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COMMENT

An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven

JESSICA S. WILTSE†

INTRODUCTION

One central actor, the nation state, has traditionally dominated international relations and international law. The state has long enjoyed exclusive access to public international legal regimes and remedies and exclusive political jurisdiction over transnational disputes in which a sovereign is a party. As a result, if a non-state party, such as an individual, an organization, a corporation or an investor, were to find itself involved in a transnational dispute with a foreign government, its most likely recourse would be to petition its home government to act on its behalf to resolve the dispute with the foreign government.†

† J.D. Candidate, State University of New York at Buffalo School of Law, 2004; M.A., State University of New York at Buffalo, 2003; B.A., State University of New York at Buffalo, 2000. I wish to thank George H. Bilkey IV for his support and encouragement and Professor Amy Westbrook of the University at Buffalo Law School for her thoughtful guidance and valuable comments. I would also like to thank the members of the Buffalo Law Review for their assistance in editing the drafts of this article. All errors and inconsistencies remain, of course, my own.

1. For example, private industries might petition the United States Trade Representative ("USTR") to commence a Section 301 case to investigate alleged unjustifiable or unreasonable trade practices of other states and to retaliate
Another equally imperfect option for the non-state party would be to use the domestic legal system of the foreign government or to try to obtain jurisdiction over it in the private party's domestic courts.\(^2\) This solution is particularly problematic for U.S. non-state parties when the claim is against a foreign nation, because the Foreign Sovereign Immunities Act of 1976 ("FSIA")\(^3\) expressly limits the jurisdiction of U.S. courts in suits against foreign sovereigns. And even in those circumstances where the FSIA does not bar jurisdiction, as is arguably the case in international investment disputes,\(^4\) U.S. courts will not inquire into the validity of an act by a foreign sovereign within its own jurisdiction, including disputes relating to foreign investment contracts, according to the act of state doctrine.\(^5\)

unilaterally if the allegations are correct. See Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1994). This can lead to a World Trade Organization ("WTO") case between governments. To protect against imports, private industries may ask the Commerce Department to initiate an antidumping or countervailing duty investigation. 19 U.S.C. §§ 1673, 1677 (2000). The important point here, however, is that the private party or industry must always ask the government to act on their behalf.


4. The FSIA provides for at least two exceptions that probably preclude immunity. First, immunity does not apply to suits arising out of a foreign sovereign's "commercial activity" having a "direct effect in the United States." 28 U.S.C. § 1605(a)(2). A foreign sovereign's obligations under an investment contract may qualify as "commercial activity." See Michael D. Ramsey, _Acts of State and Foreign Sovereign Obligations_, 39 HARV. INT'L L.J. 1, 10-11 (1998). The second possible exception to foreign sovereign immunity is when the sovereign waives immunity, which is a provision that may be drafted into an investment contract. FSIA, 28 U.S.C. § 1605(a)(1).

5. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory."); see also Ramsey, _supra_ note 4, at 11 (discussing how the act of state doctrine, and not the FSIA, is the principal barrier to the enforcement of foreign investment contracts in U.S. courts). In contrast to foreign sovereign immunity, the act of state doctrine is an expression of judicial self-restraint, and as such is not "waivable" by a foreign state. Thus, while sovereign immunity is a question of personal jurisdiction (or lack thereof) over a foreign sovereign, the act of state doctrine is more concerned with the act of the defendant foreign sovereign and whether it is proper for the home state judiciary to decide the issue in question. See Mark W. Janis & John E. Noyes, _International Law: Cases and Commentary_ 807 (2d ed. 2001); see also _Restatement (Third) of Foreign Relations Law_ § 443 (1987).
However, a new paradigm is emerging in which individuals and private entities may also avail themselves of international legal remedies.⁶ As the international system has evolved after World War II, with the creation of numerous international legal treaties and organizations such as the United Nations ("UN"), the General Agreement on Tariffs and Trade ("GATT") and now the World Trade Organization, and the pace of globalization has steadily increased, there is growing recognition of the variety of actors in this new world order, non-state actors that have separate interests from their national governments, and interests that need to be represented if this rapidly interconnected and globalized system is to sustain itself and progress. Among these new actors are international non-governmental organizations ("NGO"), such as Greenpeace and Amnesty International, and multinational corporations.

In the realm of international trade, investment, and economic relations, the need for private party access to dispute resolution is particularly notable, because of the rapidly growing volume of international trade facilitated by the success of liberal trade ideologies and the growing number of firms engaged in multinational business. New forms of dispute resolution evolved to meet this need, particularly international arbitration for private commercial parties.⁷ Yet, there remained little direct recourse for private parties as against injury caused by a foreign sovereign's unfair and even illegal trade and investment policies.

Although Treaties of Friendship, Commerce and Navigation ("FCN") have created reciprocal bilateral

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⁷. For example, the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules were adopted in 1976, providing comprehensive arbitration procedure rules for commercial parties to use on an ad hoc basis. G.A. Res. 31/98, U.N. Comm'n on Int'l Trade Law, 31st Sess., Supp. No. 17, at Ch. V, § C, U.N. Doc. A/31/17 (1976). The UNCITRAL Rules are just one example of international arbitration rules available to private commercial parties; earlier examples provided both rules and formal arbitral institutions, such as the Rules of Conciliation and Arbitration of the International Chamber of Commerce (Paris) (1923), and the American Arbitration Association (1926).

⁸. An illegal trade or investment policy would be one that violates a trade agreement, such as the WTO or NAFTA.
economic relationships and provided for state to state dispute resolution for centuries, it was not until the years following World War II that such treaties began providing non-diplomatic remedies for injured investors. Eventually, as the volume and importance of international investment increased, and as the international economic system as it existed failed to deal with investment issues, FCNs were replaced or supplemented with more modern and specialized Bilateral Investment Treaties ("BIT"), whose primary function was to promote and protect investment relations between the two parties to the BIT. Most significantly, however, BITs provided for direct investor-state arbitration of investment disputes before an arbitral panel, eliminating the need for espousal by governments and depoliticizing investment disputes.

By the early 1990s, the bilateral solution to investment disputes proliferated in the absence of a multilateral investment regime. Although multilateral trade law has flourished in the years following World War II, with the evolution of the GATT and regional trade and economic agreements like the European Economic Community (now the European Union ("EU")) and North American Free Trade Agreement ("NAFTA"), a multilateral investment regime had been slow to materialize. Against this background, Chapter 11, the investment chapter of NAFTA, stands out as an innovative response to this deficit. It is the first, and only, multilateral trade agreement that provides


10. Following World War II, "modern" FCNs were negotiated, which usually provided for adjudication of disputes before the International Court of Justice. Although this was a procedural advancement from the viewpoint of United States investors, it still required espousal by the U.S. government before the ICJ. See id. at 121-23.

11. See id. at 162-65.

12. See id. at 163-64.

13. For instance, the Trade Related Investment Measures ("TRIMs") Agreement of the Uruguay Round of GATT negotiations created a very limited multilateral investment agreement, and the Organization for Economic Cooperation and Development's ("OECD") attempt at negotiating a Multilateral Agreement on Investment ("MAI") in the mid-1990s was ultimately a failure. See generally Glen Kelley, Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations, 39 COLUM. J. TRANSNAT'L L. 483 (2001); see also the discussion of the difficulties of negotiating a multilateral investment treaty, infra Part III.C.
for direct investor-state binding arbitration.\textsuperscript{14} In the nine years since NAFTA came into force,\textsuperscript{15} there have been a number of claims brought under the investor-state dispute mechanism.\textsuperscript{16} The claims asserted, and the outcomes of them, have been surprising at times and Chapter 11 is increasingly becoming the focal point of the controversy surrounding free trade and its negative effects on the environment and the sovereignty of the state.\textsuperscript{17}

Despite the continuing controversy over free trade, negotiations are currently underway for the Free Trade Area of the Americas ("FTAA"), which would unite the thirty-four democratic nations of the Western Hemisphere (essentially all of the nations of the hemisphere except Cuba)\textsuperscript{18} into the largest free trade area in the world, encompassing over 800 million people and representing a GDP in excess of $12 trillion.\textsuperscript{19} The FTAA will also encompass perhaps the most diverse group of states to join a regional trade agreement, given the large range of economic development within the Western Hemisphere, differing levels and lengthiness of democratic governance, and rich and varied cultural tapestry.\textsuperscript{20} As the NAFTA
agreement is serving as the primary model for the FTAA agreement, it is imperative that we evaluate its features for the desirability of their inclusion. Among the features being hotly debated are the investment provisions of Chapter 11 of NAFTA, which provide investors of a Party, defined as one of the three NAFTA signatories (Canada, Mexico, and the United States), with substantive rights and guaranteed minimum standards of treatment, and both a state-state and an investor-state mechanism for resolving disputes arising from breaches thereof. This controversial chapter has already been incorporated into the draft text of the FTAA.

The purpose of this article is to analyze the pros and cons of including a NAFTA Chapter 11-like provision in the FTAA Agreement, negotiations for which are to conclude by 2005. Rather than debating about whether such a provision should or should not be included in the FTAA, an increasingly moot consideration, this article takes the position that an investor-state dispute mechanism will likely be incorporated into the FTAA, and therefore we should attempt to improve on it in light of our experience with NAFTA Chapter 11. A careful review of experience with NAFTA Chapter 11 can help us to avoid simply replicating an investment provision riddled with problems while ignoring the particular context of the proposed FTAA Agreement. Part I lays the foundation for the discussion by examining the history and mechanics of NAFTA Chapter 11, providing an overview of the substance of the provision. A discussion of three important cases that have been decided using the Chapter 11 investor-state procedure will shed some light on how Chapter 11 works in practice. Part


II presents the various arguments in favor of and against both private party access to international dispute resolution mechanisms in general, and Chapter 11 arbitration in particular. Part III assesses the inclusion of an investor-state dispute mechanism in the FTAA, taking into account the particular problems such a provision may pose in negotiations with Latin American states. This part will also briefly address the difficulties in attempting to negotiate investment treaties multilaterally, such as the failed Organization for Economic Cooperation and Development's ("OECD") Multilateral Agreement on Investment ("MAI"). Finally, Part IV considers several proposals and suggestions to improve Chapter 11, given the reality that the provision is likely a permanent feature of the North American and Western Hemispheric free trading regimes.

I. THE NAFTA INVESTMENT CHAPTER

A. Historical Background

Because private parties traditionally lacked standing under international law, throughout most of history trade and investment disputes between private parties and states were usually resolved between states (the home state of the private party and the host state) through diplomatic or political channels (i.e., diplomatic protection) or by the use of actual force.25 By the mid-twentieth century, however, the capital-exporting nations began to shift strategies in order to counter the ineffectiveness of such dispute resolution. As liberal economic ideologies became dominant following World War II, institutionalized in the Bretton Woods economic framework, the United States and other capital-exporting nations undertook the development of a regime to improve the protection of investments abroad. Treaties of Friendship, Commerce and Navigation were entered into bilaterally, the major purpose of which was to protect foreign investments.26

FCN treaties fell short of a panacea, however, because FCNs still only provided for sovereign-to-sovereign dispute resolution, albeit in a more legalistic manner, and even occasionally in the adjudicative forum of the International Court of Justice ("ICJ").

