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**THE COMBAT ZONE: MONDEV INTERNATIONAL,  
LTD. V. UNITED STATES AND THE BACKLASH  
AGAINST NAFTA CHAPTER 11**

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I. INTRODUCTION

The North American Free Trade Agreement (“NAFTA”)<sup>1</sup> is a comprehensive agreement entered into force in 1994 and designed to promote trade among its three signatories—Canada, Mexico, and the United States.<sup>2</sup> Chapter 11 of NAFTA (“Chapter 11”) establishes rules governing

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<sup>1</sup> North American Free Trade Agreement, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]. A detailed analysis of NAFTA Chapter 11 is beyond the scope of this note. For a general discussion of Chapter 11, see, for example, Daniel M. Price & P. Bryan Christy III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 165 (Judith H. Bello et al. eds., 1994); Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2-SUM NAFTA: L. & BUS. REV. AM. 82 (1996); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CANADIAN BUS. L.J. 405 (2002).

<sup>2</sup> Article 102 of NAFTA establishes six objectives for the agreement: The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored nation treatment and transparency, are to:

- (1) eliminate tariff and non-tariff barriers to trade;
- (2) promote fair competition;
- (3) increase investment opportunities;
- (4) provide protection for intellectual property rights;

the treatment and protection of foreign investments.<sup>3</sup> The substantive obligations, which are enumerated in Section A of Chapter 11, prohibit performance requirements,<sup>4</sup> discrimination,<sup>5</sup> actions tantamount to expropriation,<sup>6</sup> and violations of the minimum standard of treatment established in international law.<sup>7</sup> To ensure compliance with the substantive obligations, the procedural measures set forth in Section B of Chapter 11 enable investors of signatory nations to bring binding arbitration actions against the host government in the event of investment disputes.<sup>8</sup> Accordingly, any foreign investor<sup>9</sup> of a member nation who has incurred a loss due to an alleged breach of one or more of the substantive obligations can submit a claim for arbitration against the host government.<sup>10</sup>

Originally hailed as a model for future free trade agreements,<sup>11</sup> Chapter 11 has recently been decried as “an end-run around the Constitution.”<sup>12</sup> This about-face can be attributed to a growing perception that the NAFTA investor protection provisions are being implemented in ways not envisioned by its negotiators or by parties bound by its provisions. Indeed, much of the criticism stems from NAFTA arbitral decisions rendered thus far, which suggest that foreign investors can receive more protection and additional avenues of recourse, thanks to Chapter 11, than their domestic counterparts.

This note first explores the backlash against Chapter 11 by examining an October 2002 NAFTA arbitral decision, *Mondev International, Ltd. v. United States* (“*Mondev*”), that resolved an investment dispute between a Canadian company and the city of Boston, represented by the United

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(5) create procedures for effective implementation and enforcement of the Agreement; and

(6) establish a forum for further enhancement and expansion of the benefits provided by the Agreement.

NAFTA, *supra* note 1, art. 102, 32 I.L.M. at 297.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* art. 1106, at 640.

<sup>5</sup> *Id.* art. 1102, at 639.

<sup>6</sup> *Id.* art. 1110, at 641-42.

<sup>7</sup> *Id.* art. 1105, at 639-40.

<sup>8</sup> *Id.* art. 1122, at 644.

<sup>9</sup> “Investor of a Party” is broadly defined as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” *Id.* art. 1139, at 647. Similarly, “Investment of an Investor Party” is also broadly defined encompassing investments “owned or controlled directly or indirectly by an investor of such Party.” *Id.*

<sup>10</sup> *Id.* art. 1122, at 644.

<sup>11</sup> Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT’L LAW. 727, 736 (1993). Daniel Price represented the United States Trade Representative in the Chapter 11 negotiations. *Id.* at note a1.

<sup>12</sup> *Bill Moyers Reports: Trading Democracy* (PBS television broadcast, Feb. 5, 2002), at [http://www.pbs.org/now/printable/transcript\\_tdfull\\_print.html](http://www.pbs.org/now/printable/transcript_tdfull_print.html).

States.<sup>13</sup> *Mondev* is one of only eight final decisions (three of which involved claims against the United States) rendered to date by NAFTA Chapter 11 tribunals.<sup>14</sup> Although NAFTA decisions do not have precedential value per se, the sheer paucity of final decisions suggests that each award will have some influence on future arbitrations. Moreover, the arbitral decisions impact the behavior of foreign investors and municipal, local, and federal governments. This note suggests that while the *Mondev* tribunal found in favor of the United States, it was a hollow victory primarily based on technical grounds, and will not likely appease critics of Chapter 11.

Next, this note considers the battle being waged among environmentalists, transnational businesses, think tanks, and government authorities over the proper scope and application of Chapter 11. The growing opposition to the NAFTA investor protections is due, in large part, to the perception that transnational corporations have abused the agreement's broad provisions to the detriment of ordinary citizens. Critics urge that Chapter 11 has impinged on local regulatory and judicial authority.<sup>15</sup> To illustrate, one need simply imagine the ramifications of a finding in favor of the Canadian investor in the *Mondev* arbitration. If the *Mondev* tribunal had not dismissed the Canadian corporation's claims on technical grounds but instead had found that the United States breached Chapter

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<sup>13</sup> Pursuant to Article 105, the United States federal government has a duty to ensure that the individual states, including state judiciaries and legislatures, comply with the substantive provisions of the treaty. NAFTA, *supra* note 1, art. 105, 32 I.L.M. at 298 ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

<sup>14</sup> The second arbitral decision involving Chapter 11 grievances against the United States was issued on January 9, 2003 and ruled in favor of the United States. *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), at <http://www.state.gov/s/l/c3754.htm> (finding that the Surface Transportation Assistance Act requiring American-made steel for use in federally funded highway projects did not violate NAFTA's national treatment requirement). See also U.S. Department of State Media Note, Jan. 9, 2003, at <http://www.state.gov/r/pa/prs/ps/2003/16509.htm>; Mary Janigan, *How Not to Do It*, *MACLEAN'S*, Mar. 10, 2003 at 46. The most recent decision involving claims against the United States was issued on June 26, 2003. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf> (dismissing claims against the United States on jurisdictional grounds, noting, however, that but for the jurisdictional escape hatch the excessive jury verdict and appeal bond would have constituted a denial of justice).

<sup>15</sup> See, e.g., *Bill Moyers Reports: Trading Democracy* (PBS television broadcast, Feb. 5, 2002), at [http://www.pbs.org/now/printable/transcript\\_tdfull\\_print.html](http://www.pbs.org/now/printable/transcript_tdfull_print.html). See also Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* (International Institute for Sustainable Development, 1999), at <http://iisd1.iisd.ca/pdf/nafta.pdf>.

11 guarantees, the independent tribunal decision would have effectively overruled a decision of the American judiciary. Although Chapter 11 criticisms are not unfounded, this note contends that the United States is merely experiencing the “benefit” of its bargain. The United States is being held to the same standards it has long imposed on countries with which it has bilateral investment treaties. While Americans may be surprised by this turn of events, U.S. interests are best served by the predictability and neutrality that can be achieved most effectively in the international context through arbitration.

Finally, this note examines one manifestation of the backlash against NAFTA Chapter 11—the 2002 Trade Act. Chapter 11 was not controversial at the time of enactment and, to the extent commented on, was lauded as providing comprehensive investment protections that “ought to set a standard for further multilateral and bilateral investment accords in the hemisphere.”<sup>16</sup> In perhaps one of the most surprising trade developments of this decade, public advocacy groups and politicians have acted to curb the use of Chapter 11 as a model for trade pacts. The 2002 Trade Act, which delineates foreign investment negotiating objectives,<sup>17</sup> limits the legal recourse that will be available to investors under future trade agreements. The incorporation of many of these limitations can be attributed to the perceived weaknesses of Chapter 11.

## II. *MONDEV INTERNATIONAL, LTD. v. UNITED STATES*

### A. *Factual Background*

In the late 1970s, the city of Boston (“City”), under the leadership of Mayor Kevin White, revealed redevelopment plans for an area of the City that catered to the adult entertainment industry and was appropriately known as the “Combat Zone.”<sup>18</sup> The City and the Boston Redevelopment Authority<sup>19</sup> (“BRA”) formalized this vision of Combat Zone rejuvenation in a 1978 Tripartite Agreement (“Agreement”) with Lafayette Place Associates<sup>20</sup> (“LPA”), a Massachusetts limited partnership.<sup>21</sup> The Agreement granted LPA the exclusive development rights to the

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<sup>16</sup> Price, *supra* note 11, at 736 (1993).

