

REPENSER NAFTA CHAPTER 11: A CATALOGUE OF LEGITIMACY CRITIQUES

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I. INTRODUCTION

“**R**EPENSER CHAPTER 11.” By this I do not mean “rethinking” Chapter 11 in the hopeful English sense of integrating experience to do better a second-time (i.e. a call for renewal and improvement).¹ Rather, by *repenser*, I mean to simply acknowledge that we know now many things that we did not know then. Chapter 11 would not come into its present form were it adopted today. *Repenser*, if I have the French right, is rethinking tinged with regret.

No feature of NAFTA is more often criticized than Chapter 11.² It has proved to be a lightning rod for anti-NAFTA and anti-globalization critics. Environmentalists, labor organizers and human rights advocates all decry its secrecy, its potential disruptiveness to ordinary lawmaking and its placing of investors' interests before those of the broader public.³ Chapter 11 is portrayed as a great give-away – an elaborate ruse to evade checks on corporate activity in the three NAFTA countries.

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¹ For a leading example of “rethinking” in academic legal discourse, see GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978). See also Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

² See, for example, PUBLIC CITIZEN GLOBAL TRADE WATCH, *NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY*, available at http://www.citizen.org/trade/NAFTA/CH_11/; INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT & WORLD WILDLIFE FUND, *PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTMENT RIGHTS* (2001).

³ See Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141 (2002) (“Critics of Chapter 11 portray it as a Bill of Rights for transnational corporations, conferring on them the right to sue host governments for enacting bona fide, non-discriminatory public health and environmental regulations”).

Nor do any of the three NAFTA Parties – the governments of the United States, Canada, and Mexico – seem particularly pleased with Chapter 11's operation. There is more than a little buyer's remorse evident.⁴ All three nations share a general discomfort with the extensive reach Chapter 11 has displayed.⁵ Through an unanticipated flow of decisions, Chapter 11 tribunals have entertained – if not endorsed – far more extravagant investment claims than were likely imagined by the three nations while negotiating Chapter 11's substantive terms.⁶ At least with respect to Canada and the United States – there is the shock that a self-imagined “civilized” state with a tradition of protecting property rights would ever be compelled to respond to a Chapter 11 claim. And, in the first significant Chapter 11 money judgment,⁷ Mexico – the unstated intended object of Chapter 11 – found itself whipsawed between growing environmental awareness and newly energized local land-use activism, reformist trends encouraged by NAFTA, and the claims of a disappointed U.S. investor asserting reliance on old-school assurances of the then PRI-dominated central government.

Such widespread unhappiness with Chapter 11 is somewhat unanticipated, as Chapter 11 attracted little attention during its negotiations. Indeed, it is now viewed as having been something of a Trojan Horse: seemingly unthreatening upon first delivery, but later understood to have wrecked enormous damage to national democratic institutions.

Many of the attacks on Chapter 11 are expressed in terms of a lack of legitimacy. The exercise of authority by Chapter 11 tribunals over public decisions seems wildly inconsistent with the understandings and expectations of how legitimate political and judicial determinations should be made in all three countries. There is a repeated and emphatic protest of unfair surprise advanced by critics of Chapter 11 – many, if not most,

⁴ Id. at fn 24. See also Julie Soloway, *Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11*, 33 CAN. BUS. L.J. 92, 112 (2000).

⁵ This discomfort became evident upon the adoption of the “interpretation” by the three NAFTA Parties to cut back on Chapter 11's reach. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001). This “interpretation” has been described as a de facto amendment of Chapter 11 – something that would not have seemed problematic but for its potential withdrawal of vested rights from NAFTA investors.

⁶ These cases are digested in the appendix to this book. For a discussion of the early NAFTA Chapter 11 cases, see Jeffery Atik, *2001 International Investment Developments*, 12 YB. INT'L ENV'TL L. 371 (2002); Jeffery Atik, *2000 International Investment Developments*, 11 YB. INT'L ENV'TL L. 343 (2001); Jeffery Atik, *1999 International Investment Development*, 10 YB. INT'L ENV'TL L. 376 (2000).

⁷ *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36 (2001).

state/provincial and local public officials in the three NAFTA Parties claim unawareness of the establishment of an external mechanism that can impose monetary liability for legislative and judicial decision-making.⁸ The implication made here is that had Chapter 11 been better known and understood, it would never have been implemented. It is a sucker-punch, a hidden rider, the unnoticed fine print. Now in place, the potential of Chapter 11 to restrict lawmaking prerogatives chafes legislators in each country.

Legitimacy is a wonderfully open concept in legal discourse. It is often defined in counter-distinction to legality: legitimacy is something other than, something beyond mere legality. A structure or norm may be legal but not legitimate – and vice versa. Ideally, legitimacy and legality coincide, of course, but not always. Legitimacy should precede legality. A legitimacy critique, a particular form of legal discourse, tends to be voiced when legality (at least in its ordinary sense) is conceded. Legitimacy critiques, such as those aimed at Chapter 11, seek to destabilize the foundations upon which a legal structure is erected.

Thomas Franck has famously explored the notion of legitimacy in international law.⁹ And recently Charles Brower *files* has applied Franck's legitimacy framework to NAFTA's Chapter 11.¹⁰ Given the excellence of Brower's extension of Franck's work, I will simply point the reader to it and undertake something different here.