Espousal by the investor's home state was still necessary, but now claims were to be decided at the ICJ rather than through diplomatic channels. This proved rather unsatisfactory to private parties and states alike, because the ICJ was reluctant to become a forum for resolving international commercial disputes and would thus decline such cases on jurisdictional grounds. The prime example of this scenario is the Barcelona Traction case, where the ICJ denied standing to the Belgian government to espouse the claims of its citizens, who were the majority shareholders of a corporation established under the laws of Canada but with its principal place of business in Spain.

According to the ICJ, "the general rule of international law authorizes the national State of the company alone to make a claim." In this case, however, because Spain had not consented to the compulsory jurisdiction of the ICJ, Canada was unable to bring the claim. The Belgian shareholders were effectively deprived a remedy, despite that they owned about 88% of Barcelona Traction's shares and that the Belgian and Spanish governments were parties to a bilateral treaty that recognized the ICJ's jurisdiction to hear disputes arising from the treaty.

This historical reliance on the investor's home government to represent its interest was the main impetus behind the development of Bilateral Investment Treaties in the 1970s and 1980s, which are the genesis of NAFTA Chapter 11 investor-state dispute resolution. BITs were designed to provide investors with a "shield" to protect their

29. Id. at 7.
30. Id. at 46.
31. Id. at 45.
32. Id. at 24.
33. Id. at 11.
34. See Jones, supra note 25, at 529-30.
interests from host nations. Furthermore, BITs, unlike FCNs, usually provide for direct investor-state arbitration, eliminating the need for espousal by the home state. The form of the typical U.S. BIT evolved over time to eventually include, by 1981, the two fundamental canons of the NAFTA model: (1) the exact language and legal standard of expropriation, and (2) an investor-state dispute mechanism providing for direct enforcement of this and other investor protections. BITs are utilized by most major capital exporting countries and are becoming increasingly popular with less-developed countries, with almost 200 countries having signed at least one BIT, and a total of approximately 2099 BITs in place worldwide by the end of 2001.

In addition to the shortcomings of FCNs, another direct impetus of the development of an investor-state dispute mechanism in BITs, from the perspective of the investor's country, was the need to respond to the problems foreign investors encountered as a result of the popularity of the Calvo Doctrine in Latin America. Carlos Calvo, an Argentinean scholar, developed a theory in the mid-nineteenth century to counteract the use of power politics and force to resolve international trade and investment disputes. The Calvo Doctrine was based on two main points:

(1) sovereign states, being internationally equal and independent, should enjoy the right to absolute freedom from interference by other states, either through force or diplomacy; and (2) while

35. Id.
36. Shenkin, supra note 27, at 549.
39. See id. This represents a significant increase from the approximately 1300 BITs in place worldwide by the end of 1998. See Beauvais, supra note 37, at 253. Even just between 2000 and 2001, the number of total BITs in effect worldwide increased by 158 from 1941. UNCTAD Website, supra note 38.
41. Id. at 1171-73.
aliens should be given equal treatment with nationals, they are not entitled to "extra" rights and privileges and thus may only seek redress in local courts.

The Calvo Doctrine essentially limited foreign investors to the same rights and remedies available to domestic investors in the host country's domestic court system, without interference by the investor's home government. This often left foreign investors unable to obtain relief. However, the changes in the global political-economic environment following World War II eventually reached Latin America, and adherence to the Calvo Doctrine slowly began to deteriorate. The role of FCNs and BITs between the United States and Europe and Latin America was of considerable importance in triggering the move away from the Calvo Doctrine and toward affording certain protections to foreign investors. Yet, in many Latin American states, this shift was slow to materialize. For instance, Mexico had traditionally adhered to the Calvo Doctrine, up to the time that NAFTA was being negotiated in the early 1990s. Thus, the inclusion of Chapter 11 was a necessary objective of both the United States and Canada during the NAFTA negotiation process. NAFTA represented "the first time that Mexico has entered into an international agreement providing for investor-state arbitration." For Mexico, the potential gains in joining NAFTA, in the form of increased market access to the United States and Canada, and increased foreign direct investment in Mexico from those countries, were so great as to induce Mexico to alter its foreign investment laws to come into compliance with

42. Jones, supra note 25, at 529-30.
44. See id.
45. See the discussion of the demise of the Calvo Doctrine in Latin America, infra Part III.A.
46. See Bhal & Kennedy, supra note 43, at 186.
47. Id.
NAFTA, thereby representing the abandonment of the Calvo Doctrine for Mexico.49

In light of the proliferation of BITs, and the move toward peaceful dispute resolution, the inclusion of binding investor-state arbitration in NAFTA should come as no surprise. None of the NAFTA Parties previously had BITs with each other.50 Furthermore, the evolution of free trade regimes has resulted in an ever-broadening scope of coverage, encompassing many aspects of international economic relations besides merely trade in goods, such as trade in services, investment, and intellectual property protection, to name a few. Yet, NAFTA is significant in that it is the first, and as of yet the only, multilateral trade agreement to include a comprehensive investment chapter providing for binding investor-state arbitration.51 As one observer noted, "NAFTA's Chapter 11 is, in essence, a tri-lateral investment treaty grafted onto an arrangement which is otherwise largely directed at establishing liberalization and fairness in the trade of goods and services."52

B. Overview of the Substance and Procedure

NAFTA Chapter 11 has three objectives: first, "to establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investments and investors"; second, "to remove barriers to investment by eliminating or liberalizing existing restrictions"; and third, "to provide an effective means for the resolution of disputes between an investor and the host government."53 Part A of Chapter 11 provides the substantive obligations of the Parties concerning the treatment of investments, while Part B establishes the

50. Robert K. Paterson, A New Pandora's Box? Private Remedies for Foreign Investors Under the North American Free Trade Agreement, 8 WILLAMETTE J. INT'L L. & DISPUTE RES. 77, 85 (2000). Note that, while NAFTA is not technically a BIT, it eliminates the need for one between any of the Parties because Chapter 11 provides comprehensive investment provisions.
51. Tollefson, supra note 14, at 142-43.
52. Haigh, supra note 17, at 129.
mechanism by which investors can resolve claims against
the host government for breaching the substantive
obligations. For the sake of brevity, this Comment will
address and consider only briefly those provisions that are
relevant to the topic at hand.

1. The Substantive Obligations (Part A). The breadth of
the investment chapter is addressed in the Scope and
Coverage provisions (Article 1101), which has been
interpreted quite broadly. Chapter 11 applies to all
measures adopted or maintained by a Party relating to: (a)
investors of another party and (b) investments of
investors of another Party in the territory of the Party.

The first substantive obligations of Chapter 11 are
national treatment (Article 1102), and Most-Favored-
Nation ("MFN") treatment (Article 1103), which
essentially require that each Party treat other NAFTA
investors and their investments no less favorably than it
treats its own investors and their investments (national
treatment) or investors or investments of third parties
(MFN treatment). A Party must confer the better of
national or MFN treatment.

NAFTA also sets up minimum standards of treatment
(Article 1105), requiring a NAFTA Party to treat
investments of investors of another Party in accordance
with customary international law principles, including "fair
and equitable treatment" and "full protection and
security." Significantly, even if a measure is not
discriminatory on its face, it may still violate Article 1105,
because "]the minimum standard described in Article 1105
does not refer to measures themselves (such as laws,

54. The definition of "measure" is extremely broad, and specifically includes
any "law, regulation, procedure, requirement or practice" of a Party. NAFTA,
supra note 22, art. 201.
55. The definition of "investor" is similarly broad, meaning anyone seeking
to make, making, or having an "investment." Id. art. 1139.
56. "Investment" is subject to a lengthy definition in Article 1139, and
includes ownership, equity, real estate, and all forms of tangible and intangible
property, including intellectual property. Id.; see also Price & Christy, supra
note 48, at 173.
57. NAFTA, supra note 22, art. 1102.
58. Id. art. 1103.
59. Id. art. 1104.
60. Id. art. 1105(1).
regulations and decisions) but to the administration of measures.\textsuperscript{61}

Performance requirements are prohibited by Article 1106.\textsuperscript{62} This prohibition is designed to eliminate trade distortions arising from such requirements, and to ensure entrepreneurial autonomy in investment decisions.\textsuperscript{63} While the imposition of certain performance requirements as a condition for receiving incentives are specifically prohibited, requirements other than those specifically listed in Article 1106 are permitted.\textsuperscript{64} Because the ability to transfer or repatriate profits and capital is vital to foreign investors, Article 1109 (Transfers) requires the Parties to freely allow all transfers that relate to investments of investors of another Party.\textsuperscript{65}

It is the expropriation provision (Article 1110),\textsuperscript{66} however, that is generating the most controversy. In fact, according to one scholar, expropriation is "the most controversial aspect of foreign investment in the past century."\textsuperscript{67} Article 1110 generally prohibits direct or indirect nationalization or expropriation, or measures "tantamount" to expropriation of NAFTA investments.\textsuperscript{68} Article 1110 provides that the expropriation of an investment of an investor is prohibited unless it is done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt, adequate compensation,\textsuperscript{69} meaning fair market value paid in G7 currency.\textsuperscript{70}

What exactly is "tantamount" to expropriation is unclear. The NAFTA definitions in Article 1139 do not include a definition of "expropriation" or of "measures tantamount to expropriation." Several claims brought under Chapter 11 have asserted that governmental regulations in the areas of the environment or human safety are tantamount to expropriation because such

\begin{align*}
\text{\quad 61. Paterson, supra note 50, at 97.} \\
\text{\quad 62. NAFTA, supra note 22, art. 1106.} \\
\text{\quad 63. Price & Christy, supra note 48, at 174-75.} \\
\text{\quad 64. Paterson, supra note 50, at 98.} \\
\text{\quad 65. NAFTA, supra note 22, art. 1109(1).} \\
\text{\quad 66. Id. art. 1110.} \\
\text{\quad 67. Paterson, supra note 50, at 102.} \\
\text{\quad 68. Price & Christy, supra note 48, at 175-76.} \\
\text{\quad 69. NAFTA, supra note 22, art. 1110(1).} \\
\text{\quad 70. Id. art. 1110(2), (4).}
\end{align*}
measures effectively nullify the investor's expectations of his investment. However, certain governmental acts are specifically not expropriatory, such as compulsory licensing of intellectual property. Furthermore, Chapter 11 explicitly excludes several listed government programs (including public education, social welfare and health) from its provisions. It does not, however, specifically mention environmental and safety measures as excluded. Article 1114, Environmental Measures, provides, "[N]othing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." At first, this provision appears to allow for broad environmental protection by the Parties, but the words "otherwise consistent with this chapter" subordinate the section to the rest of the provisions, suggesting that they must first not be expropriatory before they can be considered legitimate according to 1114.

