U.S. National Cancer Institute concluded: 1) that "light," "mild" and "low-tar" cigarettes are just as harmful as regular cigarettes; and, 2) that advertising strategies used by Philip Morris and other companies have led consumers to perceive filtered and low-tar products as safer alternatives to regular cigarettes.[651]

While Philip Morris has told Public Citizen that it is not moving forward with the threatened NAFTA case, the Canadian public health legislation is not moving forward either.[652] A spokesperson for Physicians for a Smoke Free Canada thinks that the Philip Morris threat as well as threatened domestic court action has played a role in stalling passage of this important public health policy.[653]

NAFTA Threats Scuttle Plans for Canadian Public Auto Insurance Program: In April 2004, an all-party committee of the provisional government of New Brunswick, Canada, recommended that the province develop its own public auto insurance program. The committee was responding to a public outcry over skyrocketing auto insurance premiums, an issue so controversial that it almost led to the unseating of the Progressive Conservative party in the 2003 elections.[654] The committee recommended a plan that would achieve average premium reductions of approximately 20 percent over existing plans due to the not-for-profit mandate and other cost savings.

Before the ink was dry on the proposal, the Insurance Bureau of Canada (IBC), representing Canada's largest insurers, warned that the proposal could trigger legal action on the part of foreign firms under NAFTA Chapter 11. The IBC General Counsel warned that the proposal could be considered an "expropriation" of the market share of NAFTA insurance providers already in the market.[655] The NAFTA Chapter 11 tribunal in the S.D. Myers PCB case had previously stated that "market share" could constitute a legitimate investment under NAFTA. The IBC argument was supported by a legal opinion prepared for a number of Canadian provinces exploring similar schemes that warned that "to the extent that the replacement of private automobile insurance with a mandatory public insurance system were to deprive private insurance providers of the use or expected economic benefits of their investments," it could be argued that the program was an expropriation under NAFTA.[656]

In June 2004, New Brunswick Premier Bernard Lord officially rejected the plan and instead recommended modest market reforms geared at lowering rates such as a first time driver's credit and a new oversight board. The Canadian Center for Policy Alternatives charged that the government had backed down in the face of "aggressive threats of treaty litigation and behind the scenes lobbying by federal trade officials."[657] The Center's Scott Sinclair argued that the province should go ahead and implement the plan. "The decision whether to create public auto insurance is still in the hands of New Brunswick citizens, and they should make it without interference from broadly worded NAFTA and [WTO] rules."[658] Canadian trade and investment expert Steven Shrybman added, "These investment treaty provisions are extreme and bear little or no relations to trade. They must be scaled back so that they do not interfere with democratic decisions about important public services."[659]

CONCLUSION AND RECOMMENDATIONS

After examining the extraordinary history of NAFTA cases and claims contained in this report, it is worth revisiting the underlying assumptions that gave rise to the NAFTA model of investor protections and the investor-state dispute resolution system. An analysis grounded in available data regarding foreign investment cast suggests neither the investment model nor its enforcement mechanism are justifiable or sound public policy.

What Purpose Do These Foreign Investor Protections Really Serve?

The primary justification for the investor-state system from the developed country point of view is that it is needed to protect investors from state seizure of property. The primary justification for the investor-state system from the developing country point of view is that the adoption of these investor protections will result in foreign direct investment. Both these arguments bear further scrutiny.

Do Foreign Investor Protections Serve to Protect Firms from Expropriation?

The backers of the NAFTA investor protection model and the investor-state enforcement system argue that such provisions are needed to protect firms from illegal expropriations and outright discrimination in unstable nations with underdeveloped legal systems. Indeed, NAFTA backers invoked the history of Mexico's 1938 nationalization of its oil industry to frame NAFTA's extreme version of investor protections as a reasoned response to nationalizations and extrajudicial expropriations.

Yet, as this report makes abundantly clear, the NAFTA Chapter 11 track record of cases is not one of reversing illegal expropriations or clear-cut instances of discrimination, rather it is a track record of a broad array of attacks on government actions and regulatory policies that include nondiscriminatory environmental and public health measures, a variety of land-use actions, domestic court decisions, legal settlements, municipal contracts, public services, tax policy, anti-gambling policy, drug policy and the application of anti-dumping and countervailing duties. One supporter of these investor rules characterized NAFTA's investment rules as "an open invitation to unhappy investors, tempted to complain that a financial or business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host treatment by the host government,"[660] and this description is much closer to the mark.

A review of the 42 NAFTA cases and claims in this report shows that only one case involved an incident that could be characterized as government expropriation – the GAMI Mexican Sweeteners case. The actions that gave rise to that case do not resemble the vision of unjustified government seizure of foreign firm that NAFTA supporters feared. The Mexican government's 2001 takeover of a number of debt-ridden *Mexican* sugar mills resulted in troubled mills staying afloat and being restructured, so that the mills could once again become economically viable, and they are now being re-privatized by the government. It is likely that the government did not even know that a U.S. investment firm had a small share in a few of the plants. Governments in all three NAFTA countries are sometimes forced to address the problem of troubled firms in crucial industries with direct state intervention, as we saw when the Bush administration moved to assist the troubled U.S. steel industry in 2002.

A full accounting of how often true government expropriations trigger bilateral investment treaty (BIT) cases is not possible because the vast majority of these cases remain absolutely secret as they are adjudicated behind closed doors in various venues. While rare, nationalizations do occur. One need only think of the nationalizations performed in modern history in Libya and Iran, and more recently in

Zimbabwe. These infrequent occurrences, however dramatic, hardly justify the application of the extreme investor rights that allow investors to attack an array of host countries' domestic policies unrelated to acts of expropriation in closed investor-state dispute resolution systems to all nations of the world.

The golden rule regarding when international commercial agreements allow challenges of domestic regulatory policies should be simply: Is the regulation in question discriminatory? Does it treat foreign and domestic investors alike? If these questions are answered in the affirmative, there is simply no legitimate basis for an international commercial agreement to permit – much less encourage – investor challenges.

Do Foreign Investor Protections Serve to Attract Foreign Direct Investment?

The investment rules contained in NAFTA, CAFTA, in BITs and many Free Trade Agreements (FTAs) have been packaged and sold to world leaders as a tool for increasing foreign direct investment (FDI) and also increasing trade. President Antonio Saca of El Salvador believes "CAFTA provides an opportunity for a new generation of companies to invest in our country, and encourage sustainable growth, a rise in incomes and economic diversification."[661]

But will CAFTA's investment chapter deliver on such expectations created by decades of repetition of the claim? The evidence that it will not is beginning to accumulate.

In 2003, the World Bank published a study analyzing FDI flows from 20 wealthier countries (members of the invitation-only Organization for Economic Cooperation and Development (OECD) to 31 developing countries over the past twenty years. Noting that OECD member nations are the source of over 85 percent of FDI to developing countries, the study concluded that "analyzing twenty years of bilateral FDI flows from the OECD [nations] to developing countries finds little evidence that BITs have stimulated additional investment."[662]

A recent Yale University study using similar econometric analysis with data from 176 countries found that "in general, BITs appear to have little impact on FDI." Even more damning, the Yale study found very little relationship between the existence of a bilateral investment treaty with the United States and the level of U.S. FDI.[663] A pending Tufts University study confirms these findings. Bilateral investment treaties have had zero effect in attracting FDI to Latin America, especially U.S. FDI, according to Tufts.[664]

These studies analyzed the actual investment flow data and conclude investor protections did not increase FDI. Yet, was Mexico under NAFTA an exception to these findings, given that FDI in Mexico increased after NAFTA? The work of Mexican economist Enrique Dussel Peters, of the National Autonomous University in Mexico City, demonstrated that Mexico's shared border with the United States – not NAFTA's investor protections – was the dominant factor attracting U.S. FDI.[665] Yet in recent years, Mexico's edge due to proximity has been eroded. After China's entry into the WTO in 2001, U.S. investors started moving production from Mexico to China. Thereafter, Mexico saw almost 1/3 of its plants owned by U.S. investors relocate.[666] It seems unlikely that the Central American nations or the Dominican Republic will benefit from proximity when so many U.S. firms have already made the calculation that China's educated workforce, low wages and numerous government subsidies offset the transportation costs and inconvenience of long-distance production. Notably, the United States does not have a BIT with China, yet China is now the largest destination of U.S. FDI. Moreover, the flow of U.S. FDI is occurring despite the fact that the United States government and numerous business interests have long been extremely critical of China's economic, political and legal institutions.

