

ARBITRATION UNDER NAFTA

CHAPTER 11: PAST, PRESENT, AND FUTURE

Marcia J. Staff & Christine W. Lewis***

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* Regents Professor of Business Law, University of North Texas; B.J. *with high honors*, University of Texas at Austin (1973); J.D. *magna cum laude*, University of Houston Law School (1975).

** Associate Professor, Management Department, Auburn University at Montgomery; B.A. *cum laude*, University of Alabama (1978); J.D., University of Alabama School of Law (1981).

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I. INTRODUCTION

This Article explains the background of the North American Free Trade Agreement¹ (NAFTA) by centering on its dispute resolution provisions and outline the provisions of Chapter 11 of NAFTA (Chapter 11), perhaps the most innovative and certainly the most controversial part of the entire agreement.² On its effective date of January 1, 1994,³ NAFTA created the world's largest international free trade zone.⁴ The phase-out of trade barriers has produced dramatic increases in trade between the NAFTA parties: the United States of America (United States), the Government of Canada (Canada), and the United Mexican States (Mexico), collectively the signatory states.⁵ However, as one might expect, the increase in trade has also increased disputes related to trade and to the provisions of NAFTA itself.⁶

1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. For the U.S. legislation implementing NAFTA, see the NAFTA Implementation Act of 1993, 19 U.S.C. §§ 3301-3473 (2000).

2. See, e.g., *Bill Moyers Reports: Trading Democracy* (PBS television broadcast, Feb. 5, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/transcript.html> [hereinafter *Trading Democracy*] (discussing NAFTA Chapter 11, which causes the public to compensate a private investor for unrealized profits). Critics have referred to Chapter 11 as "the Trojan horse of NAFTA." *Id.*

3. NAFTA, *supra* note 1, annex 302.2, 32 I.L.M. at 310.

4. Lucille M. Ponte & Erika M. Brown, *Resolving Information Technology Disputes After NAFTA: A Practical Comparison of Domestic and International Arbitration*, 7 TUL. J. INT'L & COMP. L. 43, 45 (1999).

5. See RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 454-59 (4th ed. 1999) (summarizing the economic indicators for the signatory states and discussing specific indicators of decreased trade tariffs and increased trade); United States Department of Agriculture Foreign Agricultural Service, *FAS Backgrounder: Benefits of NAFTA*, FASONLINE, July 2001, at http://www.fas.usda.gov/itp/Policy/NAFTA/nafta_backgrounder.htm (last modified Jan. 16, 2002) (discussing indicators of increased agriculture trade between the United States and Mexico).

6. While the stated purpose of NAFTA is to promote economic activity between

To understand Chapter 11 and the controversy surrounding its arbitral decisions, namely their perceived attack on sovereignty and their perceived requirement of confidentiality, this Article provides an overview of the published Chapter 11 cases and a critical analysis of these cases. Additionally, this Article reviews the Notes of Interpretation of Certain Chapter 11 Provisions (Notes of Interpretation) adopted by the NAFTA Free Trade Commission⁷ on July 31, 2001.⁸ Finally, this Article examines current proposals and prospects for changing the application of Chapter 11 by discussing the impact of NAFTA on future trade negotiations and international treaties, especially the proposed Free Trade Area of the Americas (FTAA).⁹

II. BACKGROUND OF NAFTA

A. NAFTA Generally

A thorough discussion of NAFTA is beyond the scope of this Article. Briefly, NAFTA is a cooperative economic intergovernmental organization (IGO) designed to eliminate trade barriers without establishing an external tariff in common among the three member states.¹⁰ It is one of many IGOs creating a free trade area.¹¹ NAFTA began as the U.S.–Canada

the signatory states, the “agreement focuses on resolving conflicts between the signatory nations and gives little guidance to private businesses on how to resolve future business disputes.” Ponte & Brown, *supra* note 4, at 45.

7. The NAFTA Free Trade Commission is comprised of cabinet-level representatives of the NAFTA signatory states. NAFTA, *supra* note 1, annex 1911, 32 I.L.M. at 693.

8. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, at <http://www.dfait-maeci.gc/tna-nac/nafta-interpr-e.asp> (last updated May 17, 2002) [hereinafter Notes of Interpretation].

9. See Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT’L L. 141, 185 (2002) (stating “[t]hirty-four states in the American hemisphere have committed to concluding FTAA negotiations by the year 2005.”).

10. Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration for the Asian Century: An Early Look at New Approaches*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 187, 188 (1994) (defining NAFTA as an intergovernmental organization with the purpose of establishing a free trade area by phasing out tariffs and other trade barriers).

11. See *id.* (defining NAFTA as a “fundamentally free trade area”); Jack I. Garvey, *AFTA After NAFTA: Regional Trade Blocs and the Propagation of*

Free Trade Agreement (CFTA).¹² Shortly thereafter, the United States initiated discussions with Mexico to create a U.S.-Mexico trade agreement.¹³ Canada joined the process, and the negotiations yielded NAFTA.¹⁴ Although CFTA was a model for NAFTA, NAFTA addresses additional issues.¹⁵ NAFTA's purposes include: eliminating trade barriers, promoting fair competition, increasing investment opportunities, providing protection for intellectual property rights, creating procedures for implementing and enforcing NAFTA, and establishing a forum for further enhancement and expansion of the benefits provided by NAFTA.¹⁶

B. *Dispute Resolution Under NAFTA*

NAFTA establishes three new dispute resolution mechanisms: NAFTA Chapter 20 (Chapter 20) applies to disputes between signatory states;¹⁷ NAFTA Chapter 19 (Chapter 19) applies to disputes between the signatory states relating to investigations of anti-dumping and countervailing duty (AD/CVD) investigations;¹⁸ and Chapter 11 applies to disputes between signatory states and investors from another

Environmental and Labor Standards, 15 BERKELEY J. INT'L L. 245, 245-47 (1997) (discussing NAFTA and other organizations creating free trade areas and their impact on the formation of free trade in Asia); Nobuo Kiriya, *Institutional Evolution in Economic Integration: A Contribution to Comparative Institutional Analysis for International Economic Organizations*, 19 U. PA. J. INT'L ECON. L. 53 (1998) (discussing institutional designs of international economic organizations); European Free Trade Association, EFTA, at <http://www.efta.int> (last visited Jan. 24, 2003); Southern Cone Common Market, MERCOSUR, at <http://www.mercosur.org.uy> (last updated Jan. 24, 2003); U.S. Department of State, Association of Southeast Asian Nations (ASEAN), at <http://www.state.gov/p/eap/regional/asean/> (last visited Jan. 24, 2003); The Central European Free Trade Area, CEFTA, at <http://www.cefta.org> (last visited Jan. 24, 2003).

12. U.S.-Canada Free Trade Agreement, Jan. 2, 1985; 27 I.L.M. 281; SCHAFFER ET AL., *supra* note 5, at 456.

13. SCHAFFER ET AL., *supra* note 5, at 456.

14. *Id.*

15. *Id.* Some additional issues addressed in NAFTA include: intellectual property protection, environmental protection, relaxed restrictions on trucking companies, relaxed restrictions on financial services, and labor issues. *Id.*

16. NAFTA, *supra* note 1, arts. 101-02, 32 I.L.M. at 297-98.

17. *Id.* arts. 2001-22, 32 I.L.M. at 692-98.

18. *Id.* arts. 1901-11, 32 I.L.M. at 682-87.

signatory state (foreign investors).¹⁹ Although NAFTA does not create a private right of action,²⁰ it encourages alternative dispute resolution methods and the study of the methods' effectiveness to resolve private international disputes.²¹

1. *Disputes Under NAFTA Chapter 20*

Chapter 20 provides a mechanism for resolving disputes concerning the interpretation and application of NAFTA and alleged violations of NAFTA by signatory states.²² The Free Trade Commission is charged with resolving disputes under Chapter 20.²³ Disputing signatory states are first required to seek resolution through cooperation and consultation.²⁴ Should this fail, a five-member arbitral panel may ultimately resolve the dispute.²⁵ After reviewing the dispute, the arbitral panel shall issue a report recommending a solution.²⁶ The disputing signatory states are free to implement the solution.²⁷ If the disputing signatory states cannot reach an agreement, Chapter 20 allows the wronged signatory state to retaliate by suspending benefits.²⁸

2. *Disputes Under NAFTA Chapter 19*

Chapter 19 provides a mechanism for the resolution of trade disputes specifically related to AD/CVD investigations.²⁹ This Chapter allows a signatory state to request a binational review

19. *Id.* arts. 1101–39, 32 I.L.M. at 639–48.

20. *Id.* art. 2021, 32 I.L.M. at 648.

21. *Id.* art. 2022, 32 I.L.M. at 648.

22. NAFTA, *supra* note 1, arts. 2001–22, 32 I.L.M. at 693–99; See Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 10 J. INT'L ARB. 51, 64 (1993).

23. NAFTA, *supra* note 1, art. 2001, 32 I.L.M. at 693.

24. *Id.* art. 2003, 32 I.L.M. at 694.

25. *Id.* arts. 2008, 2011, 32 I.L.M. at 695–96.

26. *Id.* art. 2017, 32 I.L.M. at 693.

27. *Id.* arts. 2018–19, 32 I.L.M. at 697.

