

# NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back

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With respect to the North American Free Trade Agreement (NAFTA) investor-state claims, three themes emerged during 2001:

- (1) Tribunals went about their jobs establishing a persuasive body of substantive and procedural law.
- (2) Officials who have been defending against NAFTA claims began to demonstrate a kind of coordination and cooperation that is rarely seen on the international economic policy stage; and
- (3) Issues involving the openness and transparency of the dispute settlement process slowly began to crystallize.<sup>1</sup>

In 2001, various Tribunals pressed forward with substantive and procedural decision-making that is bound to have some influence on future arbitrations.<sup>2</sup> NAFTA governments continued to bring challenges to the jurisdiction of Tribunals to hear investors' claims as a matter of course and were consistently refused. These losses did not appear to stem from the practice of NAFTA governments challenging early and often. They have, although, resulted in even wider preliminary challenges, which cannot honestly be seen as actually related to the competence of a Tribunal to hear any particular claim. As the applicable arbitral rules also countenance "preliminary" (rather than strictly jurisdictional) challenges, however, one can expect the practice to continue.

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1. Only one NAFTA Award has been published to date. All available awards, orders, and pleadings are available at <http://www.naftalaw.org> (last visited July 23, 2002).

2. There is no formal rule of precedent for NAFTA investment law awards. See Article 1136(1), *North American Free Trade Agreement*, 6 Sept. 1992, ch. 17, [1993] 32 I.L.M. 296, annex 1901.2.

As a function of such preliminary challenges, we have had the benefit of receiving more NAFTA law quicker than might have been expected if we had waited for full merit awards. There was a very significant merit award in 2001 in *Pope & Talbot, Inc. v. Canada*. There were also two weighty hearings on damages in which the NAFTA governments continued to demonstrate that they will apply the WTO-approach to international economic law (IEL) litigation to investor-state claims, which can essentially be characterized as “total war.”<sup>3</sup>

“Total war,” in short, means never settling a dispute when there remains an opportunity to further argue about the case. At the WTO, “total war” means always appealing to the WTO Appellate Body, even when it is obvious that a loss will ensue. It often means taking ineffective means to comply with a ruling, when the opportunity to force the complaining party into further arbitration sessions remains available. In the NAFTA investment law context, it means launching multiple jurisdictional challenges (1) at the beginning of an arbitration, (2) during the merits of an arbitration (if not resolved beyond doubt with a preliminary award), and (3) even during the damages phase of an arbitration (reasserting that all the arguments that failed during the merits phase take on new relevance in terms of limiting recovery for a lost claim). For NAFTA investment law, “total war” now also means resorting to judicial review of Tribunal decisions even if they simply do not fall within the class of “final awards” that are supposed to be reviewable under NAFTA 1136 and the applicable UNCITRAL Model Law statute.

Why have the NAFTA governments taken such an approach? They have done so, in short, because they can do so and because they believe they must. Litigation by NAFTA governments is not subject to the same kind of cost-benefit analysis that is applied to litigation by private parties. If a politician does not believe that settlement is in his or her political interest, the cost of litigation becomes a secondary concern. The same is not true for private parties, particularly the small- and medium-sized enterprises, which often must resort to investor-state claims to obtain a satisfactory remedy that might be obtained by a larger enterprise or a domestic competitor through other methods such as lobbying.

Moreover, it appears that Tribunals are consistently demonstrating their unwillingness to ascribe a narrow meaning to the scope and availability of NAFTA investment law. The governmental officials who have been advocating a narrow approach, therefore, have turned to each other, and to other mechanisms, for solace and potential redress.<sup>4</sup> Faced with an unprecedented loss of control of the IEL dispute settlement process (because NAFTA investment arbitrations can be launched without the approval of the investor’s home government), and concerned about the significant ramifications of limiting the scope of discretion of the regulators who act as they see fit, NAFTA trade-policy bureaucrats and investment lawyers began to strike back.