The mounting evidence that investment rules and the investor-state regime will have little impact on FDI is consistent with much of the literature on FDI, which cites labor costs, market size, market performance, access to regional and global markets, raw materials, physical infrastructure (ports, roads, power), cost of other inputs and other economic factors as the key determinants of FDI.[667] As well, increasing factors include the presence of an educated workforce and large concentrations of skilled workers in urban areas, no doubt related to the increasing rates of offshoring of service sector jobs from developed to developing economies and the boom in mergers and acquisitions as foreign firms snap up privatized government assets. Standards of treatment for foreign investors may be one of the many factors businesses consider, but these factors are likely trumped by considerations regarding economic, political and social stability, rules regarding market access and taxation, and specific incentive packages tailored for specific businesses.

Thus, it is not surprising that there are many significant nations, major investors and major recipients of foreign direct investment whose transactions are not covered by BITs. Japan, which is the second largest source of FDI, is party to only four BITs, while Brazil, one of the biggest recipients of FDI in Latin America, is not party to even one BIT. [668] Conversely, many countries that have signed a large number of BITs have continued to receive only moderate FDI flows in return. For instance, the nations of Sub-Saharan Africa still have trouble attracting FDI, despite concluding a multitude of agreements designed to protect the interests of foreign investors in these countries. [669]

Moreover, the investment rules in the NAFTA, BITs and recent FTAs actually *ban* the primary public policy mechanisms used by governments to ensure that FDI contributes to local development. For instance, CAFTA Article 10.9, on Performance Requirements, provides that CAFTA nations may not impose requirements to: export a given level or percentage of goods or services; achieve a given level or percentage of domestic content; purchase, use or accord a preference to goods produced or services provided in its territory; relate in any way the volume or value of imports to the volume or value of exports; transfer technology, a production process or other proprietary knowledge to a person in its territory; and act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market. Similar rules are contained in many BITs and FTAs.

Most now-developed nations made extensive use of these types of performance requirements, such as local content rules, during their history of industrialization and some have maintained such policies until very recently. Many developed nations utilized such policies extensively in the auto sector to promote backward integration and localization of production and value added.[670] Today, developed countries use other mechanisms that have different names but perform a similar function, such as trade 'rules of origin,' which set the level of local content for product to qualify for trading preferences. Numerous theoretical, cross-country and country-specific studies have demonstrated that performance requirements are an important tools in development policy that generate significant benefits for host countries.[671] Many would argue that such developmental tools should continue to be available to developing nations as they have been to developed nations, rather than being removed from that economic development toolbox.

While developing countries have the most to lose, developed countries could see important local development policies challenged as well. For instance, the United States Community Reinvestment Act works by conditioning regulatory approval for the opening of new bank branches on a bank's record with regard to making loans and other investments in the locale it is supposed to serve. If drafters of FTAs and BITs make no exception for either of these types of public interest regulations, these laws could be challenged as forbidden performance requirements because they require a set portion of services to be provided within a set domestic territory.

The Real Story: Investor "Protections" Have Moved from Shield to Sword

If these investor protections and investor-state enforcement are not central to the investment decisions of foreign investors and they do not promote foreign investment, what do they do?

First, as this report demonstrates, instead of providing investors with a shield against government seizure of property, these investor protections are being wielded by investors as a sword to attack an array of regulatory policies and everyday government functions. To avoid incurring financial liability, increasingly countries will revoke important public interest policies, as Canada did in the Ethyl case, and weaken other regulatory safeguards to evade the possibility of further liability from other foreign firms. The variety of policies challenged is surprising, even to the governments who sign the free trade agreements and BITs containing investor protections. Recently, foreign firms have expanded the use of these rules even further to seek cash compensation for losses that occur during an economic downturn. The 30-plus cases against Argentina over the emergency measures Argentina took to weather its 2002 financial crisis are still pending, but they threaten to take a substantial bite out of the Argentine recovery. Worse, such cases are only the beginning of the potential adverse impacts that such investor protections threaten.

Second, recent BIT cases illustrate the astonishing extent of the financial liability that countries have knowingly or unknowingly undertaken when agreeing to the NAFTA model investor protections included in BITs and FTAs. In January 2005, the Slovak Republic was ordered to pay an astonishing $868 million to a Czech bank in settlement of a loan dispute.[672] If Slovakia were to pay this amount, this would reportedly increase its public sector deficit from 3.9 percent of GDP, to 5.8 percent of GDP. [673] In 2003, the Czech Republic was ordered to pay some $350 million to a multinational media firm (Central European Media or CME) following a BIT tribunal ruling that Czech media regulatory authority had violated the terms of a Czech-Netherlands BIT.[674] The giant award almost doubled the Czech Republic's budget shortfall that year. [675] In 2004, the U.S. firm Occidental Petroleum took advantage of a U.S.-Ecuador BIT to challenge the cancellation of value-added tax rebates by Ecuador. It was awarded $71 million plus interest by the BIT panel.[676]

Third, a government's cost of defending against investor-state claims in various arbitration bodies can be quite substantial. The U.S. government has already spent $3 million in just one case − defending the United States against the challenge to California's MTBE regulations.[677] With 10 cases completed or pending against the United States, taxpayers may spend an approximate $30 million simply on legal fees. The Czech Republic spent $10 million in an unsuccessful effort to defend its interests in the two media cases mentioned above.[678] Taxpayers in nations like Argentina, which has a total of 37 BIT cases pending against it (the vast majority by foreign utility firms challenging the emergency measures Argentina took to weather the 2002 financial crisis, such as a freeze on utility rates) and Mexico, with 14 pending BIT cases, will face very large bills for the specialized legal counsel needed to defend these cases. Alternatively, countries facing such prohibitive costs may find it more expedient to cave in when a challenge is threatened.[679]

But perhaps the clearest evidence yet that NAFTA-style investor protections have moved from a defensive tool against uncompensated expropriation to an offensive weapon used to attack basic regulatory policy is the fact that in CAFTA, new language may establish the right of a company to use its subsidiary in another nation, a nation that is a party to the agreement, to attack its home-state laws. This new clause – found in CAFTA's Article 10.12 (Denial of Benefits) is an outrageous pre-emption of congressional authority to make the law of the land. However, sadly this development is also a natural evolution of these unnaturally expansive investor protections. Recent BITs and NAFTA panel rulings have steadily eroded the ostensible foundation of these investment rules by concluding that investors need not be foreign to obtain compensation (*Tokios Tokelės v.Ukraine*) and may not even need to have an investment to bring investor-state claim (*S.D. Myers v. Canada*).

The "Denial of Benefits" language in CAFTA lays bare the radical, underlying agenda of proponents of these rules. The expansive NAFTA-style "investor protections" are nothing short of a parallel court − a privatized judicial system − for investor complaints over government decisions, regulations and actions that impair their profitability. What certain multinational businesses could not achieve in the halls of Congress or Parliament or through domestic court systems, they have and will continue to achieve through "trade" rules unless Congress rejects the pacts containing these provisions.

NAFTA Lessons for CAFTA Nations

Of the 42 NAFTA investor-state cases and claims reviewed in this report, in five cases investors have succeeded with their demands for compensation, and in six cases, the government has successfully defended against investor challenges. Although this is still a small body of cases, the NAFTA rulings to date are sufficient to illustrate a number of alarming trends that should play a large role in the consideration of CAFTA, which contains similar terms.

Foreign Investors Will Use the Investor-State System to Seek Compensation for Adverse Domestic Court Rulings: A growing number of NAFTA cases seek to challenge adverse domestic court rulings. In the Loewen funeral home case, the NAFTA tribunal indicated that potentially all U.S. domestic court decisions, including those of the U.S. Supreme Court, could be subject to NAFTA review. This expansive ruling led to protests from jurists and legal scholars. However, the investment terms in the proposed CAFTA fail to prevent complicated domestic court cases from being "reheard" in trade tribunals.

Increasing Questions Regarding the Constitutionality of Investor-State Tribunals: Article III of the U.S. Constitution creates an independent judiciary. Congress cannot delegate the "essential attributes" of the judiciary to tribunals or other such bodies. Yet, just such a delegation appears to have occurred under the investor-state system. While organizations representing jurists have demanded an examination of the constitutionality of trade tribunals before the U.S. expands investor rules via new FTAs such as CAFTA, the administration has failed to provide such an analysis and instead simply replicated the flawed investor-state system in CAFTA.