Chapter 11, as part of NAFTA, is layered on top of the domestic legal regimes of the three NAFTA Parties. As such, questions of its legitimacy are perhaps best viewed from the specific legal traditions – and legal expectations – native to each Party. Thus, to answer whether Chapter 11 is legitimate, one can usefully draw on the structures, constitutional understandings and functional notions of legitimacy found within each NAFTA Party. To the extent Chapter 11 goes beyond the expected (even if this is exactly the intended point of its construction), legitimacy is tested. Presented here, then, is a catalogue of defects, surprises, shortcomings and deliberate design associated with Chapter 11 – all of which have attracted attacks on its legitimacy.

⁸ Chris Tollefson, *Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 148 (2002).

⁹ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l. L. 705 (1988).

¹⁰ Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003).

II. GENERAL NAFTA & WTO LEGITIMACY CRITIQUES

THERE HAVE BEEN A SERIES OF GENERAL LEGITIMACY attacks on the NAFTA's structure (including the two NAFTA side agreements),¹¹ and these broader critiques can be said to attach to the more specific Chapter 11 as well. The larger NAFTA in turn shares much criticism with the WTO (at least in the United States)¹² – as anti-globalization activists see both the NAFTA and the WTO as manifestations of a derailed polity, dominated by multinationals seeking profits without regard to broader public interests. By creating these new institutions, multinational-friendly norms are removed to a higher legal and institutional level, beyond the reach of national political reversal.

The NAFTA is frequently viewed as limiting the freedom of action of national lawmaking authorities. The NAFTA establishes broad principles that are intended to “trump” ordinary lawmaking – in an almost constitutional fashion. The NAFTA is not a treaty for internal U.S. purposes, and so its obligations do not formally and automatically trump inconsistent law.¹³ But the expectation of compliance with the NAFTA (not to mention, for the moment, the possibility of monetary penalty effected by Chapter 11) places pressure on the U.S. Congress, and on state and local officials, to keep their lawmaking NAFTA-consistent. All three NAFTA Parties – the national governments – and their subunits (states and provinces) are expected to confine their legislation to the NAFTA's disci-

¹¹ See, for examples, Reid A. Middleton, *NAFTA and the Environmental Side Agreement: Fusing Economic Development with Ecological Responsibility*, 1 SAN DIEGO L. REV. 1029, 1049 (1994); Manuel Fuentes Muniz, *NAFTA at Age One: A Blueprint for Hemispheric Integration? The NAFTA Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379 (1995); Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT'L L. & FOREIGN AFF. 1, 23 (2000).

¹² See, for examples, Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001) [hereafter, Atik, *Democratizing the WTO*]; Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401 (2000); Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT'L L. 223 (2000); Paul B. Stephan, *The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

¹³ Indeed, the U.S. NAFTA implementation act makes explicit that NAFTA's provisions do not have direct internal effect: “No provisions of [NAFTA], nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have any effect.” 19 U.S.C. §3312(a)(1).

pline. As such, their respective freedom-of-action is necessarily curtailed. The NAFTA's substantive rules, including Chapter 11, enjoy a weak form of supremacy over inconsistent national laws and regulations. At times, this phenomenon is described as a loss of sovereignty.

NAFTA (and WTO) both place certain issues onto the international plane that had theretofore been domestic matters. Moreover, NAFTA (and WTO) construct strong-form dispute settlement mechanisms to make these international commitments actionable. The greater part of NAFTA and WTO dispute resolution involves state/state conflicts – where states enjoy the discretionary privilege to place claims before a quasi-juridic institution. Chapter 11, of course, is exceptional – here the right of resort to dispute resolution is vested not in states (already a somewhat unusual case in international law), but rather in private actors (something virtually unheard of).

The NAFTA is said to suffer a democratic deficit. As an international undertaking, the actual chapters were negotiated by the executive of each country, with only limited popular input. Opinion polls in Canada consistently show a lack of public support in many provinces for Canada's participation in the NAFTA.¹⁴ Mexico's adhesion was determined by the autocratic decision of then President Salinas – the PRI-dominated Congress of the time applied merely a rubber stamp.¹⁵ In the United States, opposition to NAFTA was deep and vocal. The "fast track" mechanism has been assailed for stripping Congress of its ordinary and appropriate role in the making of such far-reaching and relatively permanent policy determinations.¹⁶

Interpretation of the NAFTA's terms and obligations has been entrusted to anonymous tribunal and panel members. These bodies – Chapter 11 tribunals and Chapter 19 and Chapter 20 panels – suffer the democratic

¹⁴ Ronald J. Wonnacott, *Canada and the U.S.-Mexico Free Trade Negotiations*, C.D. HOWE INSTITUTE COMMENTARY, Toronto, no. 21 (1990).

¹⁵ See C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 2, 52 n.241 (1994). See also Jeffery Atik, *Regional Development Assistance to Reduce Disparities Among Member Countries: Does EC Experience Point the Way for NAFTA? - Remarks*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE 221 (René Lefeber ed., 1994) (elucidating countries' positions on NAFTA); CARLOS FUENTES, A NEW TIME FOR MEXICO 132 (1996) (mentioning that NAFTA was never subject to public debate in Mexico, despite the wealth of publicity the agreement had abroad, and suggesting that the secrecy surrounding it was merely typical authoritarian treatment).