<sup>17</sup> Trade Act of 2002, Pub. L. No. 107-210, § 2102, 116 Stat. 933.

<sup>18</sup> *Lafayette Place Assoc. v. Boston Redevelopment Auth.*, 694 N.E.2d 820, 822 (Mass. 1998).

<sup>19</sup> The Boston Redevelopment Agency is the city’s planning and economic development agency.

<sup>20</sup> The BRA selected Mondev International Ltd., a Canadian commercial real estate development and management company, to head the redevelopment project. Mondev then formed Lafayette Place Associates to act as the vehicle through which they would build, own, and manage the project. *See Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 3 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>21</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 822.

Combat Zone and established two phases for the urban renewal project.<sup>22</sup> Phase I, which included construction of a shopping mall and a luxury hotel,<sup>23</sup> was completed in November 1985.<sup>24</sup> Phase II, which contemplated construction of office buildings, retail space, and a department store on property adjoining the Phase I parcel, was contingent on the City's decision to remove a parking structure.<sup>25</sup> Essentially, the Agreement granted LPA a conditional option to purchase the Phase II property upon notice of the City's intention to demolish the garage.<sup>26</sup> The Agreement specified the terms of the option, including a detailed formula for determining the purchase price if LPA exercised the option<sup>27</sup> and a binding arbitration procedure to resolve potential disputes between the parties regarding the sale of the property.<sup>28</sup>

On December 16, 1983, the City notified LPA of its intent to discontinue use of the parking garage, thereby commencing the three-year option period.<sup>29</sup> After securing an anchor store for the Phase II complex, LPA exercised the option on July 2, 1986.<sup>30</sup> The City and LPA, however, were unable to finalize plans for Phase II. In 1987, the parties amended the Agreement to extend the closing deadline and to add a "drop dead" date: "the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing."<sup>31</sup> Despite the extension, the parties could not resolve their differences.<sup>32</sup> Faced with the impending expiration of the option, LPA leased its rights in the pro-

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Both the shopping mall and hotel provided for in Phase I were completed. Phase I of the Agreement was not at issue in the ensuing litigation.

<sup>24</sup> See *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 37 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>25</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 822.

<sup>26</sup> *Id.*

<sup>27</sup> The Massachusetts Supreme Judicial Court described the formula:

The price to be paid was to be one-half of the appraised fair market value as of 1978, plus one-half of the increase in value in value attributable to the construction of the Public Improvements and the Project. In other words, the formula accounted for the possibility that between 1978 and the future sale of the Hayward Parcel, the value of the parcel could change as a result of the construction of Phase I on adjacent land.

*Lafayette Place Assoc.*, 694 N.E.2d at 822-23.

<sup>28</sup> *Id.* at 823.

<sup>29</sup> *Id.*

<sup>30</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 6 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>31</sup> *Id.* at para. 53.

<sup>32</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 823-25.

ject to a Canadian developer, the Campeau Corporation (“Campeau”).<sup>33</sup> Like LPA, Campeau encountered resistance from City authorities who refused to approve Campeau’s plans for redevelopment of the property.<sup>34</sup> Only after the January 1, 1989 deadline expired and Campeau agreed to pay the current market price (not the more favorable option price specified in the Agreement), did the City approve Campeau’s plans.<sup>35</sup>

At the time the City and LPA entered into the Agreement, the contractual terms seemed to benefit each party—the City would finally realize its goal of urban renewal of the unseemly Combat Zone and LPA could potentially exercise its contingent option to purchase the Phase II property at a predetermined rate if Phase I proved successful in enhancing the value of the area. Neither party, however, foresaw the Boston real estate boom of the 1980s and the dramatic increase in property values that ensued. Like other property in downtown Boston, the fair market value of the Phase II parcel skyrocketed. Indeed, the City could have realized much more on the sale of the Phase II parcel if it had not been bound by the Agreement’s formula.<sup>36</sup>

In January 1984, just after the City notified LPA of its intent to discontinue use of the garage, Raymond Flynn replaced Kevin White as Mayor; he served in that capacity until July 1992.<sup>37</sup> Seen through the fresh eyes of a new City administration, the Agreement seemed to heavily favor LPA, especially in light of the real estate boom. Although Mayor Flynn inherited the now unfavorable terms of the Agreement from his predecessor, the City was nonetheless contractually bound by those terms. LPA perceived the City’s reluctance to finalize Phase II as an attempt avoid the contractual terms, and sought redress in the judicial system.<sup>38</sup> The litigation that ensued began in Massachusetts state court with allegations of breach of contract and tortious interference with contractual relations<sup>39</sup> and ended a decade later in an international arbitral tribunal pursuant to the investor protections enshrined in NAFTA Chapter 11.<sup>40</sup>

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<sup>33</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 39, 65 (Oct. 11, 2002), at <http://www.naftaclaims.com>. Campeau later defaulted on its obligations to LPA, causing LPA to terminate the lease. *Id.* at para. 39.

<sup>34</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 824-25.

<sup>35</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 39, 65 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>36</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Hearing, at 48 (May 20, 2002), at <http://www.naftaclaims.com>.

<sup>37</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 823-24.

<sup>38</sup> *Id.* at 824-25.

<sup>39</sup> *Lafayette Place Assoc.*, 694 N.E.2d 820 (Mass. 1998).

<sup>40</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 39, 65 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

## B. Procedural Background

In March 1992, LPA filed suit in Massachusetts state court against both the City and the BRA with two primary bases for its suit.<sup>41</sup> First, LPA claimed that the City and the BRA breached their contractual obligations pursuant to the Agreement.<sup>42</sup> Second, LPA claimed that the BRA tortiously interfered with LPA's contract to sell its rights in the project to Campeau.<sup>43</sup> LPA supported these claims by arguing that "the City in bad faith failed to carry out those of its obligations under the Tripartite Agreement necessary to allow LPA to proceed to demand a closing, and indeed that it engaged in bad faith actions designed to impede LPA in effecting a timely closing."<sup>44</sup> LPA alleged that the City prevented a successful closing by failing to complete key property appraisals, by initiating zoning changes, and by threatening to build a street through the parcel making the project economically unviable.<sup>45</sup>

The Massachusetts jury found in favor of LPA on both claims and awarded damages totaling \$16 million—\$9.6 million against the City for breach of contract and \$6.4 million against the BRA for tortious interference.<sup>46</sup> The trial judge affirmed the jury's finding against the City for \$9.6 million, but granted the BRA's motion for judgment notwithstanding the verdict.<sup>47</sup> The trial judge found that because the BRA is a public employer pursuant to the Massachusetts Tort Claims Act,<sup>48</sup> it is shielded

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<sup>41</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 824-25.

<sup>42</sup> *Id.*

<sup>43</sup> See *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 39 (Oct. 11, 2002), at <http://www.naftaclaims.com>; *Lafayette Place Assoc.*, 694 N.E.2d at 824-25. LPA also alleged that the City and the BRA violated Massachusetts General Law Chapter 93A, which prohibits unfair and deceptive trade practices, and the Massachusetts Civil Rights Act, which prohibits interference with the exercise of civil rights. The court, however, dismissed both of these claims in a pre-trial summary judgment proceeding. *Id.* at 825.

<sup>44</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 823-24.

<sup>45</sup> *Id.* at 824.

<sup>46</sup> *Id.* at 825.

<sup>47</sup> *Id.*

<sup>48</sup> The Massachusetts Tort Claims Act provides for tort liability for "public employers" under limited circumstances. "Public employer" is defined, in relevant part, as "the commonwealth, and any county, city, town . . . and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof . . . which exercises direction and control over the public employee . . ." MASS. GEN. LAWS ANN., ch. 258, § 1 (West 1992). Section 10(c) precludes liability for "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or *interference with contractual relations*" (emphasis added). *Id.* § 10(c).

from suit for intentional torts by sovereign immunity.<sup>49</sup> Even though the City was required to pay \$9.6 million in damages, the BRA was absolved of all liability.<sup>50</sup>

Both LPA and the City appealed the decision.<sup>51</sup> On direct appellate review, the Supreme Judicial Court (“SJC”)<sup>52</sup> affirmed the lower court’s judgment in favor of the BRA on the basis of immunity, but reversed the lower court’s judgment against the City.<sup>53</sup> The SJC held that because LPA did not “manifest the willingness and ability to perform,” the City could not be liable for breach of contract.<sup>54</sup> This holding conflicted with the jury’s finding of fact that LPA had fulfilled its contractual obligations.<sup>55</sup> LPA appealed to the United States Supreme Court but was denied *certiorari*.<sup>56</sup> Thus, the City and the BRA were relieved of *all* liability and LPA had exhausted all domestic remedies.<sup>57</sup>

### C. NAFTA Arbitration

After the United States Supreme Court denied LPA’s petition for *certiorari*, the Canadian parent company of LPA, Mondev, initiated arbitration proceedings against the United States for breach of NAFTA Chapter 11 obligations.<sup>58</sup> Mondev sought \$50 million in damages, alleging that the

<sup>49</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 825.