Foreign Investors Can Bring "Regulatory Takings" Cases Not Allowed Under Domestic Law: While the U.S. Supreme Court has long held that "mere diminution" in the value of property does not constitute a taking, NAFTA panels have held that "incidental interference" with the use of a property might constitute a takings. One "fix" the USTR attempted in CAFTA was to eliminate the phrase government actions "tantamount to" an expropriation that appears in the NAFTA text as activity requiring compensation. However, that change is merely cosmetic. The new FTAs still require compensation for "indirect" expropriations which is the operative term.

NAFTA Definition of "Investment" Does Not Conform to Compensable Property Under U.S. Law, CAFTA Makes Bad Situation Worse: In NAFTA the definition of a compensable investment is not limited to the category of "real" property (i.e., real estate) implicated by regulatory takings jurisprudence. Indeed, most types of investments for which the U.S. government could be sued under NAFTA generally constitute intangible "personal" property that would not be eligible to establish the existence of a regulatory takings claim under U.S. law. NAFTA panels have extended this textual definition further in deciding that domestic court decisions, "market access" and "market share" are compensable investments. CAFTA negotiators failed to heed the calls of Congress to provide "no greater substantive rights" to foreign investors than U.S. firms, and CAFTA expands the investment category by including: "the assumption of risk," "expectation of gain or profit," intellectual property rights, as well as "licenses, authorizations, permits" increasing U.S. liability and putting more local government actions in jeopardy.

Potential Cost to the Taxpayers Could Reach the Billions: In the first 11 years of NAFTA, with only 11 cases decided or settled, fives times investors have succeeded with at least some of their claims and $35 million in public funds have been paid in compensation to foreign investors by governments. As an increasing number of cases are filed, billions in taxpayer dollars are being sought by NAFTA firms. Additionally the costs of defending cases are mounting. With 10 cases completed or pending against the United States, and just one case costing $3 million to defend, U.S. taxpayers may be billed an approximate $30 million in lawyers fees alone. If CAFTA were to be approved by Congress and go into effect, the liability and costs of the investor-state litigation will increase further.

The Investor-State Mechanism Eviscerates the Sovereign Immunity Shield: NAFTA's Chapter 11 and CAFTA's proposed investor protections include no sovereign immunity shield. This constitutes a radical revision of longstanding U.S. sovereign immunity protections. As one legal scholar put it "[b]y assenting to the terms of NAFTA, the United States, Canadian and Mexican governments essentially have waived whatever rights of sovereign immunity they may have enjoyed prior to signing."[680] That foreign investors can sue the federal government when domestic citizens and firms are barred from bringing such suits is yet another example of how foreign investors are granted greater rights than U.S. businesses operating under U.S. law.

State and Local Governments Are Not Safe From the Reach of Investor-State Tribunals: Not only have federal policies been challenged by investors in NAFTA Chapter 11 tribunals, but an increasing number of actions taken by state, provincial and municipal governments have been challenged as well. These include state and local land use decisions, state environmental and public health policies, adverse state court rulings, and state and municipal contracts. While the federal government is liable for any compensation awarded in investor-state tribunals, federal governments have a variety of avenues under domestic law to pressure state and local governments to alter their policies to reduce or avoid such liability.

Public Disputes, Private Tribunals: When investors demand taxpayer funds as compensation in investor-state tribunals, the cases are heard in arbitration bodies, which were designed to arbitrate private cases between contractual parties in narrow commercial disputes. Now, however, these private arbitral bodies are dealing with significant issues of public policy. While the CAFTA text provides for such tribunal proceedings to be open to public observation (if interested parties can afford to fly to distant venues to observe), citizens still cannot be party to a suit. Even the ability to submit an amicus brief is at the discretion of the panel. Under NAFTA, these cases can still be closed to the public upon the demand of the plaintiff corporation.

Threat of Investor-State Challenges Chill Public Interest Policies: Threatened cases continue to chill public interest policies. In 2004, a proposal by the New Brunswick, Canada, to develop its own public auto insurance program in response to skyrocketing rates was scuttled after it was noted that the idea could prompt legal action on the part of foreign firms that might consider a public auto insurance plan an "expropriation" of the their market share under NAFTA. It is impossible to calculate the real toll of threatened investor-state cases because communication regarding such cases most often takes place behind closed doors.

Number of Investor-State Cases Against Public Services Could Increase: The UPS case against the Canadian Postal Service encapsulates one of the most disturbing trends in the NAFTA cases taken as a whole, which is that some corporations are utilizing these rules to carve out move favorable market conditions for their firms. If the UPS suit is successful, few public services offered on a competitive basis would be safe from a NAFTA challenge of this type. CAFTA contains no language to safeguard nations from this type of case.

Environmental Text Has Not Protected Investor-State Environmental Measures: The provisions in NAFTA Chapter 11 purporting to protect the environment have been given such short shrift by NAFTA investor-state tribunals as to render them meaningless. In the Metalclad toxic waste case, there was no evidence that the tribunal even considered Chapter 11's environmental provisions before reaching a final decision. In the S.D. Myers PCB case, Canada's obligations under an environmental treaty that regulates trade in hazardous waste, called the Basel Convention, was considered by the NAFTA tribunal, but in the end was completely discounted. Nothing in CAFTA remedies this problem.

No Appeals in NAFTA, Appellate Proposal for CAFTA Deeply Flawed: There is no standing appellate body or other mechanism for appealing a NAFTA investor-state tribunal ruling. Thus, NAFTA signatory governments are subject to ad hoc rulings by an ever changing cast of ad hoc panelists. The result has been contradictory rulings on a variety of issues. The Bush administration is working on a proposed framework for an appellate mechanism for CAFTA. While the 2002 Fast Track statute required such a mechanism to establish "coherence," the administration proposal calls for an ad hoc appellate mechanism drawing panelists from a roster, not a standing appellate body. The lack of permanent professional staff will ensure that panels will continue to strike out on their own in interpreting the complex investment rules, a recipe for further arbitrary, contradictory rulings, out of step with U.S. law and jurisprudence. Worse, the proposal eliminates the narrow, domestic court review allowed of some investor-state cases.

Recommendations

Both the NAFTA investment model and the private investor-state enforcement mechanism established in public treaties are bad public policy. NAFTA's investment rules need a rewrite, and such provisions must not be included in future agreements. Even the most ardent business and government proponents of the investor-state dispute resolution mechanism do not argue that such a system is necessary to protect foreign investors in developed nations. The reasonable assumption underlying this position is that developed nations have strong domestic legal institutions to fairly adjudicate property rights. Indeed, very few treaties between developed nations contain such a mechanism, with NAFTA being a rare exception. Proponents of the NAFTA investor protection model do argue, however, that these investor rules should be applied to developed nations solely as a necessary *quid pro quo* to get foreign developing country governments to sign on to the rules. Thus, for developed nations, the application of the investor rules and the investor-state system is quietly acknowledged as completely unnecessary from a public policy perspective.

For certain developing nations, the purported public policy concern is the readiness of the domestic judiciary to promptly and fairly adjudicate property rights. However, if developed nations truly have an interest in spreading the rule of law around the globe, some would argue that the best way to achieve this would be to assist nations in the establishment of functioning political and judicial institutions – not by locking them into a set of specialized investor protections adjudicated by tribunals that do not provide basic due process protection and that serve only a very narrow set of interests. Indeed, the creation of such a specialized investor model may remove the incentive of developed nations to give aid to further the development of judicial institutions.

Certainly for the United States, the costs of maintaining a parallel "court" system that exposes U.S. federal, state and local governments to enormous liability as well as double jeopardy on litigated cases and threatens basic government functions and public interest safeguards on which we all rely clearly outweigh whatever benefits the investor-state system might provide some specific investor operating overseas.

CAFTA nations appear to be getting an even worse bargain. There is no evidence that greater FDI flows will follow the application of these extreme investor rules. Plus, the risk of a multimillion-dollar damage award and the cost of simply defending these suits is even more burdensome to nations with smaller economies.

Congress instructed U.S. negotiators to fix the problems inherent in the NAFTA investor protection model. The Bush administration ignored Congress' will and signed a CAFTA text in May 2004 that included investment rules that expand and even worsen the NAFTA investment rules' serious problems. Because CAFTA is signed and the Bush administration will not open it to fix these problems, the only way to avoid spreading the NAFTA investment protection problems is for Congress to reject CAFTA and send negotiators back to the table with a clear signal that Congress' demands on the investor protection issues must be met so that foreign investors are not granted greater rights than provided in U.S. law. As regards NAFTA and other FTAs containing investment rules, from a public interest perspective, an "interpretation" or "clarification" of the investment rules such as those issued by the three NAFTA trade ministers is not sufficient to fix the significant problems with the substantive rules or the procedural issues.

