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NAFTA's Article 1110 - Can Regulation Be Expropriation

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In recent months, a number of corporate investors in Canada, the United States, and Mexico have filed claims seeking compensation for economic losses that they allegedly suffered as a result of environmental laws and other regulatory measures. These claims have sparked considerable debate and controversy.1 Environmental and labor groups argue that such claims pose a fundamental challenge to a government’s ability to regulate private economic activity in the public interest.2 Some trade lawyers have defended the suits as simply enforcing an international obligation to compensate foreign investors for the expropriation of their property.3 Others, however, have expressed concern that using NAFTA’s chapter 11 to challenge the traditional regulatory functions of government could lead to a political backlash and that, in response, governments may adopt a restricted interpretation of the chapter or eliminate it altogether.4 The Canadian government has proposed that NAFTA member countries adopt an interpretation of chapter 11’s expropriation provisions, which would exclude “normal regulation” from their reach.5 However, Mexico has expressed hesitancy concerning this proposal.6

S.J.D. Candidate, Harvard Law School. LL.B, University of Toronto (1989). The author is Senior Labor Law Advisor with the Secretariat of the Commission for Labor Cooperation, the international institution established under the labor side agreement to NAFTA. The views expressed in this article are those of the author and not of the Commission for Labor Cooperation or any party to the North American Agreement for Labor Cooperation.

2. See id.
4. See id. at 5 for the views of J. Patrick Berry.
At the center of this debate lies the legal question of whether a bona fide regulatory measure with a public purpose can constitute “expropriation” for the purposes of NAFTA’s article 1110. Article 1110(1) provides:

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

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.

Thus, whenever a party directly or indirectly nationalizes, expropriates, or takes a measure tantamount to nationalizing or expropriating an investment, it may be held liable for the payment of compensation at fair market value in accordance with articles 1110(2)-(6). Part B of chapter 11 allows a foreign investor to obtain direct compensation from a member government for a breach of article 1110. The dispute resolution mechanism contained in Part B is the first provision of its kind to be included in a multilateral trade or investment agreement.

A requirement to pay compensation could directly undermine many types of property use regulation. Regulations are often aimed directly at recalibrating the balance between the property owners’ interests and social objectives by reallocating risks, redefining entitlements, and shifting costs. Requiring compensation would in effect reverse such a course of action. This has been particularly evident to practitioners in the field of environmental protection, where the application of the long-recognized “polluter pays” principle, requiring the polluter to “bear the expenses of carrying out [pollution prevention] measures decided by public authorities to ensure that the environment is an acceptable state,” could be entirely undone by compensation requirements.

This article is intended to provide a preliminary analysis of some key questions raised by the debates over recent chapter 11 claims. It will consider some implications of the general arguments underlying those claims for the traditional regulatory function of governments and whether those arguments find support in international law. I will argue that (1) the regulatory measures impugned by the claims cannot easily be distinguished from a wide range of laws regulating economic activity for public purposes without resorting to political judgments concerning priorities among such purposes and the effectiveness of the means by which they are pursued; (2) because of the breadth and flexibility of the class of property rights protected by chapter 11, using an economic effects-

based test to determine whether compensation is owed would generate potential liability for a wide range of regulatory measures; and (3) the wording of article 1110 and relevant case law plausibly support excluding bona fide regulatory measures from the scope of the article's compensation obligations, but the law on this point remains ambiguous and uncertain. I will close by sounding a note of caution about using domestic law as a source of doctrine to close gaps in the relevant international law because of some key differences in the treatment of property rights in Canada and the United States.

I. The Scope of Claims Made under Article 1110.

Information on chapter 11 cases is somewhat difficult to obtain due to the confidentiality of proceedings. A brief summary of available information with respect to five claims by investors alleging that NAFTA parties have violated article 1110 will illustrate the general themes of these claims and the challenges that they pose to the regulation of property use.

A. THE METALCLAD CASE.10

On January 2, 1997, the Metalclad Corporation filed a claim with the International Center for the Settlement of Investment Disputes against the government of Mexico.11 The claim alleges that the decision of the Governor of the State of San Luis Potosi to deny Quimica Omega de Mexico, a Metalclad subsidiary, permission to operate a waste management facility constituted an expropriation of that facility. Metalclad had been authorized by the Mexican federal government to operate the facility in 1995 and was aware at that time that both the construction and operation of such facilities are subject to environmental regulation. Metalclad claims to have invested $22 million in preparing the facility for operation. In response to protests by environmentalists and local citizens the Governor ordered that the facility be shut down. The decision was supported by a geological study allegedly showing that the facility was located on an underground alluvial stream and could contaminate the local water supply. The Governor went on to declare that the site of the facility would form part of a much larger ecological reserve. Metalclad claims the full value of the facility, which it values at $90 million dollars.

