1-1-2002

Beware the Jabberwock: A Reply to Mr. Thomas

Charles H. Brower II
University of Mississippi, charles.brower@wayne.edu

Beware the Jabberwock: A Reply to Mr. Thomas

CHARLES H. BROWER II*

I. INTRODUCTION

J.C. Thomas sets forth an interesting tale, in which the Metalclad Corporation is aware of (but ignores) the need to secure a construction permit from the municipal government of Guadalcazar, a chapter 11 tribunal runs completely amok and imposes an unprecedented obligation on Mexico to ensure the success of Metalclad's investment, observers reach a general consensus that chapter 11 disputes fall outside the legal framework of commercial arbitration, the Supreme Court of British Columbia renders a deferential and unremarkable judgment during the annulment proceedings, and I argue that Canada bears responsibility for a "gross injustice" involving a "flagrant and inexcusable violation of municipal law." Although it represents a notable lesson in advocacy, this account does not withstand scrutiny.

* Croft Assistant Professor of International Law and Jessie D. Puckett, Jr. Lecturer in Law, University of Mississippi School of Law. The author received helpful comments from Judge Charles N. Brower and Professor Jack J. Coe, Jr. The author bears sole responsibility for remaining blunders.

II. METALCLAD: VILLAIN OR VICTIM?

In laying out the factual background for his response, Mr. Thomas states that Metalclad was "fully aware" of the need to secure a construction permit from municipal authorities in Guadalcazar, Metalclad consciously decided to "ignore the problem," and the arbitral tribunal overlooked this information.[1] In my view, these statements are as improper as they are inaccurate. Because the arbitral award conclusively established the relevant facts, the Supreme Court of British Columbia recognized that independent evaluation of the facts "would not be appropriate" at this stage.[2]

Turning to the award, one finds a concise statement of relevant findings. First, Mexican federal officials "assured" Metalclad that it had all permits necessary "to undertake the landfill project."[3] Second, "Metalclad was led to believe, and did believe, that the federal and state permits allowed for construction and operation of the landfill."[4] Third, "[r]elying on the representations of the federal government, Metalclad started constructing the landfill."[5] Fourth, "Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill."[6] Fifth, "there was no evidence that the Municipality ever required or issued a construction permit for any other construction project in Guadalcazar."[7] Sixth, after demanding that Metalclad apply for a construction permit, municipal authorities in Guadalcazar denied the application at a meeting "of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."[8] Seventh, the municipal authorities denied Metalclad's request for a construction permit without citing any construction defects.[9] Eighth, denial of the construction permit

1. J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 439, 440 (2002).

2. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, United Mexican States v. Metalclad Corp. at para. 2 (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf.

3. *See* Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 80 (NAFTA/ICSID Add'l Facility), *available at* http://www.pearcelaw.com/metalclad.html.

4. *Id.* at para. 85.

5. *Id.* at para. 87.

6. *Id.* at para. 89.

7. *Id.* at para. 52.

8. *Id.* at para. 91.

9. *Id.* at para. 92.

"effectively and unlawfully prevented [Metalclad's] operation of the landfill."[10] Ninth, following the commencement of arbitral proceedings, the outgoing governor of the relevant Mexican state decreed the site to be part of an ecological preserve, which "barr[ed] forever the operation of the landfill."[11] The award's brief and trenchant presentation of facts may lack political sensitivity, but its findings provide the conclusive background for legal analysis.

III. THE TRIBUNAL: RUNNING AMOK OR WITH THE PACK?

Mr. Thomas implies that the *Metalclad* tribunal exceeded the scope of its jurisdiction by unlawfully transforming the case into a chapter 18 claim and by construing articles 1802 and 102 to create an obligation for Mexico to ensure the successful implementation of individual investments.[12] Curiously, he offers no general explanation of how tribunals determine their jurisdiction or interpret the substantive obligations of chapter 11. Had he done so, the award would make considerably more sense, and his jurisdictional objections would vanish.

It is common ground that articles 1116 and 1117 limit the jurisdiction of chapter 11 tribunals to "claims" that a NAFTA Party has breached a legal obligation set forth in section A of chapter 11.[13] To establish jurisdiction, chapter 11 tribunals need only determine that "claims" depend for support on the provisions of section A.[14] Thus, whenever investors claim that their host states have breached specified provisions of section A, tribunals must exercise jurisdiction

10. *Id.* at para. 106.

11. *Id.* at para. 109.

12. Thomas, *supra* note 1, at 437–38 (particularly text accompanying note 23).

13. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., arts. 1116, 1117, 32 I.L.M. 605, 642–43 (1993) [hereinafter NAFTA].

14. *See* Ethyl Corp. v. Canada, Award on Jurisdiction (June 24, 1998) at para. 61 (NAFTA/UNCITRAL), *reprinted in* 38 I.L.M. 708, 724–25 (1999) (quoting Ambatielos Case (Greece v. United Kingdom), 1953 I.C.J. Rep. 10, 18–19 (May 19)). *See also* Pope & Talbot v. Canada, Award in Relation to the Preliminary Motion by the Government of Canada (Jan. 26, 2000) at paras. 23–25 (NAFTA/UNCITRAL), *available at* http://www.appletonlaw.com/4b3P&T.htm.

and consider the merits.[15] If the claims turn out to rely on unfounded interpretations of the provisions set forth in section A, tribunals do not lose jurisdiction—they issue awards denying the claims on their legal merits.[16] As recognized by virtually everyone (including Thomas[17] and the Supreme Court of British Columbia[18]), Metalclad claimed that the arbitrary and misleading actions of federal, state, and local authorities created a non-transparent environment that was incompatible with Mexico's obligation under article 1105(1) to provide "treatment in accordance with international law, including fair and equitable treatment." Because that claim alleged a violation of section A, it clearly fell within the tribunal's jurisdiction.[19] Metalclad's interpretation of "fair and equitable treatment" to include a requirement of transparency represented an issue that the tribunal could resolve only through consideration of the legal merits.

According to Thomas, the tribunal "began" its consideration of the merits by "first cit[ing] an article found in chapter 18 rather than chapter 11."[20] To the contrary, the tribunal first cited article 1131(1), which establishes the governing law for chapter 11 disputes and requires tribunals to "decide the issues . . . in accordance with [NAFTA] and applicable rules of international law."[21] Those rules include the principles set forth in the Vienna Convention on the Law of Treaties, which *require* interpretation of treaty provisions in the

15. *See Ethyl Corp.*, Award on Jurisdiction (June 24, 1998) at para. 61, *reprinted in* 38 I.L.M. at 724–25 (explaining that "the fact that a claim purporting to be based on a Treaty may eventually be found . . . to be unsupportable under the Treaty, does not of itself remove the claim from the category of claims which, for the purposes of arbitration, should be regarded as falling within" the tribunal's jurisdiction). *See also Pope & Talbot*, Award in Relation to the Preliminary Motion by the Government of Canada (Jan. 26, 2000) at para. 25 ("The Investor claims breaches of specified obligations . . . which fall within the provisions of Section A of Chapter 11. . . . Whether or not the claims of the Investor will turn out to be well founded in fact or law, at the present stage it cannot be stated that there are not investment disputes before the Tribunal.").