To repair the balance between the public interest and corporate interests that has gone so badly askew under the NAFTA model of investor protection and to avoid spreading this failed model further in CAFTA, Public Citizen recommends:

- The investor-state mechanism should be kept out of future agreements. Commercial disputes arising under the terms of international agreements between nations should be dealt with by the governments themselves on a state-state basis. There is precedent for this approach, as an investor-state enforcement mechanism was not included in 2004 U.S.-Australia Free Trade Agreement.

- NAFTA is overdue for a thorough review with an overarching question of whether it should be continued. In the interim, however, the radical regulatory takings provisions that give foreign investors greater rights than U.S. investors under U.S. law should be excised from NAFTA and kept out of future agreements. Other aspects of the NAFTA model of investor protection model require significant change to ensure that foreign investors are not granted greater substantive or procedural rights than U.S. firms operating under U.S. law.

- Trade agreements should focus on traditional trade matters − the terms of exchange between countries − not countries domestic regulatory system, investment regime or other internal policies. All non-discriminatory environmental, health, safety and other public interest policies, as well as state and local matters and domestic court decisions must explicitly be kept from the coverage of investor protection rules.

- If pressured to accept such investor-state enforcement as part of a free trade agreement or a bilateral investment treaty, developing countries should work to ensure that such enforcement is a temporary measure only.

- When Fast Track expires in 2007, this outdated procedure for trade policymaking must be replaced by a more open, accountable procedure giving all potentially interested parties a voice in the process.

KEY RESOURCES FOR NAFTA RESEARCHERS

Public Citizen's Global Trade Watch: www.tradewatch.org

Friends of the Earth: www.foe.org

International Institute for Sustainable Development Investment Newsletter:
www.iisd.org/investment/invest-sd/

U.S. State Department site on NAFTA Chapter 11 cases: www.state.gov/s/l/c3439.htm

Canadian Department of Foreign Affairs and International Trade site on NAFTA Chapter 11 cases:
www.dfait-maeci.gc.ca/tna-nac/gov-en.asp

Mexican Government site on NAFTA Chapter 11 cases:
www.economia-snci.gob.mx/sic_php/ls23al.php?s=18&p=1&l=1

NAFTA text: www.sice.oas.org/TRADEE.ASP#NAFTA

NAFTA negotiating texts (traveaux) for Chapter 11: www.naftaclaims.com/commission.htm

NAFTA Chapter 11 documents: www.naftaclaims.com

ICSID (provides list of pending cases): www.worldbank.org/icsid/

UNCITRAL (provides no information about pending cases or completed cases): www.uncitral.org/

ENDNOTES

[1] *See,* North American Free Trade Agreement (NAFTA), 32 IL.M 605, (Hereinafter, NAFTA).
[2] The Central America Free Trade Agreement was finalized and signed by CAFTA nations on May 28, 2004. It includes the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.
[3] John Echeverria, "The Real Contract on America," *The Environmental Law Institute* (reprinted from The Environmental Forum), Jul./Aug. 2003, at 1.
[4] Letters on NAFTA Chapter 11, go to Public Citizen's website: www.citizen.org/trade/nafta/CH__11/articles.cfm?ID=7619
[5] Conference of Chief Justices International Agreements Committee, Resolution 26: Regarding Provisions in International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments, 56th Annual Meeting on Jul. 29, 2004, on file with Public Citizen.
[6] Sandra Day O'Connor, "Federalism of Free Nations," *28 N.Y.U. J. Int'l. L. & Pol. 35*, Fall 1995-Winter 1996.
[7] Conference of Chief Justices International Agreements Committee, Resolution 26: Regarding Provisions in International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments, 56th Annual Meeting on Jul. 29, 2004.
[8] *Concrete Pipe and Products v. Construction Laborers Pension Trust,* 508 U.S. 602, Jun. 14, 1993, at 615.
[9] Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 37; Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 28. The Metalclad panel stated that 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 favor 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 reasonably-to-be-expected economic benefit of the property."
[10] Partial Award, In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 13, 2000, at 70-71. The S.D. Myers panel held, "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." Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 38.
[11] As noted on the Table of NAFTA Cases and Claims, two claims which appear to not have advanced to arbitration add large amounts to the total figure: the Sun Belt claim of $10 billion and the Baird claim of $13 billion. Even eliminating those claims from the total, countries may face $5 billion in liability. Additionally, the number of cases being filed under NAFTA is accelerating and the largest number of cases in active arbitration (seven) are pending against the United States.
[12] Edward J. Sullivan and Kelly D. Connor, "Making the Continent Safe for Investors – NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution," *36 Urb. Law. 99*, Winter 2004, at 117.
[13] *See*, *Metalclad v. Mexico, S.D. Myers v. Canada, Karpa (Feldman) v. Mexico.*
[14] Matthew Nolan and Darin Lippoldt, "Obscure NAFTA Clause Empowers Private Parties," *The National Law Journal*, Apr. 6, 1998.
[15] Luke Eric Peterson, "ICSID Tribunal Splits Sharply Over Question of Corporate Nationality*,"* *Investment Law and Policy Weekly News Bulletin*, IISD, Jun. 11, 2004.
[16] Luke Eric Peterson, "ICSID Tribunal Splits Sharply Over Question of Corporate Nationality," *Investment Law and Policy Weekly News Bulletin*, IISD, Jun. 11, 2004.
[17] Professor Prosper Weil, Dissenting Opinion, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Apr. 29, 2004, at 16, available at: www.worldbank.org/icsid/cases/awards.htm#award25.
[18] Luke Eric Peterson, "Chairman of Tribunal Resigns After Dissenting in Investment Arbitration," *Investment Law and Policy Weekly News Bulletin*, IISD, Jul. 6, 2004.
[19] Adam Liptak, "NAFTA Tribunals Stir U.S. Worries," *New York Times*, Apr. 18, 2004.
[20] NAFTA, Article 1139.
[21] NAFTA, Article 201.
[22] NAFTA, Article 1110.
[23] NAFTA, Article 1102.
[24] NAFTA, Article 1103.

[25] A ruling under a Bilateral Investment Treaty (BIT), using the same venue CAFTA complainants would use, ruled for a Malaysian investment firm in a dispute with Chile based on the logic that the "most favored nation" rule, existing in the BIT and in NAFTA and CAFTA, not only entitled the Malaysian firm to the best treatment under the rules of the Malaysia-Chile BIT, but under other BITs as well. Chilean BITs with Denmark and Croatia contained more detailed treaty language on "fair and equitable treatment" which benefited the Malaysian firm in its investment claim. The ICSID investment panel allowed the firm to "import" more favorable fair and equitable treatment language from these other treaties into that of the Malaysia-Chile BIT and granted them $5.8 million in compensation for the Chilean actions that adversely impacted the firm's investment. (Luke Eric Peterson, "Malaysian Firm Wins BIT Case Against Chile; "Wide Scope" of MFN Clause Looms Large*," Investment Law and Policy Weekly News Bulletin*, IISD, Aug. 23, 2004.)

[26] NAFTA, Article 1105.

[27] NAFTA, Article 1106.

[28] NAFTA, Article 1120.

[29] NAFTA Article 1136.5.

[30] This is clear from the fact that there were no cases brought under investment treaties until 1987. Antonio Parra, "Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties," in *ICSID News, Vol. 17, No. 2*, Fall 2000; David Waskow, Friends of the Earth, Interview with Antonio Parra, Deputy-Secretary General, ICSID, Jul. 6, 2001.

[31] Remarks by Antonio Parra, Deputy-Secretary General of ICSID, American Society of International Law Proceedings, Apr. 6, 2000.

[32] ICSID, *List of Concluded Cases*, cited Sep. 10 2004*,* available at: www.worldbank.org/icsid/cases/conclude.htm; ICSID, *List of Pending Cases*, cited Sep. 10 2004, available at: www.worldbank.org/icsid/cases/pending.htm.

[33] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes, Article 37.

[34] Convention on the Settlement of Investment Disputes between States and Nationals of Other States; Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules).

