Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution

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I. Introduction

THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) is a treaty between Mexico, Canada, and the United States to open domestic markets of each signatory country to the goods and services provided by nationals of all three countries.[1] As is the case with other multilateral trade agreements, NAFTA raises issues that have significant impacts on international investors, traders, and other business people. However, NAFTA's impacts on the regulatory authority of state and local governments render this agreement unique. Under NAFTA, the domestic laws of the signatory nations may not disadvantage foreign persons or entities undertaking business there.[2] Paramount among those fairness

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1. Canada–Mexico–United States: North American Free Trade Agreement. (Dec. 17, 1992), 32 I.L.M. 289 (1993) (chs. 1–9), 32 I.L.M. 605 (chs. 10–22) [hereinafter NAFTA].

2. NAFTA ch. 11, Investment. Emerich de Vattel, the eighteenth century Swiss philosopher and, with Pufendorf and Grotius, a founder of international law, defined the law of nations as follows: "The *Law of Nations* is *the science that teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.*" *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758; tr. *Law of Nations*, 1760). In a note under this definition, the author uses the Hanseatic League as a example of a long-standing accepted international series of understandings and agreements: "Another system of international law was framed by the deputies of the *Hanseatic League* in 1597, and which was confirmed with additions in 1614, and has obtained much consideration in the maritime jurisprudence of nations. . . ."

interests is the assurance that investments will not be expropriated except under circumstances that provide for a fair hearing and some assurance that such seizures are not a penalty for doing business in a foreign country. A frequent provision of multinational trade agreements limits the powers of national or sub-national governments to expropriate or "take" the property of foreigners.

In the United States, the Fifth Amendment to the federal Constitution prohibits the "taking" of private property without payment of "just compensation."[3] Although not clearly or consistently interpreted, this clause generally prohibits physical invasions or seizure of title in lands and has been used to limit the scope of regulatory (or "police") powers to limit the use of land.[4] The purpose of this article is to compare the investor protection provisions of the Fifth Amendment to the treaty guarantees of NAFTA with a view toward understanding the relative protections accorded within the United States to its nationals and those of other countries participating in NAFTA. This analysis should also be helpful in evaluating future efforts to protect businesses and investors in the United States and those other countries future trade agreements are created. Finally, this article should provide an understanding of the impacts NAFTA may have on state and local government regulatory powers.

This article begins with an examination of both Fifth Amendment and NAFTA protection against efforts by national or sub-national governments to regulate private property severely or to expropriate the same. The ideas in both sets of guarantees are broadly expressed and subject to diverse interpretations by different adjudicators in different times and in different circumstances. The wildly varying interpretations given to the Fifth Amendment by the U.S. Supreme Court over the years are well known. Nevertheless, the Court has both an institutional memory and commitment to precedent. The NAFTA process has neither one set of adjudicators, nor any formal commitment to following precedent. Thus, the consistency in the application of the broad provisions of NAFTA is left to the discretion of individual arbitrators, and is, therefore, theoretically problematic at best.

Following this introduction, this article proceeds to a historical dis-

3. U.S. CONST. amend. V. That amendment provides:"[N]or shall private property be taken for public use without just compensation." The constitutions of all the states have similar language or have been construed to have the same guarantees against taking without just compensation.

4. An issue not completely resolved by the Supreme Court is whether the takings clause applies to property other than real property. That Court has been less than clear on the subject. *Compare* Ehrlich v. City of Culver City, 512 U.S. 1231 (1994) (1996), *and* Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

cussion of the origins and applications of the Fifth Amendment Takings Clause. A similar discussion of the history, structure, and operations of NAFTA's provisions relating to expropriation and a discussion of cases decided under NAFTA follows. After this groundwork has been laid, an analysis of the two sets of investor protection provisions and a determination of the nature and extent of those provisions ensues. Finally, we propose our own conclusions to the issues. We emphasize the difficulty in following (much less predicting) the course of federal takings law;[5] moreover, the few cases, the lack of binding authority or precedent, and mercurial nature of foreign trade law create similar difficulties in forecasting the future of NAFTA protections. Nevertheless, the importance of the task exceeds its difficulty. The comparison of NAFTA with the U.S. Constitution is similar to a comparison of NAFTA to the Mexican[6] and Canadian[7] constitutional documents, because both are

5. In the most recent Supreme Court takings case, Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 321–22 (2002), Justice Stevens characterized this confusion as follows:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries" [citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 124], designed to allow "careful examination and weighing of all the relevant circumstances" [citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001).]

6. 1917 CONSTITUTION OF MEXICO tit. III, ch. IV, art. 107, § XIII.

> The law shall specify the terms and cases in which the precedents of the courts of the federal judicial branch are binding, as well as the requirements for their modification. If the full circuit courts sustain contradictory opinions in *amparo* cases within their jurisdiction, the ministers of the Supreme Court of Justice, the Attorney General of the Republic, or those courts, may denounce the contradiction before the appropriate section, to decide which opinion shall prevail. When the sections of the Supreme Court of Justice sustain contradictory opinions in cases of *amparo* within their jurisdiction, any one section or the Attorney General of the Republic may denounce the contradiction before the Supreme Court of Justice, which, sitting as a full court, shall decide which opinion shall prevail. Both in this instance and in the case provided for in the preceding paragraph, the decision rendered shall be solely for the effect of fixing the precedent and shall affect the concrete juridical situation deriving from contradictory judgments in the case in which they were rendered.

7. Not unlike the American judicial system, the Canadian court system is based on common law that developed based on precedent or *stare decisis*. As the Supreme Court of Canada has held, Canadian jurisprudence has been:

> built up as it has been by the long continued and arduous labors, grown venerable with years, and interwoven as it has become with the interests, the habits, and the

overseen by a court system that is guided by precedent. How NAFTA squares with the rights guaranteed by one of these national constitutions is the object of this article, with particular emphasis on the Fifth Amendment.

II. A Brief History of the Takings Clause

As mentioned, the "Takings Clause" of the U.S. Constitution fairly simply provides "nor shall private property be taken for public use." In the last quarter century, the clause has taken on a prominent role in constitutional jurisprudence, particularly with respect to the limits of state and local regulatory power. Any discussion of the Takings Clause should begin with the history of the clause, the reasons for its enactment, and the way the law has developed in the courts.

The Takings Clause finds its genesis in section 39 of the Magna Carta, which declared that land would not be taken without some form of due process.[8] Almost immediately after signing the document, King John I denounced the undertaking to his barons. However, that promise eventually made its way into the coronation oaths taken by kings and, in England at least, became a protection against confiscation of lands without some form of a hearing.[9]

That is not to say there was no significant struggle among royal power on the one hand and the nobility and, following the Renaissance, a rising middle class, on the other. Those who opposed the royal powers to seize land found three formidable legal and political writers who provided theories to support their position based on common or natural law. Each of those writers influenced the development of American law in general and constitutional law in particular.

Sir Edward Coke (1552–1634), a Lord Chief Justice of England,

> opinions of the people. [Without the common law a court would] in each recurring case, have to enter upon its examination and decision as if all were new, without any aid from the experience of the past, or the benefit of any established principle or settled law. Each case with its decision being thus limited as law to itself alone, would in turn pass away and be forgotten, leaving behind it no record of principle established, or light to guide, or rule to govern the future.

Hanford v. Archer, 4 Hill, 321.

The Canadian Constitution and Constitution Act of 1982, Part I: Canadian Charter of Rights and Freedoms, § 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

8. This section specifically provides: "No freeman shall be seized or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

9. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 395–96 (1988).

wrote decisions for cases coming before him and treatises on the development of the common law. Coke also published works opposing the powers of the King. Although his work was not historically accurate, it was put forth with passion and rhetorical brilliance. The common strand of his work was that the common law was a long-recognized tradition of rights against which even the powers of the King must bow. He authored the *Petition of Right*, which set up specific rights, of alleged ancient provenance, against the powers of the King.[10] He compiled the law in the form of reports on cases that he had heard and those he read and prepared a full volume series called the *Institutes of the Laws of England.*[11] The *Institutes* chronicled Coke's views on the role of the common law as protecting ancient rights against royal power.

Sir William Blackstone (1723–80) wrote a four-volume series entitled the *Commentaries on the Laws of England*,[12] which was used as a foundation for legal education in England and the American colonies. The *Commentarie*s sought to provide an introduction to English law in an easily understandable way. Like Coke, Blackstone stressed the continuity of the common law, as well as its position as a bulwark against royal powers.

The third writer of this trio is John Locke (1632–1704), a philosopher and political thinker. He is famous for the *Two Treatises on Government*,[13] which was written, in part, to justify the "Glorious Revolution" of 1688, in which a Catholic king was overthrown and the Protestant ascendancy returned to England with the support of the middle class. His view was that sovereignty did not reside in the state, but rather in the people, who had the right to overthrow the government. Locke's view of natural law provided for natural rights, including property rights, which did not depend on royal authority.

The writings of Coke, Blackstone, and Locke were, in addition to the Bible, a standard reference for enlightened English colonialists. These English authors influenced the Declaration of Independence, which asserted a natural right against royal (or, for that matter, parliamentary) absolutism. The Declaration of Independence, in particular, reflected Locke's view that the monarchy could be limited or overthrown if it violated ancient or natural rights.[14]

10. *Id.*

11. EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1628–44, 4 vols.).

12. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–69, 4 vols.)