¹⁶ Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 158 (1992).

infirmities of a relatively unchecked juridical body;¹⁷ attracting a warmed-over critique inspired by Bickel's *Least Dangerous Branch*.¹⁸ There is little or no chance for political reversals of their decisions – absent an unlikely and destabilizing effort to renegotiate the NAFTA treaties. The hierarchical positioning of NAFTA dispute settlement organs, and their distance from national political checks, make their existence – and their every exercise of decision – of questionable legitimacy.

III. ASYMMETRY OF OBLIGATIONS

THERE SEEMS LITTLE DOUBT that the Chapter 11 process was aimed at Mexico. While the U.S./Canada Free Trade Agreement featured a Chapter 16 dealing with investment issues,¹⁹ it did not include an investor/state dispute settlement process.²⁰ Chapter 11 tribunals were an innovation, drawn from BIT practice,²¹ occasioned by the inclusion of Mexico in a North American triad. Mexico had undertaken substantial investment liberalization prior to NAFTA. Local ownership requirements had been substantially eliminated in many industrial sectors and cumbersome technology transfer obligations were repealed.²² Mexico had broken with its prior tradition of manufacturing self-sufficiency and embraced capital importation from the United States.

Still, there was concern that these progressive advances (from the U.S. perspective) were subject to rollback. Throughout the past century, Mexico had demonstrated an oscillating ambivalence towards U.S. investment. The tightening of local ownership requirements (through a process known as “mexicanization”) had been imposed as recently as the 1970s. U.S. anxieties about an eventual turn-of-heart by Mexico led to the call for the creation of enforceable remedies to assure continued U.S. investment. Mexico, in turn, may well have welcomed an opportunity to demonstrate its resolution that this new approach to U.S. investment would be permanent.

¹⁷ See generally Atik, *Democratizing the WTO*.

¹⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1986).

¹⁹ Christopher Wilkie, *The Origins of NAFTA Investment Provisions: Economic and Policy Considerations*, paper presented at the Centre for Trade Policy and Law conference on NAFTA Chapter 11 at Carleton University, Ottawa, on Jan. 18, 2002.

²⁰ For the text of the United States – Canada Free Trade Agreement (1989), see <http://www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf>.

²¹ Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 HASTINGS INT'L & COMP. L. REV. 409, 417 (2000).

²² Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L.REV. 35 (2003).

Considering this history, there is something to the notion that the NAFTA Chapter 11 investor/state remedy was intended to be an asymmetric obligation.²³ Formally, of course, Chapter 11 (including the investor/state process) was a mutual undertaking – equally binding with respect to Canada and the United States. And there were certainly U.S. fears of possible Canadian backsliding with respect to both limits on foreign ownership and the imposition of trade-distorting investment conditions. That said, there was a shared perception that Chapter 11 would only be invoked, if at all, with respect to Mexican state action. This understanding helps explain the surprise voiced within Canada and the United States at the active use of Chapter 11 with respect to *their* measures.

If this is so, then one might well wonder how such an asymmetric obligation could be legitimate. Again, the test here must be run on Mexican terms. The ability to flex Mexican policy with respect to foreign (read U.S.) investment is significantly curtailed – what then is the *quid pro quo* that sustains what otherwise appears to be a unilateral giveaway? Chapter 11's substantive provisions (including notably its actionable entitlement to meaningful compensation) are clear departures from the more traditional Mexican view of the social nature of property. The celebration of the private established by Chapter 11 is undoubtedly of Anglo-Saxon origin. Robust private property (*vis-à-vis* the State) is hardly a value championed by Zapata. While an enhanced appreciation of ownership may eventually become incorporated into the Mexican legal fabric, it cannot yet be said to be fully integrated.

The intended asymmetry of Chapter 11 thus poses two legitimacy challenges. As to its operation with respect to Mexico, it smacks of a neo-colonial entailment, peculiarly privileging the foreign holders of capital. As to its operation with respect to Canadian and U.S. measures, it seems a betrayal of the intent of its original bargain, whereby these states, notwithstanding the formal mutuality of obligation, were entitled to immunity.

IV. PRIVATE FORA FOR PUBLIC ISSUES

THERE HAS BEEN CONSIDERABLE CRITICISM of the structure of Chapter 11. By its nature, an investor-state dispute mechanism is designed to support the interests (and champion the cause) of adversely affected investors – who stand as a uniquely privileged class of

²³ José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303 (1997).

complainants. There is an observed tension, however, between the private interests of the complainant-investor advanced in a particular Chapter 11 dispute and the broader public interest. Indeed, in some instances the champions of the *public* interest in these cases may include *both* the NAFTA Party defending its measure (the host state) *and* the NAFTA Party of which the affected investor is a national (the home state or sending state).²⁴

1. Issues of public Law

Certain Chapter 11 cases have involved rather specific government determinations with respect to the protected investment. The cancellation of the garbage collection concession that is the subject of *Azinian*,²⁵ the first Chapter 11 decision, is an example of a government act (whether justified or not) of limited general interest. Subsequent NAFTA cases have involved much broader areas of public interest. These include assertions that general regulation has effected a kind of taking – or other NAFTA-inconsistent treatment – that touches a specific investment. Chapter 11 challenges on Canadian²⁶ and California²⁷ gasoline additive restrictions, on cross-border shipment of PCBs for disposal,²⁸ and on the allocation of quotas under the U.S./Canadian softwood lumber regime²⁹ are examples of broad public policy determinations that have been caught up in NAFTA Chapter 11 dispute settlement. A finding of NAFTA-inconsistent action places broad policy measures into doubt.