B. THE ETHYL CASE.

U.S.-based Ethyl Corporation filed a Notice of Arbitration in April 1997 and then followed up with a Statement of Claim in October 1997. It alleged that a Canadian federal law banning the import or trade between provinces of methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive, expropriated its Canadian investment in

10. This summary is based upon information contained in J. Martin Wagner, supra note 8, at 488-91; see also Mexicans to Counter U.S. Firm in NAFTA Investor-State Case, [Vol.5, No.4] AM. TRADE, Feb 19, 1998, at 5.

11. See Wagner, supra note 8, at 489, n.100.
the production and sale of MMT. Ethyl contended that the ban was a discriminatory measure designed to protect domestic industry rather than a legitimate environmental or health protection measure. The Canadian government claimed that MMT posed health risks. In July 1998, following a ruling by a Canadian domestic tribunal that the MMT trade prohibition violated Canada’s Agreement on Internal Trade, the Canadian government settled Ethyl’s claim. Under the terms of the settlement the Canadian government paid Ethyl approximately U.S. $13 million and issued a letter to Ethyl stating that there is no scientific evidence showing that MMT poses a health risk.

C. THE S.D. MYERS CASE.

In November 1995, the Canadian government prohibited the export of PCB wastes from Canada to the United States. Earlier measures had prohibited such exports to all other countries. The stated grounds for the ban included complying with international obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and ensuring that volatile PCB’s did not return to contaminate the Canadian environment in the event that they were not properly disposed of in the United States. The ban lasted for fifteen months, after which time it was rescinded with respect to treatment and destruction but not landfilling, on the basis of the Canadian government’s review of new environmental measures enacted in the United States to deal with imported PCB waste. In July 1998, U.S.-based S.D. Myers Corporation alleged in a Notice of Arbitration that during its life the ban had prevented it from completing its then existing contracts to process, distribute, and treat PCB-contaminated waste from customers in Canada. S.D. Myers claimed that this action was tantamount to expropriation of those contracts.


13. See Wagner, supra note 8, at 491.


16. See Agreement on Internal Trade, R.S.C. 1996, ch. 17 (Can.); see also Wagner, supra note 8, at 495.


20. See Wagner, supra note 8, at 499-500.

D. **The Loewen Case.**

In October 1998, the Canadian-based Loewen Corporation launched a claim contending that a Mississippi state law requiring it to post a bond totaling 125 percent of a $500 million jury award of punitive damages against it pending appeal of that award amounted to uncompensated expropriation.\(^{22}\) The company alleged that the posting of such a bond would require it to pay fees that would exceed, in its view, the value of a generous settlement of the claim against it that had resulted in the punitive damage award. Loewen eventually settled the case for U.S. $150 million. Its chapter 11 claim included a claim for the value of the settlement and for its stock's loss in value subsequent to the settlement.

E. **The Methanex Case.**

In July 1999, Canadian-based Methanex Corp. issued a Notice of Arbitration stating that it would seek compensation for the effects of the California government's decision to phase out the use of methyl tertiary butyl ether (MTBE) by the end of year 2002.\(^{23}\) Methanex produces methanol, one of two key ingredients in MTBE. The company argued in its Notice that MTBE is the second largest end-use for methanol, and the California ban deprived it of one of its largest markets, thus expropriating a substantial part of its market capitalization and potential profits. It estimates the value of its claim at U.S. $970,000,000.

1. **Common Themes: Challenges to Regulations based on their Economic Effects.**

Each claim seeks compensation for the effects of government regulatory measures, as opposed to a transfer of property rights by the government to itself or another entity. Moreover, leaving aside the questions raised in the Ethyl case concerning the bona fides of the impugned regulations,\(^{24}\) in each of these cases the measures with respect to which

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24. See Notice of Arbitration, *supra* note 12, at 4, *cited in* Wagner, *supra* note 8, at 493. The Ethyl case also raises the question of what margin of error will be allowed to regulators under the standard of review employed by chapter 11 tribunals. Environmentalists have warned that the threat of compensation actions under chapter 11 could have a chilling effect upon environmental regulation by raising the threat that, in the absence of full scientific proof to justify such measures, compensation could be required. This in turn would undermine the "precautionary principle," which requires that environmental protection measures not be delayed in the absence of full scientific certainty concerning the causes, nature, and extent of an environmental hazard. See United Nations *Conference on Environment & Development: Rio Declaration on the Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (1992), princ. 15, reprinted in 31 I.L.M. 874, 879 ("Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."); see other instruments cited in Wagner, *supra* note 8, at 532, n.281. Consideration of the standard of review of regulatory action is beyond the scope of this paper.
compensation is sought serve an apparent public purpose. In Metalclad, Ethyl, S.D. Myers, and Methanex, the measures in question are prohibitions, with the apparent aim of environmental protection, on the selling of specified products or services. In the Loewen case, the measure in question appears to be designed to ensure that a party appealing a judgment does not use the right of appeal as a means of obtaining time during which to dispose of assets that might be seized in satisfaction of a judgment.