16. *See* Azinian v. Mexico, Award (Nov. 1, 1999) at para. 91 (NAFTA/ICSID Add'l Facility) ("It is therefore necessary to examine whether the annulment of the Concession Contract may be considered to be an act of expropriation violating NAFTA Article 1110. If not, the claim must fail."), *available at* http://www.worldbank.org/icsid/cases/awards.htm.

17. *See* Thomas, *supra* note 1, at 436–37.

18. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, United Mexican States v. Metalclad Corp. at paras. 66, 70, 75 (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf.

19. *See Azinian*, Award (Nov. 1, 1999) at para. 81 ("Section A of Chapter Eleven establishes a number of *substantive obligations* with respect to investments. Section B concerns *jurisdiction*. . .") (emphasis added).

20. Thomas, *supra* note 1, at 438.

21. *See* Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 70 (NAFTA/ICSID Add'l Facility), *available at* http://www.pearcelaw.com/metalclad.html.

context and in light of the treaty's object and purpose.[22] Thus, a tribunal *must* consider the treaty text, the preambles and annexes, related and contemporaneous agreements between the parties, and all rules of international law applicable to relations between the parties.[23] Consistent with this obligation, the *Metalclad* tribunal did not interpret article 1105(1) in a vacuum; instead it consulted other NAFTA provisions that supply the necessary context for understanding vague terms like "fairness" and "equity." In short, the tribunal did not begin its analysis of the merits with an unauthorized frolic through irrelevant chapters of NAFTA; it identified the applicable law and then performed a mandatory review of the interpretive context for chapter 11.

Upon examination of the interpretive context, the tribunal found a pervasive concern for transparency. In the Preamble, the NAFTA Parties undertake to "ENSURE a predictable commercial framework for business planning and investment."[24] Likewise, article 102(1) states that an objective of NAFTA is to "increase substantially investment opportunities" and article 102(1) cites "transparency" as a principle that elaborates NAFTA's objectives.[25] Finally, the tribunal observed that article 1802(1) requires each party to "ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by [NAFTA] are promptly . . . made available in such a manner as to enable interested persons and Parties to become acquainted with them."[26] Given their ubiquitous role within the interpretive context for article 1105, principles of transparency naturally assumed a central role in the

22. *See id. See also* Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 5, 2001) at paras. 50–51 (NAFTA/ICSID Add'l Facility), *available at* http://www.naftaclaims.com; S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) at paras. 196–204 (NAFTA/UNCITRAL), *available at* http://www.appletonlaw.com/4b2myers.htm; Waste Management, Inc. v. Mexico, Award (June 2, 2000) at § 9 (NAFTA/ICSID Add'l Facility), *available at* http://www.worldbank.org/icsid/cases/awards.htm; Ethyl Corp. v. Canada, Award on Jurisdiction (June 24, 1998) at paras. 55–56 (NAFTA/UNCITRAL), *reprinted in* 38 I.L.M. 708, 723–24 (1999).

23. *See* Vienna Convention on the Law of Treaties, art. 31(1)–(3), May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27; Metalclad v. Mexico, Award (Aug. 30, 2000) at para. 70. *See also* Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 5, 2001) at para. 51; S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) at paras. 196–204.

24. NAFTA, *supra* note 13, preamble, 32 I.L.M. at 297; Metalcald Corp. v. Mexico, Award (Aug. 30, 2000) at para. 71.

25. NAFTA, *supra* note 13, art. 102(1)(c), 32 I.L.M. at 297; Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 70.

26. NAFTA, *supra* note 13, art. 1802(1), 32 I.L.M. at 681; Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 71.

tribunal's analysis of Metalclad's claim for the denial of "fair and equitable treatment." Furthermore, by identifying "transparency" as an element of "fair and equitable treatment," the *Metalclad* tribunal joined a distinguished group of publicists,[27] jurists,[28] and international organizations[29] that have made the same determination. Again, the *Metalclad* tribunal did not frolic through the text of NAFTA oblivious to jurisdiction; it conducted a principled examination of the applicable law and reached an unremarkable conclusion on the merits.

Without commenting on the jurisdictional import of his allegations, I cannot accept Thomas' claim that the *Metalclad* tribunal imposed a general "*obligation* . . . to 'ensure the successful implementation of [particular foreign] investments.'"[30] To the contrary, the tribunal stated that "[a]n underlying *objective* of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment *initiatives*."[31] Thus, the tribunal did not refer to "successful implementation of *investments*,"[32] but to "successful implementation of investment

27. *See* Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 423–24 (2001) (concluding that "fair and equitable treatment" requires host states to deal "transparently in their relations with foreigners"); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COEURS 251, 344 n.150 (1997) (explaining that "fair and equitable treatment" under the Lomé Convention requires that "all rules and practices affecting an investor's interest be transparent, predictable, and non-discriminatory"). Mr. Price served as the principal U.S. negotiator of chapter 11, and Sacerdoti serves as a judge on the WTO Appellate Body.

28. *See* United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R at paras. 180–84 (holding that a regulatory system lacked transparency—and thus constituted a form of "arbitrary discrimination"—because it denied individual applications without notice, an opportunity to be heard, or the provision of reasoned, written decisions), *available at* 1998 WL 720123, at *53–*55. *See also* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 12, 2000) (separate opinion of Bryan Schwartz) at paras. 254–58 (NAFTA/UNCITRAL) (observing that it would "appear sensible" to include principles of transparency in the definition of "fair and equitable treatment" but declining to draw a "definitive" conclusion because the parties did not fully brief the issue), *available at* http://www.appletonlaw.cm/4b2myers.htm; Owners of the Tattler (United States) v. Great Britain, 6 R.I.A.A. 48, 49–51 (1920) (imposing liability due to a lack of clarity in Canadian laws regarding licenses for U.S. fishing vessels); William S. Dodge, *International Decision*, 95 AM. J. INT'L L. 910, 918 (2001) (observing that "arbitrators have based international responsibility on a lack of transparency in a number of prior decisions").