The scope of the expropriation provision of Chapter 11 is perhaps the most widely criticized aspect of the whole chapter. Most of the controversy over the chapter, and most of the cases arising under it, focus squarely on what governmental actions are legitimate and which are "tantamount to expropriation" and thus prohibited. As the case law develops, the Chapter 11 panels are beginning to establish a few guidelines in the definition of expropriation. But because panel decisions are not binding except as

71. Paterson, supra note 50, at 103.
72. NAFTA, supra note 22, art. 1110(7).
73. Id. art. 1101(4).
74. Id.
75. Id. art. 1114(1).
76. See Paterson, supra note 50, at 105.
77. I use case law for lack of a better term, because as arbitration proceedings, decisions are not technically case law as we understand it in a common law system, and because such decisions have no precedential, or even necessarily persuasive, value.
to the Parties to the particular dispute, the development of case law is not going to clarify the scope of the Chapter.

2. The Investor-State Dispute Mechanism (Part B). The second half of Chapter 11, Part B, is devoted to the investor-state dispute settlement mechanism. The NAFTA Parties have consented in advance to the jurisdiction of Chapter 11 arbitration panels by adopting and implementing the NAFTA Agreement. There are several conditions attached to the use of the investor-state dispute mechanism in Part B. First, the claimant investor of one Party, or his investment, must have suffered loss as a result of another Party breaching a substantive provision of Part A of Chapter 11. Claims must be brought within three years of when the investor first acquired, or should have acquired, knowledge of the breach and knowledge of the loss or damage, but may not be brought within six months of the event giving rise to the breach. This latter provision is intended to encourage negotiations and consultations. In addition, the investor must notify the host Party at least ninety days before submitting the claim to arbitration.

The applicable arbitration rules are provided in Article 1120 (Submission of a Claim to Arbitration) and allow an investor to submit a claim under (1) the International Centre for the Settlement of Investment Disputes ("ICSID") Convention, if both the host country and the investor's home country are parties to the Convention, (2) the Additional Facility Rules of the ICSID Convention, if either the host country or the investor's country are a party to the Convention, or (3) the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules. The first set of rules currently cannot apply because the United States is the only NAFTA Party that is currently a party to the ICSID Convention, and the second set of rules only applies where one party is the United States or a U.S.
"Of the three procedural options, the UNCITRAL rules are the widest and most flexible." UNCITRAL arbitration is available to any United Nations member state, and thus all three NAFTA Parties may use them. In practice, the UNCITRAL Rules have been used approximately twelve times, while the ICSID Additional Facility Rules have been utilized approximately eight times. The applicable substantive law is the NAFTA agreement itself and the applicable rules of international law.

There are also several procedural conditions precedent to submission of a claim to arbitration embodied in Chapter 11 itself, independent of the procedural arbitration rules selected. The investor must, in writing delivered to the host Party, consent to arbitration in accordance with the procedures set out in the NAFTA Agreement, and must "waive the right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or other dispute settlement procedures... except for proceedings for injunctive, declaratory, or other extraordinary relief not involving the payment of damages." Because Chapter 11 arbitration panels are only able to award monetary damages (plus interest) or restitution of property, investors are not required to waive their right to seek specific relief or other relief in domestic courts.

The arbitration panel is composed of three arbitrators, one appointed by each of the disputing parties and the
third, the presiding arbitrator, chosen by agreement of the disputing parties, or appointed by the Secretary General of ICSID after ninety days. Non-disputing NAFTA Parties may also make submissions to Chapter 11 panels, upon written notice to the disputing Parties, regarding the interpretation of NAFTA. As mentioned, awards made by a Chapter 11 panel "have no binding force except between the disputing parties and in respect of the particular case." The NAFTA Parties are, by agreement, expected to honor and enforce the awards of the panels within their own jurisdiction, but should enforcement in domestic courts become necessary, all the NAFTA Parties are also signatories to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

C. Claims Decided on the Merits

It is difficult to precisely identify the number of Chapter 11 proceedings that have taken place, because there is no official case-reporting requirement. As a result, information about the cases is often incomplete and unreliable. By my count, there have been thirty-two Notices

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93. NAFTA, supra note 22, art. 1123.
94. Id. arts. 1124, 1126. Panels established according to the ICSID Rules or ICSID Additional Facility ("AF") Rules follow the procedures set forth in Article 1124 for constituting an arbitral panel. Article 1126 sets forth the procedures when the parties utilize the UNCITRAL Rules. In both cases, however, if the Parties are unable to agree on a Presiding Arbitrator, the Secretary-General of ICSID is designated to choose one from the ICSID Arbitrator roster. Id.
95. Id. art. 1128.
96. Id. art. 1136(1).
98. The NAFTA Parties do not have to make information about the cases publicly available. However, the U.S. State Department maintains a list of Chapter 11 cases involving all three Parties on its website, at www.state.gov (last visited Sept. 19, 2003). A privately run website also maintains a list of citations to Chapter 11 decisions, at http://www.naftaclaims.com (last updated Aug. 17, 2003). This is probably the most comprehensive list and the website also provides portable document file (PDF) versions of many of the documents. In addition, several investors have made information about their cases publicly available, either on their own website or through their attorney. See, for example, a list compiled by Appleton & Associates International Lawyers, NAFTA Cases, at http://www.appletonlaw.com (last visited Sept. 19, 2003).
of Intent to Arbitrate submitted, of which roughly twenty
have proceeded to the establishment or call for the
establishment of an arbitral panel.\textsuperscript{99} To date, seven Chapter
11 panels have produced an arbitration award on the
merits.\textsuperscript{100} Of the seven cases in which final awards were
rendered, the investor's claim succeeded in whole or in part
in four.\textsuperscript{101}

Because this comment is primarily concerned with the
implications of the Chapter 11 provisions, only three of the
cases brought thus far and decided on the merits under the
investor-state dispute mechanism are discussed. These
cases are illustrative of the controversy surrounding
Chapter 11, and generally highlight some of the most
problematic aspects of the chapter, particularly the scope of
the chapter and the broad meaning being given to "expropriation," and
how this is affecting the NAFTA Parties' ability to effectively regulate the environment and
human safety within its territory. The cases also illustrate
that the panels are grappling with the problem of how to
delineate between "regulations" and "expropriations," and
are in practice attempting to do so. Although panel
decisions have no precedential value,\textsuperscript{102} it is likely that they

\textsuperscript{99} The actual number may well be higher, because there is no case-
reporting requirement. See Appendix A, infra, for a list of Chapter 11 claims,
and their varying statuses. By "call for the establishment of a panel," I mean
that the investor has submitted a Notice of Arbitration (as opposed to merely a
Notice of Intent to Arbitrate).

\textsuperscript{100} The seven cases are: Azinian v. Mex. (ICSID Additional Facility), Nov.
1, 1999; Waste Management, Inc. v. Mex., No. 1, June 2, 2000; Metalclad Corp.
(UNCITRAL), Nov. 13, 2000; Pope and Talbot, Inc. v. Can. (UNCITRAL), April
10, 2001; Karpa v. U.S. (ICSID Additional Facility), Dec. 16, 2002; and ADF
to some documents, are available at http://www.naftaclaims.com (last updated

\textsuperscript{101} Metalclad Corp. v. Mex. (ICSID Additional Facility), Sept. 2, 2000,
available at www.naftaclaims.com (last updated Aug. 17, 2003) (the U.S.
company was awarded $16.685 million U.S.D.); S.D. Myers Inc. v. Can.
(UNCITRAL), Nov. 13, 2000, available at www.naftaclaims.com (last updated
Aug. 17, 2003) (the U.S. investor was awarded CAN $6.05 million, the
equivalent of $3.87 million U.S.D. in November 2000); Pope and Talbot, Inc. v.
updated Aug. 17, 2003) (partial award to U.S. investor); and Karpa v. Mex.,
Case No. ARB(AF)/99/1 (ICSID Additional Facility), Dec. 16, 2002, available at
a partial award to a U.S. investor).

\textsuperscript{102} NAFTA, supra note 22, art. 1136(1).
will be at least persuasive to future panels, as most of the arbitrators and attorneys involved are experienced in the common law tradition. And, interestingly, the decisions to date appear less favorable to investors and fatal to state sovereignty than some of Chapter 11's critics would have us believe.\footnote{See Beauvais, supra note 37, at 248 (arguing that the NAFTA tribunals have interpreted the expropriation provision rather conservatively, and that the broad interpretations thus far of the national treatment and minimum standards of treatment provisions are more troubling and should be the focus of reform.)}

1. Metalclad Corp. v. The United Mexican States.\footnote{For the various documents associated with this arbitration, see www.naftaclaims.com (last updated Aug. 17, 2003).} Metalclad Corporation, a U.S. company, initiated a case against Mexico in January 1997, alleging violations of Articles 1105 (Minimum Standards of Treatment) and 1110 (Expropriation) regarding Metalclad's development of a hazardous waste disposal facility in San Luis Potosi, Mexico.\footnote{Id.} The Mexican federal and state governments had issued permits to Metalclad in 1993, and in 1994, Metalclad complied with new environmental standards that came into effect.\footnote{Id.} When the landfill was completed in 1995, Mexican state and municipal authorities prevented Metalclad from operating it by declining to issue a building permit.\footnote{Id.} After Metalclad initiated arbitration with Mexico under the ICSID Additional Facility Rules, the state government of San Luis Potosi declared the area of the landfill a "'natural area' for the protection of a rare cactus."\footnote{Id.} The Chapter 11 tribunal upheld Metalclad's minimum standard of treatment claim, holding that Metalclad was entitled to rely on the state and federal government's assurances and the issuance of permits, as the federal government had supremacy over the municipality.\footnote{Id.} With regard to the expropriation claim, the tribunal set forth the following definition:

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

Because the municipality denied Metalclad's permit without basing it on the physical construction or defect in the site, and also because of the federal government's representations to the claimant, the tribunal found that these actions amounted to indirect expropriation and awarded Metalclad approximately $17 million in damages.111 Moreover, the broad expropriation definition alarmed Chapter 11's critics and seemed to validate their claims that Chapter 11 will be used to prevent Parties from enacting and enforcing environmental and health regulations.112

2. Pope & Talbot, Inc. v. The Government of Canada.113 Pope & Talbot, an American lumber company, brought a claim against the Canadian government in March 1999, alleging that Canada's allotment of softwood export quotas violated NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements), and 1110 (Expropriation).114 The expropriation claim is particularly important here, as the Pope & Talbot tribunal issued the first interpretation of the scope of Chapter 11's expropriation provisions.115 While the tribunal held that market access is a "property interest subject to protection under Article 1110 [expropriation],"116

111. See Beauvais, supra note 37, at 269.
113. For the various documents associated with this arbitration, see www.naftaclaims.com (last updated Aug. 17, 2003).
115. See id. at 695.
it also held that Canada's actions in relation to Pope & Talbot did not constitute so-called "creeping" or constructive expropriation, defined as actions that have the effect of "taking" the property, in whole or in large part, outright or in stages. According to the tribunal, the test is "whether... interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner." "Expropriation, creeping or otherwise, requires a 'substantial deprivation' of the enjoyment of property rights; the reduction in Pope & Talbot's profits... does not constitute such a substantial deprivation."