28. *Id.* art. 2019, 32 I.L.M. at 697. NAFTA states that “a complaining party should first seek to suspend benefits in the same sector . . . as that affected by . . . [the offending] measure . . . [if] it is not practicable or effective to suspend benefits in the same sector . . . [the complaining party] may suspend benefits in other sectors.” *Id.*

29. *Id.* arts. 1901–11, 32 I.L.M. at 682–87.

of (1) another signatory state's AD/CVD legislation or (2) another signatory state's judicial or administrative AD/CVD decisions.³⁰ With respect to panel review of signatory state AD/CVD decisions, the panel decision is binding.³¹ During review of signatory state AD/CVD decisions, the panel uses the same standard of review as the signatory state.³²

3. *Private Commercial Disputes Under NAFTA*

NAFTA does not create a private right of action,³³ however, it promotes alternative dispute resolution (ADR) methods and mandates the study of the methods' effectiveness to resolve private international disputes.³⁴ ADR methods offer many advantages over litigation when resolving international investor disputes. Although American businesses embrace litigation to resolve disputes, many other cultures view litigation as a personal failure.³⁵ International investors using arbitration may not have to worry about some of the factors that can plague them in international litigation, including: choice of law, *forum non conveniens*, home country bias, foreign judicial procedures, or foreign rules of evidence.³⁶

NAFTA mandates that the signatory states create an Advisory Committee on Private Commercial Disputes (Advisory

30. *Id.* art. 1904, 32 I.L.M. at 683.

31. *Id.* art. 1904(9), 32 I.L.M. at 683.

32. *Id.* art. 1904(3), 32 I.L.M. at 683.

33. *Id.* art. 2021, 32 I.L.M. at 648.

34. *Id.* art. 2022, 32 I.L.M. at 648. NAFTA states that "[e]ach Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." *Id.* art. 2022(1), 32 I.L.M. at 648.

35. SCHAFFER ET AL., *supra* note 5, at 105.

36. *See id.* at 124-25 (noting the flexibility of rules of evidence during arbitration, the differences in procedure in arbitration, and the neutrality of arbitration proceedings); Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 775, 780, 803-04 (2002) (discussing the neutrality of arbitration and absence of conflict of law issues); Covington & Burling, *A Primer on International Arbitration* (May 1998), at <http://www.cov.com/publications/primer.asp>; *see Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972) (holding that international agreements to arbitrate override other judicial doctrines determining how the parties must settle a dispute).

Committee) to study the effectiveness of arbitration and other ADR methods to resolve private international commercial disputes.³⁷ The Advisory Committee³⁸ was charged with:

1.2.1 compilation, examination, and assessment of existing means for the settlement of private international commercial disputes;

1.2.2 identification of sectors and types of businesses that would particularly benefit from the use of alternative dispute resolution (ADR);

1.2.3 promotion of the use of arbitration and other procedures for the resolution of private international commercial disputes in the NAFTA region, including ways to increase private sector awareness of the benefits of using ADR;

1.2.4 facilitation of the use of arbitration and other procedures in the NAFTA region, including the use of model ADR and other contractual clauses;

1.2.5 opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region; and

1.2.6 issues relating to the enforcement of arbitration agreements and awards, and other litigation issues related to ADR.³⁹

The Advisory Committee issued its initial report in November 1996, concluding that “[e]ach NAFTA country has laws and procedures in place to support the use of arbitration, including the recognition and enforcement of arbitral awards, at both the federal and state/provincial levels. No new legislation is recommended at the present time.”⁴⁰ The Advisory Committee observed a growing interest in ADR methods other than

37. NAFTA, *supra* note 1, art. 2022(4), 32 I.L.M. at 698.

38. The Advisory Committee consists of up to ten members from each signatory state, only two of whom may be government representatives. NAFTA Advisory Committee on Private Commercial Disputes to the NAFTA Free Trade Commission, *November 1996 Report*, app. A, § 2.1 at http://www.sice.oas.org/trade/nafta/reports/disp1_e.asp (last visited Jan. 25, 2003). The two government representatives serve as chairs of the Advisory Committee. *Id.* app. A, § 2.3.

39. *Id.* app. A, §§ 1.2.1–1.2.6.

40. *Id.* pt. III.

arbitration, noting that “[t]he availability, uses and effectiveness of mediation, conciliation and other forms of ADR are being explored further by the [Advisory] Committee.”⁴¹ The Advisory Committee included a brochure of the ADR methods available to parties contracting in the NAFTA region and suggested model clauses to include in private contracts.⁴² The Advisory Committee further established subcommittees to study various aspects of ADR in the signatory states.⁴³

4. *Investor-State Disputes Under Chapter 11—A Controversial Past*

Chapter 11 permits foreign investors to invoke binding international arbitration against another signatory state that violates the investment provisions of NAFTA.⁴⁴ Although other countries have attempted to secure similar protections under the Organisation for Economic Co-operation and Development (OECD),⁴⁵ currently NAFTA is the only international agreement that provides these protections.⁴⁶ Section A of Chapter 11 (section A), designed to deter “illegal takings of U.S. and Canadian businesses by the Mexican government,”⁴⁷ protects the rights of foreign investors from governmental action by signatory states. Specifically, foreign investors are protected from signatory states’ measures.⁴⁸ Section A affords four basic

41. *Id.*

42. *Id.* app. D.

43. *Id.* pt. IV.

44. NAFTA, *supra* note 1, art. 1116(1), 32 I.L.M. at 642–43; see Zachary M. Eastman, *NAFTA’s Chapter 11: For Whose Benefit?*, 16 J. INT’L ARB. 105, 106 (1999); Cheri D. Eklund, *A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes*, 11 J. INT’L ARB. 135, 140–41 (1994); Horlick & DeBusk, *supra* note 22, at 52–57; Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT’L LAW. 727, 731–32 (1993).

45. This was attempted through the Multilateral Agreement on Investment. OECD, *Multilateral Agreement on Investment: Documentation from the Negotiations*, at <http://www1.oecd.org/daf/mai/> (last visited Jan. 25, 2003).

46. Tollefson, *supra* note 9, at 143.

47. Eastman, *supra* note 44, at 106 (citing Matthew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Private Parties: Investor-Protection Clause Lets Companies Haul Signatories into Arbitration for Violation of Pact*, NAT’L L.J., Apr. 6, 1998, at B8).

48. NAFTA, *supra* note 1, arts. 1101–14, 32 I.L.M. at 639–42. However, there

protections to foreign investors: parity with investors in the signatory state;⁴⁹ freedom from performance requirements;⁵⁰ free investment-related funds transfers;⁵¹ and expropriation only in accordance with the international law.⁵²

Section B of Chapter 11 (section B) establishes a procedure for binding international arbitration between a signatory state and a foreign investor.⁵³ The adoption of section B “represents the first time Mexico has entered into an international agreement providing for investor-state arbitration.”⁵⁴

Under other multilateral trade regimes, including GATT, companies that suffer damages due to the actions of a foreign government have no right of private action against the host state; their only remedy is to persuade their home state to pursue a trade complaint on their behalf. Where this remedy is unavailable or inadequate (which is almost invariably the case), the investor’s only option is to pursue its complaint under the sometimes inhospitable judicial system of the host country.⁵⁵

Section B allows foreign investors to use international arbitration to resolve a dispute when a foreign investor alleges that foreign investors’ investment⁵⁶ has been damaged by a

are exceptions. *Id.*; HOWARD MANN, PRIVATE RIGHTS, PUBLIC PROBLEMS, A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTMENT RIGHTS 24 (2001) [hereinafter MANN, PRIVATE RIGHTS]. NAFTA states that a “measure includes any law, regulation, procedure, requirement or practice[.]” NAFTA, *supra* note 1, art. 201, 32 I.L.M. at 298.

49. NAFTA, *supra* note 1, art. 1102, 32 I.L.M. at 639.

50. *Id.* art. 1106, 32 I.L.M. at 640.

51. *Id.* art. 1109, 32 I.L.M. at 641.

52. *Id.* art. 1110, 32 I.L.M. at 641.

53. *Id.* arts. 1115–38, 32 I.L.M. at 642–48.

54. Price, *supra* note 44, at 731.

55. Tollefson, *supra* note 9, at 148.

56. 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;

signatory state's violation of section A.⁵⁷ The foreign investor has three years from when the foreign investor acquires knowledge of the alleged section A violation to notify the signatory state of the foreign investor's intent to submit a claim.⁵⁸ Before filing a claim, the foreign investor and signatory state (the disputing parties) are required to attempt settlement.⁵⁹ If the disputing parties fail to settle, and the foreign investor wants to pursue arbitration, the foreign investor must notify the signatory state

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- (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);

NAFTA, *supra* note 1, art. 1139, 32 I.L.M. at 647-48.

57. *Id.* art. 1116(1)(a), 32 I.L.M. at 642.

58. *Id.* arts. 1116-17, 32 I.L.M. at 642-43.

59. *Id.* art. 1118, 32 I.L.M. at 643.

within ninety days of submitting the claim.⁶⁰ After following these procedures, the foreign investor may submit the claim to arbitration no earlier than six months after the alleged violation.⁶¹ Arbitration fora available to the foreign investor are:

- (a) the ICSID Convention [Convention on the Settlement of Investment Disputes Between States and Nationals of Other States], provided that both the disputing Party and the Party of the investor are parties to the Convention;
- (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL [United Nations Commission on International Trade Law] Arbitration Rules.⁶²

The United States is the only signatory state that is a party to the ICSID Convention; therefore, Chapter 11 disputes by foreign investors cannot be heard under this convention.⁶³ However, claims brought by American investors or claims against the United States may be brought under the ICSID Additional Facility Rules or UNCITRAL.⁶⁴ The Additional Facility Rules are only available for investment disputes between signatory states and foreign investors.⁶⁵ Specifically, the Additional Facility Rules apply in the following situations:

- (i) conciliation or arbitration proceedings for the settlement of investment disputes arising between parties one of which is not a Contracting State or a national of a Contracting

60. *Id.* art. 1119, 32 I.L.M. at 643.