29. World Bank, Guidelines on the Treatment of Foreign Direct Investment at III.2, III.8, *reprinted in* 31 I.L.M. 1379, 1381–82 (1992) (requiring "fair and equitable treatment according to the standards recommended in these Guidelines" and specifically calling for promotion of "transparency in . . . dealings with foreign investors").

30. Thomas, *supra* note 1, at 438 (emphasis added).

31. Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 75 (emphasis added).

32. Thomas, *supra* note 1, at 438 (particularly text accompanying note 24).

initiatives" (i.e., policies or programs of NAFTA Parties).[33] More importantly, the tribunal did not identify successful implementation as a binding "*obligation*,"[34] but as an "*underlying objective*"[35] or goal. Because anyone should appreciate the fundamental distinction between obligations and objectives, I remain baffled by the statement that the tribunal created an unprecedented obligation of result.[36] In any event, even Thomas stops short of claiming that the tribunal actually applied any such obligation in its determination of liability. To the contrary, he repeatedly identifies "transparency" as the predicate for the tribunal's imposition of liability.[37] Thus, as discussed above, the predicate for liability resulted from a principled examination of the merits, not the analytical frolic described by Thomas.

IV. THE ANNULMENT PROCEEDINGS: NONCOMMERCIAL OR COMMERCIAL ARBITRATION?

Dissatisfied with the *Metalclad* award, Mexico exercised its right to seek annulment by the Supreme Court of British Columbia. Thomas offers a surprising explanation for the decision to seek relief both under the International Commercial Arbitration Act (ICAA) (British Columbia's version of the UNCITRAL Model Law, which applies to international commercial arbitration and does not permit review of the merits), and the Commercial Arbitration Act (CAA) (which applies to all other arbitrations and which permits review of the merits). He attributes this strategy to Mexico's concern that Metalclad would argue that the award was not a commercial award, that ICAA did not apply, and that Mexico could not proceed.[38] This "prosaic point of immense practical significance"[39] lacks credibility. Throughout the arbitration, Metalclad relied on the ICAA to support procedural arguments.[40] Under the circumstances, Metalclad would

33. Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 75 (emphasis added).

34. Thomas, *supra* note 1, at 438.

35. Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 75 (emphasis added).

36. Thomas, *supra* note 1, at 438.

37. *Id.* at 438–39, 452–53.

38. *See* Thomas, *supra* note 1, at 442.

39. *Id.*

40. See Jack J. Coe, Jr., Domestic Court Control of Investment Awards–Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA? at 16 (2002) (unpublished manuscript, on file with the author).

have been inhibited (and probably estopped) from resisting application of the ICAA. Furthermore, one cannot imagine Metalclad arguing *against* application of the *deferential* ICAA and *for* an alternative statute that contemplates judicial review of the *merits*. Finally, in its submissions to the court, Mexico did not portray the CAA as a secondary avenue to be used in the event of an ambush. To the contrary, Mexico itself described the award as noncommercial and petitioned the court to apply the CAA.[41] Mexico did so not for prudential or procedural reasons, but—in its own words—to "appeal" seven "questions of law" decided by the tribunal.[42]

Thomas also hints at a growing agreement with the NAFTA Parties' litigation position that chapter 11 disputes fall outside the legal framework of commercial arbitration.[43] Read carefully, his authorities establish only that chapter 11 disputes differ from the "ordinary,"[44] "usual,"[45] or "standard run"[46] of commercial arbitration between private parties. My article agrees with this limited proposition and recognizes the unique mix of commercial (i.e., private) and noncommercial (i.e., public or regulatory) interests that

41. *See* Petitioner's Outline of Argument (Feb. 5, 2001) at paras. 131, 145–66, *In re* Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States (B.C. Sup. Ct. 2001) [hereinafter Mexico's Outline of Argument].

42. *Id.* at paras. 166, 523–91.

43. *See* Thomas, *supra* note 1, at 442–43, 461–62.

44. *Id.* at 443, 461–62.

45. *Id.* at 443 (quoting Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001) at para. 49 (NAFTA/UNCITRAL), *available at* http://www.naftaclaims.com).

Contrary to Thomas' suggestion at 441–42, the *Methanex* tribunal never "noted that it was possible that chapter 11 is not a 'commercial arbitration agreement between the investor-claimant and the respondent-party state.'" Rather, the tribunal's decision only records that the United States "noted that . . . Chapter 11 of NAFTA is not . . . a commercial arbitration agreement between the investor-claimant and the respondent-party state." *See* Mexico's Outline of Argument, *supra* note 41, at para. 149 (quoting Methanex Corp. v. United States, Decision of the Tribunal on the Place of Arbitration (Sept. 7, 2000) at para. 16 (NAFTA/UNCITRAL)). Because the United States "did not . . . press" its contention, the tribunal did not consider the matter and simply observed that the United States had raised a "controversial" issue. *See id.* (quoting *Methanex*, Decision of the Tribunal on the Place of Arbitration (Sept. 7, 2000) at para. 27). By labeling it as "controversial," the tribunal may reasonably have been seen as questioning—rather than endorsing—the United States' position on the character of investor-state arbitration.

46. Thomas, *supra* note 1, at 443, 462 (quoting United Parcel Serv. of America, Inc. v. Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001) at para. 70 (NAFTA/UNCITRAL), *available at* http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp).

characterize investor-state arbitration.[47] While acknowledging the presence of multiple interests in chapter 11 disputes, these observations do not establish a general agreement about the predominance of commercial or noncommercial attributes for purposes of legal analysis. Rather, they suggest the need for some principled basis on which to make that determination.

According to Thomas, the noncommercial (or public) characteristics should predominate because chapter 11 disputes have "public policy ramifications;"[48] that is to say, the noncommercial characteristics should predominate because they exist and are important. This analysis is circular and subjective. In investor-state arbitration, investors and states frequently disagree about the goals to be pursued.[49] Complaining investors emphasize the objective of commercial security.[50] In contrast, states highlight the importance of public regulatory goals—particularly when responding to claims that regulatory action has been taken at the expense of private interests.[51] Under these circumstances, one cannot establish the predominance of commercial or noncommercial characteristics based on perceived importance without descending into subjective argumentation about the underlying merits.[52]

One must, therefore, consider objective evidence that NAFTA contemplates the resolution of investor-state disputes within the general legal framework of international commercial arbitration.[53] This evidence includes custom, the text of NAFTA, and the relevant state practice of the NAFTA Parties.[54] Historically, investor-state arbitration takes place within a framework that resembles

47. *See* Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM J. TRANSNAT'L L. 43, 72 (2001). I reiterate, however, that this represents a difference in degree rather than in kind because "ordinary" commercial arbitrations often involve complex issues of public regulatory law. *See id.* at 71–72. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (involving commercial arbitration of antitrust claims).