This strike back came through a liberal use of *every conceivable litigation* stalling tactic and a never-ending attempt to obtain judicial review of interlocutory Tribunal orders and awards.<sup>5</sup> NAFTA trade policy bureaucrats and investment lawyers also had three ministers

3. *Pope & Talbot, Inc. v. Canada* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002).

4. There is very little evidence that NAFTA investment law is actually occupying the minds of political leaders, as opposed to the minds of trade lawyers, a vocal minority of globalization opponents, and the bureaucrats who must deal with them.

5. The government of Canada, for example, has applied to the federal court of Canada to review an interim merits award of the Tribunal in *S.D. Myers, Inc. v. Canada* even though the damages phase only took place in

jointly sign a document that purports to change one of the primary norms of NAFTA investment law (NAFTA Article 1105). Sitting as the NAFTA Free Trade Commission, these three ministers issued a statement on interpretation of Article 1105 that was apparently intended to correct certain “errors” in interpretation that had been made by the first three NAFTA Tribunals to rule in favor of investors’ claims.<sup>6</sup>

Whether the ministers’ statement will have the desired effect remains to be seen. The primary objective of the statement is to limit the treatment required under Article 1105 (“treatment in accordance with international law, including fair and equitable treatment and full protection and security”<sup>7</sup>) to treatment in accordance with the customary international law minimum standard of treatment of aliens. The ministers and their officials have argued that the latter standard is what was actually intended when NAFTA was signed. Each has argued (unsuccessfully) before three NAFTA Tribunals that the latter standard imposes an extremely high threshold of impropriety before international liability can be found.

There are two essential problems with this interpretation of the text of NAFTA Article 1105. First, it is simply not supported in the text of the provision and reflects neither the current state of IEL nor the broad objectives of the NAFTA, which must inform any such interpretation. Accordingly, it appears fairly clear that the ministers have attempted to amend NAFTA Article 1105 using an interpretative authority (found in Article 1131(2)) rather than the appropriate amendment provision (Article 2202).<sup>8</sup> Second, even if Tribunals conclude that they must obey the FTC and employ the new standard, it is quite possible that they would conclude that the standard is not as minimal as government officials would like it. Tribunals may also conclude that the most-favored-nation provisions of NAFTA would require the new standard to rise to the level of similar standards in other bilateral investment treaties agreed to by NAFTA parties since 1994.

In spite of these apparent shortcomings the three NAFTA governments have argued extensively before the Tribunal in *Methanex Corp. v. United States* that the FTC statement completely forecloses the investor’s claim under NAFTA Article 1105 (leaving only an Article 1102 claim discussed below).<sup>9</sup> Moreover, in the damages phase of *Pope & Talbot*, the three NAFTA governments actually argued the application of the FTC statement—even though the Tribunal issued its finding of a breach of NAFTA Article 1105 months before the ministers issued their statement on interpretation. The NAFTA governments argued that the FTC statement must be obeyed so that it would no longer be possible to award damages based upon an earlier finding that differed from the new standard of treatment.<sup>10</sup>

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November 2001 and an award is still pending. *S.D. Myers, Inc. v. Canada* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002). More surprisingly, in the opening weeks of 2002, the government of Canada launched an unprecedented judicial review of a procedural order issued by the Tribunal in *United Parcel Serv. v. Canada* apparently because it did not approve of the Tribunals choice of Washington D.C. as the *situs* of that arbitration. *United Parcel Serv. v. Canada* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002).

6. North American Free Trade Commission, *Notes of interpretation of certain Chapter 11 provisions* (NAFTA Free Trade Comm. July 31, 2001), available at <http://www.naftalaw.org> (last visited Aug. 2, 2002).

7. NAFTA art. 1105(1).

8. The choosing of a far more dubious course of action, under Article 1131(2), over a clear-cut NAFTA amendment was most likely due to a concern that once it is agreed that NAFTA should be “opened up” for one provision, there are many other issues and disputes that would beg consideration for amendment as well.