61. *Id.* art. 1120, 32 I.L.M. at 643. There are two exceptions for alleged violations by Mexico. *Id.* annex 1120.1, 32 I.L.M. at 648.

62. *Id.* art. 1120(1)(a)-(c), 32 I.L.M. at 643.

63. International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention, at <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last modified Dec. 16, 2002); NAFTA, *supra* note 1, art. 1120(1)(a), 32 I.L.M. at 643.

64. NAFTA, *supra* note 1, art. 1120(1)(b), 32 I.L.M. at 643.

65. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 8, 1965, 17 U.S.T. 1270, 1298-99, 1357-64, 575 U.N.T.S. 160, 229-35 [hereinafter ICSID Convention].

State;

- (ii) conciliation or arbitration proceedings between parties at least one of which is a Contracting State or a national of a contracting State for the settlement of disputes that do not directly arise out of an investment; and
- (iii) fact-finding proceedings.⁶⁶

While there are other international arbitration fora, the available rules for arbitration under Chapter 11 are limited to the three enumerated in the chapter.⁶⁷ The arbitration fora available for each signatory state under Chapter 11 are outlined in Table 1.

Table 1. Arbitration Fora Available Under NAFTA Chapter 11

Foreign Investor's Signatory State	Signatory State Being Sued	Forum Option(s)
United States	Mexico	ICSID Additional Facility Rules (ICSID AF) or UNCITRAL Rules ⁶⁸
United States	Canada	ICSID Additional Facility Rules (ICSID AF) or UNCITRAL Rules ⁶⁹
Canada	Mexico	UNCITRAL Rules ⁷⁰
Canada	United States	ICSID Additional Facility Rules (ICSID AF) or UNCITRAL Rules ⁷¹
Mexico	United States	ICSID Additional Facility Rules (ICSID AF) or UNCITRAL Rules ⁷²
Mexico	Canada	UNCITRAL Rules ⁷³

66. *Id.*

67. NAFTA, *supra* note 1, art. 1120(1)(a)-(c), 32 I.L.M. at 643; Eklund, *supra* note 44, at 141-42.

68. NAFTA, *supra* note 1, art. 1120, 32 I.L.M. at 643.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

The procedural rules of the selected forum control, unless NAFTA has modified the rules.⁷⁴

Remedies available under Chapter 11 arbitrations include: monetary damages and applicable interest, however, no punitive damages are allowed; restitution of property; and costs in accordance with the selected arbitration rules.⁷⁵ According to published arbitration awards, arbitrators have used discretion assessing costs.⁷⁶ The *Waste Management* tribunal decided not to award costs because it did not find evidence of bad faith or recklessness.⁷⁷ The *Azinian* tribunal cited their reasons for declining to award costs as: the novelty of the dispute resolution mechanism, the efficiency of the Claimant's presentation, the Respondent's incorrect objection to lack of notice invited litigation, and the tribunals lack of power to punish the bad actors.⁷⁸

The final arbitration is only binding on the parties to the arbitration.⁷⁹ However, each signatory state is required to provide for the enforcement "of an award in its territory."⁸⁰ After the award is rendered and a time period has elapsed,⁸¹ "a disputing party shall abide by and comply with an award

74. NAFTA, *supra* note 1, art. 1120(2), 32 I.L.M. at 643. See Eklund, *supra* note 44, at 159–71 (comparing the rules under NAFTA, ICSID, ICSID Additional Facility, and UNCITRAL).

75. NAFTA, *supra* note 1, art. 1135(1), (3), 32 I.L.M. at 646.

76. See, e.g., *Azinian v. United Mexican States*, Case No. ARB(AF)/97/2, at 35 (ICSID AF Nov. 1, 1999) (award), at http://www.worldbank.com/icsid/cases/robert_award.pdf [hereinafter *Azinian Award*] (declining to award costs to the Respondent although the Claimant's action failed and the Respondent was greatly inconvenienced); *Waste Mgmt., Inc. v. United Mexican States*, Case No. ARB(AF)/98/2, at 239–40 (ICSID AF June 2, 2000) (award), at http://www.worldbank.org/icsid/cases/wase_award.pdf [hereinafter *Waste Mgmt. Award*].

77. *Waste Mgmt. Award*, *supra* note 76, at 239. "[O]n there being no evidence of recklessness or bad faith on the Claimant's part, this Tribunal is of the opinion that it would be improper to make an award for such legal costs as the Respondent may have incurred in the defence of its interests in this arbitration." *Id.*

78. *Azinian Award*, *supra* note 76, at 35.

79. NAFTA, *supra* note 1, art. 1136(1), 32 I.L.M. at 646.

80. *Id.* art. 1136(4), 32 I.L.M. at 646.

81. *Id.* art. 1136(3), 32 I.L.M. at 646.

without delay.”⁸²

A foreign investor may seek enforcement of a Chapter 11 award⁸³ under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,⁸⁴ the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),⁸⁵ or the Inter-American Convention on International Commercial Arbitration (Inter-American Convention).⁸⁶ NAFTA specifically provides that a Chapter 11 claim is “considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.”⁸⁷

If a signatory state fails to abide by a Chapter 11 award, the foreign investor’s signatory state may request that a Chapter 20 arbitral panel review the signatory state’s failure.⁸⁸ This review determines whether the signatory state’s failure is inconsistent with its obligations under NAFTA and the arbitral panel may recommend that the signatory state comply with the Chapter 11 award.⁸⁹ Thus, failure to comply with a final Chapter 11 arbitration award may result in suspension of NAFTA benefits to the non-complying signatory state.⁹⁰ Because Chapter 20 applies only between signatory states,⁹¹ the foreign investor’s signatory state must take action to compel performance of the

82. *Id.* art. 1136(2), 32 I.L.M. at 646.

83. *Id.* arts. 1116–17, 32 I.L.M. at 642–43.

84. ICSID Convention, *supra* note 65, art. 36, 17 U.S.T. 1270, 1284–85, 575 U.N.T.S. 160, 176.

85. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, arts. I–III, 21 U.S.T. 2517, 2519, 3330 U.N.T.S. 38, 38, 40.

86. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, arts. 1–3, 1438 U.N.T.S. 249, 249; 9 U.S.C. § 301 (2000) (American legislation implementing Inter-American Convention). As noted previously, the United States is the only signatory state that is a member of the ICISD. International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention, at <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last modified Dec. 16, 2002).

87. NAFTA, *supra* note 1, art. 1136(7), 32 I.L.M. at 646.

88. *Id.* art. 1136(5), 32 I.L.M. at 646.

89. *Id.*

90. NAFTA, *supra* note 1, art. 2019(1), 32 I.L.M. at 697.

91. Horlick & DeBusk, *supra* note 22, at 64.

arbitration award. Furthermore,

Chapter 20 panels have no power to actually overturn United States law. Rather, the panels issue reports that allow the United States to decide what course of action to take in the event a given law is found to violate NAFTA. . . . Failure to alter a law to conform to NAFTA gives the injured nation the right to unilaterally impose trade sanctions on the United States. . . . Of course, in the absence of this arrangement, the governments of Canada and Mexico would be free to set tariff levels at whatever point they see fit.⁹²

Chapter 11 awards may be published under the following circumstances:

Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public. Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award. Where the United States is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public.⁹³

However, there is no mechanism to force publication or compilation of awards.⁹⁴ This discretionary publication of arbitration awards has prompted criticism and debate.⁹⁵ Such criticism prompted the Free Trade Commission to adopt the Notes of Interpretation, clarifying, among other things, the

92. *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1291 (N.D. Ala. 1999), *vacated and appeal dismissed*, 242 F.3d 1300 (11th Cir. 2001).

93. NAFTA, *supra* note 1, annex 1137.4, 32 I.L.M. at 648.

94. *Id.*

95. Lucien J. Dhooge, *The Loewen Group v. United States: Punitive Damage Awards as Expropriation Pursuant to the North American Free Trade Agreement*, J. LEGAL STUD. BUS., Summer 2001, at 1, 3, 3 n.17 (criticizing the Loewen Group's ability to circumnavigate judicial proceedings by pursuing arbitration); Howard Mann & Konrad von Moltke, *NAFTA'S Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, at <http://www.iisd.org/trade/chapter11.htm> (last visited Jan 25, 2003) (arguing that ADR does not have the same safeguards as domestic court proceedings); J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, 2-3 (Feb. 22, 2002), at <http://www.carleton.ca/ctpl/ch11papers/vanduzer.htm>.

Commission's position on publishing awards.⁹⁶

III. CHAPTER 11 CASES: PAST AND PRESENT

Despite the debate over the Chapter 11 cases, a review of published cases does not provide support to Chapter 11 champions or critics, due to the paucity of published cases. The arbitration fora allowed by NAFTA provide for confidentiality, because they were designed for private commercial dispute resolution.⁹⁷ Although the United Nations maintains a system for the compilation of UNCITRAL decisions and awards, it is difficult to collect the decisions and awards.⁹⁸

The accessibility of arbitral awards varies considerably and is, as a rule, rather limited. Often, their availability is restricted by requirements of confidentiality. Their accessibility may also be restricted by the general usage of an arbitral institution. . . . Thus, arbitral awards are included in the collection only in so far as they come to the attention of national correspondents and in the form in which they are made available to them.⁹⁹

However, electronic media sources help to disseminate Chapter 11 decisions.¹⁰⁰ Presently, twenty-eight Chapter 11 actions have been publicly noticed.¹⁰¹ Part III of this Article explores political and public responses to Chapter 11 cases.