<sup>50</sup> *Id.* at 821-22.

<sup>51</sup> See *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 1 (Oct. 11, 2002), at <http://www.naftaclaims.com>; *Lafayette Place Assoc.*, 694 N.E.2d at 824-25.

<sup>52</sup> The Supreme Judicial Court is the highest court in the Commonwealth of Massachusetts.

<sup>53</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 822.

<sup>54</sup> *Id.* at 827-29.

<sup>55</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 130 (Sept. 1, 1999), at <http://www.naftaclaims.com> (“Then after a jury explicitly found as a matter of fact that LPA had fulfilled its contractual obligations while the City had not, the SJC—an appeals court that had not heard the facts or observed the witnesses—reversed the jury’s verdict by substituting its own version and interpretation of the facts.”). See also *Lafayette Place Assoc.*, 694 N.E.2d at 825 (“The jury found that there was a contract for the purchase of the Hayward Parcel, that both the city and the BRA breached the contract, but that the BRA was not acting as an agent of the city in connection with the contract.”).

<sup>56</sup> *Lafayette Place Assoc. v. City of Boston*, *cert. denied*, 525 U.S. 1177 (1999).

<sup>57</sup> *Id.*

<sup>58</sup> Mondev brought its claims pursuant to NAFTA Article 1116, which allows an investor of a NAFTA party to submit a claim on its own behalf. Alternatively, Mondev could have brought the claim under Article 1117, which allows an investor of a NAFTA party to submit a claim on behalf of an enterprise of another party that the investor owns or controls directly or indirectly. During arbitration hearings, the United States objected to Mondev’s standing under Article 1116 and argued that the claim should have been brought pursuant to Article 1117. See *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 84 (Oct. 11,



actions of the City of Boston, the BRA, the state trial court, and the Massachusetts Supreme Judicial Court constituted a denial of national treatment, a measure tantamount to expropriation, and a denial of justice.<sup>59</sup>

In order for a state to be held liable for breach of a treaty obligation, the treaty must have been in effect at the time of the alleged breach.<sup>60</sup> Thus, the City and the BRA could not be liable for conduct that occurred before NAFTA entered into force on January 1, 1994.<sup>61</sup> In accordance with these principles of international law, only the May 20, 1998 dismissal of LPA's claims by the Massachusetts Supreme Judicial Court and the March 1, 1999 denial of *certiorari* by the United States Supreme Court could constitute a breach of NAFTA.<sup>62</sup> Therefore, as discussed below, the tribunal found that it did not have jurisdiction over two of the three claims, and devoted the bulk of its opinion to the remaining claim for denial of justice.

### 1. 1102: National Treatment

Mondev alleged that the United States breached its obligation to ensure national treatment.<sup>63</sup> Article 1102(2) provides:

Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>64</sup>

Simply stated, Article 1102(2) is an anti-discrimination provision. A successful Article 1102(2) claim requires a showing that the investor or investment was treated less favorably than its similarly situated domestic counterpart.<sup>65</sup> Mondev contended that anti-Canadian animus was the

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2002), at <http://www.naftaclaims.com>. The tribunal, while recognizing that claimants must carefully consider whether to bring a claim under Article 1116 or 1117, noted that Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory". Therefore, Mondev was able to file pursuant to Article 1116. *Id.* at para. 80.

<sup>59</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at paras. 21-22 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>60</sup> Vienna Convention on the Law of Treaties, 23 May 1969, art. 28, 1155 U.N.T.S. 331, 339.

<sup>61</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award at para. 68 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>62</sup> *Id.* at para. 70.

<sup>63</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 129 (Sept. 1, 1999), at <http://www.naftaclaims.com>; Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Hearing, at 987 (May 24, 2002), at <http://www.naftaclaims.com>.

<sup>64</sup> NAFTA, *supra* note 1, art. 1102, 32 I.L.M. at 639.

<sup>65</sup> *Id.*

underlying reason for the BRA's refusal to fulfill its contractual obligations under the Agreement.<sup>66</sup> The Canadian company, therefore, received less favorable treatment than an American investor would have received in similar circumstances. Mondev argued: "As a practical matter, it seems an inescapable conclusion that if the Lafayette Place Project had been undertaken by a wholly U.S. development, the City and the BRA would have treated it more favorably than it treated Mondev."<sup>67</sup> To support the allegation of "naked animosity," Mondev submitted evidence of periodic references made by City officials suggesting that Mondev go back to Canada.<sup>68</sup>

The arbitral tribunal found that the alleged discriminatory statements were made before NAFTA went into effect and, because NAFTA cannot be applied retroactively, Mondev's Article 1102 claim was denied on jurisdictional grounds.<sup>69</sup> The tribunal, however, noted in *dicta* that if it had been required to decide the claim on the merits Mondev's 1102 allegations would fail.<sup>70</sup> According to the tribunal, the evidence suggested that the City and the BRA acted not out of anti-Canadian bias, but out of a desire to receive greater compensation for the property than allowed by the option price in the Agreement.<sup>71</sup> Due to the dramatic increase in downtown real estate values, the City could have received over \$16 million more for the property if sold for its current market value rather than under the formula set forth in the Agreement.<sup>72</sup> Moreover, Campeau, another Canadian enterprise, eventually concluded an agreement with the City for Phase II, thereby negating any evidence of discrimination.<sup>73</sup>

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<sup>66</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 129 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>67</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Hearing, at 987 (May 24, 2002), at <http://www.naftaclaims.com>.

<sup>68</sup> For example, the Executive Director of the BRA, Mr. Coyle, allegedly objected to Mondev taking profits and "running back to Canada with [them]." See Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 129 (Sept. 1, 1999), at <http://www.naftaclaims.com>. See also Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award at paras. 64-65 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>69</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award at paras. 65-75 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>70</sup> *Id.* at para. 65.

<sup>71</sup> The tribunal cited evidence that Campeau, also a Canadian company, obtained the necessary permits for the project. *Id.* The tribunal also noted that LPA did not pursue a claim of discrimination in the Massachusetts trial, suggesting that the claim was added to strengthen its NAFTA claim. *Id.* Mondev did not assert any claim of discrimination of the part of the Massachusetts courts which would not have been time barred. *Id.*

<sup>72</sup> Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Hearing, at 48 (May 20, 2002), at <http://www.naftaclaims.com>.

<sup>73</sup> *Lafayette Place Assoc.*, 694 N.E.2d at 823-24.

The *dicta* suggests that, while the panel certainly did not condone the City's conduct, a state's refusal to abide by contractual obligations combined with occasional disparaging remarks does not suffice to establish a successful claim of discriminatory treatment. This application of Article 1102 is not inconsistent with the interpretations of other NAFTA tribunals that have required a showing of discriminatory intent or, at least, discriminatory effect.<sup>74</sup> For example, the panel in *S.D. Myers v. Canada* based its finding of an Article 1102 violation on extensive evidence of blatant discrimination against the American investor in order to guarantee the preeminence of the Canadian industry.<sup>75</sup> Although the *Mondev* award does not contain any novel interpretations of Article 1102, it does reinforce the requirement of a high threshold of impropriety before international liability will attach to state conduct.

## 2. 1110: Expropriation and Compensation

*Mondev* alleged that the Massachusetts state court rulings constituted an expropriation of their investment. An expropriation occurs when a government organ interferes with the use or enjoyment of an alien's property.<sup>76</sup> Article 1110 states:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

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<sup>74</sup> See *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2 at para. 78 (Apr. 10, 2001), at <http://www.naftaclaims.com> (finding that a host government may treat an investor less favorably than domestic counterparts if the difference in treatment is rationally related to a legitimate policy goal); *S.D. Myers, Inc. v. Canada*, Partial Award at paras. 251-55 (Nov. 13, 2000), at <http://www.naftaclaims.com> ("Intent is important, but protectionist intent is not necessarily decisive on its own.").