The Pope & Talbot tribunal continued this conservative approach by holding that the phrase "tantamount to [nationalization or] expropriation" does not "[broaden] the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of the effect." "Tantamount" means "equivalent." Measures are covered only if they achieve the same results as expropriation.

With respect to the national treatment claim, the tribunal interpreted it broadly in favor of investor protection, holding that discriminatory effects could be determinative of whether an investment had been discriminated against, and that intentional or purposeful discrimination was not necessary. By construing expropriation relatively narrowly, and national treatment and minimum standards of treatment more broadly in favor of investors, the Pope & Talbot decision underscores the point that the expropriation provision is not the sole source of concern for critics of Chapter 11, nor should it be the only target for reform.

117. Beauvais, supra note 37, at 271.
118. RESTATEMENT (THIRD) OF FOREIGN RELATIONS: STATE RESPONSIBILITY FOR ECON. INJURY TO NAT'LS OF OTHER STATES § 712 cmt. g (1987).
119. Pope & Talbot Interim Award, supra note 116, ¶ 102, at 36-37.
120. Beauvais, supra note 37, at 271.
121. Pope & Talbot Interim Award, supra note 116, ¶ 96, at 33-34.
122. Id. ¶ 104, at 38.
123. Id. at 38 n.87.
124. See Beauvais, supra note 37, at 271-72.
125. See id. at 285-87 (discussing targets for reform in NAFTA Chapter 11). Beauvais emphasizes that "[a]rticle 1110 [Expropriation] is not the first priority for short-term reform." Id. at 285.

S.D. Myers, Inc., a U.S. company, brought a $20 million NAFTA claim against Canada in October 1998 in connection with its business of disposing PCBs. The company had established a Canadian subsidiary to export the PCBs to the U.S. for disposal. The U.S. Environmental Protection Agency gave S.D. Myers permission to import PCBs in 1995, but Canada subsequently instituted an export ban. S.D. Myers claimed that the ban violated Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements), and 1110 (Expropriation).

The final decision on the merits, in November 2000, upheld the Article 1102 and 1105 claims but denied the Article 1106 and 1110 claims. S.D. Myers was awarded $3.87 million, plus interest.

The S.D. Myers tribunal took an even narrower view of expropriation than the Pope & Talbot tribunal, holding that expropriation implies a "taking" of a person's "property" for the purpose of transferring ownership of that property to the government or a third party. The tribunal attempts to distinguish an expropriation and a regulation as follows:

The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility. . . . Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that
governments will be subject to claims as they go about their business of managing public affairs.134

Because the Canadian export ban was temporary and did not transfer property to the government or other parties, the tribunal denied the expropriation claim.135 With regard to the national treatment and minimum standards of treatment claims, the tribunal upheld both while agreeing with Pope & Talbot that discriminatory intent is not necessary to establish a violation of national treatment.136

D. Summary

The three cases discussed above are significant in that each deals with a challenge to a state regulatory action, and each has been decided by a Chapter 11 tribunal, providing insight into how Chapter 11 is being used in practice. Although the expropriation provision has a potentially broad scope, in practice, the tribunals are approaching the issue rather conservatively.137 A separate opinion in S.D. Myers, issued by Dr. Bryan Schwartz, one of the three arbitrators, indicates that the arbitrators are at least aware that Chapter 11 may be used to rollback and "chill" environmental and safety regulation.138 Another possible reason for the restraint shown thus far is the need to preserve the legitimacy of NAFTA in the United States. NAFTA represents possibly the most controversial trade

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134. Id. ¶¶ 281-282, at 69.
135. See id. ¶¶ 287-288, at 81.
136. Id. ¶¶ 252-256, at 62-63. In this case, the tribunal found that there was discriminatory intent, in that Canada's export ban was in part the result of a desire to maintain a PCB-processing industry in Canada in the future. Id. ¶ 255, at 64. The tribunal considered this goal legitimate, but found the means ill-suited, as nondiscriminatory alternatives were available. Id.
137. See Beauvais, supra note 37, at 285-86 (arguing that the expropriation provision has not been as problematic as critics feared).
138. Dr. Schwartz, of Canada, was one of the three S.D. Myers arbitrators (the other two arbitrators were Edward C. Chiasson of Canada and J. Martin Hunter, Presiding Arbitrator, of England). Dr. Schwartz' separate opinion sympathizes with the critics of NAFTA Chapter 11 but also emphasizes that regulatory action by governments are not legitimate Article 1110 expropriation claims. See S.D. Myers Inc. v. Can., Concurring Final Merits Award, Separate Opinion by Dr. Bryan Schwartz, Nov. 12, 2000, ¶¶ 202-207, available at www.appletonlaw.com/cases (last visited Oct. 24, 2003).
legislation passed in U.S. history.\textsuperscript{139} Outspoken critics stirred up controversy in Congress, and the passing of NAFTA into law was relatively close.\textsuperscript{140} For those involved in Chapter 11 arbitration, and litigation and arbitration under the other dispute resolution provisions of NAFTA, the need to preserve the legitimacy of NAFTA to maintain public support may be the underlying policy of the decisions and awards rendered thus far.\textsuperscript{141}

II. SUPPORT FOR AND CRITICISM OF CHAPTER 11

Taking into consideration the substance and procedure of Chapter 11, explained above, and the examples of cases decided under it, following is a brief summary of the arguments both for and against private party direct access to dispute settlement against sovereign states in general, and the investor-state dispute mechanism of NAFTA Chapter 11 in particular.

A. Investor-State Dispute Settlement is a Positive Feature of Trade Agreements

Proponents of private party direct access to international dispute resolution mechanisms argue that such access is necessary to depoliticize trade relations.\textsuperscript{142} As a general rule, if a private party wants to challenge a trade practice of another state, it must get its government to act on its behalf, or espouse its claim.\textsuperscript{143} The results are often unsatisfactory for the private party for a variety of reasons,

\textsuperscript{139} See I.M. Destler, American Trade Politics 222-33 (3d ed. 1995) (discussing the political controversy surrounding NAFTA in the broader context of American trade politics in the twentieth century).

\textsuperscript{140} The final vote in the House of Representatives was 234 to 200, and final affirmation in the Senate by 61 to 38. See Judith H. Bello and Alan F. Holmer, The North American Free Trade Agreement: Its Major Provisions, Economic Benefits, and Overarching Implications, in NAFTA: A New Frontier in International Trade and Investment in the Americas 1 (Judith H. Bello et al. eds., 1994).

\textsuperscript{141} See David Lopez, Dispute Resolution Under NAFTA: Lessons From the Early Experience, 32 Tex. Int'l L.J. 163, 206-07 (1997) (discussing the importance of internal domestic politics as a constraint on the NAFTA Parties use of the various dispute resolution mechanisms in the Agreement).

\textsuperscript{142} See, e.g., Schleyer, supra note 2, at 2277; Price & Christy, supra note 48, at 167.

\textsuperscript{143} Schleyer, supra note 2, at 2296.
such as the home government declining to raise the claim because it may affect non-trade politics with the foreign state, or the two nations reach an agreement that has little to do with the initial claim. Private parties should be given direct access, it is argued, because they are not as susceptible to political pressures as national governments, and private claims would be less likely to damage diplomatic relations between countries because they would not represent the official position of the government.

Other proponents of private party direct access point to the declining role of the nation state in international economic activity and the increasing dominance of private actors, such as multinational corporations and nongovernmental organizations. The need to establish and enforce international standards of business conduct necessitates extending standing under international law to private entities as against foreign state parties. Without a means for private actors to enforce compliance with international rules, the credibility and legitimacy of such rules are undermined. In the context of NAFTA, according to one commentator, "[m]aking the governmental parties directly accountable to those whose economic interests may be unlawfully harmed . . . is our best assurance that NAFTA's highest goals will be achieved."

A third argument is more pragmatic in nature. Investor-state dispute resolution is hardly novel. There has been a virtual explosion in Bilateral Investment Treaties since the 1970s, and the U.S. Model BIT has included investor-state arbitration since 1981. NAFTA Chapter 11 is significant only to the extent that it is essentially a trilateral investment treaty contained within a free trade agreement. NAFTA Chapter 11 does not expand upon the protections already afforded foreign investors in nations with which the U.S. has a BIT in place. Furthermore, the Chapter 11 dispute regime is a necessary "shield" to protect

144. See id. at 2297.
145. See id. at 2277.
146. See Paterson, supra note 50, at 79.
147. Id.; see also Schleyer, supra note 2, at 2293.
148. See Paterson, supra note 50, at 119.
149. Haigh, supra note 17, at 133.
150. See UNCTAD Website, supra note 38 (discussing the rapid expansion of BITs worldwide, particularly among the developing countries).
151. See Haigh, supra note 17, at 129-30.
foreign investors from unfair trade policies of their host state.  

B. Investor-State Dispute Settlement is a Negative Feature of Trade Agreements

The most prevalent criticism of Chapter 11 is that the NAFTA Parties have eroded their national sovereignty and ability to enact domestic laws because they are now susceptible to challenges from foreign investors that such regulations have injured their investments. Most of the concern here focuses on the expansive meaning of "expropriation." The Metalclad decision, which is to date the only successful expropriation claim decided on the merits, exacerbated this early fear by broadly construing "expropriation." Rather than serving as a means for foreign investors to protect themselves from improper host state action with regard to the investment, "Chapter 11 has become a 'sword' for investors, allowing them to attack the NAFTA countries, rather than the 'shield' it was intended to be." That is, foreign investors are wielding Chapter 11 more as an offensive weapon to attack domestic laws and regulations that happen to affect their investment than as a defensive protective measure to redress actual wrongs by the host state.