Cases under Chapter 11 are unique. The publicly available cases range from a challenge to a multimillion-dollar punitive

96. Notes of Interpretation, *supra* note 8.

97. See NAFTALAW.ORG, at <http://www.naftalaw.org> (last visited Jan. 25, 2003) [hereinafter NAFTALAW.ORG].

98. *Case Law on UNCITRAL Texts (CLOUT)*, U.N. Commission on International Trade Law, at 3–5, U.N. Doc. A/CN.9/SER.C/GUIDE/1/Rev.1 (2000), available at www.uncitral.org/english/clout/guides/guid1-rev1-e.pdf.

99. *Id.* at 4–5.

100. See, e.g., NAFTALAW.ORG, *supra* note 97; U.S. Department of State, NAFTA Investor-State Arbitrations, at <http://www.state.gov/s/l/c3439.htm> (last visited Jan. 25, 2003); Canadian Department of Foreign Affairs & International Trade, Trade Negotiations and Agreements, Dispute Settlement: NAFTA-Chapter 11-Investment, at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp> (last updated June 4, 2002); Appleton & Associates International Lawyers, NAFTA Cases, at <http://www.appletonlaw.com/4acases.htm> (last visited Jan. 25, 2003).

101. See *infra* Appendix.

damage judgment in Mississippi against a foreign investor¹⁰² to a claim that certain Mexican criminal prosecutions violate Chapter 11.¹⁰³

While arbitration is touted as bringing predictability to international disputes, the public history of Chapter 11 refutes this claim. A great deal is known about several of the cases,¹⁰⁴ while little or nothing is known about many of them. In some cases, claimants fail to file Notices of Arbitration after filing Notices of Intent.¹⁰⁵ In at least two cases, the Notice of Intent was withdrawn.¹⁰⁶ Three cases filed against Mexico had three different results. *Metalclad* was decided in favor of the foreign investor.¹⁰⁷ *Waste Management* was dismissed on jurisdictional grounds.¹⁰⁸ *Azinian* was decided in favor of Mexico.¹⁰⁹ Two final tribunal awards were submitted for review to Canadian courts.¹¹⁰

102. *Dockins v. Allred*, 755 So. 2d 389, 390 (Miss. 1999) (citing *O'Keefe v. Loewen Group*, No. 91-677-423 (Miss. 1991)); *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (ICSID AF Oct. 30, 1998) (notice of claim), at <http://www.state.gov/documents/organization/3922.pdf>.

103. See Notice of Intent, *Calmark Commercial Dev., Inc. v. United Mexican States* (Jan. 11, 2002) (notice of intent), at http://www.international-economic-law.org/Mexicans/Calmark_Redacted_NOI.pdf.

104. NAFTA.LAW.ORG, *supra* note 97.

105. MANN, PRIVATE RIGHTS, *supra* note 48, at 101 (showing that the notice of arbitration was not pursued in *Halchette Distribution v. United Mexican States* (Aug. 1995) (notice of intent) nor in *Signa S.A. de C.V. v. Canada* (UNCITRAL Mar. 4, 1996) (notice of intent)).

106. NAFTA.LAW.ORG, *supra* note 97 (noting that the dispute in *Ketcham Invs., Inc. v. Canada* (Dec. 22, 2000) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/K&T-e.pdf>, was abandoned without commencement of an arbitration and that *Trammell Crow Co. v. Canada* (Dec. 7, 2001) (notice of intent), at http://www.dfait-maeci.gc.ca/tna-nac/documents/TC_vs_GC.pdf, was settled in April 2002).

107. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF Sept. 2, 2000) (final award), at <http://www.state.gov/documents/organization/3998.pdf> [hereinafter *Metalclad Award*]; *Metalclad to Receive \$16 Million NAFTA: Mexico Pays the Newport Beach Company to End 5-Year Dispute Over Dump Site*, L.A. TIMES, Oct. 27, 2001, at C8 (stating that the Mexican government paid *Metalclad Corp.* \$16 million to satisfy the NAFTA arbitration award).

108. Waste Mgmt. Award, *supra* note 76.

109. *Azinian Award*, *supra* note 76, at 35.

110. *United Mexican States v. Metalclad Corp.*, (2001) 89 B.C.L.R.3d 359 (Can.), *modified by*, (2001) 95 B.C.L.R.3d 169 (Can.); *Canada v. S.D. Myers*, [2002] F.C.

Of the twenty-eight cases, fifteen (fifty-four percent) were initiated after the year 2000.¹¹¹ Of the fifteen, two have been withdrawn,¹¹² one has resulted in a final award,¹¹³ and the remaining twelve appear to be in the early procedural stages.¹¹⁴

Table 2. Published Chapter 11 Cases¹¹⁵

Foreign Investor's Signatory State	Respondent	Published Chapter 11 Cases
United States	Canada	8
United States	Mexico	10
U.S. Total		18
Canada	Mexico	1
Canada	United States	7
Canadian Total		8
Mexico	United States	0
Mexico	Canada	1
Mexican Total		1
Unknown	United States	1
Grand Total		28

Critics in the United States and Canada complain the loudest that Chapter 11 threatens sovereignty, arguing that Chapter 11 actions threaten present signatory state regulations and chill future signatory state regulatory initiatives.¹¹⁶

39 (Can.).

111. NAFTALAW.ORG, *supra* note 97.

112. *Id.* (indicating that *Trammel Crow* and *Ketcham* have been withdrawn).

113. ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1 (ICSID AF Jan. 9, 2003) (award), at <http://www.state.gov/documents/organization/16586.pdf>.

114. NAFTALAW.ORG, *supra* note 97 (indicating that the remaining cases are pending).

115. *See infra* Appendix.

116. *See, e.g.*, Harry W. Arthurs, *The State We're in: Legal Education in*

However, as evidenced by Table 2., U.S. and Canadian investors have brought the majority of Chapter 11 cases.¹¹⁷ Five cases brought under Chapter 11 exemplify this perceived threat to sovereignty.

A. Ethyl Corp. v. Canada

Ethyl Corporation (Ethyl), a U.S. corporation that produces methylcyclopentadienyl manganese tricarbonyl (MMT),¹¹⁸ filed a notice of intent to submit a Chapter 11 claim against Canada.¹¹⁹ Ethyl claimed that a proposed Canadian ban on the import and interprovincial trade of MMT amounted to an expropriation¹²⁰ that merited compensation under Chapter 11.¹²¹ The case settled after the tribunal dismissed Canada's request to deny the claim on procedural grounds.¹²² The *Ethyl* settlement required Canada to pay Ethyl thirteen million U.S. dollars, to amend the proposed ban, and to state that there was a lack of scientific

Canada's New Political Economy, 20 WINDSOR Y.B. ACCESS TO JUST. 35, 40 (2001) (arguing that Chapter 11 is the most notorious example of an unwritten neoliberal constitution that prioritizes trade above all other considerations); Murray Dobbin, *Mulroney Baloney*, at <http://www.pl.net/8politics/baloney.html> (posted July 16, 2001) (arguing that Chapter 11 is too broad by allowing companies to challenge governmental decision-making); *Trading Democracy*, *supra* note 2 (arguing that the Chapter 11 arbitration process is too secretive and gives too much power to corporations); Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas, at <http://www.citizen.org/publications/release.cfm?ID=7076> [hereinafter Bankrupting Democracy] (arguing that Chapter 11 gives corporations too much power at the expense of environmental and other regulations).

117. U.S. and Canadian investors brought twenty-six of the twenty-eight cases cited. *See infra* Appendix. Only two cases have resulted in payments to investors—both of whom were from the United States. *See infra* text accompanying notes 143, 152.

118. MMT is a fuel additive that boosts gasoline octane. John Urquhart, *Canada's House of Commons is Expected to Vote for Ban on Ethyl Fuel Additive*, WALL ST. J., Oct. 28, 1996, at B3.

119. Ethyl Corp. v. Canada (UNCITRAL Sept. 10, 1996) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl1.pdf>.

120. Ethyl contended that there was an expropriation "whenever there is a substantial and unreasonable interference with the enjoyment of a property right." Ethyl Corp. v. Canada (UNCITRAL Apr. 14, 1997) (notice of arbitration), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl2.pdf>.

121. *Id.*; NAFTA, *supra* note 1, art. 1110(1), 32 I.L.M. at 641.

122. Ethyl Corp. v. Canada (UNCITRAL June 24, 1998) (juris. award) at 48, at <http://www.appletonlaw.com/cases/ejurisdiction.pdf>.

evidence to support the proposed ban.¹²³ The *Ethyl* settlement has been characterized as “tak[ing] environmental regulations out of the hands of governments and giv[ing] ultimate control to NAFTA investors.”¹²⁴ However, one commentator noted that the issue was not the validity of the environmental regulation but its discriminatory application.¹²⁵ Yet another commentator concluded that “the Ethyl claim may stand for the inability of Parties to enact environmental regulations indirectly, through trade restrictions, though perhaps the environmental regulations would be defensible if enacted directly.”¹²⁶ Finally, another commentator stated:

In essence, Ethyl was able to intimidate Canadian lawmakers into rescinding a valid environmental regulation, which resulted in the Canadian taxpayer “paying off the polluter” for importing a dangerous chemical. The use of Chapter 11 to lobby against valid environmental legislation in this case set a major precedent for the cases to follow.¹²⁷

B. *Metalclad Corp. v. United Mexican States*

In *Metalclad*, the U.S. investor contended that the state government of San Luis Potosi (SLP) unlawfully refused Metalclad permission to reopen a waste disposal facility.¹²⁸

123. Sanford E. Gaines, *The Masked Ball of NAFTA Chapter 11: Foreign Investors, Local Environmentalists, Government Officials, and Disguised Motives*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION 109, 110 (John K. Kirton et al. eds., 2002).