[35] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes, Article 52, provides for the annulment of an award, if: the Tribunal was not properly constituted; the Tribunal has manifestly exceeded its powers; if there was corruption on the part of a member of the tribunal; if there was a serious departure from a fundamental rule of procedure, and; if the award has failed to state the reasons on which it is based.

[36] *See,* United Nations Commission on International Trade Law (UNCITRAL), *Arbitration* Rules, General Assembly Resolution 31/98*,* available at: www.uncitral.org/english/texts/arbitration/arb-rules.htm.

[37] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules), Article 23.

[38] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes, Oct. 14, 1966. Article 48 reads in part "the Centre shall not publish the award without the consent of the parties." United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, General Assembly Resolution 31/98, Article 32 (5).

[39] John Echeverria, "The Real Contract on America," *The Environmental Law Institute* (reprinted from The Environmental Forum), Jul./Aug. 2003, at 35.

[40] For more information about this proposal, please see "Possible Improvements of the Framework for ICSID Arbitration," ICSID Secretariat Discussion Paper, Oct. 33, 2004, available at: www.worldbank.org/icsid/improve-arb.pdf.

[41] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Jul. 31, 2001.

[42] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Jul. 31, 2001.

[43] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Jul. 31, 2001.

[44] U.S. State Department site on NAFTA Chapter 11 cases: www.state.gov/s/l/c3439.htm; Canadian Department of Foreign Affairs and International Trade site on NAFTA Chapter 11 cases: www.dfait-maeci.gc.ca/tna-nac/gov-en.asp; Mexican Government site on NAFTA Chapter 11 cases: www.economia-snci.gob.mx/sic_php/ls23al.php?s=18&p=1&l=1

[45] A ruling under a Bilateral Investment Treaty (BIT), using the same venue CAFTA complainants would use, ruled for a Malaysian investment firm in a dispute with Chile based on the logic that the "most favored nation" rule, existing in the BIT and in NAFTA and CAFTA, not only entitled the Malaysian firm to the best treatment under the rules of the Malaysia-Chile BIT, but under other BITs as well. Chilean BITs with Denmark and Croatia contained more detailed treaty language on "fair and equitable treatment" which benefited the Malaysian firm in its investment claim. The ICSID investment panel allowed the firm to "import" more favorable fair and equitable treatment language from these other treaties into that of the Malaysia-Chile BIT and granted them $5.8 million in compensation for the Chilean actions that adversely impacted the firm's investment. (Luke Eric Peterson,

"Malaysian Firm Wins BIT Case Against Chile; "Wide Scope" of MFN Clause Looms Large*," Investment Law and Policy Weekly News Bulletin*, IISD, Aug. 23, 2004.)

[46] Declaration of Guillermo Aguilar Alvare, Jan. 4, 2002, on file with Public Citizen.

[47] 19 U.S.C.A. § 3801.

[48] 19 U.S.C.A. § 3801(3).

[49] Edward J. Sullivan and Kelly D. Connor, "Making the Continent Safe for Investors – NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution," *36 Urb. Law. 99*, Winter 2004, at 117.

[50] Pub. L. No. 103-182 (1993) §102 (a) states "no provision of this Agreement . . . which is inconsistent with any law of the United States shall have effect."

[51] John Echeverria, "The Real Contract on America," *The Environmental Law Institute* (reprinted from The Environmental Forum), Jul./Aug. 2003, at 36.

[52] 19 U.S.C.A. § 3801(3).

[53] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 53, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=534544 *citing* Communication from the United States to the WTO Working Group on the Relationship Between Trade and Investment (WT/WGTI/W/142) Sept. 16, 2002.

[54] U.S.-Chile FTA, Article 10.24.

[55] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1015-19 (1992).

[56] Second Partial Award, In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules*, S.D. Myers, Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Oct. 21, 2002, at 21-22. Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 33-34.

[57] CAFTA, Article 10.7.

[58] CAFTA, Article 10.7.

[59] Partial Award, In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 13, 2000, at 70-71. The S.D. Myers panel held, "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." Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 38.

[60] *See, Penn Cent. Transp. Co. et al. v. New York City et al.*, 438 U.S. 104 (1978). For example, the Penn Central factors are include in U.S.-Chile FTA, Annex 10-D; CAFTA, Annex 10-C; Model BIT, Annex B.

[61] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 15.

[62] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 55.

[63] *Concrete Pipe and Products v. Construction Laborers Pension Trust,* 508 U.S. 602, Jun. 14, 1993, at 615.

[64] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 33.

[65] Partial Award, In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 13, 2000, at 70.

[66] *Concrete Pipe and Products v. Construction Laborers Pension Trust,* 508 U.S. 602, Jun. 14, 1993, at 615.

[67] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 33.

[68] CAFTA, Annex 10-C.

[69] Personal property, the Supreme Court has indicated, is unlikely to be held to have been taken by a regulatory action, since "by reason of the State's traditionally high degree of control over commercial dealings, [an owner of personal property] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1027-28 (1992).

[70] Memorandum, To: Matthew Porterfield, Georgetown University, From: Courtney C. Kirkman, Subject: Minimum Standard of Treatment in Customary International Law, Date: May 2, 2003, on file with Public Citizen.

[71] CAFTA, Article 10.5 (2) (a).

[72] Memorandum, To: Matthew Porterfield, Georgetown University, From: Courtney C. Kirkman, Subject: Minimum Standard of Treatment in Customary International Law, Date: May 2, 2003, on file with Public Citizen.
[73] U.S. Conference of Mayors, "Resolution Urging that Foreign Investors be Given No Greater Rights than U.S. Investors in the Trade Promotion Authority Act of 2001," adopted 70th Annual Conference of Mayors, Madison, Wisconsin, June 2002.
[74] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 62.
[75] MacDonald, Sommer and Frates v. Yolo County, 477 U.S. 340, 348 (1986).
[76] CAFTA, Annex 10-F.
[77] Letter to Robert Zoellick, United States Trade Representative, from Sen. Max Baucus (D-MT), May 12, 2004, on file with Public Citizen.
[78] Memorandum, To: Files, From: John D. Echeverria, Georgetown University, Re: Proposed Investor-State Appellate Review, Date: Jun. 4, 2004, on file with Public Citizen.
[79] CAFTA, Article 10.21.
[80] CAFTA, Article 10.20.
[81] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 65.
[82] John D. Echeverria, "Who Will Decide for Us?" *Legal Times, Vol. 27, No. 10*, Mar. 8, 2004.
[83] Mike McKee, "Skirting the Law: Under NAFTA, Foreign Companies Can Avoid American Courts," *The Recorder*, Feb. 24, 2004.
[84] Sandra Day O'Connor, "Federalism of Free Nations," *28 N.Y.U. J. Int'l. L. & Pol. 35*, Fall 1995-Winter 1996.
[85] Statement of Respondent United States of America Regarding Petitions for Amicus Curiae Status, *Methanex Corporation v. United States of America*, at 14.
[86] *See, N. Pipeline Constr. Co. v. Marathon Pipe Line Co. et al.*, 458 U.S. 50 (1982).
[87] Conference of Chief Justices International Agreements Committee, Resolution 26: Regarding Provisions in International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments, 56th Annual Meeting on Jul. 29, 2004.
[88] U.S. Conference of Mayors, "Resolution Urging that Foreign Investors be Given No Greater Rights than U.S. Investors in the Trade Promotion Authority Act of 2001," adopted 70th Annual Conference of Mayors, Madison, Wisconsin, June 2002.
[89] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 68.
[90] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 68.
[91] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 70.
[92] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004, at 34, n. 150.
[93] For further information about the Canadian lawsuits, see www.dfait-maeci.gc.ca/tna-nac/other_cases-en.asp.
[94] Notice of Application between The Council of Canadians et al. and Her Majesty in Right of Canada, as represented by the Attorney General of Canada, Ontario Superior Court of Justice, court file no. 01-CV-208141, Mar. 28, 2001, *available at* www.dfait-maeci.gc.ca/tna-nac/disp/cupw_archive-en.asp.
[95] Notice of Application between Democracy Watch, et. al. and The Attorney General of Canada, Ontario Superior Court of Justice, court file no. 01-CV-211576, May 28, 2001, available at: www.dfait-maeci.gc.ca/tna-nac/disp/cupe_archive-en.asp.
[96] Herbert L. Needleman and Philip J. Landrigan, "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
[97] Herbert L. Needleman and Philip J. Landrigan, "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
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[101] J. Michael Davis, "Methylcyclopentadienyl Manganese-Tricarbonyl: Health Risk Uncertainties and Research Directions," *Environmental Health Perspectives*, Vol. 106, Supplement 1, Feb. 1998, at 191.
[102] Philip J. Landrigan, "MMT, Déjà Vu and National Security," *American Journal of Industrial Medicine*, *Vol. 39, Issue 4,* Mar. 2001, at 434-5.
[103] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Sep. 10, 1996, at 4.
[104] In 1995, Ethyl won a lawsuit against the U.S. EPA that forced the EPA to lift its restrictions on MMT and it became available for use in conventional unleaded gasoline. National Round Table on the Environment and the Economy, "Methylcyclopentadienyl Manganese Tricarbonyl (MMT) Case Study," 1999, at 8, cited Apr. 24, 2001.