13 JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge: University Press 1963).

14. In chapters 18 and 19 of his *Second Treatise on Government*, Locke posits that even royal authority is subject to natural law and can be deposed when that authority

Following both independence and the adoption of the American Constitution, there was fear, particularly by the anti-Federalists led by Jefferson, that the federal government would be too powerful. The Anti-Federalists agitated for the adoption of a Bill of Rights, which included what came to be the first ten amendments to the federal Constitution. One of these Amendments, the Fifth, provided that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Support for these clauses was probably grounded in the readings of Coke, Blackstone, Locke, and Enlightenment philosophers, and reflected similar provisions in certain earlier post-Revolutionary War state constitutions.[15]

The Fifth Amendment, as originally written, was only a restriction against action by the federal government. As was held in the opinion of Chief Justice Marshall in *Barron v. Mayor and City Council of Baltimore*,[16] the prohibitions of the Bill of Rights did not apply to the states. While there were some limits on the powers of the states before 1865,[17] it was not until the Civil War that the federal Constitution limited the powers of the state (and thus local) governments against their own citizens through the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.

The Fourteenth Amendment imposed restrictions on states through the broadly worded Privileges and Immunities, Equal Protection, and Due Process Clauses. The Privileges and Immunities Clause was quickly eviscerated in the *Slaughterhouse Case*s.[18] The Equal Protec-

violates such law. These thoughts found their way into the United States' Declaration of Independence (1776), which said:

> That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Declaration of Independence, *available at* http://www.law.indiana.edu/uslawdocs/declaration.html.

15. LEVY, *supra* note 9.

16. 32 U.S. 243 (1833).

17. The principal limitations included the commerce clause, federal military powers, and the contracts clause.

18. 83 U.S. 36 (1873).

tion Clause developed its own jurisprudence as to similar treatment of similar situations and was especially useful in ending state-sponsored racial segregation in *Brown v. Board of Education.*[19] The Due Process Clause, however, has developed along at least three lines.

One of those lines was procedural and was developed to assure that hearings and other governmental decision-making processes were conducted fairly.[20] This review of the processes of government is known as "procedural due process."

A second line of cases extended the limits on the federal government in the Bill of Rights to state and local government action using the Due Process Clause. For approximately 100 years after the passage of the post-Civil War amendments, litigation under the Due Process Clause resulted in "incorporation" of some of the limitations on the federal government in the Bill of Rights to state and local actions as well.[21] The Supreme Court applied the Takings Clause of the Fifth Amendment to the states through the Fourteenth Amendment Due Process Clause in *Chicago Burlington and Quincy R.R. v. City of Chicago.*[22]

A third line of cases commenced with *Mugler v. Kansas*,[23] in which the U.S. Supreme Court, through Justice John Marshall Harlan the elder, indicated that that Court could review, through the Due Process Clause, the substance of legislation. The ability to review both the substance, as well as the procedure, involving legislation, came to be known as "substantive due process."[24] This third strand of the Due Process Clause allowed judges to "second-guess" state and local legislative decisions and reigned supreme for the period 1887 through approximately 1940. Under substantive due process, a court could determine whether the ends and means of legislation were appropriate and whether or not the legislation was "unduly oppressive" to regulated

19. 349 U.S. 294 (1955).
20. Mathews v. Eldridge, 424 U.S. 319 (1976).
21. *Slaughterhouse Cases*, 83 U.S. at 36.
22. 166 U.S. 226 (1897).
23. 123 U.S. 623 (1887).
24. Justice Harlan stated:

> The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

Id. at 661.

parties.[25] In previous articles, the authors have suggested that substantive due process allowed judges to substitute their own views on political and social matters in the guise of constitutional interpretation.[26]

However, substantive due process generally became unimportant after the clash between the U.S. Supreme Court and the Franklin Delano Roosevelt administration when various New Deal measures were declared unconstitutional and the President threatened to "pack" the Supreme Court.[27] The packing effort was unsuccessful; however, President Roosevelt was able to appoint seven Justices to the Supreme Court in approximately two years. With some notable exceptions, particularly in the privacy[28] and abortion[29] areas, substantive due process is not a major factor in constitutional adjudication today, but some critics assert that the ability to second guess legislatures has shifted from this third strand of substantive due process to the Takings Clause.[30]

It was to be a quarter century after incorporation of the Takings Clause of the Fifth Amendment that the U.S. Supreme Court began

25. *See, e.g.*, Lawton v. Steele, 152 U.S. 133, 137 (1894). More specifically, the Court said:

> To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

Id. at 137.

26. Edward J. Sullivan, *Emperors and Clothes—the Genealogy and Operation of the* Agins' *Tests*, 33 URB. LAW. 343 (2001); Edward J. Sullivan, *Return of the Platonic Guardians:* Nollan *and* Dolan *and the First Prong of* Agins, 34 URB. LAW. 39 (2002).

27. In his "Fireside Chat on Reorganization of the Judiciary," on March 9, 1937, President Roosevelt said:

> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws.

28. Traditionally, the right to privacy has been implied in the wording of the Fourth Amendment and applied to state governments through the "Due Process" clause of the Fourteenth Amendment. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937), Wolf v. Colorado, 338 U.S. 25 (1949). As Justice Frankfurter said: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U.S. at 27–28.

29. Roe v. Wade, 410 U.S. 113 (1973).

30. Moore v. East Cleveland, 431 U.S. 494 (1977). *See also Eastern Enterprises*, 524 U.S. at 498.

working out its application to actions of state and local government. In 1922, the Supreme Court decided *Pennsylvania Coal v. Mahon*,[31] involving a regulation enacted by the Pennsylvania legislature to prohibit mining of coal under streets, houses, and places of public assembly. The coal company held mineral rights to many properties in northeast Pennsylvania and had sold the surface rights to others. The coal company argued that a taking had occurred under these regulations because it was unable to mine the coal. The Supreme Court agreed and said that, while property may be regulated, if the regulation goes "too far," it constitutes a taking.[32] No compensation was ordered in that case, and the law was deemed invalid.[33] The analysis of the Court in *Pennsylvania Coal* was along the lines of substantive due process. For years after the Court rendered its *Penn Central* decision, subsequent opinions reference neither the case nor its reasoning.

At about the same time as the *Pennsylvania Coal* case, the U.S. Supreme Court took four cases involving the new land use regulatory technique called "zoning."[34] Two of these cases were important. In *Village of Euclid v. Ambler Realty Co*,[35] the Court upheld a general zoning ordinance against various substantive due process challenges. However, the Court found a zoning ordinance invalid as applied in a particular situation in *Nectow v. City of Cambridge*.[36] Both of these cases were substantive due process cases and used a substantive due process analysis. For almost fifty years, the Supreme Court did not take a land use regulation case, but, in the meantime, abandoned its substantive due process analysis. Ironically, all four land use cases decided between 1926 and 1928 relied on substantive due process, rather than Takings Clause, analysis.

In 1978, in *Penn Central Transportation Co. v. New York City*,[37] the U.S. Supreme Court applied the *Pennsylvania Coal* takings analysis to determine whether a local government had gone "too far" and announced a three-factor rule to determine whether a taking had occurred.[38] The

31. 260 U.S. 393 (1922).

32. *Id.* at 415 ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

33. *Id.*

34. The two cases most often cited are: Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and Nectow v. City of Cambridge, 277 U.S. 183 (1928). The other cases are: Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), and Zahn v. Bd. of Public Works, 274 U.S. 325 (1927).

35. 272 U.S. 365 (1926).

36. *Id.*

37. 438 U.S. 104 (1978).

38. *Id.* at 134. *See* John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 1 LAND USE LAW & ZONING DIG. 3 (2000) (concisely summarizes the three tests: "A court must evaluate a regulatory takings claim based on

Court said it would look at the "economic impact" of the regulation, how the regulation would affect "investment-backed expectations," and the "character of the governmental action." Three years later in *Agins v. City of Tiburon*,[39] the Court established a two-part alternative test to determine whether a regulation amounted to a taking. The first part was whether or not the regulation "substantially advanced a legitimate state interest," and the second was whether the regulation "denied an owner economically viable use of land."[40] Both the three-factor *Penn Central* test and the two-prong alternative test of *Agins* are part of current Supreme Court jurisprudence.

With regard to conditions involving dedication or transfer of property interests, the U.S. Supreme Court used the "substantially advanced a legitimate state interest" prong of *Agins* in *Nollan v. California Coastal Commission.*[41] In *Nolan*, the Court required that there be a "nexus" between the anticipated effects of a land use and the real property exaction.[42] It added in *Dolan v. City of Tigard*[43] that there be an individualized determination, with the burden being on the government, to show that there was a "rough proportionality" between the impacts of the land use proposal and the real property exaction.

The Court has also distinguished "facial" takings claims, which are rarely found, and involve the invalidity of a general ordinance or regulation in which its every application would be invalid, from "as applied" takings claims. In the latter case, a taking may be found in the application of an ordinance or regulation to a single property.[44] However, in an "as applied" situation, the property owner must demonstrate a final decision showing that level of use to which a parcel of land may be put.[45] That may mean that property owners must seek zoning variances or other forms of relief before the court will find that property has been "taken" by regulation.[46]

(1) the economic impact of the regulation, (2) the owner's reasonable investment-backed expectations, and (3) the character of the regulatory action.").

39. 447 U.S. 255 (1980).

40. *Id.* at 260.

41. 483 U.S. 825 (1987).

42. *Id.* at 834–35.

43. 512 U.S. 374, 384–95 (1994).

44. Sometimes that "as applied" claim may not require extensive work, as when the ordinance under consideration does not allow viable economic uses. Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

45. In "as applied" cases, a landowner must have made an application and have a final determination as to the uses that may be made of the subject property, including all "safety valves" available, such as variances. Williamson County Reg'l. Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). Unlike the *Lucas* situation, if there are channels that allow the property to be used, those channels must be explored. *See also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

46. *See Williamson County*, 473 U.S. at 172.