124. Terri L. Lilley, *Keeping NAFTA “Green” for Investors and the Environment*, 75 S. CAL. L. REV. 727, 731 (2002).

125. See Michael M. Hart & William A. Dymond, *NAFTA Chapter 11: Precedents, Principles, and Prospects*, at <http://www.carleton.ca/ctpl/papers/chapter11.doc> (last visited Jan. 25, 2003).

126. Lilley, *supra* note 124, at 757.

127. Francisco S. Nogales, *The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment*, 8 ANN. SURV. INT’L & COMP. L. 97, 133 (2002) (footnote omitted).

128. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF Jan. 2, 1997) (notice of intent) at <http://www.state.gov/documents/organization/3997.pdf> [hereinafter *Metalclad Intent*]; *Metalclad Award*, *supra* note 107, at 4–6; *United Mexican States v. Metalclad Corp.*, (2001) 89 B.C.L.R.3d 359, paras. 2–17, at 364–66 (Can.), *modified by*, (2001) 95 B.C.L.R.3d 169 (Can.).

Metalclad had purchased COTERIN, a Mexican corporation, which owned a development site for a waste disposal facility in SLP.¹²⁹ Federal environmental officials issued a construction permit to Metalclad.¹³⁰ However, municipal officials refused to issue a municipal construction permit.¹³¹ Metalclad proceeded to develop the waste disposal facility, based solely on Federal authority.¹³² Before Metalclad opened the waste disposal facility, the governor of SLP declared the area, including the waste disposal facility, a “Natural Area for the protection of rare cactus,” barring the opening of the waste disposal facility.¹³³

Metalclad brought a Chapter 11 action against Mexico.¹³⁴ The tribunal ordered Mexico to reimburse Metalclad for its investment in the waste disposal facility.¹³⁵ The tribunal based its decision on the inconsistency in construction permit grants and the environmental decree.¹³⁶ Because the denial was inconsistent with the NAFTA objective of “transparency,” the tribunal found the denial of construction permits violated article 1105.¹³⁷ With respect to the environmental decree, the tribunal found that Mexico’s action was an expropriation that violated article 1110.¹³⁸

Mexico appealed to the Supreme Court of British Columbia.¹³⁹ On appeal, Justice David Tysoe upheld the award.¹⁴⁰ Although Justice Tysoe found no violation of article 1105,¹⁴¹ he found the environmental decree to be an

129. Metalclad Award, *supra* note 107, para. 28, at 11.

130. *Id.* para. 30, at 12.

131. *Id.* para. 40, at 14.

132. *Id.* para. 42, at 14.

133. *Id.* para. 59, at 19.

134. Metalclad Intent, *supra* note 128.

135. Metalclad Award, *supra* note 107 para. 137, at 42.

136. *Id.* paras. 74–112, at 26–36.

137. *Id.* paras. 74–101, at 26–32.

138. *Id.* paras. 102–12, at 32–36.

139. United Mexican States v. Metalclad Corp., (2001) 89 B.C.L.R.3d 359, paras. 2–17, at 364–66 (Can.), *modified by*, (2001) 95 B.C.L.R.3d 169 (Can.).

140. Metalclad Corp., (2001) 89 B.C.L.R.3d 359.

141. *Id.* paras. 57–76, at 376–81. Justice Tysoe noted that the tribunal incorrectly interpreted transparency as an objective stated in article 102. *Id.* para. 71, at 380; NAFTA, *supra* note 1, art. 102, 32 I.L.M. at 297.

expropriation under article 1110, independent of the tribunal's considerations of transparency.¹⁴² Because of this ruling, Mexico settled the claim.¹⁴³

Chapter 11 critics cite *Metalclad* as an example of Chapter 11's interference with state sovereignty, particularly with respect to environmental regulation.¹⁴⁴ However, one critic notes that *Metalclad* may merely question which level of government has the ability to impose environmental regulations.¹⁴⁵

C. S.D. Myers v. Canada

In another illustrative case, S.D. Myers (SDM), a U.S. company, brought a Chapter 11 action against Canada.¹⁴⁶ SDM challenged Canada's prohibition on polychlorinated biphenyls (PCB) export.¹⁴⁷ Canada argued that SDM was not a foreign investor within the meaning of Chapter 11.¹⁴⁸ The tribunal issued a final award in favor of SDM, finding that Canada had acted in a discriminatory manner and that Canada's action violated the minimum standard of treatment under international law with respect to SDM's foreign investment.¹⁴⁹ The tribunal awarded SDM over six million Canadian dollars plus interest in damages.¹⁵⁰ After considering several factors,¹⁵¹

142. *Metalclad Corp.*, (2001) 89 B.C.L.R.3d paras. 77–105, at 381–88.

143. *Lilley*, *supra* note 124, at 733.

144. *See, e.g., Trading Democracy*, *supra* note 2; *Public Citizen*, *supra* note 116, at 10–14.

145. *See Lilley*, *supra* note 124, at 733.

146. S.D. Myers v. Canada (UNCITRAL July 21, 1998) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/myers1.pdf>.

147. *Id.* at 3–5.

148. S.D. Myers v. Canada (UNCITRAL Nov. 13, 2000) (first partial award) para. 145, at 32, at http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanada/partialaward_final_13-11-00.pdf [hereinafter *Myers First Partial Award*]. The tribunal rejected Canada's contention and found that SDM was a foreign investor in Myers Canada. *Id.* para. 321, at 80.

149. S.D. Myers v. Canada (UNCITRAL Oct. 21, 2002) (second partial award) paras. 311–12, at 77, at <http://www.dfait-maeci.gc.ca/tna-nac/documents/MyersPA.pdf>.

150. *Id.* at 77.

151. These factors include: the UNCITRAL Rules, the submission of the parties, the nature, quantum and reasonableness of the costs; the conduct of the parties during the proceedings; the majority's perception of the relative "success" or "lack of success" of the disputing parties during the two phases of the proceedings; the decisions of other NAFTA Chapter 11 tribunals and practices of international tribunals generally. S.D. Myers v. Canada (UNCITRAL Jan. 22, 2002) (final award) paras. 8–30, at 5–11, at

the tribunal awarded SDM \$350,000 (Canadian) for arbitration costs and \$500,000 (Canadian), plus interest for legal representation and assistance costs.¹⁵²

Critics of Chapter 11 contend that *S.D. Myers* stands for the proposition that “corporate rights of foreign investors must be the chief policy concern of public officials crafting a domestic regulatory policy.”¹⁵³ Others suggest that the case was merely a discriminatory application of a regulation to a foreign investor in violation of Chapter 11.¹⁵⁴

Commentators also cite *S.D. Myers* as broadening the definition of investment in Chapter 11.¹⁵⁵ This broadening creates new opportunities for challenges to signatory state regulations.¹⁵⁶ Although some commentators consider *S.D. Myers* a threat to sovereignty, at least one commentator asserts that *S.D. Myers* may bolster sovereignty.¹⁵⁷ There may now be a defense for signatory states to Chapter 11 claims based on the legitimacy of a signatory state’s environmental interests in the challenged measure.¹⁵⁸

D. Methanex Corp. v. United States

Methanex, a Canadian corporation, brought a Chapter 11 claim against the United States seeking \$970 million (U.S.) in damages.¹⁵⁹ Methanex’s claims were prompted by a California

<http://www.dfait-maeci.gc.ca/tna-nac/documents/MyersFinalAward-Final-30-12-02.pdf>.

152. *Id.* paras. 53–55, at 19.

153. Bankrupting Democracy, *supra* note 116, at 18.

154. See Hart & Dymond, *supra* note 125, at 19–20; VanDuzer, *supra* note 95, at 23–24.

155. After *S.D. Myers*, commentators were alarmed that the definition of investment under Chapter 11 now includes “assets [such] as market share in a sector, and access to markets in the host state, whether or not the investor even owns a physical plant or retail store in that country.” MANN, PRIVATE RIGHTS, *supra* note 48, at 23; Nogales, *supra* note 127, at 109 n.83.

156. See MANN, PRIVATE RIGHTS *supra* note 48, at 23. Mann states that “[t]he unintended effect of [broadening the definition of investment] is to blur the distinction between investment and trade . . .” *Id.*

157. Tollefson, *supra* note 9, at 151–53.

158. *Id.* (citing *S.D. Myers v. Canada* (UNCITRAL Nov. 13, 2000) (first partial award—separate opinion by Dr. Bryan Schwartz) para. 75, at 22, at <http://www.dfait-maeci.gc.ca/tna-nac/documents/Swartz.pdf>).

159. Methanex Corp. v. United States (UNCITRAL July 2, 1999) (notice of

decision to phase out the gasoline additive methyl tertiary-butyl ether (MTBE).¹⁶⁰ Methanex was a supplier of methanol, an ingredient used in the production of MTBE.¹⁶¹ Methanex alleged that California's action breached articles 1105 and 1110.¹⁶² The tribunal dismissed Methanex's claims for lack of jurisdiction, but left the door open for Methanex to try again with a fresh pleading.¹⁶³

Methanex filed a fresh statement of claim alleging violations of articles 1102, 1105, and 1110.¹⁶⁴ In the introduction to their fresh statement, Methanex notes that they are not trying to "expand international guarantees in a way that would threaten nations' or states' ability to enact or enforce valid and non[-] discriminatory environmental laws[.]" rather Methanex claims that "California's unlawful protectionism comports exactly with the investment guarantees Chapter 11 was meant to provide."¹⁶⁵ The case is pending.¹⁶⁶

E. Loewen Group, Inc. v. United States

The issue in *Loewen* is whether a Mississippi state court action expropriated the Loewen Group's (Loewen) assets in violation of NAFTA Chapter 11.¹⁶⁷ In a state court suit, brought by Loewen's former business partner, the jury returned a verdict against Loewen for \$260 million (U.S.) in actual damages and four hundred million U.S. dollars in punitive damages.¹⁶⁸

intent) at 1, 4, at <http://www.international-economic-law.org/Methanex/Methanex - Notice of Intnet.pdf>.