[105] J. Michael Davis, "Methylcyclopentadienyl Manganese-Tricarbonyl: Health Risk Uncertainties and Research Directions," *Environmental Health Perspectives*, Vol. 106, Supplement 1, Feb. 1998, at 192.
[106] Herbert L. Needleman and Philip J. Landrigan, "Toxins at the Pump," *New York Times*, Mar. 13, 1996.
[107] J. Michael Davis, "Methylcyclopentadienyl Manganese-Tricarbonyl: Health Risk Uncertainties and Research Directions," *Environmental Health Perspectives*, Vol. 106, Supplement 1, Feb. 1998, at 193.
[108] The transportation ban was necessary because the fuel standards established in the Canadian Environmental Protection Act are not sufficiently broad to cover a ban on substances that may damage pollution control systems in cars, even if such damage leads to increased emissions. Manganese-based Fuel Additives Act 1997, c. 11.
[109] Statement of Defence, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 27, 1997, at 23-24.
[110] Statement of Defence, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 27, 1997, at 24.
[111] Statement of Defence, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 27, 1997, at 24.
[112] Manganese-based Fuel Additives Act 1997, c. 11.
[113] Notice of Arbitration, *Ethyl v. Government of Canada*, United Nations Commission on International Trade Law, Apr. 14, 1997. Damages claimed known from Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Sep. 10, 1996.
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[115] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Sep. 10, 1996, at 2.
[116] Statement of Defence, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between *Ethyl Corporation v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 27, 1997, at 9.
[117] Award on Jurisdiction in the NAFTA/UNCITRAL Case between Ethyl Corporation and the Government of Canada, United Nations Commission on International Trade Law, Jun. 24, 1998, at 36.
[118] Government of Canada "Statement on MMT," Jul. 20, 1998, on file with Public Citizen.
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[122] Jane Bussey, "Canadian Funeral Home Firm Battles $150 Million Biloxi, Miss., Judgment," *Miami Herald*, Nov. 25, 1998.
[123] Erik Larson, "Fight to the Death: A Battle Between Rival Funeral-Home Dynasties Puts the Spotlight on a Vast But Quiet Transformation in the Way We Bury our Dead," *Time Magazine*, Vol. 148, No. 26, Dec. 9, 1996.
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[125] *Provident American Corporation et al. v. The Loewen Group Inc* (U.S.D.C. E.D.Pa. CA. No 92-1964). Settlement amount known from Mary Bottari − Public Citizen interview with Bret Flaherty, Provident attorney, Aug. 21, 2001.
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[127] Mary Bottari – Public Citizen Interview with Michael S. Allred, attorney for O'Keefe, Aug. 17, 2001.
[128] Communication from juror Robert Bruce to John Corlew, attorney, Nov. 24, 1995, on file with Public Citizen.
[129] Mary Bottari – Public Citizen Interview with Michael S. Allred, attorney for O'Keefe, Aug. 17, 2001.
[130] Mary Bottari – Public Citizen Interview with Michael S. Allred, attorney for O'Keefe, Aug. 17, 2001.

[131] Notice of Intent to Submit a Claim to Arbitration, Under Chapter 11 of the North American Free Trade Agreement, *Loewen Group, Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Oct. 30, 1998, at 2-3.
[132] Jane Bussey, "Canadian Funeral Home Firm Battles $150 Million Biloxi, Miss., Judgment," *Miami Herald*, Nov. 25, 1998.
[133] Notice of Intent to Submit a Claim to Arbitration, Under Chapter 11 of the North American Free Trade Agreement, *Loewen Group, Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Oct. 30, 1998.
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[135] Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Loewen Group, Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Oct. 30, 1998, at 2.
[136] "NAFTA rejects U.S. Plea Against Funeral Home Case, Proceeds on Merits," *Inside U.S. Trade*, Apr. 6, 2001.
[137] Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Loewen Group, Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Oct. 30, 1998, at 52-59.
[138] Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, *Loewen Group, Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Oct. 30, 1998, at 59.
[139] Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., *Loewen Group Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Mar. 1, 2002.
[140] Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., *Loewen Group Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Mar. 1, 2002, at 20.
[141] Award, In the Proceeding between The Loewen Group, Inc. and Raymond L. Loewen and United States of America, International Centre for the Settlement of Investment Disputes, Jun. 26, 2003, at 33.
[142] Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., *Loewen Group Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Mar. 1, 2002, at 40.
[143] Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., *Loewen Group Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Mar. 1, 2002, at 39.
[144] Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., *Loewen Group Inc. v. the United States of America*, International Centre for the Settlement of Investment Disputes, Mar. 1, 2002, at 21-25.
[145] Award, In the Proceeding between The Loewen Group, Inc. and Raymond L. Loewen and United States of America, International Centre for the Settlement of Investment Disputes, Jun. 26, 2003, at 53.
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[149] Award, In the Proceeding between The Loewen Group, Inc. and Raymond L. Loewen and United States of America, International Centre for the Settlement of Investment Disputes, Jun. 26, 2003, at 61.
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[151] Award, In the Proceeding between The Loewen Group, Inc. and Raymond L. Loewen and United States of America, International Centre for the Settlement of Investment Disputes, Jun. 26, 2003, at 64.
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[155] Adam Liptak, "NAFTA Tribunals Stir U.S. Worries," *New York Times*, Apr. 18, 2004.

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[160] Petitioner's Outline of Argument, In the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, Case Number ARB(AF)/97/1, Supreme Court of British Columbia, Jan. 22, 2001, at 2.
[161] Petitioner's Outline of Argument, In the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, Case Number ARB(AF)/97/1, Supreme Court of British Columbia, Jan. 22, 2001, at 3.
[162] Metalclad Corporation SEC 10K/A, "Annual Report," Jun. 6, 2001.
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[164] Andrew Wheat, "Toxic Shock in a Mexican Village," *Multinational Monitor, Vol. 16 No. 10*, Oct. 1995.
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[171] Petitioner's Outline of Argument, In the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility, Case Number ARB(AF)/97/1, Supreme Court of British Columbia, Jan. 22, 2001, at 4.
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[174] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 15.
[175] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 17.
[176] Amended Petition to the Court, Re: Sections 30, 31, 42 of the Commercial Arbitration Act, R.S.B.C. 1996, c. 55 and In the Matter of Arbitration Pursuant to Chapter 11 of NAFTA between Metalclad Corporation and the United Mexican States, ICSID Additional Facility Case No. ARB(AF)/97/1, *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, Oct. 27, 2000.
[177] The notice of arbitration has not been made public. The date and amount claimed are know from the Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 4, 36.
[178] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 1.
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[184] *See,* Stephen L. Kass and Jean M. McCarroll, "The 'Metalclad' Decision Under NAFTA's Chapter 11," *New York Law Journal*, Oct. 27, 2000.
[185] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 32.
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[188] British Columbia Commercial Arbitration Act R.S.B.C. 1996 c. 55 and the British Columbia International Commercial Arbitration Act, R.S.B.C. 1996, c. 233. Judge Tysoe ruled that the extent to which he could interfere in the case was limited by the terms of the International Commercial Arbitration Act.
[189] Reasons for Judgment of the Honourable Mr. Justice Tysoe, *the United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, May 2, 2001, at 26-27.
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[193] Evelyn Iritani, "Metalclad NAFTA Dispute is Settled," *Los Angeles Times*, Jun. 14, 2001.
[194] Adriana Ochoa, "Rechaza SLP Restituir 16 MDD a la Federacion," *El Universal*, Apr. 2, 2002.
[195] Carlos Aviles, "Corte anula descuento a recursos federales para gobierno de San Luis Potosi," *El Universal,* Mar. 5, 2004.
[196] Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 33.
[197] International Centre for Settlement of Investment Disputes (ICSID) (Additional Facility): *Metalclad Corp. v. United Mexican States*, Case No. ARB(AF)/97/1 (2000), reprinted in *40 I.L.M. 36*, Jan. 2001, at 15.
[198] Matthew C. Porterfield, "International Expropriation Rules and Federalism," *23 Stan. Envtl. L. J. 3*, Jan. 2004 at 55, and n. 274.
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[200] National Association of Counties letter to USTR Mar. 21, 2002, on file with Public Citizen.
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[346] In this instance, the United States permitted Canada to maintain its BSE free status and did not close the border to Canadian imports. Under the same logic, now the United State argues that it is BSE free and is asking its trading partners not to close their borders to U.S. meat and cattle.
[347] 68 FR 31939 (May 29, 2003).
[348] USDA "Veneman Announces that Import Permit Applications For Certain Ruminant Products from Canada Will Be Accepted," News Release No. 0281.03, Aug. 8, 2003. Veneman announced that USDA will no longer prohibit the importation of hunter-harvested wild ruminant products intended for personal use and USDA will accept applications for import permits for certain products from Canada, including: boneless sheep or goat meat from animals under 12 months of age; boneless bovine meat from cattle under 30 months of age; boneless veal (meat) from calves that were 36 weeks of age or younger at slaughter; fresh or frozen bovine liver; vaccines for veterinary medicine for non-ruminant use; and, pet products and feed ingredients that contain processed animal protein and tallow of non-ruminant sources when produced in facilities with dedicated manufacturing lines. At the current time, some scientists think that cattle under 30 months are unlikely to have the disease because of its many-year incubation period and boneless cuts of meat are unlikely to include the brain and nerve tissue thought to be the most infective.
[349] USDA "Veneman Announces that Import Permit Applications For Certain Ruminant Products from Canada Will Be Accepted," News Release No. 0281.03, Aug. 8, 2003.