Further, the U.S. Supreme Court has determined that either a physical occupation of land either by government itself or by a private person authorized by government[47] or the deprivation by regulation of all viable economic use[48] would constitute a "per se" taking (i.e., a taking in and of itself).

Aside from these "categorical" takings cases, the Court has yet to settle on an analysis for the application of the Takings Clause between the "three-factor" analysis of *Penn Central* and the alternative tests of *Agins.*

Takings law is confusing and perhaps has developed in a sporadic and contradictory way. Historically, politically, and socially, the arbitrary deprivation of title to property has always touched a raw nerve. However, the reduction of property value by regulation through general government action has not been as much a subject of concern, except in the "per se" situations described above. Law, particularly constitutional law, develops incrementally. Interpretation of the Takings Clause, as it applies to regulation of the use of land, has been slow to develop and sometimes changes course. The twists and turns of its development over the next quarter century of the Takings Clause may be expected to replicate the erratic course of the last twenty-five years.

III. History and Nature of North American Free Trade Agreement

Canadian Prime Minister Mulroney, Mexican President Salinas, and U.S. President Bush signed the North American Free Trade Agreement (NAFTA) in 1992.[49] The NAFTA provided for free trade among the three signatory countries by fostering a lessening of border control for goods traveling across the borders and discouraging imposition of tariff and nontariff trade barriers.[50] In addition, NAFTA provides an investor–

47. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
48. *See Lucas*, 505 U.S. at 1003.
49. *See* NAFTA, *supra* note 1.
50. NAFTA's objectives are detailed in Article 102:

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area; (c) increase substantially investment opportunities in the territories of the parties; (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; (e) create effective procedures for the implementation and application of this agreement, for its joint administration and for the resolution of disputes; and (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.
> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

state dispute mechanism for private investors alleging barriers to trade by a signatory country. NAFTA altered the state of North American free trade through the commitment to inviting foreign investors to compete and the protection of individual investors competing in foreign markets. By providing a forum for investors to raise claims against government activity, the United States supports limits on intrusion of trade, while protecting the rights of its investors abroad. This section discusses the history of trade treaties after which NAFTA is modeled, the relevant provisions of NAFTA, and the use of these provisions by private investors.

The provisions of NAFTA are modeled after a typical Bilateral Investment Treaty (BIT).[51] A BIT creates a contract between two nation-states regarding the terms of trade between them. The Carter Administration initiated the United States Bilateral Investment Treaty Program in 1977, though the concept of negotiating the terms of international trade between nations could hardly be described as novel. The BIT Program furthered the goals of the "Friendship, Commerce and Navigation (FCN) treaty program," initiated some 190 years earlier.[52] Prior to the initiation of the BIT program, the United States had entered into agreements that protected proprietary interests of United States investors abroad. However, the dated tone of these agreements created difficulties for the United States. Given these difficulties, the United States abandoned the FCN program in 1966, after reaching final agreements between the United States, Togo, and Thailand.[53] During the time when the United States experienced difficulty under the waning FCN program, European countries had begun negotiating under a bilateral investment protection model. The European investment model protected not only proprietary interests of investors abroad, but investment interests as well. This European model of bilateral investment protection served as the model for the United States BIT program and, subsequently, the multilateral GATT and NAFTA.[54]

Currently, the United States Bilateral Investment Treaty Program has lead to the creation of thirty-seven BITs.[55] The objectives supported by

51. Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L. L. 621, 624–31 (1993).

52. *Id.* (citing KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 29 (1992)).

53. *See* Vandevelde, *supra* note 51, at 625. *See also* Treaty of Amity and Economic Relations, Feb. 8, 1966, U.S.–Togo, 18 U.S.T. 1; Treaty of Amity and Economic Relations and Exchange of Notes, May 27, 1966, U.S.–Thail., 19 U.S.T. 5843.

54. *Id.*

55. The United States is currently a party to 321 trade agreements, thirty-seven of which are Bilateral Investment Treaties. *See* the list of agreements complied by the Trade Compliance Center, *available at* http://www.tcc.mac.doc.gov/cgi-bin/doit.

the program range from protecting United States interests abroad to promoting exportation of United States goods and services.[56] The BIT program supplemented the FCN program by protecting United States interests in countries where FCN treaties were not already in place or had expired. In addition, the BIT Program supported promotion of market economies, and the development of consistent international law.[57] The program detailed six "benefits" to be provided to U.S. investors through the adoption of BITs, including the following: entitlement to the better of "national" treatment or "most favored nation" treatment in the signatory country; limitations on expropriations and fair compensation for expropriations by government; right to transfer funds in and out of host country; limitations on host governments to impede trade through nontariff barriers; the right and creation of an international arbitration forum to resolve disputes between the investor and host government; and the right to choose personnel irrespective of nationality.[58]

BIT Program negotiations began in 1982 with Egypt and Panama. The Office of the United States Trade Representative, an office that is separate from the State Department, was created to negotiate trade agreements. This separation resulted in demarcation of the conflicting policy interests of the two divisions and problems aligning the goals and tactics of Trade Representatives with the foreign policy goals of the State Department.[59] In addition, the United States' "unwillingness to compromise" plagued the first six years of the BIT Program, resulting in the completion of but four agreements within the first four years.[60] The glacial pace of Senate ratification of negotiated agreements further delayed the process.[61] Negotiations under the BIT program ceased until shortly after 1988, when the Senate ratified the first round of agreements. Since the initial group of bilateral agreements negotiated under the BIT program, negotiations have proceeded more smoothly. The ease with which trade representatives negotiate both bi-, tri-, and

cgi?205:64:467657246:0, and Bilateral Investment Treaties compiled by the Trade Compliance Center, *available at* http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?219:64:467657246:0:TOVR!-!Bilateral%20Investment%20Treaties!-!QuickLink!-!BILATERAL_, for complete listings of trade agreements to which the United States is a party.

56. U.S. Bilateral Investment Treaty Program, Fact Sheet produced by U.S. Bilateral Investment Treaty Coordinators, Department of State, *available at* http://www.state.gov/www/issues/economic/7treaty.html.

57. *Id.*

58. *Id.*

59. Vandevelde, *supra* note 51, at 628.

60. Vandevelde, *supra* note 51, at 628.

61. Vandevelde, *supra* note 51, at 628.

multi-lateral agreements increased recently, with the enactment of the Trade Act of 2002, which essentially codifies the goals present in both the BIT Program and NAFTA and gives trade representatives more authority and autonomy in their negotiations.[62]

NAFTA's Chapter 11 incorporates several components of BITs, both in its substantive protections and dispute resolution procedure.[63] Like the BIT model, NAFTA: (1) requires host countries to treat investors as favorably as their domestic counterparts; (2) prohibits expropriation of investment interests; (3) requires the free transfer of funds relating to investments, without delay; (4) prohibits host countries from adopting performance requirements, such as quotas; (5) creates an investor–state dispute mechanism; and (6) entitles the investor to free choice of top management positions, regardless of nationality.[64] These six elemental goals of the BIT model have re-surfaced in NAFTA's Chapter 11 on investment.

Article 1102 obligates a host country to refrain from treating foreign investors differently from domestic investors.[65] Article 1103 further requires that host governments treat all foreign investors uniformly, not offering preferential treatment to investors from one nation.[66] No less favorable treatment may be afforded to the investors of any other country subject to the terms of the agreement. Articles 1104 and 1105 compel each party to treat foreign investors, at a minimum, fairly and equitably.[67] Moreover, Article 1110 prohibits host countries from directly or indirectly expropriating investments. There are a few exceptions to this prohibition, including: a legitimate public purpose supporting the

62. *See* Trade Act of 2002. 19 U.S.C. § 3802 (2003).

63. M.S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL'Y 1 (1983). BITs are structured this way and have been since the mid-1980s.

64. NAFTA ch. 11. Relevant provisions are detailed in subsequent paragraphs.

65. NAFTA art. 1102: National Treatment provides: "Each Party [country signatory] shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. . . ."

66. NAFTA art. 1103: Most-Favored-Nation Treatment provides: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

67. NAFTA art. 1104: Standard of Treatment provides: "Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103." Art. 1105: Minimum Standard of Treatment provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

regulation; application and enforcement of the regulation in a nondiscriminatory manner; compensated expropriations; and if property is appropriated in accordance with due process of law and the minimum standards obligation.[68]

The provisions detailed by the BIT Program have transcended the bilateral agreement, to the multilateral arena, and NAFTA.[69] NAFTA incorporates the six protective provisions sought by the BIT program, most notably, in Chapter 11.[70] Although the expropriations provisions provided by the NAFTA are hardly novel, the provision for direct claims by investors and the actual use of such claims by individual investors has distinguished NAFTA from other similar trade agreements and brought cause for alarm regarding domestic lawmaking abilities.[71] This section discusses the history of expropriation dispute resolution in international investment treaties and the unique circumstances accompanying NAFTA.

A. *Article 1110: Expropriation and Compensation*

Article 1110 translates Goal 2 of the BIT Program to the provisions of NAFTA by prohibiting government expropriation of an investment. The expropriation provision parallels the U.S. Constitution's Fifth Amendment protection against the "taking" of private property without just compensation by providing that:

> 1. No party [government] may directly or indirectly nationalize or expropriate investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: a) for a public purpose; b) on a non-discriminatory basis; c) in accordance with due process of law and Article 1105(1); and d) on payment of compensation in accordance with paragraphs two through six.[72]

68. NAFTA art. 1110: Expropriation and Compensation provides:

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

69. NAFTA art. 1102: National Treatment; art. 1103: National Treatment; art. 1104: Standard of Treatment; art. 1105: Minimum Standard of Treatment; art. 1106: Performance Requirements; art. 1107: Senior Management and Boards of Directors; art. 1109: Transfers; art. 1110: Expropriation and Compensation; ch. 11, § B: Settlement of Disputes between a Party and an Investor of Another Party.