9. *Methanex Corp. v. United States* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002).

The three NAFTA governments have a shared common cause in making these arguments before the *Pope & Talbot* and *Methanex* Tribunals, as they apparently have in every claim that has proceeded to arbitration thus far. In fact, there is no evidence available that any NAFTA government has ever provided an Article 1128 submission to a sitting tribunal that contained arguments in favor of the position of investors from its own territory. The days when a government would lend its support for a claim made by its investor against another country appear to have passed into history.<sup>11</sup>

It is difficult to confirm this rather disturbing fact, however, because few of the arbitrations commenced against the NAFTA governments are accessible to public scrutiny. To be sure, the awards of NAFTA Tribunals involving claims against Canada and the United States are always made public, but most of the arguments remain confidential.<sup>12</sup> In the case of claims against Mexico, even awards may be withheld from public scrutiny at the discretion of either the Mexican government or the disputing investor.

Thus far only one arbitration—the *Methanex* claim—can really be said to be sufficiently open for public scrutiny.<sup>13</sup> The parties have made most written arguments public. The United States, however, has chosen not to post certain influential documents (such as opinions provided by the renowned international law scholar and jurist, Sir Robert Jennings) on its Web site with the remainder of the investor's arguments.<sup>14</sup> Moreover, despite a *commitment to openness* issued by the FTC when it issued its July 31 statement on Article 1105, only Canada has made notices of intent to commence arbitration by disgruntled investors available on its Web site.<sup>15</sup> As a result, the public (including NAFTA opponents, opposition politicians, and other interested investors) may not be aware of potential arbitrations being contemplated by disgruntle NAFTA investors.<sup>16</sup>

At least two Tribunals, nonetheless, have concluded that they have the authority to request and/or receive *amicus* submissions from interested non-parties. This addresses some of the earlier concerns that have been expressed by NAFTA opponents about secret Tribunals rendering damaging decisions that are withheld from the public eye. The question

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10. Since this paper was written the *Pope & Talbot* Tribunal issued its award on damages, which contained a scathing—but not unjustified—attack on the NAFTA governments (and Canadian officials in particular) for their refusals to provide access (or even acknowledge the existence of) negotiating texts and their attempt to effectively amend the NAFTA through the FTC Commission Statement. As a result, at least two other sitting tribunals have entertained further submissions on the impact of the *Pope* award. See *Pope & Talbot, Inc. v. Canada* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited Aug. 2, 2002).

11. One can only wonder what kind of impact this sea change in North American government circles will have on the treatment of foreign investments in less developed countries, whose conduct is regulated under very similar bilateral investment treaty obligations.

12. This position, of course, reflects the status quo in WTO cases—where argumentation is carried on largely behind closed doors, but final panel decisions are always made public.

13. Since this paper was written, Canadian officials agreed to an offer from UPS to have completely open proceedings in its claim against Canada for unfair and discriminatory treatment at the hands of Canada Post Corporation, a state enterprise owned and controlled by Canada. The jurisdictional hearing was held in July 2001, with a live, local video feed for all interested attendees.

14. Some of these opinions are available at <http://www.naftalaw.org> (last visited July 23, 2002).

15. All public notices of intent are available at <http://www.naftalaw.org> (last visited July 23, 2002).

16. While the lack of publication of notices of intent may assist the parties to a dispute in quietly arriving at an acceptable settlement, it also assists NAFTA governments in ensuring that more potential claims are not brought—particularly if the time-limitation for bringing such a claim (which is essentially two years and nine months from the date upon which the investor should have known about the breach and the harm it occasioned) expires while the first dispute is quietly settled.

remains, however, as to whether this authority will ever be exercised because potential *amicus* submissions: (1) will likely be limited to submissions on the interpretation of NAFTA provisions (and not how those provisions should be applied to the facts of a particular case), (2) could be inhibited by a lack of access to the written arguments of the parties, and (3) would not be necessary if the government lawyers defending the claim did a good job of canvassing the relevant legal issues themselves.<sup>17</sup> Regardless of the fact that *amicus* submissions are rarely necessary, their potential use does ensure that NAFTA arbitration remains potentially more open than any other IEL dispute settlement model being used today.<sup>18</sup>