[350] 68 FR 62386 (Nov. 4, 2003).
[351] Marc Kaufman, "USDA Expands Mad Cow Inquiry, Inspector General to Examine Relaxed Rules on Canadian Beef," *Washington Post*, Jul. 3, 2004.
[352] Marc Kaufman, "USDA Expands Mad Cow Inquiry, Inspector General to Examine Relaxed Rules on Canadian Beef," *Washington Post*, Jul. 3, 2004.
[353] Moreover, among the OIE's criteria for achieving a BSE "minimal" risk status is the requirement that a country that has had a BSE case in a native animal within the previous seven years must have enforced the ban on the feeding of ruminant byproducts for a period of eight years. Canada's ban on the feeding of ruminant byproducts was implemented only six years ago and, therefore, Canada does not comply with the internationally accepted criteria. Conveniently, the new regulations proposed by the USDA in November 2003 would weaken this requirement to six years.
[354] The U.S. Department of Health and Human Services, which regulates feed for animals for human consumption, has dragged its feet in implementing proposed changes to safeguard the food supply. After holding a press conference to announce a variety of new emergency measures on January 26, 2004, HHS failed to issue the promised, binding, emergency regulations which would have implemented four changes to the current animal feed rule. The rule would have: prohibit mammalian blood and blood products to be fed to other ruminants as a protein source; ban the use of "poultry litter" as a feed ingredient for ruminant animals; ban the use of "plate waste" as a feed ingredient for ruminants; and minimize the possibility of cross-contamination of ruminant and non-ruminant animal feed by requiring equipment, facilities or production lines to be dedicated to non-ruminant animal feeds if they use protein that is prohibited in ruminant feed Instead, on July 14, 2004 HHS issued an exploratory "advanced notice of proposed rulemaking" which could take years to implement. This capitulation to industry pressure during an election year is known as "slow rolling" and made headlines in the *New York Times*. Given the differing disease status of the nations and the continued failure of regulators to take the measures consumer groups and their own hired scientific experts have recommended to protect the public from the spread of this disease, the border closure remains an important public health safeguard.
[355] 69 FR 10633 (Mar. 8, 2004).
[356] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004.
[357] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 14.
[358] Such a traceability system could be made possible however, if the USDA moved ahead to implement the Country of Origin Labeling system required in the 2002 Farm Bill. Unfortunately, the USDA has been working to transform this mandatory program to a voluntary one and has not yet implemented the rule it promulgated in September 2004.
[359] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 14.
[360] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 16.
[361] "Beef Producers File Mad-Cow Claim Against U.S.," *Globe and Mail*, Aug. 13, 2004.
[362] "Canadian Cattle Industry Takes Action Against U.S. Ban on Live Cattle," *Inside US Trade*, Aug. 20, 2004.
[363] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 14.
[364] Partial Award, In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. v. Government of Canada*, United Nations Commission on International Trade Law, Nov. 13, 2000, at 70-71. The S.D. Myers panel held, "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." Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 38.
[365] *See*, for example, Anne Mulhern, "Watchdogs or lap dogs? When advocates become regulators President Bush has installed more than 100 top officials who were once lobbyists, attorneys or spokespeople for the industries they oversee," *Denver Post*, May 23, 2004. Phillip Mattera, USDA, Inc. How Agribusiness Has Hijacked Regulatory Policy at the U.S. Department of Agriculture, Jul. 23, 2004, available at: www.agribusinessaccountability.org/page/325/1.
[366] 9 CFR 94.18 (a) (1).
[367] 9 CFR 92.2.
[368] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 10.
[369] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 12.

370 Canadian Cattlemen for Fair Trade Fact Sheet, cited Sep. 7, 2004, available at: www.ccft.info, on file with Public Citizen.
371 For a list of countries that Canada imports from see, Canada info: http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/bsefaqe.shtml.
372 Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 15.
373 Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 11.
374 Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, *Cor Van Raay, et. al. v. Government of the United States of America*, Aug. 12, 2004, at 9.
375 U.S. Food and Drug Administration, "FDA Statement on Rendered Products Derived From BSE Cow in Washington State," Press Release, Dec. 27, 2003.
376 CBC Website News, "BSE-Infected Cow May Have Gotten into Animal Feed," Oct. 1, 2004.
377 David Waskow, Friends of the Earth, communication with Public Citizen, Feb. 15, 2005, on file with Public Citizen.
378 Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Jul. 21, 2003, at 2.
379 30 U.S.C. § 22.
380 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 5.
381 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 2.
382 Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Jul. 21, 2003, at 4.
383 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 5.
384 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 5.
385 Heap-leaching is a technique for extracting microscopic gold ore through the process of saturating a pile (heap) of crushed and agglomerated gold-bearing rock with a weak cyanide solution and collecting the resulting gold-bearing solution.
386 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 2.
387 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 2.
388 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 5.
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390 Office of the Governor of the State of California, "Governor Davis Signs Legislation to Stop Proposed Gold Mine Near 'Trail of Dreams' Sacred Site," Press Release, Apr. 7, 2003.
391 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 2.
392 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 6.
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394 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 6.
395 "Honduran Villagers Battle Over Canada-owned mine," *Planet Ark*, Nov. 29, 2002.
396 "Glamis Gold Unit Hit by Honduras Protest," *Reuters*, Oct. 21, 2002.
397 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 2.
398 Friends of the Earth, "Glamis Gold: A Case Study of Investing in Destruction," Briefing Paper, Aug. 2003, at 2.
399 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 8.
400 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 8.
401 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 8.
402 Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 10.
403 Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Jul. 21, 2003, at 11.

[404] Office of the Governor of the State of California, "Governor Davis Signs Legislation to Stop Proposed Gold Mine Near 'Trail of Dreams' Sacred Site," Press Release, Apr. 7, 2003.
[405] *See,* Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003.
[406] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 10.
[407] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003, at 10.
[408] Mike McKee, "Skirting the Law: Under NAFTA, Foreign Companies Can Avoid American Courts," *The Recorder*, Feb. 24, 2004.
[409] Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement between Pope & Talbot Inc. and the Government of Canada, United Nations Commission on International Trade Law, Jun. 26, 2000, at 37; Award, Before the Arbitral Tribunal constituted Under Chapter 11 of the North American Free Trade Agreement, *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Aug. 25, 2000, at 33.
[410] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 2.
[411] Peter Kuitenbrouwer, "Natives Put New Face on Tobacco Industry," *Financial Post*, May 31, 2003.
[412] *See,* "Canadian Tobacco Companies," Ontario Campaign for Action, cited Jul. 14, 2004, available at: www.ocat.org/opposition/industry.htm.
[413] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 2-4.
[414] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 4.
[415] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 4.
[416] *See*, Dr. Mike Magee, "The U.S. Tobacco Settlement of 1998: A Missed Opportunity," *Health Politics*, May 12, 2004, at 1, available at: www.healthpolitics.com/program_transcript.asp?p=prog_46.
[417] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 7.
[418] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 7.
[419] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 12.
[420] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 1.
[421] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 16.
[422] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 13.
[423] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 16.
[424] If tobacco firms opted into the agreement, they were required to contribute *pro rata* payments based upon the amount that their current year's market share exceeded 100% of 1998's market share and 125% of 1997's market share. However, if non-

tobacco defendants opted not to become part of the settlement, then they would have to contribute *pro rata* settlement money into an escrow fund based upon the amount that their current year's sales exceeded 0% - or basically, all sales. Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 8.