48. Thomas, *supra* note 1, at 446. *See also* Mexico's Outline of Argument, *supra* note 41, at paras. 184–85.

49. *See* STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION 394 (1990).

50. *See id.*

51. *See id.*

52. *See* Brower, *supra* note 47, at 72.

53. *See id.*

54. By "relevant" state practice, I mean "what the parties did under the agreement *before the issue of interpretation arose.*" *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 cmt. d(f) (1965) (emphasis added). That practice has much greater evidentiary value than the litigation positions adopted *after* the issue of interpretation arose.

international commercial arbitration.[55] Thus, the ICSID Convention "borrow[s] heavily from the structures of international commercial arbitration."[56] Likewise, ICSID's Additional Facility Rules "are based on . . . provisions of the [ICSID] Convention which lend themselves to inclusion in an instrument of a contractual nature, and include some provisions derived from the UNCITRAL Rules and the ICC Rules."[57] In addition, the Additional Facility Rules *require* arbitration to take place on the territory of a state that is a party to the New York Convention.[58] Because most states parties limit the scope of the New York Convention to commercial arbitration,[59] this requirement makes no sense unless the Additional Facility Rules contemplate a form of commercial arbitration. This customary use of commercial arbitration models took root because it "furthers international investment" by providing investors with access to an efficient and predictable form of dispute resolution that produces enforceable outcomes.[60]

Several of NAFTA's objectives support the application of the legal framework for international commercial arbitration to chapter 11 disputes. First, the NAFTA Parties undertake to "increase substantially investment opportunities."[61] Second, they agree to "ensure a predictable *commercial* framework for . . . investment."[62] Third, they resolve to "create effective procedures for the . . .

---

55. *See* TOOPE, *supra* note 49, at 398.

56. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 154 (1990). Professor Caron describes ICSID arbitration as an example of the "evolution from diplomatic protection to international *commercial* arbitration." *Id.* (emphasis added). *See also* Ibrahim F.I. Shihata, *The Multilateral Investment Guarantee Agency*, 20 INT'L L. 485, 492 (1986) (anticipating that MIGA contracts of guarantee would refer disputes to an "internationally recognized body of rules for *commercial* arbitration, such as the ICSID arbitration rules") (emphasis added). Mr. Shihata was Vice President and General Counsel of the World Bank.

57. Introductory Note C to the ICSID Additional Facility Rules, *available at* http://www.worldbank.org/icsid/facility/v.htm.

58. *See* ICSID Additional Facility Rules, art. 20, *available at* http://www.worldbank.org/icsid/facility/41.htm.

59. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 149 (2d ed. 2001).

60. *See* Caron, *supra* note 56, at 155 (observing that the transfer of disputes to "the more enforceable process of private international arbitration . . . furthers international investment"). Mexico has recognized that the UNCITRAL Model Law, which applies to international commercial arbitrations in British Columbia, "promote[s] the efficient functioning of . . . arbitrations" and "establish[es] a climate where international commercial arbitration can be resorted to with confidence by parties from different countries." Mexico's Outline of Argument, *supra* note 41, at paras. 122, 177.

61. NAFTA, *supra* note 13, art. 102(1)(c), 32 I.L.M. at 297.

62. *Id.*, preamble, 32 I.L.M. at 297 (emphasis added).

resolution of disputes."[63] Because international commercial arbitration promotes investment by creating a predictable and effective mechanism for resolving disputes, it seems well suited to the fundamental objectives of NAFTA.[64] Perhaps this explains why the NAFTA Parties required the submission of chapter 11 disputes to arbitration under the ICSID Convention, the Additional Facility Rules, or the UNCITRAL Rules[65]—all widely regarded as falling within the broad definition of international commercial arbitration.[66] Any lingering doubt should have been resolved by article 1136(7), which provides that chapter 11 disputes "shall be considered to arise out of a commercial relationship or transaction for purposes of . . . the New York Convention and . . . the Inter-American Convention."[67]

Relevant state practice also supports treatment of chapter 11 disputes as a form of commercial arbitration. Following ratification of NAFTA, the Canadian government amended its federal arbitration statute to provide, "for greater certainty," that chapter 11 disputes fall within the definition of "commercial arbitration."[68] Likewise, the Supreme Court of British Columbia has ruled that chapter 11 disputes fall within the definition of "commercial arbitration" under the provincial enactment of the UNCITRAL Model Law.[69] Furthermore, a decision of the United States Court of Appeals for the Eleventh Circuit refers to NAFTA as an "international commercial agreement" over half a dozen times.[70] Finally, the principal U.S. negotiator of chapter 11 has publicly stated that the investment regime aims to

63. *Id.*, art. 102(1)(e), 32 I.L.M. at 297.

64. *See* Brett Frischmann, *Using the Multi-Layered Nature of International Emissions Trading and of International-Domestic Legal Systems to Escape a Multi-State Compliance Dilemma*, 13 GEO. INT'L ENVTL. L. REV. 463, 504 (2001) (explaining that chapter 11 treats "the investor-State dispute as a commercial arbitration regime, which is particularly effective and makes decisions of arbitration panels enforceable in domestic courts").

65. NAFTA, *supra* note 13, art. 1120(1), 32 I.L.M. at 643.

66. *See supra* notes 56–59 and accompanying text. *See also* Thomas, *supra* note 1, at 460 (acknowledging that the UNCITRAL Arbitration Rules represent a set of "international commercial arbitration rules").

67. NAFTA, *supra* note 13, art. 1136(7), 32 I.L.M. at 646.

68. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe, United Mexican States v. Metalclad Corp. at para. 48 (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf; Mexico's Outline of Argument, *supra* note 41, at para. 144.

69. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at paras. 39–49.

70. *See* Made in USA Found. v. United States, 242 F.3d 1300, 1302, 1313, 1316, 1318–19 (11th Cir. 2001).

remove disputes from "the political realm and put them more into the realm of *commercial arbitration.*"[71]

In short, there is no growing agreement that chapter 11 disputes fall outside the legal framework of international commercial arbitration. Whatever the NAFTA Parties may say as litigants, the objective evidence supports the opposite conclusion.

V. THE ANNULMENT PROCEEDINGS: DEFERENTIAL OR INTRUSIVE REVIEW?

Thomas states that the Supreme Court of British Columbia conducted a deferential review of the *Metalclad* award "*with the exception* of the analysis of the jurisdictional issue *and* the applicability of one arbitral authority."[72] While true, this juxtaposition of deferential review in some portions of the judgment against the vigorous review undertaken elsewhere serves to highlight the court's deep intrusion into the merits of the award.