Moreover, each claim points, as a basis for a right to compensation, to a mix of alleged interference with property rights and resulting substantial economic effects on the claimant's property. The Notice of Arbitration in the Ethyl case states that an expropriation exists "whenever there is a substantial and unreasonable interference with the enjoyment of a property right," though it offers no definition of "substantial" or "unreasonable." The Notice goes on to claim a right to compensation based on the effects, known beforehand to the government, of the MMT ban on its business. S.D. Myers bases its claim on allegations that the effect of the ban on PCB exports was to totally frustrate its Canadian operations. Methanex's Notice of Intent states that because the California government's phasing out of MTBE will end Methanex's U.S. business of selling methanol for use of MTBE in California there is a taking of Methanex's U.S. business and investment in its U.S. subsidiary. The Loewen claim goes further, asserting that "under international law an expropriation occurs where government action interferes with an alien's use and enjoyment of property." Chapter 11 is thus treated as providing investors with an indemnity against the risk of economic losses due to at least some forms of regulation that substantially limit their ability to exercise property rights. Below, I will demonstrate that it is difficult to separate the regulations impugned by the claims from types of regulations that form longstanding parts of the legal and social landscape in North America. For this purpose I will draw upon examples from the field of labor and employment law. I will also argue that if the economic effects of a regulation are considered in determining whether compensation is owed, the scope for compensation claims cannot easily be limited without narrowing the scope of protected property interests, which would run contrary to the language of chapter 11.

2. The Potential Reach of the Claims: From Property into Politics?

While opponents and critics of international investment agreements have often voiced concern that such agreements could directly impede environmental regulation efforts by creating compensation obligations, they have seldom expressed the same concerns with respect to labor regulation. However, if a substantial interference with the

27. See MANN & VON MILTKE, supra note 12.
28. See generally Notice of Intent, supra note 23.
right to sell a product or service gives rise to a right to compensation, then it is hard to see how measures such as the "Hot Goods" provisions of the U.S. Fair Labor Standards Act (FLSA) could avoid falling within the class of measures potentially creating liability. Those provisions prohibit the shipment of any goods worked on by employees paid in violation of minimum wage or overtime rules of the FLSA or in an establishment in which oppressive child labor is used. They empower the U.S. Department of Labor to seize goods and block their shipment in order to enforce these rules.

More generally, it is hard to see how interfering with rights to sell products and services can be distinguished from interference with rights to purchase the fundamental inputs into the production process. It could be argued, on the basis of the principle, that "labor is not a commodity," that labor and employment relations are different from other economic relations and therefore are open to uncompensated regulation in a way that other economic relations may not be. However, it is not clear that the premise of this argument is distinguishable from the "polluter pays" principle, which is clearly challenged by some of the claims. Both have achieved recognition as important international legal principles. Neither is clearly given priority over chapter 11 in the text of NAFTA. While international recognition of the polluter pays principle is more recent, chronological order hardly provides a basis for principled distinctions between the level of immunity from compensation obligations afforded to different types of regulatory measures.

Labor laws impose a number of constraints upon employers' decisions with respect to who to hire and what terms and conditions of employment to provide. These constraints have cost implications. In Canada and the United States, labor relations laws require employers to bargain with the certified representative of the majority of a bargaining unit of their employees, thus constraining the freedom of employers to contract for labor as they choose. Collective bargaining laws can lead to higher prices for an employer's workforce. More dramatically, they can also, in cases of collective bargaining disputes, lead to the involuntary closure of an employer's operation during a strike. This is particularly the case where the law prevents the hiring of replacement workers. For example, under Mexican labor law an employer facing a strike may not use replacement workers, forcing the operation to temporarily shut down. Similar measures can be found in some Canadian jurisdictions. Needless to say, these rules can make entire plants unprofitable for the duration of any strike action.

32. See id. §§ 12(a) and 15(a).
34. See id.
35. See id.
Labor laws can also reach into management's decision-making authority. Labor laws in Canada and the United States prohibit employers from acting upon the basis of anti-union motivation.40 Thus, in some Canadian jurisdictions, an employer that contracts out an operation in order to avoid unionization may be ordered to reopen that operation and rehire unionized workers.41 Co-determination laws in Germany grant unions representing workers in companies of a certain size fifty percent of the seats on the board of directors of the company.42 It is interesting to note that when these laws were introduced, a serious scholarly effort was made to argue that, with respect to foreign-owned corporations operating in Germany, this legislation gave rise to compensation obligations under international law.43

A similar exercise could no doubt be repeated with examples from other fields of public law. Thus, it appears that the argument underpinning the claims—that regulations that substantially restrict property rights and result in substantial loss of property rights value should be compensable—could potentially interfere with a wide range of powers to regulate social and economic life. In theory, the public purposes served by regulation could be accommodated consistently with that argument in one of two ways. First, priorities could be established among regulatory purposes, with more pressing purposes receiving an exemption from compensation obligations. A variation on this approach involves balancing property holder interests against competing public purposes. Second, the scope of protected interests could be reduced. Each approach will be briefly addressed in turn.

a. A Pathway into Politics? - Priorities and Balancing of Public Purposes.