<sup>75</sup> *S.D. Myers, Inc. v. Canada*, Partial Award at paras. 251-55 (Nov. 13, 2000), at <http://www.naftaclaims.com>. Although the *S.D. Myers* panel found that the Canadian government adopted the export ban on PCBs (polychlorinated biphenyls) for the purpose of favoring a domestic treatment facility over an American facility, it noted that discriminatory intent is not a crucial element of an Article 1102 claim. *Id.* at para. 254. An extensive analysis of *S.D. Myers*, including evidence that Canada adopted the ban to curb American competition, is found in Todd Weiler, *A First Look at the Interim Merits Award in S.D. Myers, Inc. v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection*, 24 HASTINGS INT'L & COMP. L. REV. 173, 178-179 (2001).

<sup>76</sup> The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES describes expropriation as the "actions of the government that have the effect of 'taking' the property, in whole or in large part, outright or in stages" and says that a state is responsible for any "action that is confiscator, or that prevents, unreasonably interferes with or unduly delays, effective enjoyment of an alien's property." § 712 cmt. g (1987).

- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.<sup>77</sup>

An earlier NAFTA award, *Azinian v. Mexico*, laid the groundwork for Mondev's Article 1110 claim. In that case, American shareholders of a Mexican corporation claimed that the City of Naucalpan expropriated their investment by wrongfully terminating a waste management contract.<sup>78</sup> The investors in *Azinian*, like those in *Mondev*, sought redress in the host country's courts for the City's alleged breach of contract.<sup>79</sup> The Mexican Federal Circuit Court specifically upheld the City's decision to cancel the contract, finding that the contract was invalid under Mexican law.<sup>80</sup> Although the investors did not challenge the Mexican judicial decision as expropriatory, the tribunal noted that a government authority "cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level.*"<sup>81</sup> Thus, the investors could not sustain a claim of expropriation absent evidence that the Mexican judicial decisions were arbitrary or malicious.<sup>82</sup> Although the tribunal concluded that there was no expropriation, the award is nevertheless significant for the suggestion, albeit in *dicta*, that judicial decisions can constitute expropriations.<sup>83</sup>

Unlike the investors in *Azinian*, Mondev claimed that the judicial decision itself, not merely the City's contractual breach, effected an expropriation.<sup>84</sup> In particular, Mondev alleged that the SJC through an "unprincipled, arbitrary decision" expropriated Mondev's right to redress for the City and the BRA's misconduct.<sup>85</sup> Although Mondev correctly

<sup>77</sup> NAFTA, *supra* note 1, art. 1110, 32 I.L.M. at 641-42.

<sup>78</sup> *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award at paras. 75, 85 (Nov. 1, 1999), at <http://www.naftaclaims.com>.

<sup>79</sup> *Id.* at paras. 19-23.

<sup>80</sup> *Id.* at para. 23.

<sup>81</sup> *Id.* at para. 97.

<sup>82</sup> *Id.* at paras. 100, 105. Specifically, the tribunal found that for a court decision to violate NAFTA, the claimant must prove the denial of justice, such as the refusal to entertain suit or the subjection to undue delay, or the pretence of form to achieve an internationally unlawful end. *Id.* at para. 99.

<sup>83</sup> *Id.* at paras. 97-99.

<sup>84</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 127 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>85</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 127 (Sept. 1, 1999), at <http://www.naftaclaims.com>. In the Notice of Arbitration, Mondev asserted:

By replacing the jury's finding of fact with its own interpretations, creating new retroactive rules of contract law and applying them with heightened deference to the City and the BRA because they were government entities, and by finding the BRA statutorily immune from civil process seeking to hold it responsible for acts

pled its Article 1110 claim, the tribunal dismissed the claim (without commenting on the merits) as time-barred, finding that any expropriation that may have occurred did so before NAFTA became effective.<sup>86</sup>

### 3. 1105: Minimum Standard

Mondev claimed that it was denied the minimum standard of treatment required by Article 1105(1). Unlike Mondev's national treatment and expropriation claims, the tribunal addressed the merits of this claim because the alleged violations occurred after January 1, 1994 when NAFTA entered into force.<sup>87</sup> Article 1105(1) provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."<sup>88</sup>

During the *Mondev* hearing, the Free Trade Commission, the body charged with resolving NAFTA interpretation disputes, issued a statement clarifying the meaning of Article 1105.<sup>89</sup> The statement provides, in relevant part:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded investments 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.<sup>90</sup>

If binding, the statement would require NAFTA nations to provide investors with "fair and equitable treatment" and "full protection and security" based only on those principles of international law so widely recognized as to have achieved the status of customary international law.<sup>91</sup> Accordingly, NAFTA would not require its signatories to comply

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commercial in nature, the SJC took away LPA's rights in and to the Hayward Parcel [the plot at issue in Phase II] and gave them back to the City, leaving LPA with empty hands.

*Id.*

<sup>86</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 61 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>87</sup> *Id.* at para. 67-70.

<sup>88</sup> NAFTA, *supra* note 1, art. 1105, 32 I.L.M. at 639-40. See also Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS.L.J. 475, 487 (2001).

<sup>89</sup> See *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 100-101 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>90</sup> NAFTA Free Trade Commission, *Notes on the Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), at [http://dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp\\_forma](http://dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp_forma).

<sup>91</sup> *Id.*

with the potentially more rigorous standards set forth in other sources of international law, such as treaties and conventions. Instead, NAFTA would only mandate compliance with the more limited standards prescribed by customary international law.<sup>92</sup>

The implications of the interpretive statement could be significant, particularly in a case in which the aggrieved party could establish that the host government breached a treaty obligation but not customary international law. Not surprisingly then, much of the *Mondev* hearing was devoted to debate over whether, as the United States argued, the statement constituted an interpretation and was therefore binding on all parties or whether,<sup>93</sup> as *Mondev* argued, the interpretive statement constituted an invalid attempt to amend Article 1105.<sup>94</sup> As a preliminary matter, the tribunal found that the statement was an interpretation, not an amendment, and was therefore binding on the parties under Article 1131(2).<sup>95</sup> The tribunal added that the minimum standard is evolutionary in nature.<sup>96</sup> Consequently, the relevant standard by which to judge the

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<sup>92</sup> Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987). The International Court has found that customary international law requires *opinio juris*: “The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.” North Sea Continental Shelf Cases, 1969 I.C.J. Reports 3, 44.

<sup>93</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Hearing, at 659-73 (May 22, 2002), at <http://www.naftaclaims.com>; *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 129-39 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>94</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Hearing, at 218-29 (May 20, 2002), at <http://www.naftaclaims.com>; *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 129-39 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>95</sup> Article 1131 states:

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

NAFTA, *supra* note 1, art. 1131, 32 I.L.M. at 643. For the argument that the purported interpretation is actually an amendment, see Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT'L LAW 345, 347 (2002). Another tribunal has since held, without extensive analysis, that the FTC statement was a valid interpretation. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award at paras. 124-28 (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf>. The lack of debate in *Loewen* suggests that future parties and tribunals will likely accept the statement as a valid interpretation.

<sup>96</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 119-25 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

conduct of the City and the BRA is customary international law as it has evolved, not customary international law as it existed at the time NAFTA entered into force.<sup>97</sup>

One aspect of the minimum standard of treatment established in customary international law is the denial of justice.<sup>98</sup> A party who has suffered undue delay or denial of access to the competent courts or who has who has suffered a manifestly unjust judgment may invoke the doctrine of denial of justice.<sup>99</sup> *Mondev* presented three primary grounds to support its claim that the Massachusetts Supreme Judicial Court violated the minimum standard of treatment.<sup>100</sup> First, the SJC departed significantly from its established jurisprudence by dismissing LPA's contract claim against the City after explicitly finding that the parties had entered into a binding contract.<sup>101</sup> The tribunal, however, concluded that the SJC's determination of "whether an agreement in principle to transfer real property is binding, and whether all the conditions for the performance of such an agreement have been met" is nothing more than common law adjudication.<sup>102</sup> Next, the SJC should have remanded to the jury the question of whether LPA was ready and willing to perform its contractual obligations.<sup>103</sup> Once again, the tribunal was not persuaded that the SJC's conduct was improper and emphasized that the application of local procedural rules, such as questions of appellate fact-finding, will only constitute a denial of justice in the most extreme circumstances.<sup>104</sup> Finally, public authorities engaged in commerce are not entitled to statutory immunity for intentional torts and any extension of immunity in such cases violates the minimum standard.<sup>105</sup> The tribunal noted that although statutory immunity may not shield a state party from suit for a substantive breach of NAFTA, the mere fact that a state party has extended statutory immunity to a regulatory authority does not constitute a breach of Article 1105(1).<sup>106</sup>

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<sup>97</sup> *Id.* at paras. 111-13, 119-25.