160. *Id.* at 2.

161. *Id.*

162. *Id.* at 4.

163. *Methanex Corp. v. United States* (UNCITRAL Aug. 7, 2002) (award on juris.) para. 172, at 83-84, at <http://www.state.gov/documents/organization/12613.pdf>.

164. *Methanex Corp. v. United States* (UNCITRAL Nov. 5, 2002) (second amended statement of claim) paras. 291-320, at 120-29, at <http://www.state.gov/documents/organization/15035.pdf>.

165. *Id.* para. 10, at 4.

166. NAFTALAW.ORG, *supra* note 97.

167. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (ICSID AF July 29, 1998) (notice of arbitration) at 48-65, at <http://www.state.gov/documents/organization/3922.pdf> [hereinafter *Loewen Notice*].

168. *Dockins v. Allred*, 755 So. 2d 389, 390 (Miss. 1999) (citing *O'Keefe v. Loewen Group*, No. 91-677-423 (Miss. 1991)).

Mississippi state law requires an appeal bond of 125 percent of the judgment, which Loewen was unable to afford.¹⁶⁹ Loewen settled the suit and then sued the United States government under NAFTA Chapter 11 for \$725 million (U.S.).¹⁷⁰ The tribunal entered an award on jurisdiction on January 5, 2001.¹⁷¹ The case is pending.¹⁷²

Loewen has been the subject of great public outcry in the United States because it is a perceived assault on the U.S. legal system and the sanctity of jury decisions.¹⁷³ A thorough analysis of *Loewen* suggests that the case should be reviewed dispassionately. An exceptionally thorough analysis of every step of *Loewen* while in the Mississippi courts caused Lucien J. Dhooge to conclude:

The scant evidence presented during the punitive damages phase of the trial is further demonstrative of the lack of a rational basis for the jury's award. The enormous size of the award in relation to [the plaintiff's] actual injuries and economic loss, previous awards in the state and the financial condition of Loewen lead to the conclusion that it was an unconstitutional, albeit perhaps unintentional, attempt to redistribute wealth amongst the parties. . . .

. . . .

. . . Given the inconsistency of the punitive damages awarded in the *O'Keefe* litigation [the Mississippi case against Loewen] with applicable American, Canadian and international standards, it may be concluded that it constituted an uncompensated expropriation pursuant

169. Loewen Notice, *supra* note 167, at 43–45. The Mississippi Supreme Court refused to lower the bond. *Id.*

170. *See id.*

171. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3 (ICSID AF Jan. 5, 2001) (juris. award), at <http://www.state.gov/documents/organization/3921.pdf>.

172. NAFTALAW.ORG, *supra* note 97.

173. *See, e.g.*, William Glaberson, *NAFTA Invoked to Challenge Court Award*, N.Y. TIMES, Jan. 28, 1999, at C6; *Trading Democracy*, *supra* note 2; *Bankrupting Democracy*, *supra* note 116; Nikos Valence, *NATO Effects: U.S. Contracts Could be Voided by Free-Trade Agreements, as a Case Involving Loewen Group Shows*, CFO.com, Mar. 1, 2000, at www.cfo.com/printarticle/0,5317,830,00.html.

to Article 1110 of NAFTA. Although not a direct taking, the Mississippi judiciary's acquiescence in a biased process that resulted in an excessive verdict, denied Loewen meaningful substantive review of such verdict and ultimately compelled a financially devastating settlement is without doubt an indirect measure tantamount to expropriation. The biased nature of the proceedings as evidenced by the repeated emphases upon nationality, race and wealth do not support the existence of a legitimate public purpose underlying this expropriation.¹⁷⁴

Another commentator points out: "If Loewen is successful in its claim against the United States, investors would be encouraged to try to circumvent domestic law by filing NAFTA claims challenging the state, local, and federal court systems, where U.S. citizens and businesses must abide by U.S. court rulings."¹⁷⁵ Therefore, cases such as *Loewen* are seen by some as a threat to signatory state sovereignty, and damages awarded in Chapter 11 cases are unfairly shifted to the signatory state taxpayers.¹⁷⁶

IV. RESPONSES TO CHAPTER 11 CASES: FUTURE

A. *Notes of Interpretation*

The Chapter 11 cases have prompted the Free Trade Commission to adopt the Notes of Interpretation.¹⁷⁷ Part A of the Notes of Interpretation address the issue of transparency.¹⁷⁸ NAFTA drafters modeled Chapter 11 arbitrations on private commercial arbitrations.¹⁷⁹ Private commercial arbitrations place a premium on secrecy and confidentiality; therefore, many

174. Dhooge, *supra* note 95, at 72, 74 (footnotes omitted).

175. Nogales, *supra* note 127, at 139.

176. See *Bankrupting Democracy*, *supra* note 116.

177. Notes of Interpretation, *supra* note 8.

178. *Id.* Transparency, as addressed in the Notes of Interpretation, concerns publication of decisions, whereas transparency, as discussed in *Metalclad*, concerns hidden measures by a signatory state or its subdivision. *Metalclad Award*, *supra* note 107, paras. 74–101, at 26–32.

179. VanDuzer, *supra* note 95, at 12–13.

perceive that Chapter 11 embodies these attributes as well.¹⁸⁰ Because many Chapter 11 cases involve public policy issues, commentators have demanded public disclosure of Chapter 11 decisions.¹⁸¹ Part A of the Notes of Interpretation clarifies Chapter 11's position on confidentiality and publication of documents relating to arbitrations.¹⁸² However, the Notes of Interpretation are silent on hearings and their transcripts; they will remain private unless all parties consent to disclosure.¹⁸³

Part B of the Notes of Interpretation clarifies Chapter 11's position with respect to the article 1105 minimum standard of treatment.¹⁸⁴ Part B "contributes significantly to enhancing the

180. *Id.*

181. *See id.* at 13.

182. Notes of Interpretation, *supra* note 8.

(1) Nothing in the NAFTA imposes a general duty of confidentiality on the disputing Parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

(2) In the application of the foregoing:

(a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

(b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

(i) Confidential business information;

(ii) Information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

(iii) Information which the Party must withhold pursuant to the relevant arbitral rules as applied.

Id.

183. VanDuzer, *supra* note 95, at 20.

184. Notes of Interpretation, *supra* note 8.

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

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

certainty of the Article 1105 obligation.”¹⁸⁵ However, some commentators question whether the Notes of Interpretation are binding, because the Free Trade Commission interpreted, but did not amend Chapter 11.¹⁸⁶ One of the members of the *Methanex* tribunal questioned both the propriety and the timing of Part B.¹⁸⁷ Controversy surrounds future application of article 1105, as interpreted by Part B, in Chapter 11 cases.

B. Signatory State Responses

Signatory states, while still in favor of expanded trade, have a strong interest in enacting legislation and regulations protecting public health and the environment. Chapter 11's perceived threat to democracy and sovereignty is particularly strong among citizens and politicians in Canada. As noted previously, critics of Chapter 11 continue to assert that the arbitration provisions deprive “a host government of the sovereign right to enact legislation for the economic, health and environmental benefit of its citizens.”¹⁸⁸ In particular, the Canadian Trade Minister, Mr. Pettigrew, said he would not sign the FTAA if it includes provisions similar to Chapter 11.¹⁸⁹ Canada is currently seeking review of Chapter 11.¹⁹⁰ According to the Council of Canadians, “Chapter 11 is bad news in a bad agreement.”¹⁹¹

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

Id.

185. VanDuzer, *supra* note 95, at 28.

186. Todd Weiler, *Trade Ministers Say the Darndest Things*, at <http://www.naftaclaims.com/Papers/NewsletterCommentary.pdf> (last visited Jan. 25, 2003); Sir Robert Jennings, *Opinion Regarding the NAFTA Commission Statement (Arising from Methanex Arbitration)*, Sept. 6, 2001, pt. I, at http://www.international-economic-law.org/Methanex/Jennings_Methanex_Opinion.PDF [hereinafter Jennings Opinion].

187. Jennings Opinion, *supra* note 186, pt. II.

188. Eastman, *supra* note 44, at 105.

189. Mark MacKinnon, *Canada Seeks Review of NAFTA's Chapter 11*, THE GLOBE AND MAIL, Dec. 13, 2000, at B1.

190. *Id.*

191. *Id.* (quoting Peter Julian, Executive Director of the Council of Canadians).