A quick review of the ICAA helps to illustrate the point. First, the ICAA prohibits judicial review of awards for legal error.[73] Second, although the ICAA permits the annulment of awards for excess of jurisdiction,[74] the "leading"[75] case has "emphasized"[76] that courts must apply a "powerful presumption"[77] that the arbitrators

71. Daniel M. Price, *Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 112 (2000) (emphasis added).

72. Thomas, *supra* note 1, at 447 & n.61 (emphasis added).

73. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at paras. 50–51, 99; Mexico's Outline of Argument, *supra* note 41, at para. 172.

74. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at paras. 50–51; Mexico's Outline of Argument, *supra* note 41, at paras. 168, 187.

75. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at para. 51 (identifying Quintette Coal Ltd. v. Nippon Steel Corp., [1991] 1 W.W.R. 219 (B.C. Ct. App.), as the "leading British Columbia authority"); Mexico's Outline of Argument, *supra* note 41, at para. 171 (describing *Quintette* as "the leading case in British Columbia").

76. Mexico's Outline of Argument, *supra* note 41, at para. 180.

77. *Quintette*, [1991] 1 W.W.R. at 223; Mexico's Outline of Argument, *supra* note 41, at para. 180. *See also* Transcript of Proceedings (Feb. 19, 2001) at 80–81 (argument of J.C. Thomas) ("We're well aware . . . that . . . the Court of Appeal of British Columbia has said in *Quintette* that there's a powerful presumption of jurisdiction. We take no issue with that statement as it applies to private international commercial arbitrations."), *In re* Arbitration Pursuant to Chapter Eleven of NAFTA Between Metalclad Corp. & United Mexican States (B.C. Sup. Ct. 2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#Metalclad.

acted within their jurisdiction. Third, challenges that arguably involve the arbitrators' interpretations of substantive obligations do not constitute true jurisdictional objections.[78] To the contrary, they implicate the merits of the dispute and, therefore, constitute unreviewable questions of law.[79]

In the annulment proceedings, Mexico claimed that the tribunal exceeded its jurisdiction when deciding that the ecological decree constituted a measure tantamount to expropriation within the meaning of article 1110. According to Mexico, the tribunal exceeded its jurisdiction by adopting a broader definition of expropriation than could be supported by the text of article 1110.[80] Although the court expressed surprise at the tribunal's "extremely broad definition of expropriation," it held that the definition of expropriation "is a question of law with which this Court is not entitled to interfere."[81] Thus, consistent with the ICAA and international practice, the court recognized that the definition of substantive obligations does not implicate jurisdiction, but it represents a legal question not subject to judicial review.

Mexico also claimed that the tribunal exceeded its jurisdiction in deciding that, under the circumstances, denial of the construction permit violated Metalclad's right to "fair and equitable treatment"[82] and constituted an indirect expropriation.[83] Curiously, the court did not consider the tribunal's definition of "fair and equitable treatment" to be a legal question, but a jurisdictional matter appropriate for judicial intervention.[84] Furthermore, the court disregarded the "powerful presumption" of jurisdictional propriety and reviewed the

---

Thomas cites Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, 3 ICSID Rep. 131, 143 (1988), for the proposition that "there is no presumption of jurisdiction—particularly where a sovereign state is involved." *See* Thomas, *supra* note 1, at 462 n.109. In that case, an *arbitral tribunal* held that *arbitral tribunals* cannot presume their own jurisdiction and must examine objections to jurisdiction. The case did not address the issue of whether *courts* have an obligation to presume the validity of jurisdictional decisions already made by tribunals. As "emphasized" by the "leading" case in British Columbia, courts must apply a "powerful presumption" that tribunals have acted within their jurisdiction.

78. *See* BORN, *supra* note 59, at 853. *See also infra* notes 83–84 and accompanying text.

79. *See infra* note 81 and accompanying text.

80. *See* Mexico's Outline of Argument, *supra* note 41, at paras. 310–11, 313, 317.

81. Reasons for Judgment of Hon. Mr. Justice Tysoe at para. 99.

82. *See* Mexico's Outline of Argument, *supra* note 41, at paras. 238–73.

83. *See id.* at para. 303.

84. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at paras. 66–72.

tribunal's definition under the standard of "legal correctness,"[85] which means the complete absence of deference.[86] In short, the court collapsed the merits into jurisdiction and, then, cast aside the customary presumptions that favor enforcement. Thus unshackled, the court conducted a six-page review of possible "interpretations" of article 1105, stated its own views on the matter, and annulled the tribunal's decision on "fair and equitable treatment."[87] By comparing this analysis to the court's treatment of identical issues under article 1110,[88] one may appreciate the depth of its intrusion into the merits of the award.

Its work not yet complete, the court turned to the tribunal's related determination that, under the circumstances, denial of the construction permit also constituted an indirect expropriation.[89] In so doing, the court held that the tribunal's discussion of transparency under article 1105 "infected" its analysis of expropriation under article 1110.[90] This did not, however, provide sufficient justification for annulment because the tribunal also relied on the arbitral award in *Biloune v. Ghana Invs. Ctr.* (a case that did not involve the concept of transparency).[91] The court made quick work of this obstacle by noting "substantial differences" between the "circumstances" in *Metalclad* and *Biloune*.[92] Because the "circumstances" of *Metalclad* fell "considerably short of those in *Biloune*," the court held they could not justify the tribunal's conclusions regarding expropriation.[93] Here, the court could not rest its decision on a purported jurisdictional defect because Mexico's pleadings discussed *Biloune* only in a

85. *See* Thomas, *supra* note 1, at 447. To support the application of the "legal correctness" standard, Thomas cites two Canadian cases that antedate *Quintette* (which was the *first*—and remains the *leading*—decision interpreting the relevant provision of the ICAA) and a case from Hong Kong. These cases provide no basis for disregarding the ICAA's "powerful presumption" of jurisdictional propriety. *See supra* notes 75–77 and accompanying text.

86. *See* Mexico's Outline of Argument, *supra* note 41, at para. 207 ("Where the standard of review is correctness, the tribunal is not entitled to any deference whatsoever. . . . The Court is entitled to substitute its own views for those of the original decision-maker."); Thomas, *supra* note 1, at 447 (explaining that the "correctness standard" permits a reviewing court to "substitute its view for that of the tribunal").

87. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at paras. 61–75.

88. *See supra* notes 80–81 and accompanying text.

89. *See* Reasons for Judgment of Hon. Mr. Justice Tysoe at paras. 77–80.

90. *Id.* at para. 78.

91. *See id.* at para. 80; Metalclad Corp. v. Mexico, Award (Aug. 30, 2000) at para. 108 (NAFTA/ICSID Add'l Facility), *available at* http://www.pearcelaw.com/metalclad.html.