70. NAFTA ch. 11: Investment. Part A of chapter 11 outlines the provisions for protecting investment among the three host countries. Part B details the provisions for dispute resolution.

71. Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA*, 43 HARV. INT'L L.J. 531 (2002).

72. NAFTA art. 1105: Minimum Standard of Treatment provides: "Each party shall

Like the Fifth Amendment, Article 1110 requires compensation for the expropriation of an investor's interest in real property located in the host country; however, the expropriation provision of NAFTA extends this protection to non-proprietary interests, as Article 1110 protects not only property, but "investment[s]" that could include nonproprietary interests such as the right to develop or use real property, the right to produce a certain product or the right to possess a certain product in the course of doing business.[73] It is this extension of the Takings Clause that has caused alarm among environmentalists, human rights advocates, as well as those who favor domestic control of domestic lawmaking.

Article 1110's protection to investments and the tribunal is guided by the standards of treatment established in other provisions of Chapter 11 and applicable rules of international law.[74] Unfortunately, the terms "expropriation" and "tantamount to expropriation" are not defined by

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

73. NAFTA art. 1139: Definitions provides:

> Investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

74. NAFTA art. 1131: "Governing Law A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Article 1131 further provides that "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." The Commission refers to the three trade ministers from each country party. Under section 2 of Article 1131, the trade ministers may interpret provisions of NAFTA and bind tribunals to this interpretation. However, the Commission has not provided a specific definition for "expropriation."

NAFTA. One possible result may be that arbitral tribunals interpret "compensable expropriations" for purposes of an investment agreement more broadly than courts of the United States have interpreted "compensable takings" under the U.S. Constitution. Thus, a Canadian or Mexican investor might be awarded compensation for loss of value resulting from a U.S. (or state or local) government measure, whereas a similarly situated U.S. investor would not. The potential repercussions of such a result are analyzed in greater depth later in this article. However, the fear exists of a challenge by a Canadian or Mexican investor might cause the United States (or a state or local) government to reverse an environmentally beneficial measure or to refrain from adopting such a measure in the first place.[75] This fear has yet to be realized; however, there are cases in which United States investors have made such claims in Canada and Mexico.

B. *Investor-State Dispute Mechanism*

Although the Investor–State Dispute Mechanism available through Section B of Chapter 11 is modeled directly after the BIT Program and its European bilateral investment protection predecessors, the concept of creating a tribunal for disputes involving the protection of foreign property is well known. It was used first under the Jay Treaty of 1794 between the United States and Great Britain.[76] However, in all agreements prior to World War I and most still today, only the home country of the aggrieved investor could bring a claim against an offending host country.[77] Because of political ramifications that accompany an arbitral claim of one government against another, such claims were rarely brought. The inception of direct investor dispute mechanisms thus provides a significant increase in relief available to the ailed investor abroad.[78] Among the first agreements to provide a direct investor–state claim was the Iran–United States Claims Tribunal.[79] This approach fol-

75. A current challenge to an environmentally and health-motivated ban on a harmful substance brought by Methanex is discussed below and has magnified these fears.

76. *See* Legum, *supra* at note 71, at 534. *See also* Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.–Gr.Brit., art. 6, 8 Stat. 116.

77. *See* Legum, *supra* at note 71, at 535.

78. Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*. 32 ENVTL. L. REP. 11001, 11003–04.

79. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981. In 1979, fifty-two U.S. nationals were held hostage at the U.S. embassy in Tehran, Iran. Following this hostage situation, the United States froze all Iranian assets. Algeria facilitated the resolution of the conflict and on January 19, 1981, the Democratic and Popular Republic of Algeria documented the promises made by both the United States and Iran in the "General Declaration" and the "Claims

lowed a model created to protect the interests of Allied nationals in Germany following World War I.[80] Narrowly tailored direct-claims rights, such as those created by the European Court of Human Rights, have also been created.[81]

Like the Chapter 11 obligations to investors evolving from the BIT Program, NAFTA mimics the BIT program goals with its broad and direct right of action by investors against the host government.[82] Before this time, individual investors were limited to petitioning the governments of their own countries in the hope that government would raise a claim on their behalf. NAFTA transformed that structure by providing investors a means to challenge the foreign government directly.[83] Under

Settlement," known collectively as the Algiers Accords. Under the Accords, Iran agreed to release the hostages and the United States agreed to restore the financial situation of Iran to what it had been prior to the asset freeze of November 14, 1979. At that time, there were claims pending against the United States regarding the assets. In order to prevent dual awards of decision to investors and to expedite claims resolution, all prior claims and attachments within U.S. courts were suspended and agreed to be resolved by the U.S.–Iran Claims Tribunal. The Tribunal sits in The Hague, The Netherlands, and is comprised of nine arbitrators: three appointed by Iran, three by the United States, and three by the party-appointed members acting jointly or, in absence of agreement by an appointing authority. Under the Accords, the United States released the vast majority of Iran's "frozen" assets and transferred them directly to Iran or to various accounts to pay outstanding claims. Almost all of the approximately 4,700 private U.S. claims filed against the Government of Iran at the Tribunal have been resolved and have resulted in more than $2.5 billion in awards to U.S. nationals and companies. The period for filing new private claims against Iran expired on January 19, 1982.

The two governments have also filed claims against each other. Iran against the United States filed the vast majority of these inter-governmental claims. While some parts of those claims have been resolved, a number of major cases remain to be adjudicated at the Tribunal.

80. Been, *supra* note 78, at 11003–04; *see* Treaty of Versailles, June 28, 1919, Part X, § IV, Art. 297(2)(i), and § 6; *see* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, U.S.–Iran art. 2(1), 20 I.L.M. 230 (1981).

81. Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 34, 213 U.N.T.S. 221, amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, Europe. T.S. No. 155. The European Convention on Human Rights was signed in Rome on November 4, 1950. The Convention took effect in September of 1953. The document was modeled after the 1948 Universal Declaration of Human Rights, detailing specific rights, and also created the European Court of Human Rights to preside over issues arising from the Convention. Article 34: Individual Applications provides: "The Court may receive applications from any person, non-governmental organization or group of Individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

82. J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U.L. REV. 465, 473 (1999).

83. Lawrence Herman, *Sovereignty Revisited: Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective*, 24 CAN.–U.S. L.J. 121

Article 1116, a private investor may bring a Chapter 11 claim against a foreign Party on its own behalf.[84] Investors have unqualified rights to bring claims against the government signors.[85] By assenting to the terms of NAFTA, the United States, Canadian, and Mexican governments essentially have waived whatever rights of sovereign immunity they may have enjoyed prior to signing.

Should a dispute between an investor and a host government arise, the aggrieved investor may submit a claim to arbitration under one of three sets of rules.[86] Under Article 1120, the investor may submit to the International Center for Settlement of Investment Disputes (ICSID) Convention, the Additional Facility Rules of ICSID,[87] or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[88] Rather than pursue their complaints through local courts under local laws, foreign investors may invoke arbitration under the

(1998). Herman discusses the potential for infringement on principles of sovereignty through investor–state dispute mechanisms under the WTO, GATT, and chapter 11 of NAFTA.

84. NAFTA art. 1116: Claim by an Investor of a Party on Its Own Behalf provides: "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1502(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises). . . ."

85. NAFTA art. 1122: Consent to Arbitration provides: "Each party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

86. NAFTA art. 1120: Submission of a Claim to Arbitration.

87. The ICSID was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on October 14, 1966. Although the ICSID is an independent, international organization, it is closely tied to the World Bank. All ICSID members are also World Bank members. The Center's headquarters are in Washington, D.C., but provide facilities for dispute resolution around the world. Since 1978, the Center has provided Additional Facility Rules in addition to its primary function of providing arbitration facilities. At this time, neither Canada nor Mexico is an ICSID Convention Party, so the ICSID rules are not available for resolution of NAFTA disputes. A list of current ICSID Convention parties is available at http://www.worldbank.org/icsid/constate/c-states-en.htm.

88. As mentioned in note 97, neither Canada nor Mexico is an ICSID Party; therefore, the UNCITRAL rules prevail. UNCITRAL provides uniform rules for arbitrating international claims. The UNCITRAL Arbitration Rules were established in 1976.

UNCITRAL Section III. Arbitral proceedings, *GENERAL PROVISIONS*, Article 15 provides:

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner, as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

provisions of the applicable investment agreement, which may include the rules of customary international law, as in NAFTA.[89] There are strict timelines and procedural requirements involved in filing a claim under Chapter 1111. Ninety days prior to the filing of a Notice of Arbitration, the investor must file a Notice of Intent to Submit a Claim to Arbitration under Article 1119.[90] Once the Notice of Arbitration has been filed, each party appoints an arbitrator and the third arbitrator is selected cooperatively. The third jointly appointed arbitrator presides over the panel.[91] The arbitration commences in the territory of a party that is a party to the New York Convention and pursuant to ICSID Additional Facility Rules, ICSID Convention, or UNCITRAL Arbitration Rules.[92] Following submission of relevant pleadings, responses, and rejoinders and the commencement of the arbitration, the Tribunal issues its final award. The award binds only parties involved in the dispute and only with respect to the arbitration at issue. NAFTA makes no further requirement that the final award be available to any other party or the public.