## I. Cases Brought by U.S. Investors Against the Government of Mexico

The year 2001 saw at least two new arbitrations commenced against the government of Mexico by U.S. investors, as well as the re-commencement of a claim by the Waste Management Corporation (after having had its first claim dismissed due to its allegedly insufficient waiver of the right to pursue simultaneous local remedies while it pursued its NAFTA arbitration). At least two notices of intent were received from U.S. investors, although only one was made public (by the investors). The progress of *Waste Mgmt. v. Mexico*<sup>19</sup> (involving a claim for frustration of an exclusive waste management services concession agreement) remains unknown,<sup>20</sup> and the arbitration in *Karpa v. Mexico*<sup>21</sup> (involving a claim for damages caused by the withholding of tax concessions to the investor and its investment) is rumored to have been completed although a final award had not yet materialized by the end of 2001.<sup>22</sup>

The most interesting development for NAFTA investment law in Mexico actually took place in Vancouver, British Columbia—the *situs* of the arbitration in *Metalclad Corp. v. Mexico*,<sup>23</sup>—which resulted in the first award in favor of an investor in 2000. In early 2001, a local provincial court judge held a week of hearings concerning the Mexican government's challenge to the *Metalclad* Tribunal's award. The judge was asked to review the award on a strict standard of correctness under the local arbitration statute, rather than the international arbitration statute based upon the UNCITRAL Model Law. The UNCITRAL Model Law has far more narrow grounds for review (including fundamental public policy objections and basic jurisdictional competence). Despite having correctly chosen the inter-

17. *Amicus* submissions must be limited to interpretation of various NAFTA provisions because, under NAFTA Article 1128, that is all that a non-disputing NAFTA government is entitled to make during its own submissions. As the authority to accept submissions is enjoyed by the Tribunal only in so far as it assists the Tribunal in making the most informed decision possible (as is the case in the WTO context), it is submitted that the occasion will be rare when *amicus* submissions are actually required by a particular Tribunal.

18. This is because NAFTA arbitration under either the UNCITRAL or the ICSID Additional Facility Rules is—first and foremost—consensual. Accordingly, if the parties to a dispute want to keep things quiet, the arbitration will be no more closed than a WTO arbitration. If the parties want to provide for more transparent and open proceedings, the option exists for them to do so (assuming that the NAFTA governments each meant what they said when they committed themselves to openness in the July 31, 2001 FTC statement).

19. *Waste Mgmt. v. Mexico* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002).

20. Since this paper was written, a jurisdictional award was delivered in favor of the claimant. See *Waste Mgmt. v. Mexico* (NAFTA Arb. 2002), available at <http://www.naftalaw.org> (last visited Aug. 2, 2002).

21. *Karpa v. Mexico* (NAFTA Arb. 2000), available at <http://www.naftalaw.org> (last visited July 23, 2002).

22. Since this paper was written, the Tribunal apparently requested additional submissions to be made on the relationship between the seeking of an *amparo* order in Mexico and the waiver provisions of NAFTA Article 1121. No other information is available concerning the outcome of the claim.

23. *Metalclad Corp. v. Mexico* (NAFTA Arb. 2001), available at <http://naftalaw.org> (last visited July 23, 2002).

national arbitration statute, the judge delved into an intensive review of the merits of the *Metalclad* award. This merits review was based on the pretence that the Tribunal exceeded its jurisdiction under the arbitration when it arrived at an interpretation of Article 1105 and international law that the local judge apparently could not countenance.