92. Reasons for Judgment of Hon. Mr. Justice Tysoe at para. 80.

93. *Id.*

section that identified seven "errors of law."[94] Simply put, the court granted this part of Mexico's "appeal"[95] and reversed the tribunal's application of precedent.

In short, I agree that portions of the court's judgment represent a model of deferential review. However, they serve only to emphasize the deep incursions into the merits committed elsewhere. Overall, "the case may lead one to wonder whether it is appropriate to allow national courts to review chapter 11 awards."[96]

VI. HEIGHTENED JUDICIAL REVIEW: "CLEARLY INCOMPATIBLE" WITH THE OBLIGATIONS OF CHAPTER 11

In the final pages of his response, Mr. Thomas suggests that I contend that (1) the judgment of the Supreme Court of British Columbia violates "Canadian law" and (2) Canada bears international responsibility under chapter 11 for the violation of "Canadian law."[97] Thomas then identifies the circumstances under which international tribunals will impose liability for violations of municipal law: the violations of municipal law must be "flagrant and inexcusable," must involve an element of discrimination or bad faith, and must produce "gross injustices."[98] So posited, the underlying thesis fails.

The problem is that Thomas does not accurately capture my central thesis. I argue not that the Supreme Court of British Columbia violated "Canadian law" so egregiously as to constitute a denial of justice. My central thesis is that heightened judicial review of chapter 11 awards violates specific rules of international law, including the NAFTA Parties' commitment under chapter 11 to the "settlement"[99] of investor-state disputes through "final"[100] and "binding"[101] arbitration.

---

94. *See* Mexico's Outline of Argument, *supra* note 41, at paras. 166, 523, 562–66.

95. *See id.* at paras. 166, 523.

96. Dodge, *supra* note 28, at 916.

97. Thomas, *supra* note 1, at 456–57.

98. *Id.*

99. NAFTA, *supra* note 13, art. 1115, 32 I.L.M. at 642.

100. *Id.*, arts. 1135, 1136, 32 I.L.M. at 646 (referring to the awards of chapter 11 tribunals as "final" awards).

101. *Id.*, art. 1136(1) (providing that the awards of chapter 11 tribunals shall be "binding" between the disputing parties and in respect of the particular case).

Having consulted the work of Dr. Eduardo Jiménez de Aréchaga, Thomas presumably knows that states bear international responsibility for all "judicial decisions which constitute direct breaches of international law."[102] These include, by way of example, judicial decisions that (1) exceed the limits on territorial jurisdiction set by international law or (2) treat fugitive offenders "contrary to a provision of an extradition treaty."[103] In such matters, claimants need not show "gross injustices," discrimination, bad faith, or "flagrant and inexcusable" violations of municipal law; they need only show that the judicial decisions are "clearly incompatible with a rule of international law."[104]

These views are not controversial. A former judge of the International Court of Justice maintains that the "judgment of a municipal court which gives rise to the responsibility of a State by a denial of justice does have an international character when, for instance, a court . . . applies a rule of domestic law which is itself contrary to international law."[105] In chapter 11 disputes involving consideration of judicial decisions, two tribunals adopted the same standard: "What must be shown is that the court decision itself constitutes a violation of the treaty."[106] Notably absent from these declarations is any mention of the need to show "gross injustices" or "flagrant and inexcusable" violations of international law.

To dispel any remaining doubt about the proper standard, one need only consult *Iran v. United States*.[107] Pursuant to the Algiers Accords, Iran agreed *inter alia* to arbitrate claims brought by U.S. nationals against Iran for certain violations of municipal and international law, as well as certain claims between Iran and the United States. Specifically, the two states agreed to "final and binding"[108] arbitration before the Iran-United States Claims Tribunal

---

102. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 279 (1978).

103. *Id.*

104. *Id.*

105. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 158 (Feb. 5) (separate opinion of Judge Tanaka). *See also* LORD ARNOLD MCNAIR, THE LAW OF TREATIES 346 (1961) ("[I]f . . . the courts . . . decline to give effect to the treaty . . . , their judgments involve the State in a breach of treaty.").

106. Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 5, 2001) at para. 48 (NAFTA/ICSID Add'l Facility), *available at* http://www.naftaclaims.com; Azinian v. Mexico, Award (Nov. 1, 1999) at para. 99 (NAFTA/ICSID Add'l Facility), *available at* http://www.worldbank.org/icsid/cases/awards.htm.

107. *See* Iran v. United States, para. 44, 1998 WL 1157733.

108. *See id.* at paras. 63, 69.

and to enforce the resulting awards "in accordance with national laws."[109] After the Tribunal granted Iran some $3.5 million on its counterclaim against the Avco Corporation, Iran sought enforcement of the award in the United States District Court for the District of Connecticut.[110] The district court denied enforcement and the United States Court of Appeals for the Second Circuit affirmed.[111] Citing article V(1)(b) of the New York Convention, the Second Circuit concluded that the Iran-U.S. Claims Tribunal had denied Avco an opportunity to present its case.[112] Iran then brought a new claim before the tribunal, alleging that the judicial decisions revisited matters decided by the tribunal, breached the treaty-based regime of "final and binding" arbitration, and implicated the responsibility of the United States.[113] The United States defended, in part, on the grounds that the Algiers Accords only required enforcement of "final and binding" awards "in accordance with national laws."[114] Since its federal courts had acted in accordance with U.S. law, the United States could not be liable.[115]

While recognizing that the United States had "considerable latitude" to prescribe the mechanisms for enforcement, the tribunal held that the United States had to exercise that discretion within limits.[116] Specifically, the United States had to respect the "final and binding" nature of Tribunal awards.[117] This "rule[d] out the possibility of readjudication of the merits of Tribunal awards by a municipal court, either under the guise of article V of the New York Convention or by any other means."[118] Turning to the substance of the claim, the tribunal held:

> The Second Circuit ... reconsidered a specific question raised and conclusively decided by the Tribunal; in effect, the Second Circuit repudiated the merits of the Tribunal's award in Avco.

109. *See id.* at para. 44.

110. *See* Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 142 (2d Cir. 1992).

111. *See id.* at 145–46.

112. *See id.*

113. *See* Iran v. United States, para. 31, 1998 WL 1157733.

114. *See id.* at paras. 42–44.

115. *See id.*

116. *See id.* at para. 59.

117. *See id.* at para. 63.