Chapter 11's dispute mechanism for the expropriation of investments has generated much controversy, although, as previously discussed, neither the expropriation claim nor the direct investor-state tribunal provides a particularly innovative system for resolution.[93] However, there are economic and social characteristics of the countries involved in NAFTA that have contributed to the controversy. One of the primary functions of the BIT model on which NAFTA was based is the promotion of fair, market-based economies; accordingly, many of the BITs to which the United States is already a party are with developing countries. Under NAFTA, both the United States and Canada have demonstrated histories of fairness in open, free-market trade. In addition, the paradigm shift illustrates not a difference in the provision enabling investors to initiate expropriations claims, but rather a shift in investors' expectations and consequent use of the protections available.

Currently, four expropriation claims have been filed and published against the United States by investors.[94] The impending decisions com-

89. *See* Wagner, *supra* note 82.

90. NAFTA art. 1119: Notice of Intent to Submit a Claim to Arbitration.

91. NAFTA art. 1123: Number of Arbitrators and Method of Appointment.

92. NAFTA art. 1130: Place of Arbitration. New York Convention, 1958. The New York Convention is the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed in New York, New York, United States, June 10, 1958. For a complete listing of New York Convention parties, see information, *available at* http://arbiter.wipo.int/arbitration/ny-convention/parties.html.

93. *See* discussion of Bilateral Investment Treaties *supra* note 55.

94. These claims are discussed in further detail in the next section. The following is a list of claims (including alleged violations of Article 1110) filed against the United

bined with the first successful expropriations claim have caused concern regarding expropriations to emerge again.[95] In particular, investor-state dispute settlement provisions have the potential, not only to scale back current modes of environmental protection and local land use control, but also to thwart future efforts to curb detrimental effects on the environment.[96] Given the rise in expropriations claims regarding environmental and health-based regulations having a negative impact on investments, additional attention has been placed on the arbitral forums.

IV. Current Expropriations Issues

The NAFTA does not require disclosure or publication of opinions, pending claims, nor is there a comprehensive database of Chapter 11 decisions.[97] However, the available records indicate a total of twenty-eight notices of arbitration or intent to file notice of arbitration, with twenty still pending.[98] Currently, there are three claims pending against the Canadian government and two recent awards.[99] The Mexican government has recently defended three expropriations claims.[100] Currently, five investors have submitted notices of arbitration and Mexico is defending one claim presently.[101] The United States has recently been

States: Methanex and the U.S.A.; Loewen Group and the U.S.A.; ADF Group, Inc. and the U.S.A. (FINAL AWARD); Canfor Corp. and the U.S.A.; Kenex Ltd. and the U.S.A.; Mondev International Ltd. and the U.S.A. (FINAL AWARD), *available at* http://www.naftaclaims.com.

95. Metalclad's successful expropriations claim against Mexico regarding the denial of a building permit required to construct a hazardous waste disposal site brought environmental protection concerns to the forefront. The Metalclad decision is discussed further in the next section.

96. Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INTL. L. 223 (2001). Laird maintains that legitimate government regulation will withstand Article 1110 claims and that the procedural requirements for filing Chapter 11 claims thwart frivolous attempts to profit from legitimate regulation. Specifically, Laird writes: "[I]t is misguided reasoning to think that holding governments accountable is a threat to democracy." *Id.* at 229.

97. *See* NAFTA, *supra* notes 64–70.

98. See information *available at* http://www.naftaclaims.com for a comprehensive list of documents. Todd Weiler, an attorney and scholar who has represented parties in NAFTA tribunals, maintains this site.

99. Currently pending cases are *United Parcel Service and Canada, Crompton Corporation and Canada*, and *Ethyl Corporation and Canada.* Recently decided cases are *S.D. Meyers and Canada* and *Pope & Talbot, Ltd. and Canada.*

100. *Karpa and United Mexican States, Waste Management and U.M.S.*, and *Metalclad and U.M.S.*, *available at* http://www.naftaclaims.com.

101. Notice of arbitration filed against Mexico by Adams, et al; Calmark Commercial Development, Inc.; Fireman's Fund; Frank; GAMI Investment, Inc. The Government of Mexico is presently defending a claim filed by International Thunderbird Gaming Corporation. *See* http://www.naftaclaims.com.

party to two final arbitral decisions and has four claims pending against it.[102]

The following subsection presents an analysis of several of the claims brought under Article 1110 and the reasoning relevant to an examination of potential conflict between United States jurisprudence and Tribunal decisions.

A. *Robert Azinian, et al. (DESONA de C.V.) and Mexico*[103]

Azinian and Mexico was the first expropriations claim brought in NAFTA's arbitral forum. In this case, the Tribunal held that a contract voided through the legal process could not constitute an expropriation. Desechos Solidos de Naucalpan (DESONA), a Mexican company with American shareholders, and the City of Naucalpan, Mexico, entered into a contract regarding the collection and treatment of municipal solid waste. The contract detailed a fifteen-year agreement between the parties, and specified that DESONA service the waste by constructing a plant to convert the gasses from the decomposing garbage into electricity. This project was scheduled to require at least $20 million in investments to construct the 200-megawatt plant. DESONA failed to perform at least 27 provisions of the terms of its contract. Following attempts by the city council to clarify the discrepancies, DESONA challenged the city's contentions in an administrative hearing. In the interim, the City of Naucalpan cancelled the contract, based on the discrepancies between contract provisions and actual performance by DESONA. The administrative forum, Mexico's State Administrative Tribunal, supported the city's determination to cancel the contract. This challenge was affirmed on appeal in the Mexican judicial system.

Following the breach of contract claim filed by the corporation against the government of Mexico in Mexican courts, DESONA's American stockholders sought relief in the NAFTA tribunal. The Tribunal found that unless the Mexican courts had acted in clear violation of international law, the findings could not be challenged. The Tribunal further reminded parties that contract law was not subordinate to the provisions of NAFTA. In other words, breach of contract, even on the part of the government, was actionable as such, rather than as an ex-

102. Recently, the Tribunal decided *ADF Group and U.S.A.*, Final Award, January 9, 2003 and *Mondev International Limited and U.S.A.*, Final Award, October 11, 2002. Currently, the following investors have filed claims against the United States: Loewen Corp., Methanex Corp., Canfor Corp., Kenex Ltd., *available at* http://www.naftaclaims.com. These claims are discussed in greater detail in this section.

103. *Azinian and United Mexican States.* Procedural Order, *available at* http://www.naftaclaims.com.

propriation. The reasoning behind the *Azinian* opinion did much to assuage the initial fears of the lack of authority over Tribunal decisions and lack of transparency of the opinions. Because the Tribunal deferred to the court and to established contract law, the sovereignty of Mexico remained intact.

B. *Metalclad Corp. and Mexico*[104]

The arbitral panel decision on the *Metalclad* claim is the significant analysis of NAFTA Article 1110 claims and also foreshadows potential claims under NAFTA in the future. The first successful expropriations claim reviewed by the Tribunal, Metalclad involves land use and waste regulation issues. The U.S. corporation, Metalclad, wished to purchase the Mexican corporation, COTERIN. Prior to sale negotiations, COTERIN began the process of securing permits necessary to build and maintain a hazardous waste landfill. As a condition to its assent to the sale, Metalclad required assurance that all required permits would be secured.

COTERIN purchased Metalclad and successfully secured state and federal permits to build a hazardous waste landfill. Subsequently, the municipality of San Luis Potosi denied Metalclad's building permit application. After attempting to resolve the issue through negotiation, Metalclad filed claims with the NAFTA tribunal under Articles 1105 and 1110, alleging that Mexico had acted in clear violation of international law and unlawfully expropriated Metalclad's investment interest in purchasing COTERIN. While the decision was pending, the governor of San Luis Potosi attempted to legitimize the denial by declaring the proposed site a natural area for the protection of a rare cactus.[105] The tribunal found that the Mexican government had violated both Articles 1105 and 1110.

In reaching this decision, the tribunal determined that not only are physical, "outright seizure[s]" of property prohibited by NAFTA, but that Article 1110 also prohibits "covert or incidental interference with the use of property" that essentially deprives an owner of economic benefit reasonably expected from the investment.[106] The Tribunal fur-

104. *Metalclad Corp. and United Mexican States*, Amended Procedural Order, *available at* http://www.naftaclaims.com.

105. Kevin Banks, *NAFTA's Article 111: Can Regulation be Expropriation*, 5 NAFTA L. & BUS. REV. AM. 499, 501, 58–59, 96/ Metal clad 2001 BCSC 664, 58–59, 96. At the time of publication, Banks was senior labor law advisor with the Secretariat of the Commission for Labor Cooperation, the international institution established under the labor side agreement to NAFTA.

106. *Metalclad and U.M.S.*, Final Award (AF)/97/1, 28 Award (Aug. 30, 2000), *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf (last visited Nov. 20, 2002).

ther held that the Mexican federal government exercised exclusive authority over the regulation of hazardous waste landfills and further must protect individual property owners from potential breaches of this authority by state and local permitting bodies.

Although precedent does not bind the tribunal, the opinion refers to *Biloune v. Ghana Investment Centre* in its decision.[107] The opinion also discussed a number of other factors including that the municipality could not provide a reasonable basis for denying the building permit. The action was taken in light of issuance of federal permits from the National Ecological Institute and determination by the Secretariat of Urban Development and Ecology that Metalclad's project would not be impeded by denial of a building permit.[108] This decision echoes American takings jurisprudence insofar as the tribunal determined that the municipality unjustly interfered with a "reasonable investment-backed expectation" by usurping government authority.[109] The tribunal mentioned the significance of representations made by the federal government of Mexico in ensuring that, upon securing federal permits, the municipality had no discretion to deny the permit. In finding that an investment had been expropriated, the tribunal found that Metalclad acted reasonably in relying on the government's assertions. One reason behind the tribunal's finding of expropriation in Metalclad was that the federal government gave Metalclad reason to rely on its assurance that Metalclad could secure appropriate permits and that the municipality had no discretion, rendering reliance on the Mexican federal government's representations reasonable.