Response in the United States has been similar.¹⁹² The mainstream media has characterized Chapter 11 as “a slow-ticking time bomb in the politics of globalization.”¹⁹³ Even the venerable scion of the Public Broadcasting System (PBS), Bill Moyers, has vilified Chapter 11 and Chapter 11 cases in his documentary, *Trading Democracy*.¹⁹⁴ Recent action in the U.S. Congress seems to support this sentiment. Congressional support for fast-track trade authority, designed to support President George W. Bush’s efforts to conclude a new round of negotiations with the World Trade Organization and to establish the FTAA¹⁹⁵ and other international agreements,¹⁹⁶ was tempered by concern over the extension of Chapter 11-like provisions to new trade agreements.¹⁹⁷ This concern is well founded, as “NAFTA’s investment rules continue to provide the working model for the proposed Free Trade Area of the Americas, and for other international agreements.”¹⁹⁸

After narrowly passing the House of Representatives,¹⁹⁹ the Senate considered the Bipartisan Trade Promotion Authority Act of 2001, which gives the President fast-track trade authority.²⁰⁰ The Senate subjected the bill to extensive analysis and debate.²⁰¹ The Senate Report specifically referred to NAFTA Chapter 11:

Under NAFTA [C]hapter 11, the number of investor-

192. See Julie A. Soloway, *Environmental Regulation as Expropriation: The Case of NAFTA’s Chapter 11*, 33 CAN. BUS. L.J. 92, 112 (2000) (delineating American and Mexican views regarding explication of Chapter 11).

193. William Greider, *The Right and US Trade Law: Invalidating the 20th Century—Investor Protections in NAFTA are One Manifestation of a Broad, Backdoor Effort to Restore the Primacy of Property Against Society’s Broader Claims*, THE NATION, Oct. 15, 2001, at 21.

194. See *Trading Democracy*, *supra* note 2.

195. The FTAA may extend NAFTA to most of South and Central America.

196. MAX BAUCUS, BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2002, S. REP. NO. 107-39, at 2 (2002).

197. Neil King, Jr., *A New Curve Slows Fast-Track: Foes Cite Nafta-Based Claims to Warn of Trade Bills Flaws*, WALL ST. J., Apr. 30, 2002, at A4.

198. MANN, PRIVATE RIGHTS, *supra* note 48, at viii.

199. Bipartisan Trade Promotion Authority Act of 2001, H.R. 3005, 107th Cong. (2001).

200. S. REP. NO. 107-39, *supra* note 196.

201. *Id.* at 13.

state disputes to which the United States is a party has grown substantially. While there are no reported cases of foreign investor challenges to U.S. measures under the [Bilateral Investment Treaties], there have been four such challenges since NAFTA's inception in 1994. (To date, a total of 13 investor complaints have been filed under NAFTA [C]hapter 11.)

The growing number of investor-state disputes has caused concern among certain interest groups. In particular, some environmental groups see investor-state dispute settlement provisions as having a potentially chilling effect on the adoption of environmental laws and regulations.²⁰²

After careful consideration, the Bipartisan Trade Promotion Authority Act of 2002 (TPA) was passed.²⁰³

The TPA contains several dispute resolution provisions not found in NAFTA. In particular, the TPA directs trade negotiators to provide meaningful procedures and improved mechanisms for resolving investor-state investment disputes.²⁰⁴ The TPA also provides measures to ensure transparency.²⁰⁵ Further, the TPA requires a mechanism for acceptance of *amicus curiae* submissions from businesses, unions and non-governmental organizations.²⁰⁶

The investor-state dispute resolution mechanisms, along with specific references to "fair and equitable treatment consistent with United States legal principles and practice[,]” indicate that investor-state dispute resolution processes enacted under the TPA will be a departure from Chapter 11.

202. *Id.* at 12–13.

203. Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002) (to be codified at 19 U.S.C. § 3801).

204. *Id.* § 2102(b)(3)(G), 116 Stat. at 995. These include means to eliminate frivolous claims; procedures to ensure the efficient selection of arbitrators; procedures to enhance opportunities for public input; and an appellate body or similar mechanism to provide coherence to the interpretation of the TPA. *Id.*

205. *Id.* § 2102(b)(3)(H), 116 Stat. at 995. These measures include publishing all requests for dispute settlement, all proceedings, all submissions, all findings, all decisions, and all hearings. *Id.*

206. *Id.* § 2102(b)(3)(H)(iii), 116 Stat. at 995.

V. CONCLUSION: A CLOUDY FUTURE

While investors from Canada and the United States bring the vast majority of Chapter 11 actions, Table 3 shows that all three signatory states are equal targets.

Table 3. Total Claims Noticed as of January 2003.²⁰⁷

Respondent	Claims Withdrawn/ Not Pursued	Pending	Wins	Losses	Settled	Total
Canada	4	2	0	2	1	9
Mexico	1	7	1	2	0	11
United States	0	6	2	0	0	8

With so few published Chapter 11 cases, and fewer cases completely resolved, it is difficult to draw any conclusions about what the cases mean and what the future might portend for Chapter 11. As the cries for change in Chapter 11 become louder, it appears certain that future U.S. and Canadian trade agreements are likely to have very different investor-state dispute resolution mechanisms.

Based on the cases noticed, filed, decided, and settled to-date, it is difficult to determine whether Chapter 11 is settling investor-state disputes or mauling signatory state sovereignty. This uncertainty indicates that the status quo may be the best approach. If “[a]ppplied equitably, the NAFTA’s investment Chapter will benefit both corporations and national governments alike. As there is no basis to suggest that tribunals will apply the law inequitably, Chapter 11 should, therefore, remain unaltered until there is evidence to the contrary.”²⁰⁸

The adoption of the Notes of Interpretation appears to be a positive step in providing guidance and uniformity in the application of Chapter 11, but arguably, the Notes of Interpretation do not go far enough to provide transparent investor-state dispute resolution. Future interpretations and

207. See *infra* Appendix.

208. Eastman, *supra* note 44, at 118.

amendments, similar to those in Chapters 19 and 20, may foster confidence in Chapter 11.²⁰⁹ A successful trade agreement must allow foreign private investors to hold signatory states responsible for their actions.²¹⁰ Only time will tell if Chapter 11 cases will realize the original objectives of NAFTA.

209. See VanDuzer, *supra* note 95, at 20.

210. See Hart & Dymond, *supra* note 125, at 21–22.

VI. APPENDIX

Summary of All Known Claims Filed Under NAFTA
Chapter 11
 (By Date of Notice)
January 2003

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Aug. 1995	Halchette Distribution Services [United States]	Mexico	Unknown	Notice of Intent not published. Arbitration not pursued. ²¹¹
Mar. 4, 1996	Signa S.A. de C.V. [Mexico]	Canada	UNCITRAL	Notice of Intent not published. Arbitration not pursued. ²¹²
Sept. 10, 1996	Ethyl Corp. [United States]	Canada	UNCITRAL	Notice of Arbitration filed, Apr. 14, 1997. Settled before arbitration. ²¹³

211. NAFTA.LAW.ORG, *supra* note 97; J. Anthony VanDuzer, *Appendix I: Cases Filed Under NAFTA Chapter 11 to February 28, 2002*, at 1, 11 (Feb. 28, 2002), at <http://www.carleton.ca/~ctpl/ch11papers/casesummaries.doc> [hereinafter VanDuzer Appendix].

212. NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 10.

213. Ethyl Corp. v. Canada (UNCITRAL Sept. 10, 1996) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl1.pdf>; Ethyl Corp. v. Canada (UNCITRAL Apr. 14, 1997) (notice of arbitration), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl2.pdf>; NAFTA.LAW.ORG, *supra* note 97.

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Dec. 16, 1996	Azinian and other shareholders of Desechos Solidos de Naucalpan S.A. de C.V. [United States]	Mexico	ICSID AF	Final award filed, Nov. 1, 1999. ²¹⁴
Jan. 2, 1997	Metalclad Corp. [United States]	Mexico	ICSID AF	Final award filed, Sept. 2, 2000. Appeal to the Supreme Court of British Columbia. Award upheld, May 2, 2001. ²¹⁵
Feb. 18, 1998	Karpa (a.k.a. Feldman) (CEMSA) [United States]	Mexico	ICSID AF	Final award filed, Dec. 16, 2002. ²¹⁶

214. Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2 (ICSID AF Nov. 1, 1999) (final award), at http://www.worldbank.org/icsid/cases/robert_award.pdf; NAFTALAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 10.

215. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (ICSID AF Jan. 2, 1997) (notice of intent) at <http://www.state.gov/documents/organization/3997.pdf>; Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (ICSID AF Sept. 2, 2000) (final award) at <http://www.international-economic-law.org/Metalclad/metalclad.pdf>; United Mexican States v. Metalclad Corp., (2001) 89 B.C.L.R.3d 359 (Can.), *modified by*, (2001) 95 B.C.L.R.3d 169 (Can.); NAFTALAW.ORG, *supra* note 97, VanDuzer Appendix, *supra* note 211, at 11.

216. Karpa v. United States, ICSID Case No. ARB(AF)/99/1 (ICSID AF Feb. 18, 1998) (notice of intent), at http://www.toddweiler.com/Mexicans/karpa_noi.pdf; Karpa v.

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
July 21, 1998	S.D. Myers, Inc. [United States]	Canada	UNCITRAL	Final Award filed, Nov. 13, 2000. Appeal to the Federal Court of Canada dismissed, Jan. 22, 2002. ²¹⁷
July 29, 1998 (Notice of Arbitration)	The Loewen Group, Inc. and Raymond Loewen [Canada]	United States	ICSID AF	Award on Jurisdiction filed, Jan. 5, 2001. ²¹⁸
Sept. 29, 1998 (Notice of Arbitration)	Waste Mgmt., Inc. [United States]	Mexico	ICSID AF	Final award filed, June 2, 2000. New Notice of Arbitration filed, Sept. 27, 2000. ²¹⁹

United States, ICSID Case No. ARB(AF)/99/1 (ICSID AF Dec. 16, 2002) (final award), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/FeldmanAward.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 12.