<sup>98</sup> *Id.* at para. 96.

<sup>99</sup> *Id.* at paras. 126-27.

<sup>100</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at paras. 140-50 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>101</sup> *Id.* at para. 141.

<sup>102</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 129-34 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>103</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 141 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>104</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 136 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>105</sup> *Id.* at paras. 139-40.

<sup>106</sup> *Id.* at paras. 151-56 ("[T]he extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.").

Ultimately, the tribunal dismissed each of the grounds supporting *Mondev's* Article 1105(1) claim, finding that the SJC decision was not so arbitrary as to rise to the level of denial of justice under customary international law. A mere error, with nothing more, is not sufficient to establish a violation of the minimum standard.<sup>107</sup> The key determination is

not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeals, and on the other hand that Chapter 11 of NAFTA . . . is intended to provide a real measure of protection.<sup>108</sup>

Although the *Mondev* tribunal articulated a stringent test for denial of justice,<sup>109</sup> a subsequent NAFTA award demonstrates that it is not impossible to meet this test.<sup>110</sup>

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<sup>107</sup> *Id.* at paras. 126-27. Although this standard may serve American interests in those NAFTA cases filed against the United States, it should be emphasized that the standard is equally applicable to those cases filed by American investors against Canada and Mexico. Thus, an American investor may be unable to prevail on a denial of justice claim because the United States has advocated, and tribunals have adopted, a minimalist approach to the minimum standard of treatment in cases where the United States is the defendant host government. In a pending case that is the mirror image of *Mondev*, an American investor has argued that it suffered a denial of justice due to the procedural improprieties and to the "blatantly wrongful and unjust" decision of the Mexican courts. *Calmark Commercial Development, Inc. v. United Mexican States, Notice of Intent to Commence Arbitration* at paras. 52, 58-68 (Jan. 11, 2002), at <http://www.naftaclaims.com>. It will be interesting to see whether Calmark will be able to prevail under the standards traditionally advocated by American investors abroad or whether Calmark will have to show that Mexico failed to meet the more lenient minimum standard of treatment as articulated in *Mondev*.

<sup>108</sup> *Mondev International, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award* at paras. 127 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>109</sup> Another NAFTA tribunal articulated a similar denial of justice standard: "If the Claimants cannot convince the Arbitral Tribunal that the evidence for [the decision] was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail." *Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award* at para. 105 (Nov. 1, 1999), at <http://www.naftaclaims.com>, discussed *supra* Part II.C.2.

<sup>110</sup> *Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award* at paras. 54, 137 (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf> ("[t]he conduct of the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law."). Even though the *Loewen* tribunal found a clear violation of Article 1105, the case was dismissed on jurisdictional grounds. *Id.* at para. 240. The Mississippi litigation forced the Canadian investor to file for relief under Chapter 11 of the Bankruptcy Code. *Id.* at para. 234. The company reorganized as an American entity and, thus, lost its ability to sue the United States under NAFTA, which prohibits suit against one's own government. *Id.* at paras. 220-39.



In *Loewen Group, Inc. v. United States*, the investor claimed that a \$500 million Mississippi jury verdict and a \$625 million appeal bond amounted to a denial of justice.<sup>111</sup> The underlying dispute in *Loewen* involved a breach of contract claim by an American owner of funeral homes and funeral insurance companies against his Canadian competitor.<sup>112</sup> Both *Mondev* and *Loewen* involved Canadian investors who challenged the validity of American judicial decisions. The investor's grounds for denial of justice in *Mondev*, however, seem mild when compared to those of the investor in *Loewen*.<sup>113</sup> For example, the Mississippi trial transcript was replete with comments intended to inflame jury biases based on race, nationality, and social status.<sup>114</sup> The xenophobic rhetoric helped secure an excessive award, which was grossly disproportionate to the harm actually incurred and to other awards granted by Mississippi courts.<sup>115</sup>

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<sup>111</sup> *Loewen Group, Inc. v. United States*, Notice of Claim at paras. 144-61 (Oct. 30, 1998), at <http://www.international-economic-law.org/Loewen/loewen.pdf>. *Loewen* also alleged violations of Articles 1102 and 1110. *Id.* at paras. 139-43, 162-67.

<sup>112</sup> *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award at para. 3 (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf>.

<sup>113</sup> The Mississippi trial has been described as a "mockery of justice" and "outrageous from beginning to end." *Loewen Group, Inc. v. United States*, Notice of Claim at paras. 8-9 (Oct. 30, 1998), at <http://www.international-economic-law.org/Loewen/loewen.pdf>.

<sup>114</sup> The plaintiff attempted to capitalize on the racial sensitivities of those involved in the trial (the presiding judge, the plaintiff's lead counsel, and eight of the twelve jurors were black) by suggesting that *Loewen* was a racist company. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Notice of Claim at para. 35 (Oct. 30, 1998), at <http://www.international-economic-law.org/Loewen/loewen.pdf>. One of the plaintiff's attorneys remarked in opening statements that he attends a local church "in which a lot of black and white people go to church together because they like to do that. It's often the case that black and white people in Mississippi choose to worship in different styles and different churches. Funeral business is something like that as well. [T]hese businesses that *Loewen* bought were those that served primarily the white community." *Id.* at para. 53. One example of inflammatory remarks made by the plaintiff's counsel during trial is: "[*Loewen*] comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him . . . . [One] billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may never get this chance again. And you're not just helping the poor people of Mississippi but you're helping poor people, grieving families everywhere." *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award at para. 68 (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf>.

<sup>115</sup> *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Notice of Claim at para. 3 (Oct. 30, 1998), at <http://www.international-economic-law.org/Loewen/loewen.pdf> (noting that award was greater than one-hundred times the net worth of the companies to be exchanged in the disputed transaction and that the

The tribunals that have addressed Article 1105 claims to date have been reticent to find liability for the decisions of national courts. Both the *Mondev* and *Loewen* awards emphasized that Chapter 11 was not intended to grant NAFTA tribunals with appellate jurisdiction over the decisions of national courts.<sup>116</sup> Absent evidence of manifest injustice, NAFTA tribunals thus far are loath to “second-guess the reasoned decisions of the highest courts of a State” and have sought to defer to national courts when possible.<sup>117</sup>

### III. A NEW COMBAT ZONE: PUBLIC ADVOCACY GROUPS VS. MULTINATIONAL BUSINESSES

In addition to *Mondev v. United States*, *Azinian v. United Mexican States*,<sup>118</sup> and *Loewen Group v. United States*,<sup>119</sup> other examples of Chapter 11 arbitrations include: *United Parcel Service of America, Inc. v. Canada*, in which UPS sought \$160 million in damages from the Canada Post for allegedly engaging in anti-competitive practices;<sup>120</sup> and *Metalclad Corp. v. Mexico*, in which an American investor successfully argued that a Mexican regulation prohibiting the operation of a landfill constituted unfair treatment and expropriation without compensation.<sup>121</sup> Collectively, Chapter 11 actions have fueled fears that the investor guarantees are being implemented in ways not envisioned by the NAFTA signatories and detrimental to the public interest. In the wake of these actions, a new combat zone has emerged in which public advocacy groups in all three countries express concern about the potential scope of Chapter 11 while multinational businesses attempt to ensure the incorporation of the Chapter 11 investment guarantees in other agreements.

Public advocates voice three primary criticisms of Chapter 11. First, even though Chapter 11 was intended to provide comparable treatment for foreign and domestic investors, it provides avenues of relief for foreign investors who experience financial losses even though their domestic

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punitive award was fifty times the largest award ever considered by the Mississippi Supreme Court and two-hundred times the largest award ever upheld by that court).

<sup>116</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at paras. 126-27 (Oct. 11, 2002), at <http://www.naftaclaims.com>; *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award at paras. 134, 241-42 (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf>.

<sup>117</sup> *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 126 (Oct. 11, 2002), at <http://www.naftaclaims.com>.

<sup>118</sup> Discussed *supra* Part II.C.2.