C. *Pope & Talbot, Inc. and Canada*[110]

The tribunal rejected Pope & Talbot's claim of expropriation of property by the Canadian government through quotas governing the export of softwood lumber. In 1996, Canada and the United States formed the Softwood Lumber Agreement, limiting the export of softwood lumber

107. 95 I.L.R. 183 (1993). In *Biloune*, the tribunal held that an indirect expropriation of property occurred when a permit, though not expressly denied, was never issued, and therefore the project was stalled. The tribunal used a "totality of the circumstances" test in making its determination. (Cited on page 29 of the *Metalclad* Award.)

108. *See* http://www.naftaclaims.com, a site maintained by Canadian attorney and professor of law Todd Weiler, provides comprehensive information and records about claims brought before NAFTA tribunals.

109. "Investment backed expectations" became part of American Fifth Amendment takings jurisprudence in *Penn Central v. New York City. See supra* note 37. *See also supra* Part II.

110. *Pope & Talbot, Inc. and Canada*, Notice of Arbitration (Mar. 25, 1999), Statement of Claim (Mar. 25, 1999), Final Award on the Merits (Apr. 10, 2001), *available at* http://www.naftaclaims.com.

from Canada to the United States. Pursuant to this agreement, Canada established export quotas for four provinces. Pope & Talbot, Inc. owns a subsidiary that owns a Canadian corporation, Pope & Talbot, Ltd., that manufactures and distributes lumber from British Columbia. British Columbia is one of the provinces restricted by an export quota. Pope & Talbot claimed that the province-specific quotas that Canada established pursuant to its Softwood Lumber Agreement with the United States unduly deprived the company of "some benefit of property" and therefore resulted in an uncompensated expropriation. In rejecting this Article 1110 claim, the Tribunal highlighted Article 1110's requirement that regulatory expropriations must reach the threshold of "tantamount" to expropriation. Although the tribunal rejected Pope & Talbot's claim for relief, it did establish that the interest in access to the U.S. market qualified as a property right.[111]

D. *S.D. Myers and Canada*[112]

S.D. Myers, a U.S. corporation, operates a polychlorinated biphenyl (PCB) remediation facility a mere sixty miles south of the Canadian border in Talmage, Ohio. Due to its close proximity to the Canadian border and nearness to many Canadian clients in relation to other PCB facilities in Canada, S.D. Myers enjoyed significant business from Canadian exports of PCB. In November 1995, Canada banned the export of PCB temporarily, citing uncertainty of the U.S. position on PCB imports and the subsequent regulation of PCB disposal.[113] Because of the ban, S.D. Myers' alleged a loss in profit and, therefore, an expropriation by the Canadian government.

The tribunal upheld S.D. Myers claims that Canada had violated the

111. *Pope & Talbot, Inc. and Canada*, Interim Award (June 26, 2000), *available at* http://www.naftaclaims.com.

112. *S.D. Myers and Canada*. Final Award on the Merits (Nov. 13, 2000), *available at* http://www.naftaclaims.com.

113. The United States has prohibited the manufacture, processing ,and distribution in commerce of PCBs under the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2605(e)(3)(A). The EPA subsequently banned the import and export of PCBs in 1980 under 61 Fed. Reg. 11,096 (Mar. 18, 1996). TSCA allows the Secretary of the EPA in his or her discretion to grant individual exemptions under 15 U.S.C. § 2605(e)(3)(B). Canada began banning PCB exportation in 1990, allowing an exemption for U.S. government-owned PCBs. Canada signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1992. The Convention conditions export of hazardous materials to nonparty nations on adequate assurance of environmentally safe disposal. The United States is not a party to the Basel Convention. Canada codified the terms of the Convention. Following this, the United States proposed amendments to the PCB import ban and in 1995, allowed S.D. Myers to begin importing PCBs from Canada. *See also* S.D. Myers Notice of Arbitration, *available at* http://www.naftaclaims.com.

protection against discriminatory treatment under Articles 1102 and 1105,[114] because the ban could not be supported by a legitimate environmental or health concern. The tribunal found that the ban was motivated rather by Canadian desire to protect the PCB disposal industry from U.S. competition. In spite of this finding, the tribunal nonetheless did not find that an expropriation had occurred. In rejecting S.D. Myers' claim against Canada, the tribunal indicated that under principals of international law, a regulation is rarely perceived as an expropriation.[115] The tribunal held that "regulatory conduct by public authorities is unlikely to be the subject of a legitimate complaint under Article 1110"; however, the tribunal did not discard the possibility altogether. Though the Tribunal noted the significance of the ban being only temporary, the opinion did not address a change for permanent bans. Again, the tribunal had an opportunity to find an expropriation and did not.

E. *Mondev International, Ltd. and the United States*[116]

In October 2002, a NAFTA tribunal found that the United States had not expropriated Mondev's property under Article 1110 of NAFTA. The Mondev claim arose from disputes regarding commercial real estate development contracts between Boston, Boston Redevelopment Authority (BRA), and Lafayette Place Associates (LPA), a Massachusetts limited partnership owned by the Canadian Mondev International Ltd. The contracts involved the development of an area of Boston in two phases. The Phase I included construction of a shopping mall, department store and hotel. The contract among the three parties allowed for LPA to exercise its right to purchase development rights for the parcel of land included in the development plan. LPA asserted this right in 1979. Phase II included a plan to develop city-owned land adjacent to Phase I for office and retail space. Phase II included a city parking lot. The Phase II agreement provided that in the event that the city should demolish the parking lot and build an underground parking garage in its place, LPA could exercise a timely option to purchase the air rights over the parking space to build the retail and office building. Although the city did demolish the parking lot, there were numerous delays and the closure date for LPA's option extended to January 1,

114. NAFTA arts. 1102, 1105: National Treatment and Minimum Standards of Treatment; *see also* discussion *supra* Part III.

115. *See S.D. Meyers*, Final Order, *supra* note 105. S.D. Meyers sought $20 million in damages for alleged breaches of NAFTA.

116. *Mondev International and the United States*, Notice of Arbitration (Sept. 1, 1999) and Final Award on the Merits (Oct. 11, 2002), *available at* http://www.naftaclaims.com.

1989. A good faith requirement was included regarding the exercise of the Phase II option.

The date of closure for the option came and went without an assertion from Mondev, nor a reminder of the option by the city or the Redevelopment Authority. Mondev asserted its claims of breach of contract in the Massachusetts judicial system, arguing that the city and BRA had engaged in bad faith surrounding the date of closure. The jury found for Mondev against both the city and the BRA, but because of the BRA's statutory immunity from liability, the court entered a judgment notwithstanding the verdict in that dispute. Both Mondev and the city appealed. The immunity again prevented Mondev from prevailing against on appeal and the appellate court found for the city on the contract claim. Based on preclusion from compensation, the Canadian corporation asserted that it was denied justice to the extent that the United States expropriated its property rights.[117]

Although the transactions occurred in the 1970s and 1980s, Mondev claimed that the decision of the Supreme Judicial Court of Massachusetts regarding the contracts damaged its investment to an extent that was "tantamount to expropriation."[118] In dismissing Mondev's expropriation claim, the tribunal recognized that Article "1110(1)(d) does not require that the award of compensation should occur at exactly the same time as the taking."[119] The tribunal reasoned further that even if property had been expropriated by the United States, an expropriation under Article 1110 would not be found if the state provided a procedure through which a landowner could be compensated.[120] Through this reasoning, the tribunal distinguishes between government compensation for lawful taking and judicially enforceable damage awards for unlawful expropriations. Though these findings are instructive for future tribunals facing Article 1110 decisions, the dismissal of Mondev's expropriation claim hinged on the time of the alleged expropriation. Since the dispute regarding the contract and property rights themselves arose years prior to NAFTA's adoption, the terms of the agreement could not provide Mondev with a cause of action. The Tribunal wrote: "any expropriation of the enterprise occurred not later than the date of fore-

117. *Id.*
118. *Mondev Int'l*, Notice of Arbitration, at 2.
119. *Mondev*, Final Award on the Merits, at 23.
120. *Id.* The Tribunal wrote: "at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation." *Id*.

closure, and that it was completed at the latest by that date" and "no remedy for breaches that occurred prior to the creation of NAFTA."[121]

F. *Pending Claims*

The following section details claims filed with the tribunal that have not yet been decided. So far, the United States has not defended an Article 1110 claim. However, three of the four complaints filed against the United States this year have included allegations of expropriations. The ramifications of outcomes adverse to the United States are discussed following a description of the claims.

1. METHANEX CORP. AND UNITED STATES[122]

The Canadian corporation Methanex produces Methanol, a chemical used to produce the gasoline additive MTBE. In recent years, the EPA has questioned the safety of MTBE.[123] Following EPA's advisory regarding MTBE, the University of California published studies indicating the risks to both human health and environment caused by MTBE.[124] Citing health concerns, the State of California developed in an order a timetable for eliminating MTBE from gasoline.[125] Following this order, Methanex brought claims against the United States for discrimination, unfair treatment, and expropriation under Articles 1102, 1105, and 1110. The $970 million damage award that Methanex seeks is the largest loss claimed under Article 1110.[126] Methanex alleges that governor Davis' order to ban MTBE is not motivated by health and environmental concerns, but rather by ethanol producers' contributions to Davis' campaign and continued lobbying with the Governor.[127]

121. *Id.*

122. *Methanex Corp. and United States*, Draft Amended Claim, at 3–4 (Feb. 12, 2001), *available at* http://www.methanex.com/investorcentre/mtbe/draft_amended_claim.pdf. Methanex alleged that the United States has continually referred to Methanex as foreign. Methanex further alleged that the ban on MTBE benefit primarily producers of ethanol motivated the ban and that the corporation Archer-Daniels Midland (ADM) intentionally manipulated the political process by donating an original sum of $10,000 to Davis' campaign. Finally, Methanex alleged that ADM invited and hosted Davis at ADM's headquarters in Illinois, then donating an additional $100,000 to the campaign (pages 3–4 of amended complaint).