Of course, it was not the local judge's place to second-guess the *Metalclad* Tribunal's interpretation of Article 1105 by determining that, because he personally disagreed with its interpretation of Article 1105, the Tribunal did not have the jurisdiction to arrive at such a result. The question of jurisdiction under the UNCITRAL Model Law is one of competence. Once the judge determined that the Tribunal (which was chaired by the eminent international law scholar Sir Eli Lauterpacht) was entitled to interpret and apply Article 1105 in a properly commenced NAFTA arbitration, he should not have imposed his view of the provision over the one chosen expert Tribunal, regardless of how many government lawyers appeared before him to argue for such a result.<sup>24</sup>

Nonetheless, despite overturning the specific findings of the Tribunal regarding Article 1105, the judge accepted one of its findings under Article 1110 (the expropriation provision) and thus did not overturn the award of damages itself. He ultimately escaped the scrutiny of an appellate court's review because the parties were eventually able to reach a suitable settlement. The most significant ramification of the *Metalclad* judicial review, as such, was probably the chill that the local judge's decision sent into the international commercial arbitration community. Thus Canadian commercial lawyers have been called upon by their European and other foreign colleagues to explain how British Columbia could be trusted as a location for future arbitrations given the rough ride experienced by the *Metalclad* Tribunal at the hands of a local judge with apparently no international law expertise.

## II. Cases Brought by U.S. Investors Against the Government of Canada

It did not take long for ramifications of the *Metaclad* decision to materialize in other NAFTA arbitration. In *United Parcel Service v. Canada*, for example, another Tribunal (composed of highly regarded international lawyers) indicated that Canada's arguments for no deference by local courts in the review of international arbitration awards was "troublesome."<sup>25</sup> As described above, other U.S. investors continued to experience the kind of "total war" in two long-running arbitrations: *Pope & Talbot* and *Myers*. In the damages hearings of both of these arbitrations, Canada and the other NAFTA governments provided extensive arguments as to why neither Tribunal had jurisdiction to award any damages even though both had already issued findings of liability. Neither Tribunal was able to provide a final award before 2001 came to an end.

24. Lawyers for the Governments of Canada, Mexico, and even the Canadian Province of Quebec appeared before the judge to argue that the tribunal "had gotten it wrong." One could speculate as to the potential impact of such an impressive display of government unity on a local judge from Vancouver, who viewed a much smaller—although certainly talented—contingent of lawyers representing the Californian investor. There is particular irony in the fact that a U.S. investor, which was forced to seek protection under the NAFTA because of its shabby treatment at the hands of Mexican justice, found itself reprising the role of "foreigner" before another apparently unfriendly court in British Columbia—min order to protect its hard-fought NAFTA award.

25. *UPS Claim*, Order on Place of Arbitration at para. 11. As mentioned above, in January 2002, Canada surprisingly attempted to seek judicial review of the UPS Tribunal's order, even though neither the NAFTA nor the UNCITRAL Model Law countenance judicial review of anything less than the final award of a Tribunal.

Even though the *Myers* Tribunal did not provide a final award in 2001, the government of Canada commenced a judicial review of its partial award (deciding the merits). In those proceedings, the federal court of Canada followed the lead of the *Metalclad* court in refusing intervention by third parties and setting a timetable for hearings in 2002 (possibly after the Tribunal issues its final award).

Two more notices of intent were received by the government of Canada from U.S. investors in 2001. Crompton Corporation, whose investment produces and markets pesticides in Canada, has alleged that Canadian health policy officials reneged on a promise to conduct a full review of one of the ingredients of its primary product in exchange for Crompton Canada's voluntary withdrawal of the product from the market. Officials then imposed a ban on the product, allegedly without appropriate consultation or payment of compensation. Likewise, Trammel Crow Company has alleged that Canada Post Corporation, acting as an agent of the government of Canada, unfairly and inappropriately conducted a services procurement process that caused significant harm to the investor and its investment.<sup>26</sup>