The obvious objection to giving priority to some public purposes over others is that this is precisely the function of domestic legislatures and would thus constitute an overt imposition of value judgments by unelected international officials upon domestic politics. Some might argue that a measure of deference to domestic legislatures could be secured by using a balancing test that would, for example, weigh the reasonableness of the regulatory objective, the proportionality of the regulatory means used to achieve that objective, and the extent of interference with property rights. This is in effect what the European Court of Justice did once it read protection of property rights into European Community law.44

There is, however, a set of related legal and political problems with applying a balancing test under NAFTA's chapter 11. There is no express authorization for this type of test

40. See Secretariat of the Commission for Labor Cooperation, supra note 36.
42. See Martin Baethge and Harold Wolf, Continuity and Change in the German Model of Industrial Relations, in Employment Relations in a Changing World Economy (T. Kochan & M. Piore eds., 1995).
43. Wilhelm Wengler, Parity Codetermination in West German Companies and West German Companies and International Law, 9 Vand. J. Transnat'l L. 1 (1976). Similar claims were ultimately litigated without success under German domestic law, but never pressed under international law. See Rudolph Dolzer, Indirect Expropriation and Alien Property, 1 ICSID Review - Foreign Invest. L.J. 41 (1986).
in the text of the agreement. Moreover, outside of Europe, international law has not adopted the use of a balancing approach, but has instead generally sought to distinguish categorically between “takings,” “expropriations,” and the like on the one hand, and non-compensable measures on the other.\textsuperscript{45} Explicitly, if not implicitly, U.S. domestic law similarly uses a categorical rather than a balancing approach to constitutional property rights protection.\textsuperscript{46} While Canada’s Charter of Rights and Freedoms requires a judicial assessment of the reasonableness and proportionality of certain human rights infringements, the drafters of the Charter expressly chose not to include property rights within this constitutional regime.\textsuperscript{47} Thus, the adoption of a balancing approach under NAFTA would run counter to several legal currents of more direct relevance to North American international legal relations than the jurisprudence of the European Courts.

From a political perspective, while balancing tests seek to build a measure of deference into legal decision-making rules, they nonetheless require to a certain degree, explicitly or implicitly, the weighing of social objectives in relation to each other and in relation to the interests of property owners. They may also require an assessment of the feasibility of different means of achieving social objectives in order to determine the proportionality of regulatory means to ends. While in Canada this kind of judicial assessment appears to have been accepted in relation to human rights protections, this acceptance was on the basis of constitutional language expressly providing for it and following a rejection of such an approach in the realm of property rights protection and economic relations more generally.\textsuperscript{48}

b. Could an Economic Effects-based Compensation Rule be Self-Limiting?

The scope of property rights protection could be limited by restricting the class of property interests or by making only the most serious of economic effects compensable. More specifically, either (1) a narrow definition of the property interests protected by

\textsuperscript{45} When the European Court of Justice recognized the protection of property rights under Community law it drew upon the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights under that Convention. That jurisprudence interprets article 1 of the First Protocol to the Convention as authorizing judicial weighing of proportionality and reasonableness of regulatory objectives in relation to effects on property interests. Article 1 of the Protocol to the European Convention on Human Rights provides:

\begin{quote}
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
\end{quote}

\textit{See generally} Antinori, \textit{supra} note 44, at 1796-1808. (With respect to the categorical approach employed elsewhere, see notes below and accompanying text.)

\textsuperscript{46} \textit{See generally} Philip Weinberg, \textit{Essay: Del Monte Dunes v. City of Monterey: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?}, 26 B.C. ENVTL AFF. L. REV. 315 (1999); Wagner, \textit{supra} note 8, at 502-10.


\textsuperscript{48} \textit{See id.}
compensation obligations or (2) limiting compensation obligations to cases in which the economic value of the property in question is totally or almost totally destroyed would achieve this limiting effect. However, each approach is contradicted or undermined by the breadth of the definition of property rights used in chapter 11.