123. EPA released information regarding MTBE as a proven animal carcinogen and a potential human carcinogen. MTBE released into drinking water, even in small quantities, can render water un-potable. Public Hearing to Accept Public Testimony on the University of California's Report on the Health and Environmental Assessment of Methyl Tertiary-Butyl Ether (MTBE) (Feb 19, 1999).

124. *Id.*

125. Exec. Order No. D-5–99, 4 (Cal. Mar. 26, 1999).

126. Azinian sought; Metalclad was awarded $16.7 million; S.D. Meyers sought; Pope & Talbot sought; Loewen seeks; Crompton Corp. seeks $100 million.

127. In a response to Bill Moyers' February 5, 2002 program, "Trading Democracy," Methanex released a press release detailing its position. For example, the release describes the executive order as not being motivated by health concerns, but rather solely

2. THE LOEWEN GROUP AND THE UNITED STATES OF AMERICA[128]

Perhaps the most disturbing Article 1110 claim yet, the Loewen Group seeks compensation for an expropriation by the State Court of Mississippi.[129] Loewen claimed that, in its finding against the Canadian company, the Mississippi State Court allowed violations of Articles 1102 and 1105 of NAFTA, primarily violated when the court permitted opposing counsel to make pro-American, xenophobic remarks against Loewen.

The future of the Loewen Group's claim is uncertain, as the corporation recently re-incorporated in the United States. Because the Investor-State Dispute mechanism is only available to foreign investors, the tribunal must decide whether Loewen may receive the benefit of the tribunal, although it became an American entity after filing the notice of arbitration.

3. CANFOR CORP. AND THE UNITED STATES OF AMERICA[130]

The Canfor Corporation was a Canadian company operating out of British Columbia. Canfor filed a claim under NAFTA regarding the burden of new import taxes imposed by the United States on the softwood lumber industry. The taxes were imposed to deter the sale of softwood lumber products for less than market value. In order to deter "dumping" of Canadian softwood lumber, the United States has im-

based on environmental concerns. Methanex, citing political motivations, also casts these environmental concerns aside. The release further notes Methanex's position that Chapter 11 of NAFTA protects legitimate environmental regulations.

128. *Loewen Group and the United States*, Notice of Arbitration (Oct. 30, 1998), *available at* http://www.naftaclaims.com. The Loewen Corporation recently reincorporated in the United States, therefore making it a domestic investor for purposes of NAFTA. The Tribunal is presently in the process of determining whether the reincorporation has mooted the claim or if the investor need only be a foreign investor at the time the claim was filed.

129. *Id.* at 4–6. Loewen alleges that in the course of a Mississippi State court litigation regarding commercial contracts between Loewen and Jeremiah O'Keefe. The two competed in the funeral home and funeral insurance business. Specifically, the controversy arose regarding three contracts between O'Keefe and Loewen valued by O'Keefe at $980,000. and another alleged contract regarding an exchange of two funeral homes by O'Keefe worth approximately $2.5 million for insurance from Loewen worth $4 million. Ultimately, the Mississippi jury found Loewen liable for $500 million in damages, During the course of proceedings, the jury awarded O'Keefe $500 million in damages; this amount included $400 million in punitive damages and $74 million for emotional distress. Loewen asserts that the grossly excessive fines were the product of a seven-week trial "infected by repeated appeals to the jury's anti-Canadian racial and class biases." Loewen alleges that the court's allowing O'Keefe's attorney to make "extensive, irrelevant and highly prejudicial references to" Loewen's financial and national status were tantamount to expropriation by the U.S. government.

130. *Canfor Corp. and the United States*, Notice of Arbitration (July 9, 2002), *available at* http://www.naftaclaims.com.

posed a set of duties on the Canadian imports, which Canfor claims are discriminatory and result in an unlawful expropriation.

4. ANALYSIS OF DECISIONS

Some commentators remarked that the U.S. government has nothing to fear from future claims filed by foreign investors. They say this because tribunal decisions may be based on standards of reasonableness employed similarly by Fifth Amendment jurisprudence. However, considering Metalclad's successful expropriations claim against Mexico and the number of claims based on discriminatory bans of chemical treatment and usage such fears may be warranted.[131]

V. The U.S. Constitution, the Treaty, and Frustrated Expectations

Turning to a comparison of NAFTA and the Fifth Amendment, the two bases for claims are similar; however, the scope and operation of the two vary greatly.

A. *Jurisdiction*

The Fifth Amendment is applied to the states (and local governments) through the Due Process Clause of the Fourteenth Amendment.[132] Because the Fifth Amendment's Takings Clause is applicable to state and local actions, the Constitution acts as the "supreme law of the land"[133] and attempts to impose uniformity on both state and federal actions. The variations in this area come mainly from the interpretation and application of that clause by different courts at different times. Nevertheless, there is an attempt at uniformity, at least through the use of constitutional precedent.

NAFTA on the other hand, is a treaty ratified by the U.S. Senate[134] under the federal Constitution; treaties have the force and effect of law.[135]

131. *S.D. Meyers and Metalclad* found discriminatory behavior. Two current claims related to bans: Methanex and Crompton Corp.

132. Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

133. Article VI of the U.S. Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art VI.

134. NAFTA, *supra* note 1.

135. NAFTA art. 1110. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 375 (1998) (indicating that although the court "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and

B. *Respondents and Procedures*

Most claims made under the Fifth Amendment are undertaken either in the Court of Federal Claims (in those cases in which the federal government is involved)[136] or in state courts with certiorari review at the discretion of the U.S. Supreme Court.[137] Because of the cost, time, and effort involved in such litigation, comparatively few cases come to trial, still fewer are successful, and an extremely rare number are taken to the Supreme Court.

NAFTA, on the other hand, allows only for a direct action against the national government, rather than the state or local government.[138] A foreign claimant must weigh all other remedies under domestic law and take its chances that the tribunal will order payment.[139] Under the treaty, any award is directly enforceable against the national government, which may then deal with the state or local government whose actions gave rise to the claim under applicable domestic law. Although NAFTA is to be interpreted under international treaty law rather than national constitutional principles, it is important to remember that the forum selection is exclusive. In other words, a potential claimant must proceed in a nation-established court or a NAFTA tribunal.

express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." And "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." (citing Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion)).

136. The federal courts have limited jurisdiction. They may only hear cases dealing with a federal question, such as a takings claim, or cases where the plaintiff and defendant are from different states. FED. R. CIV. P. 12(b)(1).

137. In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court held that the plaintiff's taking claim was not ripe because the plaintiff did not obtain a final denial of its subdivision application, nor did it exhaust state procedures for obtaining a remedy. Therefore, the claim was premature as both a deprivation of property without due process under the Fourteenth Amendment and a taking under the Takings Clause of the Fifth Amendment. If a state provides an adequate procedure for seeking just compensation, a person cannot claim a violation of the just compensation clause in federal court until it used the procedure and was denied compensation. 473 U.S. 172 (1985). This rule has been the subject of academic criticism. *See Procedural Implications of Williamson County/First English in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, 31 Envtl. L. Rep. 10353 (Apr. 2001); James S. Burling, *Inverse Condemnation and Related Government Liability*, *in* WHEN IS A CLAIM AGAINST THE GOVERNMENT RIPE? TAKINGS, EQUAL PROTECTION, DUE PROCESS, AND FIRST AMENDMENT CHALLENGES. ALI-ABA CLE cosponsored with the Pacific Legal Foundation, SH025 ALI-ABA 119.

138. NAFTA art. 1110(2)-(6).

139. *Id.*

C. *Subject Matter of Claims*

Most taking claims brought under the Fifth Amendment deal with real property, as the original understanding of that clause was land-based. For example, the categorical takings recognized by the U.S. Supreme Court both relate to real property—physical invasion[140] and deprivation of all viable economic use.[141] Most of the cases interpreting the Takings Clause of the Fifth Amendment deal solely with issues relating to real property.[142] Deprivation of personal property has usually been dealt with by the Due Process Clause of the Fourteenth Amendment for claims against state or local governments.[143] There is a view on the Supreme Court that some personal property claims, particularly relating to money, may be a fit subject for a claim under the Fifth Amendment.[144] For the most part, however, the Fifth Amendment's protections against taking for public use without just compensation apply only to realty.