The most significant news for U.S. NAFTA investors in Canada, however, was the second partial merits award in the *Pope & Talbot* claim. The award provided thoughtful interpretations of Articles 1002 and 1105 that will likely guide future Tribunals. For Article 1105, the Tribunal concluded that international law and fair and equitable treatment should be considered separate standards that must be accorded to NAFTA investments. The Tribunal proceeded to articulate a conception of procedural justice for the fair and equitable standard and determined that the Canadian government officials breached that standard when it subjected the investor to an arbitrary and unreasonable audit process after a NAFTA claim was launched.<sup>27</sup>

The Tribunal, however, declined the opportunity to find the measure in question substantively unfair or inequitable and therefore a breach of Article 1105. It further refused the Investor's arguments that Article 1102 entitled it to the best regulatory treatment available to any of its domestic competitors regardless of the circumstances. Instead, the Tribunal concluded that a NAFTA government could justify providing less favorable treatment to a foreign investor or investment than that enjoyed by its domestic competitors if it could demonstrate that the reason for doing so was rationally connected to a valid policy goal.

Some might conclude that this analysis imports the "aim and effects test" into Article 1102, which has been consistently rejected for the national treatment obligation by the WTO Appellate Body. The Tribunal's analysis, however, does not require a claimant to prove that a discriminatory intent could be evidenced in the effects of a measure. In fact, it explicitly acknowledges that NAFTA Article 1102 can be breached in absence of discriminatory intent—whenever anything less than the best treatment is provided to a NAFTA investor rather than that which is received by any other domestic competitor (or group of competitors). The key difference in the *Pope & Talbot* Tribunal's analysis is that it provides discretion for a Tribunal to consider whether any difference in levels of treatment cannot

26. Since this paper was written, Trammel Crow's claim was quietly settled by Canada—although the notation on its Web site indicated merely that the notice of intent had been "withdrawn." See <http://www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp> (last visited Aug. 2, 2002).

27. Since this paper was written, the *Pope* Tribunal articulated a very similar vision of the minimum standard of procedural justice required under Article 1105 in its more recent damages award, although this time based upon a customary international law analysis (rather than an "additive" analysis of the treaty text). See *Pope & Talbot, Inc. v. Canada* (NAFTA Arb. 2002), available at <http://www.naftalaw.org> (last visited Aug. 2, 2002).

be rationally connected to a legitimate policy goal. A policy goal likely will not be considered legitimate if it is arbitrary, discriminatory, or otherwise unjustifiable.<sup>28</sup>

### III. Cases Brought Against the Government of the United States

The climate for NAFTA investment disputes in the United States in 2001 could best be described as “the calm before the storm.” Four arbitrations were well underway in 2001, and at least one more notice of intent was submitted. Although, only two significant Tribunal decisions were made public: the order of the *Methanex* Tribunal concerning *amicus* submissions and the preliminary award of the Tribunal in *Loewen Group, Inc. v. United States*.<sup>29</sup>

The *Methanex* Tribunal was the first to determine that it did have the authority to accept *amicus* submissions under the UNCITRAL Rules. As described above, the *UPS* Tribunal would follow suit later in 2001. It is important to note, however, that neither Tribunal actually accepted any *amicus* submissions. Neither Tribunal granted access to would-be *amici* to oral proceedings or to written submissions not otherwise published by the parties. Further, neither Tribunal indicated that its potential acceptance of any *amici* submission would be governed by factors other than its need to make the best (i.e., most informed) decision possible.

The *Methanex* Tribunal also concluded hearings on various preliminary merit issues in the summer of 2001. This Tribunal’s award, however, was delayed by an additional series of written arguments exchanged between the parties (as well as lawyers for the governments of Canada and Mexico) concerning the potential application of the FTC statement on Article 1105. An award should be expected early in 2002. Significant awards should also be provided at some point during 2002 from the Tribunals in *ADF Group Inc. v. United States*<sup>30</sup> (a claim alleging that Federal Buy America regulations breach national treatment and performance requirement obligations when adopted and applied by a state government building a highway interchange with the assistance of federal funds, where the jurisdictional phase is underway) and in *Mondev Int’l Ltd. v. United States*<sup>31</sup> (a claim that American courts have abetted an illegal taking of the investor’s interest in a real estate development originally commenced in a public-private partnership with the City of Boston, where the merits phase is apparently well underway).