NAFTA article 1139 defines "investment" for the purposes of chapter 11 so as to cover a wide range of property interests including, among other things, various equity and debt securities, some types of loans, and, in articles 1139(g) and (h):

- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
  - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey contracts or concessions, or
  - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

The broad language of article 1139 appears to cover both the replacement value of most forms of business property and the interests such as reasonable expectations of profit. Moreover, it is unlikely to be read narrowly given that international law has traditionally recognized that expropriation compensation claims may be made in respect of a wide range of property interests.\(^{49}\)

It could be argued that the article 1110 claims limit themselves to seeking compensation for regulations that have the effect of entirely or substantially destroying the economic value of the complainant's property, and only such regulatory measures should give rise to compensation liability. However, this attempt to limit the reach of chapter 11 is undermined by the endless variation of the forms that property rights take.\(^{50}\) Many claims to things of value can come to be treated as property rights, and, as noted above, most business property rights interests will be protected under chapter 11. Established property interests, such as ownership rights in a business, can be divided into many components: bundles of customer and supplier contracts, intellectual property rights, ownership of a subsidiary corporation, and so on. These rights can in turn be broken down into various rights of use, to exclude others from, or to alienate all or part of the property interest.

Property rights can thus be redefined or subdivided so as to isolate the interests most affected by regulation and thus create a compensation liability.\(^{51}\) For example, suppose

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49. See Dolzer, supra note 43, at 44-47; Charles Brower & Jason Brueschke, The Iran - United States Claims Tribunal 372-75 (1998); Giorgio Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 Recueil des Cours 251, 381 ("All Rights and interests having an economic content come into play, including immaterial and contractual rights.").

50. Contemporary conceptions of property rights are informed by the thinking of early twentieth century legal realists, who tend to conceive of property rights as bundles of rights that could be (and in the modern economy routinely are) disassembled and recombined into different configurations. Mary Jane Radin, Reinterpreting Property (1993); Roberto M. Unger, What Should Legal Analysis Become? (1996).

51. Radin describes this move as a strategy of conceptual severance. See Radin, supra note 50, at 127-28.
that the government prohibits the sale of a type of fertilizer. An ownership interest in a large diversified enterprise producing the fertilizer would probably not on the whole be sufficiently affected to form the subject of a compensation claim. However, a patent that it holds on a key ingredient in fertilizer, or a set of contracts to sell the fertilizer, probably would be, as would a small undiversified enterprise producing nothing but this fertilizer. Similarly, in the S.D. Myers case the property interests affected by the impugned regulatory measure were a set of contracts to transport and dispose of PCB waste. In the Methanex cases the investor complains of a loss of customer base, goodwill, market for its product, capital investments made in developing and serving the MTBE market, and capital investments in its U.S. subsidiary.

On the whole it is difficult to imagine a new regulatory measure that would not undermine the value of some property rights and thus become the potential object of a compensation claim. An astute producer, anticipating the possibility of regulation of its products, might even arrange its investments so as to receive some compensation in the event of regulation.

Thus, the broad scope of property protection sought by the claims, combined with NAFTA's extensive definition of protected property interests, has the potential to create compensation obligations where property rights meet a wide range of regulatory measures. Imposing compensation obligations on such a basis could profoundly alter the current balance between regulation and property owner autonomy in the NAFTA countries. Thus, regulatory room to maneuver probably cannot be secured consistently with an economic effects test for compensable measures. In North America a balancing test would arguably lack political legitimacy and a sound legal basis. At the end of the day, it appears that either some or all regulatory measures will be categorically distinguished from measures giving rise to compensation obligations under chapter 11 or many such measures will run the risk generating compensation claims.

II. NAFTA's Chapter 11 - Can Regulation be Expropriation?

In its response to the Ethyl case, the Canadian government drew a distinction between the taking of property and regulation. It argued that only the former gave rise to compensation obligations under article 1110, because regulatory measures falling within the "police powers" of the state are treated by international law as outside the scope of a "taking" of property.

Under article 1110, the Canadian government's position raises the following questions:

1. Which regulatory measures fall within the police power of the state?
2. Can such regulatory measures constitute a direct or indirect expropriation or nationalization?
3. Can they be tantamount to expropriation or nationalization?

52. See S.D. Myers case, supra note 21.
53. See Notice of Intent, supra note 23, at 3.
54. See MANN & VON MILTKE, supra note 26, at 42.
A. Police Powers.

International tribunals and legal scholars have long recognized the principle that a state is not liable for economic injury that is a consequence of bona fide regulation within the accepted police power of the state.\(^{55}\) However, the description of the police power offered in these sources remains vague. At the core of the concept appears to be the power to regulate in the interests of public health, safety, morals, or welfare.\(^{56}\) One knowledgeable writer has added that "anti-trust, consumer protection, securities, environmental protection, land planning and other legislation are non-compensable takings" because such regulations are regarded as essential to the efficient functioning of the state.\(^{57}\)

However, at least one review of international tribunal decisions has concluded that the public purpose of a measure is not by itself sufficient to establish the exercise of a police power.\(^{58}\) Moreover, the language of article 1110 appears to be consistent with this view. It is the combination of both a public purpose and a bona fide regulatory measure that defines an exercise of the police power. Since the range of public purposes included within the police power appears to be wide and relatively undefined, and since deference can be expected from international tribunals in the face of a state's assertion of a public purpose,\(^{59}\) the key to understanding the police power exception to international compensation rules lies in the distinction between bona fide regulation and compensable measures.