As a general proposition, courts may not be the optimal institutions for the weighing of interests arrayed around such complex issues. Chapter 11 tribunals are even less apt, given their restricted range of permissible legal argument.

²⁴ One imagines that the United States was quite sympathetic with Mexico's plight in *Azinian*. See *infra* note 16. It is hard to imagine how supporting a specious claim advanced by an unsavory set of con men could be in U.S. national interest.

²⁵ *Robert Azinian v. United Mexican States* (ICSID Additional Facility), Nov. 1, 1999. See discussion of *Azinian* in Jeffery Atik, 1999 *International Investment Developments*, 10 YB. INT'L ENV'T'L L. at 377-379.

²⁶ The *Ethyl* dispute involved Canadian restrictions on the gasoline additive MMT. See *infra* note 22.

²⁷ *Methanex Corp. v. United States of America* (UNCITRAL), Jan. 15, 2001 (involving California's ban on gasoline additive MTBE).

²⁸ *SD Myers, Inc. v. Canada* (UNCITRAL), Nov. 13, 2000.

²⁹ *Pope & Talbot Award on the Merits* (Phase II), Apr. 10, 2001.

2. Lack of government control

One of the asserted defects of the off-the-rack investment arbitration mechanism is a lack of public accountability of the tribunal members. The NAFTA Parties do not control the appointment of these members; nor (as a general matter) are tribunal members subject to direct or indirect state control. Unlike NAFTA Chapter 19 and Chapter 20 proceedings, there is no vetted roster of Chapter 11 tribunal members (beyond lists maintained by the respective arbitral sponsoring institutions). Beyond the unaccountability associated with the naming of tribunal members, there is a subtler question about tribunal members' orientation. Unlike judges, who presumably integrate broader social interests in all their decisions, private arbitrators are charged to focus on the joint interests of the parties before them.³⁰ Their scope of consideration is necessarily circumscribed by the limits of their mandates.

3. Weakening of domestic legislation

NAFTA Chapter 11 tribunals unequivocally have the power to find domestic measures (including both legislation and administrative regulation) to constitute compensable violations of Chapter 11's substantive investment norms. While such a finding does not, in and of itself, cause any immediate change in the challenged domestic regime, the fact of compensation makes maintenance of the challenged regulatory position problematic. Rollback of the offending measure is a not too unlikely outcome; indeed rollback might well occur in anticipation of a potentially adverse Chapter 11 finding (as in the *Ethyl* case³¹).

Moreover, there is the arguable possibility of a "chilling effect" on regulation. Legislators and bureaucrats are increasingly aware of Chapter 11's reach. They may well curtail their decision-making to avoid Chapter 11 challenges. To the degree Chapter 11's norms are appropriate, one may see this as an intended consequence. To the extent Chapter 11 challenges are vexatious, the asserted "chilling effect" may discourage to adoption of measures that would in fact be Chapter 11-consistent. In this scenario, Chapter 11 operates with unintended, perverse and possibly undemocratic results.

³⁰ See David Gantz, Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties, 14 AM. U. INT'L L. REV. 1025 (1999).

³¹ For a description of the *Ethyl* case, including the circumstances of its settlement, see Todd Weiler, ARBITRAL & JUDICIAL DECISION: *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187 (2000); Alan Swan, INTERNATIONAL DECISION: *Ethyl Corporation v. Canada, Award on Jurisdiction (under NAFTA/UNCITRAL)*, 94 AM.J.INT'L.L. 159 (2000).

4. Use of off-the-rack commercial arbitration

The drafters of Chapter 11 decided not to create a novel dispute settlement forum. Rather, they provided for arbitration using existing bodies: ICSID, ICSID Additional Facility and UNCITRAL. These sponsors provided instant infrastructure, including secretariats, facilities, reputations and default procedural rules. Further, decisions of these bodies were (at least in theory) readily enforceable in each of the three NAFTA Parties (as well as potentially in many other jurisdictions.)

There were considerable practical advantages in utilizing existing structures. However, neither the ICSID (including the ICSID Additional Facility) nor the UNCITRAL arbitration structures were designed with Chapter 11 in mind. The ICSID/ICSID Additional Facility model is probably a better fit – in that it was designed largely to resolve disputes arising under bilateral investment treaties with similar scope to Chapter 11's investment provisions. The existing bodies brought with them practices of secrecy and non-accountability that is characteristic of private arbitration. These practices might be appropriate in some investment contexts – one can imagine a host country ICSID party preferring that its dirty laundry hang out of view. Yet the NAFTA was intended to promote and increase transparency in Mexico – and in the United States and Canada. The closed-door ethos of private arbitration does not fit a culture of legal transparency.