<sup>119</sup> Discussed *supra* Part II.C.3.

<sup>120</sup> See *United Parcel Serv. of Am., Inc. v. Gov't of Canada*, Amended Statement of Claim at paras. 14-19, 33-38 (Nov. 30, 2001), at <http://www.naftaclaims.com> (alleging violations of Articles 1102 and 1105).

<sup>121</sup> See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 16 ICSID Rev Foreign Inv L S (2001) (alleging violations of Articles 1105 and 1110).

counterparts would not have a remedy. In *Mondev*, for example, if NAFTA had already entered into force at the time of the alleged expropriation of the Canadian company's investment, the claim would not have been dismissed on jurisdictional grounds and the United States government may have had to compensate *Mondev* \$50 million for its losses. If, however, the original dispute had arisen between an American company and the City of Boston, the debate would have ended when the Supreme Court denied *certiorari*, leaving the American company to bear the burden of its loss.

Second, Chapter 11 has empowered an independent tribunal to effectively overturn final judicial decisions. In *Mondev*, the parties had already argued the merits of their case in the highest court in the Commonwealth of Massachusetts. Moreover, the United States Supreme Court denied *certiorari*, thereby effectively affirming the court's decision. The Chapter 11 arbitration process provided a forum in which the parties could reargue the merits of their case. If *Mondev*'s claims had not been dismissed on technical grounds, the NAFTA tribunal could have (and, based on *dicta*, likely would have) rendered a decision contrary to the holding issued by the SJC.<sup>122</sup> In their view, this independent "appeals" process grants the arbitral tribunal tremendous power to decide issues with important fiscal and regulatory implications. Moreover, the potential exists for the tribunal to undermine the American judicial system by rendering decisions inconsistent with those issued by domestic courts. In an investigative report entitled "Trading Democracy," Bill Moyers argued that the "system of private justice" set forth in Chapter 11 has become an "end-run around the Constitution."<sup>123</sup> Other critics raise similar con-

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<sup>122</sup> See *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award at para. 159 (Oct. 11, 2002), at <http://www.naftaclaims.com> ("In the end, the City and BRA succeeded, but only on rather technical grounds.").

<sup>123</sup> *Bill Moyers Reports: Trading Democracy* (PBS television broadcast Feb. 5, 2002), at [http://www.pbs.org/now/printable/transcript\\_tdfull\\_print.html](http://www.pbs.org/now/printable/transcript_tdfull_print.html). Moyers noted, "I read where one of these lawyers, a Canadian trade lawyer, said to the Canadian government, this is a direct quote: 'They could be putting liquid plutonium in children's food. If you ban it and the company making it is an American company, you have to pay compensation.'" *Id.* Under the Constitution, judicial decisions are subject to review only by higher courts. Article III of the Constitution creates and defines the powers of the judicial branch:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office."

U.S. Const. art. III, s1. See generally Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557 (2003), for an analysis of the transfer of power from the United States to international institutions including the United Nations Security Council, the World Trade Organization, the

cerns: "We now have a level of review for the U.S. court system that is above that of the U.S. Supreme Court . . . and it is three international arbitrators who operate in secret and whose decisions cannot be appealed."<sup>124</sup> The panels that have had to consider judicial decisions thus far have recognized this danger and have sought to alleviate concerns by refusing to find liability for judicial decisions except in the most extreme cases.<sup>125</sup>

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International Court of Justice, and NAFTA, as raising concerns of democratic accountability, shifting the balance of power between the federal branches, and erosion of the U.S. system of federalism. In particular, Bradley argues that the NAFTA Chapter 11 arbitration process raises delegation concerns because it permits "international review of the fairness and outcome of U.S. judicial decisions." *Id.* at 1576-77. See also Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (discussing the constitutionality of NAFTA as established by congressional-executive agreement); Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996) (arguing that NAFTA has increased the relative power of the executive branch by delegating the powers of other branches and because the US is represented in NAFTA by executive branch agents); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 36-42 (1995-1996) (noting that vesting judicial power in international tribunals raises significant constitutional concerns: "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal the essential attributes of judicial power. Whether our Congress has done so with respect to tribunals created by different treaties and agreements is a critical question, but one that could only be answered in specific cases. . . . [W]hat effect international tribunals have on domestic courts may inform the analysis as to whether Congress acted constitutionally in creating the international panels and vesting them with substantive adjudicatory authority.")

<sup>124</sup> Mark Ballard, *Foreign Firms Get New Appeal Right: Panel Rules NAFTA Shield Covers Canadian, Mexican Grips About U.S. Verdicts*, NAT'L L.J., Mar. 19, 2001, at A5.

<sup>125</sup> For example, the *Loewen* tribunal noted its temptation to grant a remedy to the investor for the gross injustice it suffered in the Mississippi courts. *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award at para. 242 (June 26, 2003), at <http://www.state.gov/documents/organization/22094.pdf>. But the tribunal concluded that to ignore the jurisdictional limits of NAFTA in order to grant a remedy would compromise the very purpose of NAFTA:

[W]e find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of a host nation. . . . Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone sees a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

*Id.* See also discussion *supra* Part II.C.3.

Finally, public advocacy groups are concerned that Chapter 11 arbitration creates the potential for investors to use the threat of a NAFTA suit to strong-arm the government. Instead of legislatures passing laws to protect the public, they may first consider the potential adverse effects such legislation would have on Canadian or Mexican companies. Millions of dollars of government funds are at stake in each Chapter 11 case.<sup>126</sup> The mere threat of commencing an expensive and protracted Chapter 11 arbitration, in some cases, may be sufficient to induce a local government to abandon plans to regulate a certain industry. The current budget crisis of many localities lends additional credence to this concern. The greatest and most pervasive danger, therefore, is not simply that Canadian and Mexican investors will win judgments against the United States, but that they will undermine the democratic process by threatening to sue pursuant to Chapter 11.

Environmentalists have been particularly vocal in their efforts to alert policy-makers and the public of the dangers posed by Chapter 11. Howard Mann of the International Institute for Sustainable Development opined:

[B]ureaucrats are always looking over their shoulder now. They don't want to be the next guy who has to withdraw a measure because of a Chapter Eleven challenge. And, you know, when you're in the bureaucracy, it's not easy to be the face of the challenge to the dominant trade interest.<sup>127</sup>

Jeff Faux, founding President of the Economic Policy Institute, echoed Mann's sentiment in an article entitled "Corporate Control of North America: And How to Bring NAFTA Under Popular Governance."<sup>128</sup> Faux described NAFTA as a

potential battering ram aimed at destroying domestic protections that temper modern capitalism. These social, labor, environmental and regulatory constraints, the fruits of more than a century of domestic political struggle in each of the three countries, are in danger of being swept away in a commercial arena impervious to democratic deliberation.<sup>129</sup>

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<sup>126</sup> For example, Mondev sought \$50 million in damages from the United States. *Mondev International, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Notice of Arbitration at para. 22 (Sept. 1, 1999), at <http://www.naftaclaims.com>.

<sup>127</sup> *Bill Moyers Reports: Trading Democracy* (PBS television broadcast, Feb. 5, 2002), at [http://www.pbs.org/now/printable/transcript\\_tdfull\\_print.html](http://www.pbs.org/now/printable/transcript_tdfull_print.html). Among the numerous articles calling for reform is Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* (International Institute for Sustainable Development, 1999), at <http://iisd1.iisd.ca/pdf/nafta.pdf>.

<sup>128</sup> Jeff Faux, *Corporate Control of North America; And How to Bring NAFTA Under Popular Governance*, THE AMERICAN PROSPECT, Jan. 13, 2003, at 24.

<sup>129</sup> *Id.*

According to its critics, Chapter 11, though initially intended as a shield to protect investors from egregious government conduct, has been turned into a powerful sword through the inventive interpretations of multinationals.<sup>130</sup>

Although Chapter 11 has generated copious commentary and legal discourse, its investor protection provisions are not unique to NAFTA. In fact, many bilateral investment treaties contain similar substantive provisions.<sup>131</sup> Typically, the impetus for including such provisions is to provide protection from harmful state interference in countries that otherwise have weak or corrupt judicial systems.<sup>132</sup> In the case of NAFTA, American and Canadian negotiators insisted on including the protections, which they justified by citing a pattern of Mexican nationalization of foreign—including American—investments in the oil, electrical and banking sectors.<sup>133</sup> NAFTA investor suits for harmful government conduct, however, have been raised by investors against each of the three countries, not merely against Mexico.