B. Expropriation, Nationalization, and Measures Tantamount to Expropriation or Nationalization.

NAFTA provides little guidance concerning the meaning of "expropriation" or "nationalization." Neither term is defined in the agreement. While the language of the Preamble to NAFTA suggests an interpretive need to reconcile regulatory flexibility with a predictable commercial framework for investment,\(^{60}\) the agreement does not purport to spell out how that reconciliation should be accomplished.

Treaty provisions are to be interpreted in their context, which includes any agreement relating to the treaty that was made between all the parties in connection with the conclusion of the treaty.\(^{61}\) Arguably the North American Agreement for Environmental Cooperation (NAAEC) and the North American Agreement for Labor Cooperation con-

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58. See Aldrich, *supra* note 55, at 609 (concluding that "Liability is not affected by the fact that the state has acted to legitimate economic and social reasons in accordance with its laws.").


60. See Preamble, providing, among other things, that the governments of Canada, Mexico, and the United States of America resolved to "Ensure a predictable commercial framework for business planning and investment;" "Preserve their flexibility to safeguard the public welfare;" "Promote sustainable development;" "Strengthen the development and enforcement of environmental laws and regulations;" and "Protect, enhance and enforce basic workers' rights."

stitute such agreements and thus form part of the context in which chapter 11 of NAFTA should be interpreted. These agreements include clear commitments on the part of NAFTA member countries to provide for high labor and environmental standards and to enforce those standards effectively. This suggests that NAFTA's chapter 11 should be interpreted so as to provide the member states with scope to regulate, at least in the areas on environmental and labor protection. However, neither side agreement provides any direct guidance with respect to how such regulatory measures are distinguished from compensable expropriations, and whether regulation can constitute or be tantamount to an expropriation.

The interpretive provisions of chapter 11 addressing the relationship between social policy goals and its investment rules provide little further direction. In fact, they do little more than indicate that, in some cases, measures designed to secure such goals may be inconsistent with those rules, though not necessarily with article 1110.

What little guidance is provided in NAFTA must be gleaned indirectly from subjects that are expressly included or excluded from the scope of article 1110. Article 1110(7) provides that article 1110 does not apply to the revocation, limitation, or creation of intellectual property rights, or to the issuance of compulsory intellectual property rights licenses, provided that such measures are consistent with chapter 17 of NAFTA. Chapter 17 sets out minimum standards for the protection of intellectual property. Article 1110(7) appears to be designed to carve out intellectual property from the investment protection provisions of chapter 11, deferring to the more complete set of rules in chapter 17. The unqualified language of article 1110(7) implies that but for this carve-out, revoking, limiting, creating, or

62. Wagner, supra note 8, at 529.

63. The NAAEC affirms in its preamble "the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection" and states that those goals also form part of the objectives of the NAAEC (Preamble, art. 1). The Agreement goes on to provide that each country shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve upon those laws and regulations (art. 3). The NAAEC uses a broad definition of environmental law (art. 45). Similarly, the NAALC recalls the resolve of the countries in NAFTA to protect, enhance, and enforce basic workers' rights, and commits the parties to ensuring that their laws and regulations provide for high labor standards and to continuing to strive to improve those standards in that light (Preamble, art. 2). Like the NAAEC's definition of environmental law, the NAALC uses a broad definition of labor law (art. 49).

64. Article 1101(4) commands those interpreting chapter 11 to not construe it so as to prevent a party from providing a range of public services (such as policing or social welfare) "in a manner that is not inconsistent" with that chapter. This wording seems to allow interpretations of chapter 11 that prevent a party from providing those services in a manner that is inconsistent with the chapter. It also suggests, without providing more information, that in some circumstances such services could be provided in a way that is inconsistent with chapter 11. Similarly, article 1114(1) provides that nothing in chapter 11 shall be construed to prevent a party from adopting any environmental measure otherwise consistent with that chapter. The net effect of the "otherwise consistent" qualifier in article 1114(1) is to indicate that an environmental measure will not necessarily comply with chapter 11 simply by virtue of being an environmental measure.

65. The drafters, for example, could have indicated that its provisions were "for greater certainty," as they did in article 1110(8).
requiring compulsory licensing of intellectual property, or by extension other property, could fall within the expropriation and compensation provisions of article 1110(1).

Article 2103(6) specifically provides that article 1110 shall apply to taxation measures (while requiring investors seeking to challenge such measures to abide by the rulings of domestic tax authorities), indicating that in some cases at least such measures could trigger article 1110's compensation obligations.66

On the other hand, article 1110(8) provides "for greater certainty" that a non-discriminatory measure of general application shall not be considered a measure tantamount to expropriation of a debt security or loan solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt. Since article 1110(8) is provided "for greater certainty," it can be inferred that the measures that it expressly excludes from the scope of article 1110(1)'s obligations are simply an example of a more general class of measures that fall outside that article's scope.