Many of the most criticized features of Chapter 11 process – closed door hearings, extreme secrecy, lack of accountability – may well have been avoided had a dedicated Chapter 11 dispute settlement institution been designed and implemented. The closeted spirit of private arbitration seems oddly placed – given the public interest, and public controversy, surrounding Chapter 11 tribunals.

5. Limited (and Inconsistent) Judicial Review

A feature of Chapter 11's arbitration heritage is that final awards are subject to little or no judicial review. There is no appellate system within the NAFTA Chapter 11 framework. However, national courts are conceivably available to correct at least some forms of Chapter 11 tribunal error. There are two-fold problems here. First, the availability of a particular national court to review a Chapter 11 award is happenstance. In one instance (*Metalclad*), a Canadian provincial court (Supreme Court of British Columbia) reviewed a Chapter 11 final award;³² in another case (*SD Myers*), a Canadian federal court has been asked to review a Chapter

³² *The United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 0664 (per Tysoe J.).

11 award.³³ This concurrent review jurisdiction is somewhat mysterious (at least to a non-Canadian lawyer).³⁴

In any event, the universe of available fora for review is determined by the formal situs of the arbitration.³⁵ Notwithstanding, the actual *Metalclad* hearings were conducted at the World Bank headquarters in Washington, the determined situs of the *Metalclad* arbitration was Vancouver. This formalism provided the jurisdictional hook permitting the Supreme Court of British Columbia to conduct its review of the *Metalclad* award. Parties may thus affect the degree of judicial review simply by designating particular sites for the arbitration. There may well be many sites in North America where local courts would be far more reluctant than was the Supreme Court of British Columbia to hear a Chapter 11 award challenge.

Chapter 11 does not vest jurisdiction in any national court. Rather, national courts obtain jurisdiction over Chapter 11 awards through domestic statutes. It is always an open question whether Chapter 11 proceedings are within the scope of a particular federal or state/provincial arbitration statute. The *Metalclad* review opinion is not particularly persuasive that the Chapter 11 proceedings arose from a “commercial” relationship between Mexico and *Metalclad*, as seemingly required by the relevant British Columbian statute.³⁶

Different arbitration statutes will cover – or fail to cover – Chapter 11 awards. And different statutes will limit differently the scope of review. Suffice it to say that most arbitration statutes have quite narrow grounds for judicial review – consistent with the UNCITRAL Model Law.³⁷ Still some will be narrower than others. Even in the event of textual identity, differ-

³³ The pleadings in the *SD Myers* judicial review are available at www.naftalaw.org.

³⁴ A generous Canadian lawyer explains that provincial courts enjoy primary review jurisdiction over arbitrations sited within their respective provinces. The Federal Court of Canada has jurisdiction over legal matters involving Canada as a party. Thus, it was Canada’s role as party in the *SD Myers* case that created a choice of forum between the Ontario Superior Court (based on Toronto as situs) and the Federal Court. The Federal Court was selected, one imagines, out of strategic considerations familiar to Canadian lawyers.

³⁵ See discussion of the role of arbitral situs in Chapter 11 in Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 374-377 (2003).

³⁶ *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Sept. 2, 2000).

³⁷ See Article 36 (“Grounds for refusing recognition or enforcement”) of UNCITRAL Model Law on International Commercial Arbitration (1985).

ent jurisdictions will apply different interpretations.

National judges conducting reviews will also have tastes. The judge in the *Metalclad* review demonstrates a Canadian proclivity to convert a substantive assertion of legal error (presumptively beyond his power to review) into a finding that the tribunal exceeded its mandate (which was within the scope of the relevant statute).

V. WEAKENING OF DOMESTIC COURTS

THERE IS A CURIOUS RELATIONSHIP between Chapter 11 and domestic courts. To some extent, Chapter 11 tribunals displace domestic courts – at least to the extent that domestic law provides some analogous remedy. A NAFTA expropriation claim resembles a U.S. takings case, for example. Thus, invocation of Chapter 11 often represents an effective choice-of-forum.³⁸ One can then ask whether resort to Chapter 11 tribunals strengthens or weakens – or perhaps both – domestic courts.

Effectively, Chapter 11 tribunals have concurrent jurisdiction with domestic fora for expropriation/takings type cases (including, of course, asserted regulatory takings). To some extent, Chapter 11 reflects distrust (or a perception of inadequacy) about the effectiveness of domestic tribunals. But to some extent, the presence of Chapter 11 may inspire domestic tribunals to be more receptive to takings cases. Some Mexican observers have suggested that this is the case – that Chapter 11 tribunals are encouraging Mexican federal courts to expand Mexican notions of takings law. Paradoxically, the legitimacy of Chapter 11 depends both on the consistency of its outcomes with those of national courts – and on the degree Chapter 11 may strengthen domestic institutions by providing a higher quality of judicial decision (on either procedural or substantive grounds).

VI. IMPROPERLY CONSTITUTIONALIZING NATIONAL EMINENT DOMAIN LAW

CHAPTER 11 WAS INTENDED TO AVOID any rollback of investment liberalization in Mexico. By U.S. standards, the Mexican constitution has been amended with ease since the 1914 Revolution³⁹ (this was perhaps more true during the era of the PRI dictatorship than is the

³⁸ See Gantz, *supra* at note 21.