Chapter 11 critics also characterize it as "a Bill of Rights for transnational corporations, conferring on them the right to sue host governments for enacting bona fide, non-discriminatory public health and environmental regulations." Furthermore, critics allege, Chapter 11 confers broad rights on multinational corporations, without any corresponding international obligations. Finally,
contrary to the "polluter pays" principle, Chapter 11 forces governments to "pay polluters to stop polluting."157

Another argument against Chapter 11 focuses on the lack of transparency of the process and the relative lack of procedural safeguards.158 There is no public notification or disclosure requirement in Chapter 11 arbitrations.159 Civil society critics demand more openness "to inform the public how its money is being spent; to safeguard the fairness of the decision-making process; and to reveal whether the government is functioning properly."160

Private participation in trade dispute resolution may also have a negative effect on the free trade movement in general. The enhanced negative publicity may be fueling the free trade critics' ability to promote protectionist ideologies.161 This is a particularly acute concern given the negative publicity stemming from Chapter 11 proceedings already. In the United States, trade politics is becoming an increasingly salient issue among lobby groups and civil society. One need only recall the violence and voracity of the 1999 Seattle protests against the WTO, or the difficulty of passing NAFTA and President Clinton's subsequent failure to receive a renewal of fast-track authority.162 These events should serve as an important reminder to the negotiators of the FTAA—ignore the non-economic consequences of free trade and investment at your peril, as

158. Id. at 163.
159. Id.
161. See, e.g., Schleyer, supra note 2, at 2294-95 (discussing the various arguments advanced against private access to the WTO, and trade dispute mechanisms in general).
162. See, e.g., Charles Tiefer, "Alongside" the Fast Track: Environmental and Labor Issues in FTAA, 7 MINN. J. GLOBAL TRADE 329, 329-30 (1998) (discussing the controversial nature of trade politics in Congress); Kevin C. Kennedy, A WTO Agreement on Investment: A Solution in Search of a Problem?, 24 U. PA. J. INT'L ECON. L. 77, 185 (2003) (discussing the various causes of the protests at the 1999 WTO Seattle Ministerial Conference); Bruner, supra note 24, at 17-18 (discussing how controversy over the inclusion of environmental and labor issues in trade agreements resulted in President Clinton's failure to receive a renewal of fast-track negotiating authority). Fast track authority was renamed Trade Promotion Authority ("TPA"), and such authority was given to President Bush in August 2002. See Gary G. Yerkey, White House Set to Press Congress on Export Control Legislation This Fall, 19 Int'l Trade Rep. (BNA) 32, 1374 (Aug. 8, 2002).
trade politics and policies are no longer the "low" politics of the past, ignored by the majority of the public.163

C. Investor-State Dispute Mechanisms are Inevitable in Future Trade Agreements

Both sides of the argument represent legitimate concerns over the process and substance of Chapter 11, and free trade and investment regimes in general. However, given the multitude of BITs containing similar provisions in force, the fact that NAFTA is almost a decade old, and that the new FTAA draft agreement already contains an investment provision that is substantially identical to Chapter 11, it seems that the investor-state dispute mechanism is certain to become a permanent feature of, at the very least, Western Hemispheric trade relations, if not the world trading regime at large. Evidence of this trend can be found in the recently completed United States-Chile Free Trade Agreement ("FTA"), which provides an investment chapter very similar to NAFTA Chapter 11, including investor-state arbitration.164 The criticisms, then, should be considered in light of proposals to improve the mechanism for inclusion in future trade agreements, such as the FTAA, a topic taken up in Part V.

III. AN INVESTOR-STATE DISPUTE MECHANISM IN THE FTAA

The Free Trade Area of the Americas negotiations are currently underway, with the expectation that negotiations will conclude by 2005.165 Thus far, the negotiations can be

163. Indeed, according to one observer, "[p]olls consistently showed that the vast majority of Americans opposed NAFTA and the negotiation of any new deals that the public linked with globalization, the loss of U.S. jobs, the decline of wages, and a lower living standard." Michael C. McClintock, Sunrise Mexico; Sunset NAFTA-Centric FTAA—What Next and Why?, 7 Sw. J. L. & TRADE AM. 1, 7 (2000).


165. See Bruner, supra note 24, at 7.
characterized as a bargaining process between the trading blocs led by the U.S., for NAFTA, and Brazil, for the Southern Common Market ("Mercado Comun del Sur" or "MERCOSUR"), as each attempts to gain the upper hand.\textsuperscript{166} MERCOSUR and NAFTA are dissimilar trade agreements in a number of ways.\textsuperscript{167} For example, MERCOSUR creates a customs union for Brazil, Argentina, Paraguay and Uruguay, and it has Economic Complementation Agreements with Mexico, Chile, Bolivia, and the Andean Community, while NAFTA is a less comprehensive free trade agreement among the United States, Mexico and Canada.\textsuperscript{168} Furthermore, when compared with MERCOSUR, NAFTA dispute resolution is a relatively transparent process.\textsuperscript{169} Thus, the status of investor-state arbitration under MERCOSUR is somewhat unclear, although it does appear that MERCOSUR provides for such dispute resolution following unsuccessful consultations.\textsuperscript{170}

The second draft text of the FTAA, released in November 2002, includes an investment chapter similar to that contained in NAFTA.\textsuperscript{171} However, much of the Chapter

\textsuperscript{166} Id. at 6. The FTAA negotiating principles allow countries to negotiate individually or as members of a sub-regional bloc. Brazil championed this as a means for economically less powerful nations to increase their bargaining power, and thus MERCOSUR, of which Brazil is the largest nation, has chosen to negotiate as a bloc. See id. at 6-7. For a discussion of the difficulties facing the integration of MERCOSUR (a Latin American customs union composed of Brazil, Argentina, Uruguay and Paraguay) and NAFTA (a free trade agreement) see Gilmore, \textit{supra} note 21.


\textsuperscript{168} In free trade areas, members remove internal tariffs but maintain individual external tariffs vis-à-vis non-FTA countries, while a customs union is a free trade area plus the members adopt a common external tariff. MERCOSUR aspires to eventually become a common market, which is a customs union that has also eliminated all barriers to the free movement of the factors of production among the participating states. See, e.g., McClintock, \textit{supra} note 163, at 46-47; Bruner, \textit{supra} note 24, at 28.

\textsuperscript{169} See Lopez, \textit{supra} note 167, at 27.

\textsuperscript{170} See David A. Gantz, \textit{The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?}, \textit{14 ARIZ. J. INT'L \& COMP. L.} 381, 403 n. 140 (1997) (stating that MERCOSUR does not provide for investor-state arbitration to the same extent as NAFTA Chapter Eleven); \textit{but see BHALA \& KENNEDY, supra} note 43, at 246 (apparently acknowledging a mechanism similar to NAFTA Chapter Eleven in MERCOSUR).

\textsuperscript{171} FTAA Draft, \textit{supra} note 23.
remains open for negotiation, as almost every provision contained therein is still in brackets.\textsuperscript{172} The following discussion provides a general overview of several issues that are important in considering an investor-state dispute mechanism in the FTAA. Besides the practicalities of completing such a large-scale investment agreement, there are several issues that are particular to Latin America, principally the historical dominance of the Calvo Doctrine and the increasing salience of Latin American environmental politics and protection.

A. The Calvo Doctrine in Latin America

As discussed in relation to Mexico, above, the Calvo Doctrine has traditionally been espoused by Latin American countries in response to diplomatic intervention of foreign governments on behalf of their own nationals in disputes with host countries.\textsuperscript{173} The main goal of the doctrine was to put the foreign investor in the same position as a national investor of the host country.\textsuperscript{174} The exclusive remedy for foreign investors was the domestic court system of the host.\textsuperscript{175}

Latin America has undergone something of a paradigm shift in recent years, and by the 1990s had clearly moved away from import substitution models of development and toward export-led growth strategies.\textsuperscript{176} Although levels of foreign investment and receptivity to it in Latin America have fluctuated over the years, this shift in development strategies has spurred the desire to attract more and more foreign direct investment ("FDI"), to bring much-needed currency into the countries to fund economic growth and import new technology.\textsuperscript{177} Yet, capital-exporting nations were reluctant to heavily invest in Latin America for a

\textsuperscript{172} When governments negotiate an agreement, they place any language that has not been definitely accepted by all negotiators in brackets. C. O'Neal Taylor, \textit{The Future of International Economic Dispute Resolution in the Western Hemisphere (Dispute Settlement in the FTAA)}, 42 S. Tex. L. Rev. 1265, 1267 (2001).

\textsuperscript{173} See BHALA \& KENNEDY, supra note 43, at 186.

\textsuperscript{174} Id.

\textsuperscript{175} See id.

\textsuperscript{176} See Manning-Cabrol, supra note 40, at 1194.

\textsuperscript{177} See Edward A. Fallone, \textit{Latin American Laws Regulating Foreign Investment}, SB04 ALI-ABA 325, 327 (July 8, 1996).
number of reasons, among them the use of so-called Calvo Clauses in foreign investment contracts, which limit dispute resolution to the host country's domestic courts, fears of currency fluctuations, restrictive foreign investment laws, and a history of nationalizing foreign entities with less-than-adequate compensation.\(^\text{178}\)

Along with the desire to attract foreign investment, the decreasing role of the nation state in international economic relations and the emergence of international standards of treatment are also driving the abandonment of the Calvo Doctrine.\(^\text{179}\) According to one observer, the Calvo Doctrine has always strived for equality between nationals and foreigners—and now, most international investment regimes contain an equality standard of treatment provision (so-called "national treatment").\(^\text{180}\) Thus, the Calvo Doctrine has become superfluous in this new world order.\(^\text{181}\)

The abandonment of the Calvo Doctrine in Latin America is evident in several ways. First, arbitration is increasingly common in Latin America, where it was once rejected and rarely used.\(^\text{182}\) When the ICSID Convention was signed in 1964, not a single Latin American country ratified it.\(^\text{183}\) Although Jamaica ratified it in 1966, Trinidad and Tobago in 1967, and Guyana in 1969, signature and ratification really gained momentum in the mid-1980s and continues to this day. For example, Guatemala just recently ratified the Convention on January 21, 2003.\(^\text{184}\) Today, among the thirty-four countries that are negotiating the FTAA, twenty-three have ratified ICSID,\(^\text{185}\) three countries

\(^{178}\) See id. at 326-27, 330-31.

\(^{179}\) See Manning-Cabrol, supra note 40, at 1180 (discussing the new world order where supranational organizations and individuals play an increasing role, and international standards of treatment decrease the need for diplomatic protection by home countries).

\(^{180}\) See id. at 1195.

\(^{181}\) Id. at 1198.

\(^{182}\) Id. at 1184.


\(^{185}\) Argentina, the Bahamas, Barbados, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, Trinidad
are signatories, and only eight countries have no affiliation with ICSID whatsoever.

Second, the U.S. Bilateral Investment Treaty program with Latin America undoubtedly contributed to the demise of the Calvo Doctrine, beginning in the early to mid-1980s when BITs began to almost universally provide for investor-state arbitration. The first U.S. BIT with a Latin American country was signed with Panama on October 27, 1982. The United States has since negotiated BITs with Argentina, Bolivia, Chile, Ecuador, Grenada, Haiti, Honduras, Jamaica, Nicaragua, and Trinidad and Tobago. Mexico effectively abandoned the Calvo Doctrine by adopting its 1993 Foreign Investment Law, which brought Mexico into conformity with NAFTA. Similarly, Peru abandoned the Calvo Doctrine in its 1993 Constitution, by providing that controversies arising between a foreign investor and the government of Peru may be submitted to international arbitration rather than Peruvian domestic courts.