The class of measures expressly referred to in article 1110(8) could easily include a wide range of government actions, from starkly redistributive laws to technical production or product regulations. For example, the priority for income tax obligations over obligations to secured creditors in Canadian and U.S. bankruptcy law could lead directly to a debtor's defaulting on a loan obligation. A similar measure is found in employment legislation in a number of Canadian jurisdictions deeming a part of an employer's funds to constitute a trust in favor of its employees for the purposes of meeting certain remuneration obligations to those employees.67 Obligations under these trust arrangements can take priority over the claims of some creditors. On the other hand, article 1110(8) could also cover ordinary regulatory measures that raise the costs of doing business, such as production process pollution controls, and happen to trigger the insolvency of a company owing money to an investor under a debt obligation. One could probably imagine as many different examples of article 1110(8) measures as there are ways for indebted enterprises to encounter government regulation. These considerations suggest that a wide range of regulatory measures may affect the value of an investment without constituting an expropriation or a measure tantamount to one.

A measure tantamount to an expropriation is one effectively or functionally equivalent to an expropriation.68 Article 1110(8) implies that a measure resulting in the total destruction of the value of an investment, the most dramatic of economic effects, is not necessarily tantamount to an expropriation. It is also important to note that article 1110(8) refers only

66. NAFTA article 2101 does not apply the exceptions to trade in goods rules to chapter 11. This could be read as suggesting that exceptions such as those do not apply to NAFTA's investment rules. On the other hand, it could be read as an implied recognition that a police powers exception to those rules is understood to exist. Given these ambiguities, it appears that little weight can be attached to the fact that article 2101 does not apply to chapter 11.


68. This interpretation is consistent with the language used in the French and Spanish versions of NAFTA. The French version uses the term "equivalent" for "tantamount" and the Spanish version uses "equivalente." both are terms that refer to things that are equal or identical in value function or effect. See Le Nouveau Petit Robert (Paris: Dictionnaires le Robert, 1996) and Diccionario de la Lengua Espanola, Vigesima, Primera Edition (Spain: Real Academic Espanola, 1996).
to measures tantamount to expropriation, and not to expropriation per se, whether direct or indirect. This suggests that the concept of expropriation, whether direct or indirect, cannot be defined solely by reference to the economic effects of a measure and thus is most plausibly essentially defined by its legal nature as a transaction.\(^{69}\)

Finally, it should be noted that simply having a public purpose does not exclude a measure from the category of expropriations. Indeed, public purpose alone cannot be sufficient to exempt a measure from article 1110's scope, because such a purpose is one of the four conditions that an expropriation or nationalization must meet, along with the payment of compensation, for such measures to escape outright prohibition under article 1110. On the other hand, this does not necessarily imply that no public purpose is sufficient to exclude a measure from the category of expropriations, it simply implies that not all public purposes will be sufficient to do so.

To sum up, the wording of article 1110 suggests that

1. Whether a measure constitutes an expropriation, direct or indirect, depends upon the legal nature of the measure and not necessarily upon its economic consequences. However, the legal nature of the measure should not be determined overly formalistically, since an expropriation can be accomplished directly or indirectly.

2. A measure tantamount to an expropriation is one that is effectively or functionally equivalent to an expropriation.

3. A wide range of measures may affect the value of an investment without constituting an expropriation or a measure tantamount to one.

4. Not all measures destroying the value of an investment are tantamount to an expropriation, nor, a fortiori, are they an expropriation per se.

5. The fact that a measure has a public purpose does not categorically exempt it from the compensation obligations of article 1110. However, it remains possible that some public purposes will result in such exemption.

6. The range of measures that can trigger compensation obligations under article 1110 includes taxation measures, and probably includes revocation, creation, or limitation of property rights, compulsory property licensing laws, and similar measures. This does not necessarily imply that all such measures will trigger compensation obligations.

These propositions leave vague the distinction between compensable and non-compensation measures under chapter 11. On the side of compensable measures, we lack a specific description of the legal transaction of expropriation, and of the kind of functional or effective equivalency between an expropriation and a measure tantamount to one. If a measure is not tantamount to expropriation because it causes the destruction of the

\(^{69}\) This would suggest that the indirectness or directness of an expropriation does not refer to the way in which a set of economic effects are achieved, but rather to the way that the legal transaction of expropriation is carried out. Whether an expropriation is carried out indirectly or directly, the end result is a legal one and is the same. Thus, the scope of the set of measures that are tantamount, that is, equivalent to an expropriation will be the same whether the expropriation is carried out directly or indirectly. Thus, there is no meaningful distinction between measures tantamount to direct expropriation and measures tantamount to indirect expropriation.
value of an investment, what in the alternative or in addition is required? Similar questions arise on the side of non-compensable measures. If some regulatory measures are non-compensable, how are they distinguished from those of taxation, licensing, or other measures that are, under certain circumstances at least, potentially compensable measures? Would a test of the bona fides of the measure suffice for this purpose?