118. *See id.*

> By reconsidering an issue that already had been aired and decided by the Tribunal, the Second Circuit, in violation of [the Algiers Accords], failed to treat that Tribunal's decision as "final and binding" . . . .
>
> In other words, a party . . . cannot evade findings made by the Tribunal by relitigating them in an enforcing court. The Claims Settlement Declaration requires the States Parties to stand behind the Tribunal's findings and makes them liable if their courts second-guess decisions the Tribunal has made. . . .[119]

Without belaboring the point, the Iran-United States Claims Tribunal imposed liability without any discussion of "gross injustices" or "flagrant and inexcusable" violations of law. Rather, it imposed liability because the United States violated a treaty-based regime of "final and binding" arbitration by allowing its courts to "second-guess" the merits of an award.

It is only necessary to posit this test to prove my thesis. In ratifying NAFTA, Canada agreed to an arbitral regime that would accomplish the "settlement"[120] of investor-state disputes through "final"[121] and "binding"[122] arbitration, subject to the possibility of "annulment" or "revision" (but not "appeal").[123] This rules out any readjudication of the merits by a municipal court. The Supreme Court of British Columbia rendered a judgment that second-guessed the substantive decisions of the *Metalclad* tribunal.[124] Thomas admits this, at least with respect to the court's analysis of *Biloune*.[125] By second-guessing the merits, the court violated Canada's commitment to "final" and "binding" arbitration under chapter 11.

My principal article also examines the subsidiary issue of whether NAFTA Parties will escape the imposition of liability for

---

119. *See id.* at paras. 68–70.

120. NAFTA, *supra* note 13, art. 1115, 32 I.L.M. at 642.

121. *Id.*, arts. 1135, 1136, 32 I.L.M. at 646 (referring to the awards of chapter 11 tribunals as "final" awards).

122. *Id.*, art. 1136(1) (providing that the awards of chapter 11 tribunals shall be "binding" between the disputing parties and in respect of the particular case).

123. *Id.*, art. 1136(3)(b). As stated in my principal article, "revision" and "annulment" have established legal meanings that fall considerably short of an "appeal." *See* Brower, *supra* note 47, at 76, n.207.

124. *See supra* notes 85–98 and accompanying text.

125. *See* Thomas, *supra* note 1, at 447 & n.61. *See also* Mexico's Outline of Argument, *supra* note 41 at paras. 166, 523, 562–66 (discussing *Biloune* in connection with Mexico's "appeal" on seven "errors of law").

unlawful conduct, or whether circumstances could ever permit investors to use heightened review of chapter 11 awards as the predicate for new chapter 11 claims.[126] On this point, my principal article discusses the many obstacles that investors face and identifies a low probability of success.[127] Nevertheless, under the right circumstances, I believe that heightened review of chapter 11 awards may provide the basis for a new chapter 11 claim. Assuming that investors have standing,[128] they need only show a violation of any obligation set forth in section A of chapter 11. Heightened judicial review of chapter 11 awards may violate the obligations of "fair and equitable treatment,"[129] "national treatment," or "most-favored-nation treatment."[130] It may also constitute a "denial of justice" according to

126. My principal thesis is that heightened judicial review of chapter 11 awards violates the treaty commitment to settle investor-state disputes through final and binding arbitration. The capacity (or incapacity) of investors to seek direct redress for violation of that treaty obligation represents a subsidiary concern, but remains important because the absence of a mechanism to correct treaty violations undermines the rule of law in international economic relations. *See* C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 757 (1964) (arguing that "institutional arrangements not grounded in respect for law are a mas[k] for arbitrary power, incapable of organic growth into a lasting political order"); SIR HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 424 (1966) (explaining that the absence of impartial tribunals to adjudicate disputes about the operation of legal rules "seriously impairs their character as rules of law").

127. *See* Brower, *supra* note 47, at 81–85.

128. *See id.* at 82 (discussing the problem of standing).

129. For example, in a decision cited with approval by the Supreme Court of British Columbia, a chapter 11 tribunal held that a host state's breach of a rule of international law (including treaty law) "that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of [fair and equitable treatment under] Article 1105." *See* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000) at paras. 262–66 (NAFTA/UNCITRAL), *available at* http://www.appletonlaw.com/4b2myers.htm. *See also* Reasons for Judgment of Hon. Mr. Justice Tysoe, United Mexican States v. Metalclad Corp. at paras. 62–63 (B.C. Sup. Ct. 2001) (indicating that the *S.D. Myers* tribunal adopted the "proper" and "correct" understanding of Article 1105), *available at* http://www.dfait-maeci.gc.ca/tna-nac/trans-2may.pdf. This analysis enjoys the support of other highly qualified publicists. *See, e.g.*, THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 472–73 (1995) (stating, in the context of international investment law, that treaty violations clearly constitute actionable violations of fairness).

Because the commitment to settle investor-state disputes through "final" and "binding" arbitration is specifically designed to protect investors, its breach weighs heavily in favor of finding a denial of fair and equitable treatment.

130. By definition, when courts perform "heightened" judicial review of chapter 11 awards, investors do not receive the best treatment available to people in like circumstances. Depending on the nationality of those who receive "normal" judicial review under the ICAA, "heightened" review constitutes a *prima facie* denial of national treatment (Article 1102) or most-favored-nation treatment (Article 1103). *See* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 78–79 (NAFTA/UNCITRAL) (holding that "differences in treatment... presumptively violate Article 1102(2), unless they have a reasonable justified nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, *and* (2) do not otherwise

the definition adopted by Judge Tanaka in *Barcelona Traction.*[131] Under these circumstances, I think it possible for certain investors tenably to claim that heightened judicial review of chapter 11 awards constitutes an independent violation of international law capable of submission to investor-state arbitration under chapter 11 of NAFTA.

In his conclusion, Thomas asks whether it is "necessary to go so far as to allege the 'heightened' judicial review [of chapter 11 awards] amounts to . . . an independent breach of the NAFTA."[132] The authorities indicate that judicial "second-guessing" of legal and factual determinations made in chapter 11 awards violates the commitment to settle investor-state disputes through "final" and "binding" arbitration. Whether or not investors succeed in making it the predicate for new claims, it is necessary for the NAFTA Parties to recognize the unlawful character and potential consequences of heightened review.

VII. THE INTOXICATING PROPERTIES OF SOVEREIGN POWER

Thomas repeatedly expresses confidence that judicial review of chapter 11 awards will "contribute to" the operation of NAFTA and the development of international economic law.[133] By definition, however, municipal courts cannot "contribute to" the development of international economic law without systematically reviewing the legal analyses performed by arbitrators in chapter 11 disputes.[134] Thus, despite his protestations to the contrary, Thomas endorses *de novo* review of awards in annulment proceedings before municipal courts as a tool to control the substantive outcome of investor-state arbitration. To call his enthusiasm for this process "chilling" would be no exaggeration.