The suits against the United States, while disconcerting, should not come as a complete surprise. Indeed, one could argue that the United States is merely experiencing the “benefit” of its bargain. One crucial difference between most bilateral investment treaties and NAFTA should have alerted legislators and public advocates to the likelihood of NAFTA suits against the United States. Most bilateral investment treaties are entered into by a developed “exporter nation” (most typically the United States) and a developing “importer nation.”<sup>134</sup> NAFTA does not fit

<sup>130</sup> See, e.g., William Greider, *The Right and U.S. Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, at 21.

<sup>131</sup> For an overview of bilateral investment treaties, including a list of the goals, benefits, and current U.S. bilateral investment treaties, see U.S. Bilateral Investment Treaty Program (July 1, 2003) at <http://www.state.gov/e/eb/rls/fs/22422.htm> (noting, “U.S. investment in Canada and Mexico is covered by Chapter Eleven of the North American Free Trade Agreement (NAFTA) which contains provisions similar to BIT obligations”).

<sup>132</sup> Dhooge, *supra* note 88, at 481-82.

<sup>133</sup> UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO THE CONGRESS, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES, Vol. 2 (Sept. 1993), at 19. An article published two years after NAFTA entered into force presented a hypothetical investment dispute to illustrate the application and practical effect of Chapter 11. Levin & Marin, *supra* note 1, at 94-109. Not surprisingly, the authors envisioned a situation in which a U.S. investor filed a claim against Mexico for an expropriation of their investment. *Id.* Indeed, the article presumes that American and Canadian investors would be filing claims against Mexico, not vice versa. *Id.* at 109.

<sup>134</sup> See Charles N. Brower, *NAFTA CHAPTER 11: Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT’L L. 193, 194-95 (2001) (noting that “the overwhelming majority of BITs to date have been North to South, between capital-exporting countries to capital-importing countries,

within this framework because two of the signatories, Canada and the United States, are highly developed countries.<sup>135</sup> Thus, under NAFTA the United States assumes the dual role of exporter and importer. As a NAFTA exporter nation, the United States benefits from the investor protection guarantees of Chapter 11. As a NAFTA importer nation, the United States must ensure that Mexican and Canadian investors benefit from those same investor protection guarantees. Consequently, the investment regime established by NAFTA protects American investors in Canada and Mexico, but it has also made state and local governments susceptible to suit by Canadian and Mexican investors. Arguably, the Chapter 11 controversy can be attributed to the unfamiliarity of the United States with fulfilling the obligations of an importer nation.<sup>136</sup>

#### IV. THE BACKLASH AGAINST CHAPTER 11: THE 2002 TRADE ACT

Regardless of its cause, the widespread criticism surrounding Chapter 11 is an undeniable reversal of earlier attitudes toward its provisions. One manifestation of the backlash against Chapter 11 is the 2002 Trade Act. The level of alarm among Chapter 11 critics reached new heights with President Bush's push to enact fast-track trade negotiating authority. Fast-track authority enables the President to expedite congressional consideration of trade agreements.<sup>137</sup> Congress provides the Executive with predetermined guidelines and objectives to pursue during trade negotiations. Congress then has a limited amount of time in which to reject or to approve, without amendment, the product of the President's negotiations.<sup>138</sup>

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and the private investors who actually have benefited from such treaties have been those from the North").

<sup>135</sup> Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 369-70 (2003).

<sup>136</sup> See Brower, *supra* note 134, at 195 (noting that "at least some of the distress felt by Canada and the United States over NAFTA Chapter 11 has been caused by the novel and disconcerting fact of having to live up to the same substantive and procedural guarantees that they have required of their BIT partners"). See also Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 51 (2001) (suggesting that the United States government anticipated NAFTA Chapter 11 to "provide a depoliticized method of protecting U.S. investors against the arbitrary conduct of Mexican officials"). See generally Alvarez & Park, *supra* note 135, at 368-69 (discussing the emerging double standard of American attitudes toward arbitration: "Arbitration is good when it corrects misbehavior by foreign host states, but not so desirable when claims are filled for alleged wrongdoing by the United States.").

<sup>137</sup> Fast-Track Authority for Trade Agreements: Background and Developments in the 107th Congress, CRS Report IB10084 (May 14, 2001) (updated Jan. 14, 2003) at <http://www.ncseonline.org/nle/crsreports/03Apr/IB10084.pdf>.

<sup>138</sup> *Id.*

At first glance, fast-track authority would not appear to warrant a barrage of criticism from Chapter 11 opponents. In fact, from 1974 to 1994 presidents have almost continuously enjoyed fast-track authority.<sup>139</sup> Such trade negotiating power has been instrumental in facilitating the conclusion of trade agreements, including NAFTA.<sup>140</sup>

Despite former fast-track negotiating successes, Chapter 11 adversaries only needed to look to the emerging pattern of investor-state disputes to justify their ardent opposition to fast-track authority. Their concern was twofold. First, the trade negotiating objectives would incorporate the investment provisions of Chapter 11. Second, these objectives would be used in negotiations of new bilateral and multilateral agreements. The end result would be to perpetuate further incursions into the judicial and regulatory domain of the signatories.

Moreover, President Bush's trade agenda called for using fast-track authority to negotiate an ambitious multilateral trade agreement, the Free Trade Area of the Americas ("FTAA"). Targeted for enactment in 2005, the FTAA would establish the largest free trade market in the world, encompassing thirty-four nations and eight hundred million people.<sup>141</sup> The complexity of such an agreement and the sheer magnitude of the area targeted for economic integration would dramatically increase the potential for investor-state suits.<sup>142</sup>

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (noting that no agreement has been rejected under fast-track procedures). See Committee on Finance, *Report on Bipartisan Trade Promotion Authority Act of 2002*, S. REP. NO. 107-139 (Feb. 28, 2002). See also Margot Roosevelt, *Toxic Trade? A Canadian Chemical Firm Says California's Pollution Controls Violate NAFTA Rules*, TIME, Mar. 25, 2002 ("The idea is to protect hard-bargained agreements from pork-barrel politicking").

<sup>141</sup> *Hearing on Free Trade Deals: Is the United States Losing Ground as its Trading Partners Move Ahead?: Testimony Before the Subcommittee on Trade of the House Committee on Ways and Means 107th Cong.* (2001) (statement of Jeffrey J. Schott, Senior Fellow, Institute for International Economics).

<sup>142</sup> The Free Trade Area of the Americas Committee on Government Representatives on the Participation of Civil Society in the FTAA solicited recommendations from civil society. Many of the responses mirror the debate between public advocates and multinationals over NAFTA Chapter 11. For example, the U.S. Chamber of Commerce, the Association of American Chambers of Commerce in Latin America, and the U.S. Section of the Brazil-U.S. Business Council, not surprisingly supported the incorporation of NAFTA-like provisions into the investment section of the FTAA. Mark Smith & John Murphy, *Recommendations for the Investment Negotiating Group*, FTAA.soc/civ/77 (May 23, 2003) at [http://www.ftaa-alca.org/spcomm/SOC/Quito/AnnexD/soc-civ-77\\_e.asp](http://www.ftaa-alca.org/spcomm/SOC/Quito/AnnexD/soc-civ-77_e.asp). The Citizens Trade Campaign (including labor, environmental, and consumer organizations), on the other hand, noted that the FTAA is based on NAFTA and urged adoption of significant changes to the NAFTA model. The CTC noted, ". . . the proposed FTAA expands NAFTA's Pandora's Box of investor-to-state lawsuits in closed unaccountable tribunals. These special rights for foreign investors go far beyond those



Although Congress ultimately granted President Bush fast-track authority, criticism of Chapter 11 did not fall on deaf ears. The 2002 Trade Act does not directly affect NAFTA; however, it does attempt to remedy some of the most problematic provisions of Chapter 11 before they are extended to future trade pacts.<sup>143</sup> The foreign investment negoti-

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provided in the U.S. Constitution for foreign or domestic corporations . . . .” Gretchen Gordon, *Comments of the Citizens Trade Campaign to the Committee of Government Representatives on the Participation of Civil Society in the Free Trade Area of the Americas*, FTAA.soc/civ/88 (May 27, 2003) at [http://www.ftaa-alca.org/spcomm/SOC/QUITO/AnnexD/soc-civ-88\\_e.asp](http://www.ftaa-alca.org/spcomm/SOC/QUITO/AnnexD/soc-civ-88_e.asp).