217. S.D. Myers v. Canada (UNCITRAL July 21, 1998) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/myers1.pdf>; S.D. Myers v. Canada (UNCITRAL July 21, 1998) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/MyersFinalAward-Final-30-12-02.pdf>; Canada v. S.D. Myers, [2002] F.C. 39 (Can.); VanDuzer Appendix, *supra* note 211, at 2.

218. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3 (ICSID AF July 29, 1998) (notice of arbitration), at <http://www.international-economic-law.org/Loewen/loewen.pdf>; Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3 (ICSID AF Jan. 5, 2001) (juris. award), at <http://www.international-economic-law.org/Loewen/LoewenAwardonJurisdiction.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 7-8.

219. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 (ICSID AF Sept. 29, 1998) (notice of arbitration), at

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Nov. 27, 1998	Sun Belt Water, Inc. [United States]	Canada	UNCITRAL	Notice of Arbitration filed, Oct. 12, 1999. Arbitration not pursued. ²²⁰
Dec. 24, 1998	Pope & Talbot, Inc. [United States]	Canada	UNCITRAL	Award on Costs filed, Nov. 26, 2002. ²²¹
July 2, 1999	Methanex Corporation [Canada]	United States	UNCITRAL	Award on Jurisdiction and Admissibility filed, Aug. 7, 2002. Fresh Statement of Claim filed, Nov. 5, 2002. ²²²

<http://www.state.gov/documents/organization/3999.pdf>; Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 (ICSID AF June 2, 2000) (final award), at http://www.worldbank.org/icsid/cases/waste_award.pdf; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 12.

220. Sun Belt Water, Inc. v. Canada (UNCITRAL Nov. 27, 1998) (notice of intent), at http://www.toddweiler.com/sun_01.pdf; Sun Belt Water, Inc. v. Canada (UNCITRAL Mar. 25, 1999) (notice of arbitration), at http://www.toddweiler.com/sun_02.pdf; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 2-3.

221. Pope & Talbot, Inc. v. Canada (UNCITRAL Dec. 24, 1998) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdoc1.pdf>; Pope & Talbot, Inc. v. Canada (UNCITRAL Nov. 26, 2002) (costs award), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/CostsAward26Nov02.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 3.

222. Methanex Corp. v. United States (UNCITRAL July 2, 1999) (notice of intent), at <http://www.international-economic-law.org/Methanex/Methanex - Notice of Intent.pdf>; Methanex Corp. v. United States (UNCITRAL Aug. 7, 2002) (juris. &

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Sept. 1, 1999	Mondev Int'l, Ltd. [Canada]	United States	ICSID AF	Final Award filed, Oct. 11, 2002. ²²³
Apr. 19, 2000	United Parcel Service, Inc. [United States]	Canada	UNCITRAL	Award on Jurisdiction filed, Nov. 22, 2002. ²²⁴
July 19, 2000 (Notice of Arbitration)	ADF Group, Inc. [Canada]	United States	ICSID AF	Final Award filed, Jan. 9, 2003. ²²⁵
Nov. 11, 2000	Adams et al. [United States]	Mexico	UNCITRAL	Notice of Arbitration filed, Feb. 16, 2001. ²²⁶

admissibility award), at <http://www.state.gov/documents/organization/12613.pdf>; Methanex Corp. v. United States (UNCITRAL Nov. 5, 2002) (second amended statement of claim), at <http://www.state.gov/documents/organization/15035.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 8.

223. Mondev Int'l, Ltd. v. Canada, ICSID Case No. ARB(AF)/99/2 (ICSID AF Oct. 11, 2003) (final award), at <http://www.state.gov/documents/organization/14442.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 7.

224. United Parcel Serv., Inc. v. Canada (UNCITRAL Apr. 19, 2000) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ups-noi.pdf>; United Parcel Serv., Inc. v. Canada (UNCITRAL Nov. 22, 2002) (juris. award), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/JurisdictionAward.22Nov02.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 4.

225. ADF Group, Inc. v. United States, ICSID No. ARB(AF)/00/1 (ICSID AF July 19, 2000) (notice of arbitration), at [http://www.international-economic-law.org/ADF/ADF Group Inc. and USA - Notice of Arbitration.pdf](http://www.international-economic-law.org/ADF/ADF%20Group%20Inc.%20and%20USA%20-%20Notice%20of%20Arbitration.pdf); ADF Group, Inc. v. United States, ICSID No. ARB(AF)/00/1 (ICSID AF Jan. 9, 2003) (final award), at <http://www.state.gov/documents/organization/16586.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 9.

226. Adams v. United Mexican States (UNCITRAL Nov. 11, 2000) (notice of arbitration), at [http://www.international-economic-law.org/Mexicans/Adams et al and Mexico - Notice of Arbitration.PDF](http://www.international-economic-law.org/Mexicans/Adams%20et%20al%20and%20Mexico%20-%20Notice%20of%20Arbitration.PDF); NAFTA.LAW.ORG, *supra* note 97 (stating that there is a notice of intent); VanDuzer Appendix, *supra* note 211, at 13.

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Dec. 22, 2000	Ketcham Investments, Inc. and Tysa Investments United States]	Canada	Unknown	Arbitration not pursued. ²²⁷
Sept. 7, 2001	Trammell Crow Co. [United States]	Canada	Unknown	Arbitration not pursued. ²²⁸
Oct. 30, 2001 (Notice of Arbitration)	Fireman's Fund Insurance Co. [United States]	Mexico	ICSID AF	Pending. ²²⁹
Nov. 5, 2001	Canfor Corp. [Canada]	United States	Unknown	Notice of Arbitration filed, July 9, 2002. ²³⁰

227. Ketcham Invs. Inc v. United States (Dec. 22, 2000) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/K&T-e.pdf>; NAFTA.LAW.ORG, *supra* note 97.

228. Trammel Crow Co. v. Canada (Sept. 7, 2001) (notice of intent), at http://www.dfait-maeci.gc.ca/tna-nac/documents/TC_vs_GC.pdf; Canadian Department of Foreign Affairs & International Trade, Trade Negotiations and Agreements, Trade Negotiations and Agreements—Dispute Settlement-NAFTA-Chapter 11-Investment, at <http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp>.

229. Fireman's Fund Ins. Co. v. United Mexican States, ICISD Case No. ARB(AF)/02/1, (ICISD AF Oct. 30, 2001) (notice of arbitration); NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 13–14.

230. Canfor Corp. v. United States (Nov. 5, 2001) (notice of intent), at <http://www.toddweiler.com/Canfor/Canfor Notice of Intent.pdf>; Canfour Corp. v. United States (July 9, 2002), at <http://www.toddweiler.com/Canfor/Canfor Notice of Arbitration and Statement of Claim.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 9.

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Nov. 6, 2001	Crompton Corp. [United States]	Canada	Unknown	Amended Notice of Intent filed, Sept. 19, 2002. ²³¹
Dec. 24, 2001	Calmark Commercial Dev., Inc. [United States]	Mexico	Unknown	Notice of Arbitration filed, Jan. 11, 2002. ²³²
Jan. 14, 2002	Kenex, Ltd. [Canada]	United States	Unknown	Notice of Arbitration filed, Aug. 8, 2002. ²³³
Feb. 12, 2002	Robert J. Frank [United States]	Mexico	Unknown	Notice of Arbitration filed, Aug. 5, 2002. ²³⁴

231. Crompton Corp. v. Canada (Nov. 6, 2001) (notice of intent), at <http://www.toddweiler.com/Crompton/Old Crompton Notice of Intent.pdf>; Crompton Corp. v. Canada (Sept. 19, 2002) (amended notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/ComptonCorp.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 6.

232. Calmark Commercial Dev., Inc. v. United Mexican States (Dec. 24, 2001) (notice of arbitration), at http://www.international-economic-law.org/Mexicans/Calmark_Redacted_NOI.pdf; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 13.

233. Kenex, Ltd. v. United States (Jan. 14, 2002) (notice of intent), at http://www.international-economic-law.org/US Notices/kenex_noi.pdf; Kenex, Ltd. v. United States (Jan. 14, 2002) (notice of arbitration), at <http://www.international-economic-law.org/USNotices/KenexNoticeofArbitration.pdf>; NAFTA.LAW.ORG, *supra* note 97; VanDuzer Appendix, *supra* note 211, at 9.

234. Frank v. United Mexican States (Feb. 12, 2002) (notice of intent), at <http://www.dfait-maeci.gc.ca/tna-nac/documents/NoticeofIntent.pdf>; NAFTA.LAW.ORG, *supra* note 97.

Date of Initial Notice/Claim	Claimant(s) [Country]	Respondent	Forum	Actions/ Current Status
Apr. 9, 2002 (Notice of Arbitration)	GAMI Investments [United States]	Mexico	UNCITRAL	Pending. ²³⁵
May 1, 2002	Doman Industries, Ltd. [Canada]	United States	Unknown	Pending. ²³⁶
May 4, 2002	Tembec Corp. [Unknown]	United States	Unknown	Pending. ²³⁷
2002	International Thunderbird Gaming Corp. [Canada]	Mexico	UNCITRAL	Notice not publicly available. ²³⁸

235. GAMI Invs., Inc. v. United Mexican States (UNCITRAL Apr. 9, 2002) (notice of arbitration), at <http://www.state.gov/documents/organization/11848.pdf>; NAFTA.LAW.ORG, *supra* note 97.

236. Doman Indus. Ltd. v. United States (May 1, 2002) (notice of intent), at <http://www.state.gov/documents/organization/11848.pdf>; NAFTA.LAW.ORG, *supra* note 97.

237. NAFTA.LAW.ORG, *supra* note 97.

238. NAFTA.LAW.ORG, *supra* note 97.