One merely needs to follow recent developments to recognize the inevitable consequences of heightened review. Following the *Metalclad* judgment, at least one chapter 11 claimant sought to

unduly undermine the investment liberalizing objectives of NAFTA") (emphasis added), *available at* http://www.appletonlaw.com/4b3P&T.htm.

131. *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 158 (Feb. 5) (separate opinion of Judge Tanaka) (explaining that the "judgment of a municipal court which gives rise to the responsibility of a State by a *denial of justice* does have an international character when, for instance, a court . . . applies a rule of domestic law which is itself contrary to international law") (emphasis added).

132. Thomas, *supra* note 1, at 460.

133. *Id.* at 444, 463.

134. *See* Coe, *supra* note 40, at 26; Dodge, *supra* note 28, at 916.

prevent selection of British Columbia as the seat of arbitration.[135] Likewise, a chapter 11 tribunal declined to select Ottawa, Toronto, Montreal, or Vancouver as the seat of arbitration, in part because it was "troubled" by the Canadian government's support for *de novo* review of the *Metalclad* award.[136] More broadly, an arbitrator sitting in another chapter 11 dispute warned that "[if] every decision lost by a government is challenged in court . . . and if the courts entertain review on the merits, the efficacy of the chapter 11 process will be seriously damaged, and [the NAFTA Parties] may weaken respect for [investor-state arbitration] worldwide."[137]

Unfortunately, heightened judicial review represents only one of two means recently adopted by the NAFTA Parties to assert control over the chapter 11 process, to purge their responsibility for liabilities already imposed, and to immunize themselves against the prospect of liability in pending matters. On July 31, the trade ministers of Canada, Mexico, and the United States adopted certain Notes of Interpretation regarding the obligation under article 1105(1) to treat NAFTA investors "in accordance with international law," which involves affording them "fair and equitable treatment."[138]

When read in light of the NAFTA Parties' litigation positions, the Notes seem to reduce article 1105(1) to the customary international law prohibition of egregious, outrageous, or shocking governmental conduct.[139] Furthermore, the NAFTA Parties assert that the Notes govern the outcome of claims that antedate July 31,[140] even in cases where tribunals have already rendered partial-final awards on liability.[141]

---

135. *See* Coe, *supra* note 40, at 22, n.97.

136. United Parcel Serv. of Am., Inc. v. Canada, Decision of the Tribunal on the Place of Arbitration (Oct. 17, 2001) at paras. 1, 8, 11, 16–19 (NAFTA/UNCITRAL), *available at* http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp.

137. David A. Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10646, 10667 (June 2001), *available in* WESTLAW, 31 ELR 10646, 10677. Professor Gantz currently serves as an arbitrator in Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1.

138. Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, § B [hereinafter Notes], *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp.

139. *See id.* (limiting the scope of Article 1105(1) to "customary international law"). *See also* Pope & Talbot v. Canada, Award on the Merits of Phase 2 (Apr. 10, 2000) at paras. 108–09, 118 (NAFTA/UNCITRAL) (recounting Canada's arguments that Article 1105 only incorporates the customary international law prohibition of egregious, outrageous or shocking governmental conduct), *available at* http://www.appletonlaw.com/4b3P&T.htm.

140. Thomas, *supra* note 1, at 455.

141. The author is informed of Canada's position that the Notes require the *Pope & Talbot* tribunal to revisit its partial-final award of Apr. 10, 2001.

Because the limitations of time and space preclude comprehensive analysis, I must focus on the application of the Notes to pending disputes.[142] While chapter 11 provides no explicit guidance on this issue, article 1131(1) requires tribunals to "decide the issues . . . in accordance with . . . applicable rules of international law."[143] Those rules include two fundamental tenets of procedural justice: (1) equal treatment of the parties,[144] and (2) the principle that "no one may be the judge of his own cause."[145] The NAFTA Parties' use of interpretive statements to determine the outcome of pending disputes in which they have demonstrable interests violates these tenets of procedural justice and undermines the rule of law.[146]

In early 2001, Canada's Minister of International Trade (the Honorable Pierre Pettigrew) "stated repeatedly that Canada is so dissatisfied with chapter 11 that it could never accept a similar clause as part of a hemisphere-wide Free Trade Area of the Americas."[147] In the wake of the *Metalclad* judgment and adoption of the Notes, Pettigrew has become an enthusiastic supporter of chapter 11, referring to it as the embodiment of "basic tenets that most Canadians firmly believe in," which "protect the flow of trade . . . for everyone's benefit" and hold the "key to increasing . . . productivity and . . . prosperity" in North America.[148] Clearly, heightened judicial review

142. I reiterate my position that the Notes constitute an *ultra vires* attempt to amend Article 1105(1). Sir Robert Jennings, former President of the International Court of Justice, reportedly characterized the Notes as "a démarche intended to apply pressure on the tribunal . . . by *amending* the treaty to curtail investor protections." *See* Claimant's Letter Brief at 20 (Sept. 18, 2001), Methanex Corp. v. United States (NAFTA/UNCITRAL) (quoting an enclosed expert opinion of Sir Robert Jennings [hereinafter Jennings Opinion]) (emphasis added), *available as "Methanex Post-Hearing Submission on FTC Interpretation of Article 1105" at* http://www.state.gov/s/l/c5823.htm.

143. NAFTA, *supra* note 13, art. 1131(1), 32 I.L.M. at 645.

144. *See* Charles H. Brower II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 87 (2000). *See also* Pope & Talbot Inc. v. Canada, Decision by Tribunal (Sept. 6, 2000) at para. 1.5 (NAFTA/UNCITRAL) (identifying equality of treatment as an "overriding principle" in NAFTA arbitrations conducted under the UNCITRAL Rules), *available at* http://www.appletonlaw.com/4b3P&T.htm.

145. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. l (1987) (identifying the rule that no one may be judge in his own cause as a general principle that has achieved the status of international law).

146. *See* Jennings Opinion, *supra* note 142 (describing the NAFTA Parties' behavior as inconsistent with "the most elementary rules of the due process").

147. Jim Brown, *Chretien, Pettigrew Insist They're Not at Odds over Free Trade Rules*, CAN. PRESS, Apr. 23, 2001, *available at* 2001 WL 19238201.

148. Hon. Pierre Pettigrew, Address to the C.D. Howe Institute/Munk Centre for International Studies, University of Toronto Special Meeting, "Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose" (Sept. 28, 2001), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104560.htm.

and retroactive interpretive statements have intoxicating properties. But, make no mistake, they emanate from the elevation of sovereign power over individual economic rights and the rule of law. I fear that the enchanting sensation will prove both addictive and unhealthy for the NAFTA Parties.