³⁹ David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 765 (2000).

case currently). Mexican national ownership of land in the frontier and state ownership of petroleum extraction, for examples, are constitutionally compelled. Mexico's constitutional tradition has been quite permissive (again, by U.S. standards) with respect to expropriations – the social function of private property is a notion embraced in Mexico. Even today, there seems to be no indigenous constitutional doctrine compelling compensation for regulatory takings in Mexico.

Chapter 11 can be seen as assuring, in a quasi-constitutional manner, that certain guarantees have been withdrawn from the reach of politics of the moment. Whether this is desirable depends on one's view of the correctness – and desired permanence – of NAFTA's investment norms. Chapter 11 of course is mapped on the constitutional traditions of each NAFTA Party. There was the common view – perhaps now revealed as mistaken – that as to the United States NAFTA's Chapter 11 was merely redundant to existing constitutional protections: that Chapter 11 provides no more than what was already assured by operation of the 5th and 14th Amendments. With respect to Mexico, however, Chapter 11 was seen as having a greater reach – and greater permanence – than protections sourced in the Mexican constitution. Is it appropriate to site such norms – typically of constitutional magnitude – outside the reach of national control? And when NAFTA Chapter 11 norms conflict with Mexican constitutional traditions, is it appropriate that the Mexican constitution give way? Suffice it to say, the duties owed by the Mexican state to a NAFTA Party investor in the event of nationalization is no longer an organic part of Mexican constitutional discourse.

VII. EQUAL PROTECTION

THE PARTIAL REDUNDANCY OF CHAPTER 11 with domestic constitutional norms means that investors often will have an effective choice of forum. They can pursue ordinary relief, based on ordinary or constitutional principles through national fora. Alternately, they may initiate the Chapter 11 process by seeking the establishment of a tribunal. Chapter 11 does require that a choice be made; an investor may not seek relief from a Chapter 11 tribunal so long as domestic remedies are being pursued.⁴⁰ An investor may, however, first pursue domestic relief and still retain an eventual ability to bring a Chapter 11 challenge. Note that a national of the NAFTA party imposing the contested measure does not enjoy this same effective choice-of-forum. The national investor has

⁴⁰ See NAFTA Article 1121.

only the rights and remedies provided by national law; Chapter 11's norms and its process are not available to it. Thus, an investor from another NAFTA Party may effectively enjoy rights (in substance and process) that exceed those available to a local. Legally favoring foreigners (even those from friendly neighboring countries) will always raise legitimacy concerns. One could imagine a domestic constitutional notion (equal protection perhaps?⁴¹) that might automatically repair this situation, eliminating the disparity of treatment between national and non-national NAFTA investors by creating equivalent redress for nationals in a national forum. Still, this is somewhat doubtful and in any event unlikely to be uniform across the three NAFTA Parties.

VIII. DISPROPORTIONALITY (AS COMPARED TO HUMAN RIGHTS, LABOR OR ENVIRONMENTAL LAW)

JOSÉ ALVAREZ LAUNCHED ONE OF THE MOST trenchant critiques of Chapter 11 in a 1997 article,⁴² describing Chapter 11 as a "human rights treaty for special interest groups." Like conventional human rights treaties, Chapter 11 imposes international norms on the NAFTA Parties. Further, it grants both standing and effective remedy to protected parties (here investors) affected by breaches of these norms. While Alvarez' juxtaposition of human rights and Chapter 11 is at first jarring, there are some reasons for the family resemblance. Both Chapter 11 and the human rights movement grew out of the customary international law tradition of state responsibility. So, in a way, Chapter 11 is a form of specialized human rights treaty. But here Alvarez' critique takes bite: where are the counterpart protections for political dissidents, for indigenous peoples, for women? Why does NAFTA build the Chapter 11 edifice for transboundary corporate actors and ignore the needs of real people?

IX. COMPENSATION INAPPROPRIATE REMEDY

CHAPTER 11 TRIBUNALS HAVE BEEN ATTACKED for their ability to award damages or order the restitution of property. But there is a prerogative enjoyed by the three NAFTA Parties to make payments in lieu of restitution. Note that tribunals do not have general

⁴¹ Joshua Traver, a student in my Spring 2003 NAFTA Seminar at Loyola Law School, suggested this equal protection argument in his seminar paper.

⁴² José E. Alvarez, *Critical Theory and The North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303 (1997).

declaratory powers – in the sense that their finding in a particular case as to the inconsistency of a Party's measure with Chapter 11 does not render the measure null and void. Rather, the tribunals can only exact damages. Still, the possibility of damages may cause a Party to desist from a course of conduct, repeal an offending piece of legislation or return property.

The problem with compensation is two-fold. As to the payee, there may be an element of unjust enrichment. A successful Chapter 11 claimant might receive significant compensation, whereas other similarly situated persons (notably nationals who do not enjoy access to Chapter 11) do not. Recall there is no *res judicata* resulting from a Chapter 11 determination. Other parties do not have an instant claim based on an adverse Chapter 11 finding. Further, the offsetting societal benefit of the offending measure is not measured at all. These considerations are simply beyond the Chapter 11 tribunal's competence.