In sum, the Calvo Doctrine may have, in the recent past, posed a formidable obstacle to including investor-state arbitration in the FTAA. However, a number of political forces have slowly eroded the necessity of Calvo Clause protections in Latin America. Furthermore, the desire of attracting foreign investment in Latin America is motivating the shift toward acceptance of investor-state dispute mechanisms as well as the acceptance of the substantive protections afforded by investment treaties.

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186. The signatory-only countries are Belize, Dominican Republic, and Haiti. See id.
187. Antigua and Barbuda, Brazil, Canada, Dominica, Guyana, Mexico, St. Vincent and the Grenadines, and Suriname. See id.
189. The FTAA Website maintains a list of all Bilateral Investment Treaties (BITs) that the FTAA members have signed, Free Trade Area of the Americas-FTAA Bilateral Investment Treaties, at http://www.alca-ftaa.org/cp_bits/english99/listagrs.asp#Bilateral%20Investment%20Treaties (last visited Oct. 1, 2003).
190. See Fallone, supra note 177, at 336 (noting that without NAFTA dispute resolution procedures, Mexican law required foreign investors to sign so-called Calvo Clauses).
191. See id. at 338.
However, as Brazil is the major player in the FTAA negotiations for Latin America, and Brazil is one of the few countries that is not associated with ICSID or in a BIT with the United States, it is possible that Brazil may be less willing to abandon the Calvo Doctrine as some of her neighbors. MERCOSUR currently does not provide for binding investor-state arbitration without the investor first seeking consultations, and its investment provisions are decidedly less comprehensive than those of NAFTA. Until recently, Chile seemed similarly attached to Calvo principles, and with the United States' failure to negotiate Chile's accession to NAFTA and Chile's subsequent association with MERCOSUR, it appeared Chile would remain that way for some time. An encouraging sign emerged very recently, however, with the United States and Chile entering into a bilateral Free Trade Agreement, which provides investment protection and investor-state arbitration similar to NAFTA Chapter 11. Whether the remaining Latin American countries similarly still attached to Calvo principles will eventually follow suit, especially in investment agreements with non-Latin American countries, remains unknown. Yet, it is difficult to envision the United States accepting the FTAA without an investor-state arbitration mechanism. Thus, this issue may present a major stumbling block in the FTAA negotiations as controversy continues to rise over the merits of investor-state arbitration.

B. Environmental Politics in Latin America

The strongest criticism of Chapter 11 is that foreign investors use it to challenge legitimate national environmental regulations on the grounds that they are

192. See Gantz, supra note 170, at 403-04 (discussing the problems associated with merging NAFTA and MERCOSUR into the FTAA).
193. Fallone, supra note 177, at 334-35 (discussing dispute resolution under Chile's Foreign Investment Law as recently as 1996, which essentially followed the Calvo Doctrine model of providing exclusively for local remedies). Chile was slated, at one point, to become the fourth NAFTA Party, indicating its willingness to adhere to Chapter 11 and abandon the Calvo Doctrine as Mexico did. See McClintock, supra note 163, at 3-6 (discussing how the President's failure to receive fast-track negotiating authority made it impossible to negotiate the terms of Chile's accession into NAFTA).
194. See U.S.-Chile FTA, supra note 164.
"tantamount to expropriation" of their investment. The *Metalclad* decision exacerbated this fear among environmentalists and other civil society critics when it awarded almost $17 million in damages in connection with the investor's hazardous waste facility in Mexico. Indeed, a significant number of the cases brought under Chapter 11 thus far deal with environmental regulation, public health, or resource management policies. Many environmentalists oppose the inclusion of an investor-state dispute mechanism in the FTAA for fear that it will be used to challenge environmental and public health laws of those governments. Interestingly, it is also for this reason that Canadian trade ministers have demonstrated eroding support for investor-state dispute settlement, saying that they will not ratify the FTAA if it includes a provision similar to NAFTA Chapter 11.

Although Latin America has abundant natural resources, it has traditionally allowed exploitation of those resources as a means to economic development. "As a result of this relentless drive to develop, [the region] acquired not only a reputation as a haven for environmentally negligent industries, but also a host of environmental problems that threaten the region's biodiversity and human health." Yet recently, and in response to two complementary sources of pressure—growing concern from Latin American citizens and environmental NGOs and increasing widespread awareness of the environmental side effects associated with increased international trade—many Latin American countries have adopted much stronger environmental laws. Many international environmental and development organizations see this as a step in the right direction for Latin America, as countries find new ways to develop

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196. According to one earlier observer, of the eighteen claims filed at the time of his writing, eleven had dealt with at least one of these issues. See Tollefson, supra note 14, at 149.
197. See Jessica M. Johnson, *The Free Trade in the Americas Agreement: Free Trade or Export of Environmental Problems?*, 2001 COLO. J. INT'L ENVTL. L & POL'Y 71, 74 (2001) (citing opposition to the inclusion of Chapter 11 in FTAA from environmental groups such as the Sierra Club and Friends of the Earth).
200. See id. at 528.
economically while also taking steps to protect their environment and natural resources. 201 But the fact remains that many of Latin America’s national environmental regulations, and especially the enforcement thereof, are still below the standards of the NAFTA Parties. 202

The lower environmental standards in Latin America raise some important issues. The most significant is how to prevent the lower standards from creating a foreign investment "race to the bottom." Those countries with less strict environmental laws make doing business there less costly, 203 and many Latin American countries have decided to maintain the lower standards in order to attract investment. 204

This race to the bottom was also an issue when the Canada-U.S. Free Trade Agreement 205 ("CUSFTA") was extended to Mexico and NAFTA was created. As a result of political pressure in the United States, the newly elected Clinton Administration negotiated supplementary labor and environment "side agreements" to dispel fears of lenient regulations and enforcement in Mexico. 206 To the United States, the inclusion of the side agreements was a political necessity, "to allay the primary American suspicion of the agreement prior to its adoption: that lax standards south of the border would prompt industry to save money on environmental compliance by relocating to such areas." 207 Such side agreements may again become necessary to the NAFTA Parties in the process of negotiating the FTAA, especially to Mexico, which had to improve its enforcement of environmental laws when NAFTA came into force, and will not want to "lose" foreign investment to those Latin American countries with lower standards and lax

201. See id. at 579.
203. Id. at 332.
204. Id.
207. Rosencranz, supra note 199, at 539.
enforcement. But whether the Latin American countries will be willing to agree to such provisions is doubtful, as they are likely to view such requirements as an infringement on their national sovereignty\textsuperscript{208} and their ability to compete internationally\textsuperscript{209}.

In summary, Latin American integration into the FTAA faces at least two significant challenges with regard to environmental issues. First, the use of Chapter 11-like investor-state arbitration should be a source of concern for those who do not wish to see Latin American environmental regulations "chilled" or even clawed back. The newly developing environmental awareness in some Latin American countries is a step in the right direction for these countries, and concern that investor-state arbitration will have a negative impact on new environmental regulation is well-founded. For example, according to author Howard Mann of the International Institute for Sustainable Development, between 1994, when NAFTA came into force, and 2001, the Canadian government enacted only two new environmental regulations, and both have been challenged\textsuperscript{210}. Second, the goal of attracting foreign investment in Latin America may cause some countries to resist increasing environmental enforcement standards,\textsuperscript{211} and thus a mechanism similar to the environmental side agreement of NAFTA may be necessary to both level the playing field and promote sustainable development. The tension between the promotion of free trade and investment on the one hand, and environmental protection on the other, is likely to generate heated controversy as the negotiations for the FTAA conclude and the ratification process commences.

\begin{footnotesize}
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\item 208. See Lazega, supra note 202, at 331-32 (noting that Latin America may perceive U.S.-imposed environmental standards as an attempt at cultural imperialism and domination).
\item 209. See id. at 332-33 (citing the reluctance of many Latin American countries to limit their competitive advantage in "low wages and regulatory costs and . . . natural resources" by agreeing to be bound by U.S. environmental standards).
\item 210. See Summit-Environment-Chapter 11, supra note 198.
\end{itemize}
\end{footnotesize}
C. A Multilateral Agreement on Investment

No discussion of investment treaties and investor protections would be complete without at least a brief consideration of the difficulty of negotiating a multilateral treaty that includes investment provisions. A comprehensive multilateral treaty on foreign investment currently does not exist.\footnote{212} NAFTA contains a comprehensive investment chapter, but it only covers three countries, while the Trade Related Aspects of Investment Measures ("TRIMs") Agreement applies to every member state of the WTO, but it creates only minimal obligations. "One major reason for the difficulty in establishing an international treaty on investments has been the great difficulty in striking a compromise between industrialized nations' desire for security of their investments and developing nations' desire for flexibility."\footnote{213} In 1995, the Organization for Economic Cooperation and Development began negotiating the Multilateral Agreement in Investment, which would be a comprehensive investment treaty containing an investor-state dispute mechanism among the twenty-nine members, most of which are developed countries.\footnote{214} The MAI Negotiating Text revealed that its provisions were essentially identical to NAFTA Chapter 11.\footnote{215} Thus, it was susceptible to many of the same criticisms levied at Chapter 11, especially with respect to environmental protection and sovereignty. Yet the MAI was even broader than Chapter 11. Specifically, it potentially applied to both portfolio investments and foreign direct investment.\footnote{216} This would effectively have extended the benefits of the MAI and its investor-state dispute mechanism to investors from non-OECD countries, because non-OECD investors would be able to establish shell corporations in MAI member countries to take advantage of MAI benefits.\footnote{217} Essentially, almost any corporation in the

\footnote{212}{Baker, supra note 20, at 340.}
\footnote{213}{Id.}
\footnote{214}{Wagner, supra note 211, at 481.}
\footnote{215}{Id. at 483.}
\footnote{216}{See Mark Vallianatos, De-Fanging the MAI, 31 CORNELL INT'L L.J. 713, 714 (1998).}
\footnote{217}{Id. at 714-15.}
world would have legal standing under the MAI, regardless of whether their home country is an MAI Party.\footnote{218 Id. at 715.}

Another significant problem with the MAI had to do with the nature of the negotiating parties. The OECD is dominated by the wealthiest of nations, meaning the MAI focused mostly on the concerns of multinational corporations, rather than the concerns of the developing nations that host investment.\footnote{219 See Jürgen Kurtz, A General Investment Agreement in the WTO? Lessons From Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, 23 U. PA. J. INT'L ECON. L. 713, 714 (2002).} Two major problems arose during the MAI negotiations: (1) disputes among the negotiating states, particularly the United States, Canada and the European Union, over exemptions from MAI provisions for cultural industries and preferential trade agreements, and (2) an aggressive campaign against the MAI by an international coalition of NGOs, opposed to the MAI on similar grounds to those given for opposing NAFTA Chapter 11, specifically the environmental and other negative consequences of economic globalization.\footnote{220 Id. at 758-59.}

Ultimately these troubles overwhelmed the negotiations: the MAI was a failure, and in October 1998, the negotiations were abandoned as a result of concerns that the agreement would negatively affect national sovereignty, labor rights and the environment.\footnote{221 See id. at 761; Wagner, supra note 211, at 481.}

The Uruguay Round of GATT negotiations, which resulted in the creation of the World Trade Organization in 1995, managed to reach a minimal agreement on TRIMs,\footnote{222 See Agreement on Trade-Related Investment Measures, reprinted in Uruguay Round Trade Agreements, Statement of Administrative Action 1, H.R. Doc. 316, 103d Cong., 1448 (1994) [hereinafter TRIMs Agreement].} to which all WTO members are obligated, albeit to varying degrees.\footnote{223 See Kennedy, supra note 162, at 135-39 (summarizing the provisions of the TRIMs Agreement).} TRIMs requires national treatment, and lists certain actions that are inconsistent with this principle, such as performance requirements.\footnote{224 Id. at 136. Article 2.2 of the TRIMs Agreement provides an illustrative list of the TRIMs that are inconsistent with the GATT 1994. See TRIMs Agreement, supra note 222, art. 2.2, at 1448.} It also allowed developing countries to "deviate temporarily" from the national treatment obligation, which diminished the
effectiveness of the agreement. Furthermore, the dispute settlement provision of TRIMs is similar to the rest of the WTO, in that it is strictly a state-state dispute mechanism, and private parties, including investors, have no standing. In light of this, the NAFTA provisions are much more comprehensive, although limited, of course, to the three NAFTA Parties.