<sup>143</sup> Trade Act of 2002, Pub. L. No. 107-210, § 2102, 116 Stat. 933, 994 (2002). Section 2102(b)(3) delineates the trade negotiating objectives regarding foreign investment:

Recognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections that United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by—

- (A) reducing or eliminating exceptions to the principle of national treatment;
- (B) freeing the transfer of funds relating to investments;
- (C) reducing or eliminating performance requirements, forced technology transfers, and other unreasonable barriers to the establishment and operation of investments;
- (D) seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice;
- (E) seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process;
- (F) providing meaningful procedures for resolving investment disputes;
- (G) seeking to improve mechanisms used to resolve disputes between an investor and a government through—
  - (i) mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims;
  - (ii) procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims;
  - (iii) procedures to enhance opportunities for public input into the formulation of government positions; and
  - (iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements; and
- (H) ensuring the fullest measure of transparency in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, by—
  - (i) ensuring that all requests for dispute settlement are promptly made public;
  - (ii) ensuring that—
    - (a) all proceedings, submissions, findings, and decisions are promptly made public; and
    - (b) all hearings are open to the public; and
    - (c) establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and nongovernmental organizations.

ating objectives delineated in the Trade Act evidence a retreat from the pre-NAFTA emphasis on protection of the investor and on arbitration. The focus has shifted to limiting both the power wielded by foreign investors to seek legal recourse and the power of the tribunals to provide redress.

The 2002 Trade Act mandates the inclusion of “mechanisms to eliminate frivolous claims” in future trade acts.<sup>144</sup> The Committee Report suggests that granting panels the authority to dismiss actions that fail to state a cognizable claim and to impose costs and attorney’s fees on the filing party could deter frivolous suits.<sup>145</sup> Although such penalties will not necessarily curtail investor-state disputes, the government will no longer be defenseless against multinationals that abuse investment guarantees. This provision may also discourage investors from filing claims merely to strong-arm the government.

The development of a reliable body of law will enhance the effectiveness of the frivolous claims provision. To that end, the 2002 Trade Act also requires “an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.”<sup>146</sup> Whereas NAFTA panels are not bound by the determinations of predecessor panels, the 2002 Trade Act encourages fluidity among tribunals. Consistency of interpretation enables investors to better manage risk and increase the value of their investments, thereby fostering trade and cooperation. State parties also benefit from the elimination of aberrant interpretations. With the introduction of predictability into the dispute resolution process, government authorities will be less likely to refrain from adopting regulations in the public interest merely because a foreign investment may suffer a diminution of value.

Finally, the 2002 Trade Act requires U.S. trade negotiators to “ensur[e] the fullest measure of transparency in the dispute settlement mechanism[s]” of future trade agreements.<sup>147</sup> The act enumerates methods to achieve a more open resolution of disputes, including making documents available, opening hearings to the public, and accepting *amicus curiae* submissions.<sup>148</sup> The vociferous opposition to the secretive nature of NAFTA Chapter 11 proceedings may have prompted Congress to include safeguarding public access as a priority in future agreements.<sup>149</sup> Given the

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*Id.*

<sup>144</sup> Trade Act of 2002 § 2102(b)(3)(G)(i).

<sup>145</sup> Committee on Finance, *Report on Bipartisan Trade Promotion Authority Act of 2002*, S. REP. NO. 107-139 (Feb. 28, 2002).

<sup>146</sup> Trade Act of 2002 § 2102(b)(3)(G)(iv).

<sup>147</sup> Trade Act of 2002 § 2102(b)(3)(H).

<sup>148</sup> *Id.*

<sup>149</sup> *See, e.g.*, Letter from Senator Byron Dorgan to Ambassador Robert Zoellick, U.S. Trade Representative, Mar. 22, 2002 (urging the U.S. Trade Representative to make NAFTA tribunal proceedings more public and claiming that NAFTA cases,

extensive ramifications of tribunal decisions, this provision helps ensure that the dispute resolution process will be accessible to public scrutiny. At the very least, it will help alleviate concerns that are perpetuated by the veil of secrecy surrounding the arbitrations.

Massachusetts Senator John Kerry proposed an amendment to the Trade Act that would have gone even further to prevent replication of the Chapter 11 model in future trade pacts.<sup>150</sup> In an attempt to curb abuses of investor protections and to safeguard the regulatory authority of federal, state, and municipal governments, the Kerry Amendment would have limited foreign investor rights to those granted by the Constitution.<sup>151</sup> This provision was intended to eliminate the result of a foreign investor receiving compensation for a loss incurred due to a validly promulgated regulation, while its domestic counterpart would have no recourse for losses arising out of the same regulation. The Amendment would have also imposed a higher threshold of impropriety in order for a State to be held liable to a foreign investor.<sup>152</sup> For example, under Kerry's proposal an investor could only sustain an action based on the denial of national treatment by demonstrating that "the measure was enacted or applied primarily for the purpose of discriminating against foreign investors or investments."<sup>153</sup> Thus, discriminatory effect would not be sufficient.

The most radical provision of the Kerry Amendment would have required government approval before an investor could file a claim against a country.<sup>154</sup> The Amendment provided in relevant part:

[A] claim by an investor under the agreement may not be brought directly unless the investor first submits the claim to an appropriate competent authority in the investor's country; such entity has the authority to disapprove the pursuit of any claim solely on the basis that it lacks merit.<sup>155</sup>

This objective would have eliminated one of the most distinctive features of Chapter 11, the automatic right to submit a claim to arbitration. Although this provision would not have abolished a private right of action, it would have required an investor to demonstrate the merits of

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"which imperil the ability of the federal and state governments to enact regulations in the public interest, are being conducted in near total secrecy"). See also Paul Magnusson, *The Highest Court You've Never Heard Of*, BUSINESS WEEK, Apr. 8, 2002, at 97 (observing that Chapter 11 disputes are decided in a "little-known and highly secretive process" by an "obscure three-judge panel that stands distinctly apart from the U.S. legal system").

<sup>150</sup> 148 CONG. REC. S4527, S4529 (daily ed. May 17, 2002) (statement of Mr. Reid, on behalf of Senator Kerry). The Amendment was set aside May 17, 2002.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

his case to his own government.<sup>156</sup> Like the provision actually adopted by Congress preventing frivolous suits, this procedural hurdle was intended to reduce opportunities for investors to abuse foreign investment guarantees. Even though investor governments would only be able to dismiss a case on the merits and not for policy reasons, the mechanism would enable governments to rein in frivolous suits and help direct the development of foreign investment law.

The push for fast-track authority enabled Congress to consider a variety of mechanisms to prevent abuses of investment guarantees. One concern that was not addressed in either the 2002 Trade Act or the Kerry Amendment is the ability of investment panels to trump jury verdicts and decisions of U.S. courts. Congress was confronted with the task of striking a delicate balance between the legitimate corporate interests in protecting investments abroad and the interests of federal, state, and municipal authorities in safeguarding regulatory power. Although the 2002 Trade Act is unlikely to silence NAFTA Chapter 11 critics, it should certainly alleviate concerns that NAFTA-like provisions will be replicated in future trade agreements.

## V. CONCLUSION

The unanticipated emergence of NAFTA Chapter 11 claims against the United States has caused public outcry against the perceived threat to regulatory and adjudicatory sovereignty. In light of the already intense debate surrounding Chapter 11, a decision by the *Mondev* tribunal for \$50 million against the United States would only have served to strengthen the opposition and to hasten the demise of neutral arbitration as a means to settling complicated international commercial disputes. The 2002 Trade Act is a first attempt at preventing the perceived weaknesses of NAFTA from being replicated in future trade pacts. The Trade Act recognizes the need for some form of investor protection in future trade pacts but also strives to protect the government's need to govern unimpaired by concerns of frivolous foreign investor suits. Whether Congress has struck the appropriate balance in the 2002 Trade Act remains to be seen. As the body of NAFTA arbitral decisions grows and as trade agreements are concluded pursuant to the 2002 Trade Act, the fate of foreign investment guarantees will become more clear.

DANA KRUEGER

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<sup>156</sup> This provision is similar to the tax veto pursuant to NAFTA § 2103(6). For a discussion of the tax veto, see William W. Park, *NAFTA Chapter 11: Arbitration and the Fisc: NAFTA's "Tax Veto"*, 2 CHI. J. INT'L L. 231 (2001) (noting that "if an expropriation claim implicates 'taxation measures,' the competent fiscal authorities of host and investor countries may block arbitration").