As to the payor, here too is a significant problem, which results from the various forms of federalism of the three NAFTA Parties. Despite the differences in federal structure among Mexico, Canada and the United States, in every case it is the federal government that is responsible for Chapter 11 violations – even if the offending entity is a sub-unit, such as a state/province or even a municipality. The problem is made more difficult in that it may not be within the respective federal government's power to constrain the sub-federal unit to "behave" in a NAFTA-consistent way. Thus, in *Metalclad*, the Mexican central government was compelled to make a sizeable payment based on actions taken by a state and a locality contrary to national policy. Chapter 11 is an invitation to NIMBY cases⁴³ – the locality restricts a NAFTA investment; the central government pays the compensation.

X. BROAD INTERPRETATIONS OF INVESTMENT NORMS

MUCH OF THE CRITIQUE OF CHAPTER 11 has been on the merits – that Chapter 11 tribunals have given an unexpectedly expansive interpretation to the provisions. Admittedly, many tribunals considered – and then rejected – some quite adventuresome readings. Still, some fairly aggressive readings have been adopted. It is perhaps here that the NAFTA Parties (the actual governments) have been most displeased. Chapter 11, as expansively asserted, is not something to which they feel they agreed.

⁴³ NIMBY refers to "not in my backyard" land-use disputes, where socially desirable facilities, such as airports or prisons, are resisted in their immediate locality. *Metalclad* was a quintessential NIMBY dispute.

There are several points of specific language within Chapter 11's substantive provisions that have garnered most of the controversy. Each provision is its own case as a textual matter;⁴⁴ yet taken together they present a potential opportunity for a substantial enhancement of Chapter 11's reach, beyond the Parties' respective original intent, and perhaps beyond the underlying consent of the respective polities. Part of the blame for unwanted textual innovation resides with the tribunals. Certain tribunals were unable to resist calls to expand and extend the reach of investment law by embracing novel interpretations. Blame rests as well with the sloppy draftsmanship of several key provisions in Chapter 11. Seeking to clarify and limit by redundancy and explicitness, the authors of the treaty text ironically invited expansionary interpretation.

Consider first the definition of investment contained in Article 1139.⁴⁵ The language is unmistakably broad. While the definition may or may not support an interpretation that would include the expectancy of market access for a regulated product, it certainly suggests that Chapter 11 protects more than what had previously been considered an "investment." Consider Article 1110(1)'s prohibition on (and requirement for compensa-

⁴⁴ These are discussed in greater detail by other authors elsewhere in this book.

⁴⁵ 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).

tion for) expropriation. The unfortunate additive phrase “measure tantamount to nationalization or expropriation” became an available hook for reaching beyond “ordinary” creeping expropriation to placing substantive limits on regulatory authority.

Finally, consider the minimum standard of treatment consistent with international law that is assured by Article 1105(1). Again, the presence of clarifying (and perhaps redundant) language – “fair and equitable treatment and full protection and security” has been interpreted by at least one Chapter 11 tribunal to add to, and thus expand on, the treatment theretofore assured by international law.⁴⁶ Note also the implicit license accorded to Chapter 11 tribunals. Their determinations are unquestionably among the most important contemporary sources of the customary international law on investment protection. This alone is heady stuff for tribunal members. Further, there is a potential feedback loop whereby one tribunal’s innovative decision on, for example, the minimum standard of treatment informs the minimum standard of treatment to be applied by a subsequent tribunal. This may be a mild form of *stare decisis* – or a dangerous bootstrap. Again, the point as to legitimacy is not the correctness of these interpretations. They are not necessarily erroneous – merely because they are novel or unexpected. The legitimacy objection goes to the creation of opportunity to expand these norms that may not have been wisely placed in the hands of Chapter 11 tribunals, given the other concerns and defects discussed above.

XI. TRANSPARENCY

AS NOTED ABOVE, one of the artifacts of the private arbitration heritage of Chapter 11 proceedings is an obsessive secrecy.⁴⁷ Indeed, it had been argued that there is an implicit background obligation to preserve confidentiality in Chapter 11 proceedings that can only be waived by consent of all parties. Of the three state parties to Chapter 11 actions, Mexico had been the most aggressive in asserting a right to confidentiality.⁴⁸ The practice of secrecy has contributed to the crisis of legitimacy surrounding Chapter 11. Indeed, the continuing existence of

⁴⁶ This expansive interpretation was cut back by subsequent “interpretation” stipulated by the three NAFTA Parties. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001).

⁴⁷ See Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT’L L. 213 (2001).

⁴⁸ Marc J. Goldstein, *International Commercial Dispute Resolution*, 36 INT’L LAW. 401, 413 (2002).

Chapter 11 cases was often not clear. Chapter 11 requires the public noticing of claims, but the existence of a claim did not necessarily mean there was an active case. Nor did the existence of a claim permit the public to know much of the legal argument in support of that claim, nor (at least during the initial decade of Chapter 11 practice) anything about possible defenses to be asserted by the responding NAFTA Party. Transparency has only gradually become integrated into NAFTA Chapter 11 proceedings.