The FTAA will be composed of not only two of the most developed countries in the world, the United States and Canada, but also several of the least developed countries. In addition, it will encompass thirty-four separate states, whereas current investment treaties involve far fewer-BITs involve only two countries and NAFTA involves only three. It remains to be seen whether the scale of the FTAA or the disparity in development among its negotiating parties will affect the negotiation of the investment provision. If the MAI and TRIMs agreements are any indication, the prospects are not overwhelmingly optimistic.

IV. IMPROVING THE INVESTOR-STATE PROVISIONS OF NAFTA AND FOR FUTURE AGREEMENTS

As we have seen, NAFTA Chapter 11 is a source of controversy in the debate over the merits of liberal trade and investment. Some argue that it is an assault on state sovereignty and that it chills the ability of democratic governments to protect public health and the environment within their own territory. Others argue that in this modern era, where private actors are increasingly dominant in international economic relations, a mechanism whereby private parties can resolve disputes against states is a welcome innovation. Regardless of the merits of either argument, one thing seems certain—the investor-state dispute mechanism is here to stay. It is a feature of

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225. See Kennedy, supra note 162, at 138 (observing that while the developed countries must eliminate any inconsistent TRIMs within two years, the developing countries have five years and the least-developed countries have seven years to do so).
226. See Kurtz, supra note 219, at 787 (discussing the unlikely possibility that WTO negotiators will include an investor-state dispute settlement procedure similar to NAFTA Chapter 11 in a WTO agreement).
227. For further discussion of these criticisms see, for example, Jones, supra note 25, at 545.
228. See, e.g., Paterson, supra note 50, at 79.
NAFTA, which has been in force for nearly a decade.\footnote{NAFTA came into force in the United States in January, 1994. See 19 U.S.C. § 3311(b).} The ICSID has been in existence since 1966.\footnote{For more information about the purpose and structure of ICSID, a World Bank Agency, see their website, at http://www.worldbank.org/icsid (last visited Oct. 10, 2003).} There are over 2000 Bilateral Investment Treaties in force worldwide, most of which provide for investor-state arbitration.\footnote{UNCTAD Website, supra note 38.} The likelihood that investor-state arbitration will be incorporated into the FTAA is high—the November 2002 draft text already contains such a provision.\footnote{See FTAA Draft, supra note 23.} Furthermore, the United States is adamant that investor-state arbitration be included in the FTAA.\footnote{Proposed Investor-State Provision in FTAA Opposed, 18 Int'l Trade Rep. (BNA) 479 (March 22, 2001).}

Given this probability, it is nevertheless important to consider how the investment provisions of NAFTA Chapter 11 can be improved, both for NAFTA itself and for inclusion in the FTAA. Only by learning from past mistakes can we avoid repeating them. As the FTAA will be the largest regional trading bloc in the world, the negotiating parties must be careful not to become "Frankenstein."\footnote{See Haigh, supra note 17, at 125 (citing the Random House Dictionary definition of Frankenstein as "... a person who creates a monster or destructive agency that he cannot control or that brings about his own ruin").} Therefore, the foregoing critique should serve as an impetus to refine the investment provisions of Chapter 11, and suggestions on how to do so are already emerging from the literature on this subject. These suggestions can be grouped into four general categories—Definitional, Procedural, Institutional, and Environmental.

A. Narrow and Explicit Definitions

Many of the terms used in NAFTA Chapter 11 are either broadly defined or not defined at all and thus subject to ambiguity. Among the most significant of these are "expropriation," "measure," and "national treatment." As one commentator put it, "[n]o one is exactly sure what a 'measure tantamount to nationalization or expropriation'
really means, and... no one can be sure what the limits to 'national treatment' will be.'

With respect to expropriation, we have seen that early Chapter 11 tribunals have in practice interpreted the term conservatively, limiting its scope to the customary international law definition of expropriation, and nothing more. In addition, these tribunals have interpreted the customary international law standard of expropriation as requiring substantial or complete deprivation of economic use of the investment. However, although the expropriation provision has not in fact created the problems its critics feared, it is still advisable that the NAFTA trade ministers, and the FTAA negotiators, attempt to incorporate the tribunals' early decisions on this issue into the agreement itself, as the decisions are currently not binding on future tribunals.

Similarly, the term "measure" is overbroadly defined to include "any law, regulation, procedure, requirement or practice" of a host government. A "measure tantamount to expropriation," then, could be any government measure enacted for a legitimate purpose as part of the host state's police powers. A measure may even be a governmental statement of intention to introduce legislation, which essentially allows foreign corporations from another Party to influence the passage of legislation that would otherwise be legitimate behavior for sovereign governments to pursue. To limit what "measures" can be challenged by an investor, tribunals should consider not whether the effects of the measure are expropriatory, but whether the host state purpose was expropriatory or a legitimate exercise of

235. Jones, supra note 25, at 553.
236. See Beauvais, supra note 37, at 285.
237. Id.
238. See NAFTA, supra note 22, art. 1136.
239. Id. art. 201(1).
240. See Haigh, supra note 17, at 125; see also Ethyl Corp. v. Can., 38 I.L.M. 708 (1998). In Ethyl, a U.S. investor submitted a Notice of Arbitration while the legislation that it wished to challenge as a "measure tantamount to expropriation" was still pending. Id. at 725. The tribunal held that Canada's jurisdictional objections, based on Ethyl having "jumped the gun" by filing before there was even a measure within the meaning of article 1101, was nevertheless moot because the legislation had in fact been signed into law by the time the tribunal was hearing the case, a fact that Canada itself conceded. Id. at 726.
its police powers. Furthermore, measures should be limited to those actually enacted, and not merely proposals, to avoid interference with the legislative policy-making process.

The national treatment and minimum standard of treatment claims have, on the whole, been more prevalent than the expropriation claims. The problem is that virtually any economic injury, regardless of substantiality, is compensable. The Pope & Talbot tribunal held that, with respect to a breach of the national treatment requirement, although discriminatory intent is relevant, it is not necessary. '[T]he provisions function as a general equitable redress of alleged wrongs against investors.' A pending Chapter 11 claim underscores the problems associated with the national treatment and minimum standard of treatment provisions. In October 1998, the Loewen Group, a Canadian company, brought a $725 million claim against the United States. The claim alleged, among other things, that the $400 million in punitive damages that a Mississippi jury awarded Loewen's former business partner in a $5 million contractual dispute was "tantamount to expropriation," a violation of Article 1110, and that it was not afforded national treatment in the U.S. courts, as required by Article 1102. In addition to this jury award, Mississippi state law requires a bond of 125 percent of the judgment to stay the judgment pending appeal, which Loewen was unable to afford. Loewen settled the suit with its former U.S. business partner for $175 million, and then sued the United States for $725 million, arguing that this "coerced" settlement amounted to an expropriation within NAFTA Article 1110. The preliminary award on jurisdiction rejected the United States argument that a judicial decision cannot be a

241. See Paterson, supra note 50, at 104.
242. See Beauvais, supra note 37, at 285-86.
243. Id. at 286.
244. Id. at 274.
245. Id. at 286.
247. Been & Beauvais, supra note 156, at 68, 82 (discussing the claim in Loewen).
248. Id. at 82.
249. Id.
measure of expropriation under Chapter 11. The administration of justice in national courts is considered a governmental measure, which is evidently within the scope of Chapter 11! The NAFTA Parties themselves are palpably concerned with the scope of the minimum standards of treatment provision, Article 1105. Following the Pope & Talbot decision, the NAFTA Free Trade Commission issued the first interpretive statement, binding upon future Chapter 11 tribunals, limiting the Article 1105 minimum treatment requirement to the standards of protection provided by customary international law, and nothing more.

Perhaps the best way in dealing with these definitional issues is through amendments to the Chapter 11 substantive rights and definitions. However, this is unlikely to occur in the foreseeable future, and therefore, the NAFTA Parties should adopt more substantive interpretive statements to define the limits of expropriation, measures, and nationals treatment. Presently, the interpretive statement issued after Pope & Talbot remains the sole clarification to Chapter 11 offered by the Free Trade Commission. Because such interpretations are binding on future Chapter 11 tribunals, they could be of significant value in addressing several definitional aspects of the Chapter. The FTAA negotiating ministers are well advised to take these definitional issues into consideration in drafting the new agreement, in an attempt to learn from NAFTA and build on it as a foundation.


252. See Beauvais, supra note 37, at 288-95 (illustrating a number of proposed statements and offering guidance to would-be drafters).

253. NAFTA, supra note 22, art. 1131(2).
B. Procedural Improvements

Improving the procedural problems associated with Chapter 11 may be even more beneficial than clarifying the scope of substantive rights in that such changes can increase the legitimacy of the mechanism, a step toward improving public relations in the realm of trade politics. This should be a central concern of both the NAFTA Parties and the negotiators of the FTAA, as public support is necessary to sustain the liberal trade and investment regime that will eventually encompass almost the entire Western Hemisphere.

Most of the procedural suggestions focus on establishing open, transparent proceedings. Currently, arbitrations are closed to the public and there is no publication requirement. "Chapter 11 encourages governments to litigate public interest issues in a secretive process in which the interests of only one party are presented and considered." Recently, U.S. and Canadian NGOs have sought amicus status in Chapter 11 proceedings. The NGOs wanted the right to observe the proceedings and to make oral and written submissions to the tribunals concerning the policy issue raised in the case. Eventually, the U.S. and Canadian governments supported amicus submissions in Chapter 11 arbitrations. Canada was motivated by the desire for greater transparency in the process, while the U.S. argued that amicus submissions should be permitted as a general rule where they are likely to help the tribunal. This represents an important first step in making the Chapter 11 investor-state mechanism more transparent and accountable.