A more interesting question, however, relates to determining which taking test applies. As noted above, there are two tests formulated by the U.S. Supreme Court in takings cases, i.e., *Agins*[145] and *Penn Central*.[146] The two prongs of *Agins* have yielded a check on the imposition of conditions involving the transfer of real property interests[147] while the other deals with a categorical taking, i.e., the declaration of all viable economic use of land.[148] More recent cases from the U.S. Supreme Court do not use *Agins* except in these areas. Instead, that court

140. *Loretto*, 485 U.S. at 419.
141. *Lucas*, 505 U.S. at 1003.
142. *See supra* Part II.
143. *Chicago, B. & Q.R. Co.*, 166 U.S. at 239.
144. In a number of recent cases, the Supreme Court has held that requiring the payment of money can operate as a taking. For example, in *Eastern Enterprises v. Apfel*, a plurality of four Justices held that a statute requiring a company to contribute to a benefits fund operated a taking. Although Justice O'Connor, giving the opinion of the plurality, accepted that this case did not concern a "classic taking," she assumed that "economic regulation . . . can effect a taking," citing *Penn Central* and *Pennsylvania Coal* as justification for such an assertion. She identified the considerations of "justice and fairness," the "ad hoc inquiries," and the three-stage *Penn Central* test as the starting points for determining whether a taking had occurred. Justice O'Connor concluded that when regulations impose a substantial burden on individuals, the regulation implicates the "principle of fairness" which (apparently) underlies the takings clause. *See supra* note 2. Similarly, in *Philips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court held that a law requiring attorneys to place their clients' funds in an account that generated interest to fund low-income persons was potentially a taking.
145. *See Agins*, 447 U.S. at 225.
146. *See Penn Central*, 438 U.S. at 104.
147. *See Nollan*, 438 U.S. at 825; *see also Dolan*, 512 U.S. at 374.
148. *See Lucas*, 505 U.S. at 1003.

has now fixed upon the use of the three *Penn Central* factors in those cases in which a regulatory taking is claimed, i.e., when the government has allegedly gone "too far." The interpretation of the various tests, or their derivations, is far from settled and the "certainty" provided by reliance on precedent is far from certain, thus undermining the perceived superiority to the less constrained use of tribunals in NAFTA cases.

NAFTA does not restrict itself to real property in its limitations against governmental expropriations.[149] Rather the provisions are sufficiently broad to deal with both real and personal property.[150] Indeed, it is the prolix nature of NAFTA that is most troublesome to its critics, for NAFTA can be used to limit or defeat regulations relating to labor relations, land use, or the environment. And while NAFTA's provisions contain the ritual genuflections against a race to the bottom, the very nature of the agreement is aimed at allowing capital to find investment opportunities.[151] These opportunities may come to bear (and fruition to the investors) when the other country has a less demanding environmental or labor regime.

Alternatively, under NAFTA, an expropriation claim may result from land use or other regulations adopted after an investment is made because it lessens, or frustrates, an investment. The fear in all three signatory nations is that NAFTA may be used as a battering ram against national or sub-national regulations applied alike to nationals and foreigners.

D. *Dispute Resolution Methodology*

As noted above, the value of precedent should result in greater consistency of decision-making over a regime that uses ad hoc tribunals having no fixed standards. The interpretation of the Takings Clause in the United States, however, does not give much comfort to that position.

149. NAFTA covers "investments" and is defined for purposes of chapter 11 so as to cover a wide range of property interests including, among other things, various equity and debt securities, some types of loans, real estate or other property, and any capital expenditure. NAFTA art. 1139(g), (h).

150. *Id.*

151. NAFTA's preamble states:

> The Government of the United States of America, the Government of Canada and the Government of the United Mexican States, resolved to: . . . CREATE new employment opportunities and improve working conditions and living standards in their respective territories; UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental laws and regulations; and PROTECT, enhance and enforce basic workers' rights. . . .

One need only look to *Mugler*[152] to deal with claims made over regulations of real property and compare those decisions with *Pennsylvania Coal v. Mahon*,[153] to view a sea change in the Supreme Court's views over the limits of regulations. Similarly, following *Euclid*[154] and *Nectow*,[155] two cases relating to the validity of land use regulations and having very different results, one sees a period in which the federal Supreme Court was silent for almost fifty years until 1974.[156] The case law since that time appears to depend more upon the composition of the Supreme Court than on any doctrinal principles. In the middle of such volatility, precedent certainly has its limits.

Nor is NAFTA bereft of all limitations on the discretion of its arbitral tribunals. Appointments to the tribunals are made by the national governments, which choose those most articulate and able to enforce both the national interests and that of free trade. The national governments are certainly aware that, even though precedent is not formally binding, it is useful and consistency is morally important. An outlandish result may bring the treaty and its free trade system into disrepute. Nevertheless, NAFTA may certainly be improved through the use of greater transparency in its decision-making process in order to enhance the legitimacy of the free trade institutions NAFTA fosters.

One unexplored area is the follow-up of an unfavorable adjudication. If a Canadian provincial or a Mexican or American state regulation were deemed an expropriation under NAFTA, the national government must pay the cost of compensation. Because a NAFTA tribunal has no authority to provide equitable relief through injunctions, the NAFTA adjudication does not invalidate the challenged regulation. Thus there is the prospect of other similarly situated making similar claims. It may be that the national government will seek indemnification of those claims from the sub-national government. It may also be possible that the national government will seek to invalidate the offending regulation as being contrary to the free trade regime to which the national government had committed itself in ratifying NAFTA. At this point, however, it is not clear how this area of the law will develop.

E. *Conversions*

Future bilateral and multilateral trade agreements are likely to model the trade and investment regime provided by NAFTA. The movement

152. *See Mugler*, 123 U.S. at 623; *See also* Hadacheck v. Sebastian, 239 U.S. 394 (1915), and Reimann v. Little Rock, 239 U.S. 394 (1915).

153. *See Pennsylvania Coal*, 260 U.S. at 393.

154. *See Euclid*, 272 U.S. at 365.

155. *See Euclid*, 272 U.S. at 365.

156. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The next regulatory takings case was *Penn Central*, 430 U.S. at 104, in 1978.

of capital across political boundaries is likely to increase, not withstanding the concerns expressed over multilateralism. Much like the Hanseatic traders of the thirteenth through seventeenth centuries, there will be a continuing effort to develop an international *lex commercialias* in which common understandings of the risks and limitations on the movement of capital and ownership of real property will evolve.[157] The European Convention of Human Rights contains such understandings[158] and is being explored through case law developed in the European court in Strasbourg. Consider, also, the effect that European Human Rights assurances facilitated by land use regulations did not interfere with the peaceful enjoyment of the claimants "possessions" and did not find an expropriation had occurred.[159] This was so because although the ease with which the property could be sold could have been adversely affected by the regulation, it did not result in rendering the property completely devoid of value and re-sale marketability.[160] In addition, the Iran-United States Claims Tribunal has intimated a heightened sense of the state's interest in regulating the use of land. When faced with expropriations challenges, the tribunal reasons that it in order to find an expropriation, the government regulation or action at issue must obviously deprive the owners of any financially beneficial use of their property rights.[161]

157. *See supra* note 2.

158. Article 1 of the European Convention on Human Rights provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

159. Wagner, *supra note* 82, at 522.

160. Wagner, *supra note* 82, at 524 (explaining *Sporrong and Lönnroth v. Sweden*, before the European Court of Human Rights 23 September 1982. (1983) 5 E.H.R.R. 35, where two landowners were affected by a development moratorium, called an expropriation permit, that extended for twenty-five and eight years respectively. The owners received no compensation during the time development was prevented by the local government of Stockholm. The court held that an expropriation had occurred because the city's action had significantly reduced the owners' proprietary rights to use and dispose of their land, thereby affecting the substance of ownership).

161. Wagner, *supra note* 82, at 522. (citing to the work of WAYNE MAPP, THE IRAN-US CLAIMS TRIBUNAL: THE FIRST TEN YEARS 152, 155 (1983) (discussing the U.S.–Iran Claims Tribunal decision Starrett Housing Corp. v. Iran, 4 Iran- U.S. Cl. Trib. Rep. 122, 154 (1983), where the Tribunal declared "[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purpose to have expropriated them and the legal title to the property formally remains with the original owner." Compare with the discussion of American Fifth Amendment Jurisprudence. Much like *Lucas*, when land is deprived

Similarly, more recent trade agreements have included more precise language responding to concerns over the effect of globalization on labor, environmental and land use issues, and the need for transparency. It appears that international methods of trade dispute resolution will survive only if they enjoy the confidence of member states to the trade agreements they have entered, as well as the public, which support those states. To that end, transparency and the use of precedent are most beneficial.

VI. Conclusion

Aside from the possibility of monetary compensation for real or perceived financial difficulties caused by regulation, the objectives, scope, and remedies provided by NAFTA differ greatly from that provided under the Fifth Amendment. Regardless of these differences, the perceptions of both nationals and foreign investors will likely be that there must be fairness in the protection of property interests and that protection provided by these two mechanisms should be roughly equal.

The volatility of both regimes precludes confidence in that equality, however. The interpretation of the Fifth Amendment's Takings Clause by the U.S. Supreme Court often depends on the kind of case accepted for certiorari review,[162] the facts of that case, and the composition of that court. The virtue of Fifth Amendment adjudication in the federal courts is the use of the same text by the same institution, and an obligation to adhere to, or explain departures from, precedent. As noted above, the utility of precedent as a check on result-oriented decision-making in such cases may be limited.

NAFTA has all the potential for volatility as well. The use of ad hoc tribunals instead of a permanent institution and the lack of a formal obligation to adhere to precedent are apparent drawbacks. Nevertheless, the need for certainty in the investment community, as well as among governments, may well endorse more certainty in the application of broad NAFTA principles in the adjudication process. The high visibility of the mechanics of globalization and the intense political scrutiny that important adjudications under NAFTA will continue to receive will likely result in further demands for transparency of all NAFTA insti-

completely of economic value, should be compensated. This particular analysis does not consider, however, if the owner of property was reasonable in expecting certain use of land.).

162. One wag noted that three cases that impacted land use law were cases involving widows. *See Dolan*, 512 U.S. at 374, *Tahoe-Sierra Pres. Council*, 535 U.S. at 302, and Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

tutions. This transparency is likely to result in explanation of adjudications in terms of the lofty general principles contained in NAFTA and the relationship of the adjudication under consideration with other decisions under those same principles.

However, the demands of the trading and investment communities for greater certainty and consistency of adjudication will result in greater application of NAFTA than for adjudication under the Fifth Amendment in cases involving property regulation. It would be ironic if these demands brought greater certainty for the foreign business community investing in the United States than for U.S. nationals investing in, or owning, land.