Mexico had earlier maintained that no party should be able to voluntarily disclose pleadings absent consent of all parties to the dispute. A series of Chapter 11 tribunals generally supported the notion that there was no limit on what any party to a Chapter 11 proceeding might choose to make public.⁴⁹ Recently, in a somewhat surprising change of policy, Mexico joined the other two NAFTA Parties in stipulating an “interpretation,”⁵⁰ which provides that “[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties . . .” Mexico appears to have definitively abandoned its prior commitment to confidentiality in Chapter 11 proceedings, embracing (perhaps) even more transparency than the relevant arbitral rules might provide.⁵¹

All this being said, there has been a surprising amount of real documentary transparency about early Chapter 11 decisions – at least after the fact. This is in large extent due to the efforts of Todd Weiler, a resourceful and energetic lawyer/scholar who has developed a comprehensive website dedicated to Chapter 11.⁵² Weiler’s website collects both decisions and associated pleadings of the major Chapter 11 cases. Many of these are “unofficial” (including bootlegged and leaked copies), but in the absence of formal reporting, these documents constitute the accepted jurisprudence of Chapter 11.

Real transparency is more than access to the documentary record, of course. To date NAFTA Chapter 11 hearings had been conducted, without exception, *in camera*. Here too there has been dramatic recent

⁴⁹ *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Sept. 2, 2000), *SD Myers, Inc. v. Canada*, UNCITRAL Decision (May 13, 2000) (Procedural Order No. 16); *Loewen Group, Inc. v. United States*, ICSID Case no ARB(AF)/98/3, Decision (Sept. 28, 1999).

⁵⁰ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001).

⁵¹ It remains an untested question if an investor were to insist on the maintenance of confidentiality provided by UNCITRAL and ICSID rules.

⁵² See www.naftalaw.org. See also Marcia Staff & Christine Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 Hous. J. INT’L L. 301, 316 at fn 100.

change. The upcoming *UPS* (involving Canada), *Methanex* (involving the United States) and *Thunderbird*⁵³ (involving Mexico) hearings are all to be held in the open. This new-found embrace of transparency will likely allay some of the worst suspicions about the Chapter 11 process. Of course, transparency may well reveal decisions of substance that continue to alarm.

XII. NGO PARTICIPATION

CONSISTENT WITH THE CLOSED NATURE of the arbitral process, NGOs have generally been denied access to Chapter 11 proceedings.⁵⁴ Inspired in part by recent WTO opening to NGO briefs by its dispute settlement body,⁵⁵ several NAFTA Chapter 11 tribunals have considered admitting NGOs as *amici curiae*. In both *UPS*⁵⁶ and *Methanex*,⁵⁷ Chapter 11 tribunals found authority in Article 15(1) of the UNCITRAL Arbitration Rules to accept written briefs by *amici*. There continues to be resistance, however, to the admission of NGOs as a matter of right. The NGO debate within Chapter 11 largely tracks the ample debates about NGO participation in other international legal fora,⁵⁸ including most notably the controversy surrounding NGO participation in WTO dispute settlement.⁵⁹

⁵³ See <<http://www.naftalaw.org>>.

⁵⁴ See Andrea Bjorklund, *The Participation of Amici Curiae in NAFTA Chapter Eleven Cases*, March 2002 manuscript available at the Canadian Department of Foreign Affairs and International Trade website, <http://www.dfait.maeci.gc.ca/tna-nac/background-en.asp>.

⁵⁵ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998).

⁵⁶ *United Parcel Service of America, Inc. v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae* (17 October 2001).

⁵⁷ *Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae”* (15 January 2001).

⁵⁸ See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994). But see Peter Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 CARDOZO L. REV. 957 (1996).

⁵⁹ See Steve Charnovitz, *Participation of Nongovernmental Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); Philip Nichols, *Extension of Standing in World Trade Organization Disputes to Non Government Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996); Jeffery Dunoff, *The Misguided Debate over NGO Participation in the WTO*, 1 J. INT'L ECON. L. 433 (1998).

There is at least one distinctively NAFTA strand in its parallel NGO debate. Mexico remains resolutely opposed to the participation of NGOs in Chapter 11. Mexico's argument is that Chapter 11 represents a carefully constructed balance between its civil law tradition and the Anglo-American law traditions of Canada and the United States.⁶⁰ To introduce NGO participation (a notion wholly foreign to Mexican domestic practice) is to unfairly upset the balance between these two systems – and would place Mexico – and presumably Mexican investors – at an unfair disadvantage in Chapter 11 proceedings.

XIII. CONCLUSION

CHAPTER 11 IS A REMARKABLY INNOVATIVE PIECE of international law. There are few other sites where private actors can bring claims directly against foreign states and from which they can obtain readily enforced judgments. In a bold stroke, traditional investment law (based on notions of espousal of claims) has been rendered obsolete. That said, Chapter 11 has also raised a storm of critique – as the creative and resourceful Chapter 11 bar, and at times Chapter 11 tribunals, have expanded the range of state responsibility. Chapter 11 is increasingly crowding on the discretion of regulators. In its current incarnation, Chapter 11 creates a curious asymmetry by which investors (but not other actors) can indirectly challenge host state regulation. Whether real or imagined, the threat of Chapter 11 intrusions may limit the chances that it remains a permanent feature of NAFTA or that it be transposed into future trading arrangements.

⁶⁰ Debra F. Guajardo, Comment *Redefining the Expropriation of a Foreign Direct Investment in Mexico*, 42 S. TEX. L. REV. 1309, 1312, 1323-1324 (2001).