254. See Jones, supra note 25, at 549-50.
255. Id. at 548.
257. See Tollefson, supra note 14, at 164.
258. Id.
259. Id.
260. Id. Note also that the United States argued successfully at the WTO for the admission of amicus curiae briefs where they are likely to help the Appellate Body resolve state-state trade disputes. This is especially significant because prior to this, non-state actors had no direct voice at the WTO. Report of the Panel on United States–Import Prohibition of Certain Shrimp and Shrimp Products, 2001 WL 671012, WT/DS58/RW, at 11-13 (June 15, 2001).
Another approach to improving the investor-state dispute mechanism is to establish a preliminary review of cases coupled with the threat of sanctions against a party who brings a frivolous or meritless lawsuit. This would have the added benefit of preventing U.S. and Canadian investors from abusing the mechanism and using it as a threat to induce the weaker Mexican government to alter its practice in order to avoid costly arbitration. The same argument applies to curbing the abuse of the mechanism by U.S. investors against Canada, as we've already witnessed several successful claims against the Canadian government, as well as at least one instance where Canadian lawmakers withdrew from enacting legislation in response to a Chapter 11 arbitration claim from a U.S. investor. A second suggestion is to require preliminary home governmental approval of Chapter 11 claims that challenge important public policies.

These procedural improvements of Chapter 11 may be among the simplest to adopt, or to incorporate into the FTAA. However, one must consider these procedural changes in light of the arguments made by supporters of investor-state arbitration, and Chapter 11 proceedings in particular. Instituting prohibitive access barriers to the mechanism runs the risk of depriving private parties of direct access, and returning to the days of pure state-state resolution of trade and investment disputes. This outcome would essentially "throw the baby out with the bath water," and bring us right back to where we started.

261. See Jones, supra note 25, at 546.
262. See id.
264. See Dhooge, supra note 256, at 553.
265. See Francisco S. Nogales, The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment, 8 ANN. SURV. INT'L &
abandoning all the reasons an investor-state dispute mechanism was created in the first place. Change and modification should be tempered by recalling the purpose of the mechanism in the first place.

C. Institutional Enhancements

Institutionally, NAFTA is relatively bare bones when compared with the WTO or the European Union. NAFTA tribunals are established on an ad-hoc basis, and there is not currently an appellate procedure for NAFTA decisions. To that end, the creation of a body to interpret and apply NAFTA law, and hear appeals from the various dispute resolution mechanisms, including Chapter 11, would provide consistency and stability to the NAFTA dispute process. FTAA negotiators may want to establish a body, akin to the WTO Standing Appellate Body, from FTAA's inception.

As a corollary to the establishment of a standing body, the NAFTA Parties and FTAA negotiators may wish to modify NAFTA Article 1136(1) to make tribunal decisions binding, or at least persuasive on future tribunals. This would have beneficial consequences for stability and would also begin to establish a body of jurisprudence that governments and investors alike could use to help them make decisions. Doing so will also likely discourage investors from bringing claims that are substantially similar to those that a Chapter 11 tribunal has already declined. And as early tribunal decisions have been less favorable to investors than the Chapter's critics had feared, this may further encourage public confidence in the regime and enhance its legitimacy.

Finally, an open, transparent reporting requirement would also contribute significantly toward improving the transparency of the system. Any non-confidential material relating to NAFTA Chapter 19 and Chapter 20 proceedings, including the status of cases, is made available to any

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COMP. L. 97, 141 (2002) (describing abandoning the investor-state mechanism as amounting to "throwing the baby out with the bath water," because less dramatic steps can be taken to improve it).

266. See Gal-Or, supra note 6, at 5-8 (discussing the "institutional meagerness" of NAFTA).

267. See Haigh, supra note 17, at 133.
interested party by the NAFTA Secretariat. The same policy of information disclosure should be uniformly applied to all NAFTA proceedings, including Chapter 11 arbitrations, as well as future FTAA dispute resolution procedures. As an institution, the proposed NAFTA standing body could establish a reporting requirement that would make public those decisions that deal with policies that are public in nature. Furthermore, "[a] more transparent reporting system is needed so that when a dispute arises, interested parties will be able to gain information concerning the dispute and take part." Once again, the increased transparency of the system is vital to promoting public trust and confidence, and curbing criticism that democracy and national sovereignty are being undermined.

D. Explicit Environmental Safeguards

There are numerous additional proposals for improvement in the NAFTA Chapter 11 literature. For the purposes of this article, which deals with incorporating an improved investor-state dispute mechanism into the FTAA, those additional proposals dealing specifically with the "chilling" of environmental regulation are of particular interest, and are considered generally below.

First, a broad coalition of U.S. environmental NGOs has called for clear "environmental exceptions" to trade and investment rules for laws and regulations designed to protect public health, the environment and natural

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268. Lopez, supra note 160, at 27. Chapter 19 deals with antidumping and countervailing duty disputes, and Chapter 20 applies to controversies dealing with the interpretation, application or breach of the Agreement. Both Chapters provide for exclusively state to state dispute resolution. NAFTA, supra note 22, Chs. 19, 20.

269. Lopez, supra note 160, at 27.

270. Jones, supra note 25, at 549.

271. Id.
resources.\footnote{272} This group argues that principles of "environmentally responsible trade" should inform all aspects of U.S. trade policy, including the negotiations for the Free Trade Area of the Americas.\footnote{273} In essence, environmental and labor NGOs, as well as other facets of civil society, are demanding a voice in the FTAA negotiations. Indeed, civil society probably has more of a voice in the FTAA negotiations than in any trade agreement to date.\footnote{274} Whether this is actually desirable or not is beyond the scope of this comment, but surely a question of considerable significance in this new climate of trade politics.

A second suggestion in relation to investor challenges to environmental laws deals with clarifying the standard of risk assessment. In cases where there is no discriminatory intent, how should Chapter 11 tribunals determine whether there is sufficient justification for regulatory action to bring it within the "police powers" exception to expropriation?\footnote{275} That is, what level of scientific proof is necessary to establish a regulatory measure as justified to preserve the environment or public health? The NAFTA has yet to address this issue.\footnote{276} The WTO requires a fairly high degree of scientific proof and/or risk assessment, and the recent WTO Beef Hormones decision effectively rejects the use of the precautionary principle, which allows for regulatory action on scientific proof that is somewhat less than absolute, in the WTO.\footnote{277} The NAFTA needs to develop a reasonableness standard for government regulatory action,

\begin{footnotes}
\item[273] Id.
\item[274] See Bruner, supra note 24, at 8-9. The FTAA has established a committee to receive input from civil society to take into consideration in the negotiations. While this is significant as compared with previous trade agreement negotiations, some groups have questioned how substantive and effective this participation really is. See id.
\item[275] See Gantz, supra note 114, at 742.
\item[276] Id. at 742.
\item[277] Id. at 743.
\end{footnotes}
perhaps one that recognizes the precautionary principle, as in the Cartagena Protocol on Biosafety.278 "Among the factors that could go into that analysis would be the extent of the risk assessment, the availability of scientific evidence on both sides of the issue, any existing international standards and the nature and degree of health protection that is sought under national law and policy. Other factors may include the legality of the regulation under domestic law and a consideration of the economic feasibility of less injurious alternatives, even without a requirement that the environmental regulation be "necessary."279

CONCLUSION

Investor-state arbitration is rapidly becoming among the most controversial issues in the debate over the merits of free trade and investment. Besides the criticisms from environmental and citizen-protection groups, the Canadian government is demonstrating increasing hostility toward the NAFTA Chapter 11 mechanism, and more recently, state lawmakers in the United States have expressed concern that investor-state dispute mechanisms threaten state authority and sovereignty.280 Although clearly not a harbinger for the death of liberal trade in North America, public and interest group support is vital to sustaining the legitimacy of free trade agreements such as NAFTA, the GATT, and soon, the FTAA.

One of the most significant hurdles to the FTAA negotiations has been the lack of fast-track negotiating authority for the President since 1994. Fast track authority essentially allows the President to negotiate international trade agreements that are then submitted to Congress for

278. Conference of the Parties to the Convention on Biological Diversity, Draft Cartagena Protocol on Biosafety, UNEP/CBD/ExCOP/1/L.5 (Jan. 28, 2003). The Cartagena Protocol provides the first "hard" international legal basis for the precautionary principle, which allows states to take actions in the absence of scientific proof. See Gantz, supra note 114, at 739. Although the United States participated extensively in the drafting of the Protocol, it cannot become a party to the Protocol because it is not a party to the Biodiversity Convention. Id.
279. Id. at 744.
280. Id.
approval on an up-or-down basis, preventing Congress from amending the agreement in any manner.\textsuperscript{282} Controversy over whether labor and environmental issues should be included in trade agreements was the primary reason that the Clinton Administration failed to obtain renewed fast-track negotiating authority following the ratification of NAFTA until the end of his presidency.\textsuperscript{283} Foreign governments are reluctant to negotiate trade agreements with the United States without fast-track authority because of the potential that Congress could alter the agreement of the parties, or fail to ratify it altogether.\textsuperscript{284}

This obstacle has been removed, as President Bush was granted Trade Promotion Authority ("TPA") (essentially a new name for fast track), in August 2002.\textsuperscript{285} This should bode well for the FTAA negotiations, as the United States now has more bargaining power and credibility, and the means to come to an agreement by January 2005. This also means that Congress will most likely ratify whatever the FTAA trade ministers agree to incorporate into the final FTAA text, rather than decline the agreement in whole, which would force the FTAA parties to start over again. The prospect of little Congressional debate over the FTAA because of TPA is a continuing source of concern for the movement against free trade, which argues that fast track procedures undermine democratic governance.

In this context, the foregoing analysis of the problems with the investor-state dispute mechanism in NAFTA, and the recommendations on improving it, take on a new sense of importance. The FTAA will be the largest regional trading bloc in the world. Can the region, even the world, afford to allow the FTAA negotiating ministers to act as a colossal "Dr. Frankenstein," by replicating NAFTA's Chapter 11 for inclusion in the FTAA, thereby exporting and expanding the problems of NAFTA to thirty-four countries and more than 800 million people? Although investor-state dispute settlement is, on the whole, a positive development in international trade relations, and thus worth preserving, we should not hesitate to improve on it. Only by learning from the past can international trade

\textsuperscript{282} Tiefer, supra note 162, at 329.
\textsuperscript{283} See McClintock, supra note 163, at 19-20.
\textsuperscript{284} See Gantz, supra note 170, at 406-07.
\textsuperscript{285} See Yerkey, supra note 162, at 1374.
regimes evolve and progress. Anything less undermines the legitimacy and stability of the international trading regime as a whole.
## Appendix A

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