[425] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 14-15.

[426] Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America, Mar. 11, 2004, at 15.

[427] "Teen Smoking Burns Down to Lowest Rate in Decade," *Associated Press*, Jun. 17, 2004.

[428] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 3.

[429] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 3.

[430] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 3.

[431] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 3.

[432] Particularized Statement of Claim of Claimant International Thunderbird Gaming Corporation, NAFTA Arbitration Under the UNCITRAL Rules and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 15, 2003, at 11.

[433] Barnard R. Thomson, "Mexico Could Re-Authorize Casinos After 70-year Prohibition," *Gamble Tribune*, Aug. 31, 2004.

[434] "Vegas, South and by the Sea," *The Economist*, Apr. 5, 2003.

[435] "Vegas, South and by the Sea," *The Economist*, Apr. 5, 2003.

[436] Particularized Statement of Claim of Claimant International Thunderbird Gaming Corporation, NAFTA Arbitration Under the UNCITRAL Rules and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 15, 2003, at 9.

[437] *See,* for instance, Wis. Stat. § 945.01 (2003) which reads: (3) GAMBLING MACHINE. (a) A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine.

[438] Particularized Statement of Claim of Claimant International Thunderbird Gaming Corporation, NAFTA Arbitration Under the UNCITRAL Rules and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 15, 2003, at 11.

[439] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 3.

[440] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 4.

[441] Particularized Statement of Claim of Claimant International Thunderbird Gaming Corporation, NAFTA Arbitration Under the UNCITRAL Rules and the North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 15, 2003, at 17.

[442] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and The North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 8.

[443] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and The North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 6-7.

[444] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and The North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 8.
[445] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and The North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 8.
[446] Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and The North American Free Trade Agreement, *International Thunderbird Gaming Corporation v. Government of Mexico*, Aug. 1, 2002, at 8.
[447] Notice of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group Inc. v. the Government of the United States of America*, International Centre for the Settlement of Investment Disputes, Jul. 19, 2000, at 7.
[448] ADF Group web page, cited Jun. 26, 2001, available at: www.adfgroup.com/AN/index.html, and on file with Public Citizen.
[449] 23 CFR 635.410.
[450] Notice of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group Inc. v. the Government of the United States of America*, International Centre for the Settlement of Investment Disputes, Jul. 19, 2000, at 10-12.
[451] Notice of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group Inc. v. the Government of the United States of America*, International Centre for the Settlement of Investment Disputes, Jul. 19, 2000, at 19.
[452] Notice of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group Inc. v. the Government of the United States of America*, International Centre for the Settlement of Investment Disputes, Jul. 19, 2000, at 19.
[453] Notice of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group Inc. v. the Government of the United States of America*, International Centre for the Settlement of Investment Disputes, Jul. 19, 2000, at 20.
[454] Notice of Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group Inc. v. the Government of the United States of America*, International Centre for the Settlement of Investment Disputes, Jul. 19, 2000, at 22.
[455] Award, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group, Inc. v. United States of America*, International Centre for Settlement of Investment Disputes, Jan. 9, 2003, at 73.
[456] Award, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group, Inc. v. United States of America*, International Centre for Settlement of Investment Disputes, Jan. 9, 2003, at 73.
[457] Todd Weiler, "Foreign Investment Law and the United States: You Can't Tell the Players without a Score Card," *37 Int'l Law. 279*, Summer 2003, at 12.
[458] Award, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group, Inc. v. United States of America*, International Centre for Settlement of Investment Disputes, Jan. 9, 2003, at 82-83.
[459] Award, In the Matter of an Arbitration Under Chapter 11 of the North American Free Trade Agreement, *ADF Group, Inc. v. United States of America*, International Centre for Settlement of Investment Disputes, Jan. 9, 2003, at 83.
[460] Award, Between Robert Azinian, et. al., and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 2-3.
[461] Award, Between Robert Azinian, et. al., and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 2-3.
[462] The notice of arbitration for this case is not publicly available. The date is known from the Award, International Centre for the Settlement of Investment Disputes (Additional Facility), Between Robert Azinian, et. al., and the United Mexican States, Nov. 1, 1999, at 20.
[463] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 6.
[464] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 3.
[465] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 31.
[466] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 8.
[467] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 25.
[468] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 29.
[469] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 26.

[470] Award, Between Robert Azinian et al. and the United Mexican States, International Centre for the Settlement of Investment Disputes (Additional Facility), Nov. 1, 1999, at 23.
[471] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Crompton Corp. v. Government of Canada*, Nov. 6, 2001 at 2.
[472] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Crompton Corp. v. Government of Canada*, Nov. 6, 2001 at 2.
[473] In June 2001, President Bush signed the POPs Treaty which is an international commitment to rid the world of the 12 worst POPs including PCBs and 11 other chemicals. While lindane did not make the initial list, it is currently a candidate for review under the POPs treaty once the agreement is ratified by a sufficient number of nations.
[474] U.S. EPA, 1,2,3,4,5,6-HEXACHLOROCYCLYHEXANE (all stereo isomers) (LINDANE) Hazard Summary, May 17, 2001, on file with Public Citizen.
[475] EPA, "National Primary Drinking Water Regulations; Consumer Fact Sheet on Lindane," Office of Groundwater and Drinking Water, cited Dec. 17, 2001, available at: www.epa.gov/safewater/dwh/c-soc/lindane.html, on file with Public Citizen.
[476] EPA, Office of Pesticide Programs, "EPA Releases Preliminary Risk Assessment for Lindane," Announcement, Aug. 29, 2001, on file with Public Citizen.
[477] Steven Chase, "Ottawa Faces Suit Over Banned Pesticide," *The Globe and Mail*, Dec. 10, 2001.
[478] Canadian Pest Management Regulatory Agency, *PRA Points, Issue 8*, Jan. 19, 2000.
[479] Letter To: Mr. Gene Dextrase, President Canola Growers Association, From: C.A. Franklin, Executive Director, Pest Management Regulatory Agency, Date: Feb. 9, 1999, on file with Public Citizen.
[480] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement*, Crompton Corp. v. Government of Canada,* Nov. 6, 2001, at 7.
[481] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Crompton Corp. v. Government of Canada*, Nov. 6, 2001, at 8.
[482] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Crompton Corp. v. Government of Canada*, Nov. 6, 2001, at 10.
[483] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement*, Crompton Corp. v. Government of Canada*, Nov. 6, 2001, at 10.
[484] Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, *Crompton Corp. v. Government of Canada*, Nov. 6, 2001.
[485] *See,* Crompton Corp. Notices of Intent to Submit a Claim to Arbitration Under Article 1119 of the North American Free Trade Agreement, Sep. 19, 2002.
[486] Mary Bottari – Public Citizen Interview with Crompton spokesperson Mary Ann Dunnell, Jan. 11, 2005.
[487] Notice of Arbitration Under the Rules Governing the Additional Facility for the Administration of Proceedings by the International Centre for Settlement of Investment Disputes and the North American Free Trade Agreement between Fireman's Fund and the United Mexican States, Sep. 28, 2001, at 4.
[488] Decision on Preliminary Question Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, *Fireman's Fund v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Jul. 17, 2003, at 15.
[489] Decision on Preliminary Question Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, *Fireman's Fund v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Jul. 17, 2003, at 16.
[490] Decision on Preliminary Question Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, *Fireman's Fund v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Jul. 17, 2003, at 17.
[491] Decision on Preliminary Question Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, *Fireman's Fund v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), Jul. 17, 2003, at 17.
[492] Article 1405 requires each Party to accord investors of another Party treatment no less favorable than that it accords to its own investors, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.
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