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28. This analysis is appropriate given that the Tribunals in *Pope & Talbot* and *Myers* (as well as the panel in the state-to-state NAFTA Chapter 20 dispute: *USA—In Re Cross-Border Trucking Serv.*—available at <http://www.naftalaw.org> (last visited Aug. 2, 2002)), were faced with the dilemma of interpreting a national treatment provision, such as Article 1102, without any applicable general exemption provision. Whereas *prima facie* breaches of GATT or GATS national treatment obligations can be remedied if the objectives of offending measures are necessary or related to certain legitimate policy goals, wholly justifiable measures that breach NAFTA Article 1102 would otherwise still require payment of compensation to affected investors. Under the *Pope & Talbot* Tribunal’s analysis, a Tribunal would determine whether differences in treatment could be justified by its rational connection to a justifiable policy goal. However, if the policy goal is not justifiable, or the means employed to achieve it are discriminatory or arbitrary, it is likely that liability would attach under this analysis.

29. *The Loewen Group, Inc. v. United States* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002).

30. *ADF Group, Inc. v. United States* (NAFTA Arb. 2001), available at <http://www.naftalaw.org> (last visited July 23, 2002).

31. *Mondev Int’l Ltd. v. United States* (NAFTA Arb. 1999), available at <http://www.naftalaw.org> (last visited July 23, 2002).



Earlier in 2001, the Tribunal in *Loewen* issued its preliminary merit award, dismissing or putting off all of the jurisdictional arguments made by the U.S. government lawyers against both investors. Essentially, the *Loewen* Tribunal reaffirmed the well-established proposition of international law—that a decision of the judicial arm of a government constitutes a measure to which state liability attaches (and that the court decisions before it accordingly fell within the scope of NAFTA Chapter 11). The *Loewen* claim involved an allegation that jingoistic and racist sentiments were allowed to infect and color a Mississippi jury's decision-making, resulting in an outrageous damage award of \$500,000,000, which mortally wounded the investment in question. This decision was allegedly compounded by an appellate court's effectively expropriatory decision to refuse to grant a waiver of its 150 percent bond requirement so that the investment could proceed with its appeal. A final merit award (probably the first ever BIT award to be made against the U.S. government after decades of practice) is also expected in 2002.

#### IV. Conclusion: Fasten Your Seatbelts!

The year 2001 demonstrated that NAFTA government officials were not about to allow control of the development of substantive NAFTA investment law to fall into the hands of expert Tribunals. As Mexican officials stated in 2000 (after experiencing early victories in both the *Azinian* and *Waste Management* claims) Tribunals would be given the opportunity to make the right decisions. If they failed to do so, only then would Mexico agree to consider changes to NAFTA. After experiencing a loss in *Metalclad* and witnessing two more losses suffered by Canada in the *Myers* and *Pope & Talbot* claims, Mexican officials apparently changed their minds concerning Article 1105. Worried about potential losses in claims such as in *Mondev*, *Loewen*, and *Methanex* it appears that U.S. officials also agreed to the long-standing Canadian government's requests for changes to be made.

Until July 31, 2001 the United States and Mexico were only willing to participate in what appears to be an unwritten pact never to argue in favor of its own investor before a NAFTA Tribunal. Since the FTC issued its statement, rumors persist that officials are considering changes to other NAFTA provisions (particularly NAFTA Article 1110, expropriation). The official policy of each country remains solidly in support of these provisions as currently drafted (and appearing in numerous bilateral investment agreements involving other countries). But this process of quiet NAFTA reinterpretation should give cause for some concern. On the other hand, if NAFTA Tribunals continue to reject the coordinated submissions of government officials and the FTC statement as untenable under international law, the fireworks may be spectacular in 2002.