Modern tribunals deciding expropriation claims have relied principally on judicial and arbitral precedent. On the question of defining expropriation, however, the international jurisprudence remains relatively undeveloped. Historically, international legal decisions and scholarship have been far more preoccupied with the rules governing compensation for expropriation than with defining expropriation itself. In most cases confronted by international tribunals it has been clear that an expropriation has taken place by almost any definition of the term. Perhaps as a result, the historical record of international tribunal decisions provides a scant articulation of which measures give rise to compensation obligations. Indeed, as late as 1986, a careful reviewer of international tribunal decisions, international investment treaties, and state practice concluded that the boundary line between regulation and expropriation remained essentially undefined in international law.

The leading recent source of decisions on the international law of expropriation is the Iran-United States Claims Tribunal. The decisions of this tribunal constitute the most extensive set of investor-state arbitrations ever undertaken. Events following the overthrow of the Shah of Iran in 1979 led to claims for compensation both by American property owners in Iran and Iranian property owners in the United States. The Tribunal has rendered approximately fifty awards addressing claims for the taking of property arising out of those events.

72. The point of contention, particularly in the immediate post-colonial period, generally concerned whether and to what extent compensation might be owed for expropriated property rights, particularly rights to exploit natural resources that had been acquired by foreigners during colonial rule. Arguments often focused on the legitimacy of the means through which such property was acquired and the nature of national sovereignty over natural resources, as newly emerging nation states sought to justify nationalizations of industries and enterprises formerly controlled by individuals or corporations based in the colonial powers. Similar debates surrounded the expropriation of industries and enterprises under nationalist economic programs in Latin America, most notably, for present purposes, the nationalization of the oil industry in Mexico in 1938. In this context there was little need to develop an extensive mapping of the boundaries of expropriation, because the existence of expropriation itself was seldom at issue. The desire to assure investors that they would be fully compensated in the event of a resurgence of nationalist economic programs appears to have informed the drafting of chapter 11. Article 1110 devotes far more attention to defining the measures, means, and timing of compensation than to defining expropriation itself (1110(2)-(6)). See generally COMEAUX & KINSELLA, supra note 71, at ch. 3; SORNORAIH, supra note 57, at ch. 7.
73. See Dolzer, supra note 43.
74. MANN & VON MILTKE, supra note 26, at 39-40.
75. BROWER & BRUESCHKE, supra note 49, at 369.
However, some caution is required in interpreting the Tribunal's case law. The foundation of the Tribunal's jurisdiction is article II, paragraph 1 of the Claims Settlement Declaration, which gave the Tribunal authority to resolve disputes arising out of "expropriations and other measures affecting property rights." This language clearly encompasses a greater range of measures than expropriations. While there is some disagreement over whether it extends the Tribunal's jurisdiction beyond the categories of acts already recognized by international law as giving rise to compensation obligations, the Claims Settlement Declaration's mandate certainly appears no less broad than the "measures tantamount" language of NAFTA's article 1101, and is arguably broader. Moreover, as one member of the Tribunal has noted, the breadth of its jurisdiction may have led to a certain degree of laxity on the part of the Tribunal in maintaining definitional distinctions between terms such as "expropriation," "appropriation," "deprivation," "taking," and "other measures affecting property rights." Moreover, "the outcome of the cases seems to have depended more upon the facts surrounding the alleged taking than the description of the underlying act."

 Nonetheless, the Tribunal's jurisprudence can provide some useful points of reference. First, the Tribunal's definition of expropriation can be seen as establishing at least an outer bound for the definition of the term, given the already noted tendency of the Tribunal to allow the boundaries between "expropriation" and "other measures affecting property rights" to become indistinct. Second, because of the breadth of its mandate, a Tribunal decision that a measure did not give rise to compensation obligations under the Claims Settlement Declaration can be taken as a reliable indicator that similar measures should not give rise to such liability under chapter 11.

In Amoco International Finance Corporation, the Tribunal equated expropriation with "a compulsory transfer of property rights." This unsurprising definition is consistent with other international law precedent. However, the Tribunal did not limit the class of compensable measures to formal expropriations. Rather, it tended instead to use the broader concept of compensable " takings." This concept should be understood in light of four groups of cases giving different general formulations of it. The first adopts an "unreasonable interference" test. The second requires "interference to such an extent that the property rights are rendered so useless that they must be deemed to have been expropriated." The third, "non-ephemeral deprivation of the fundamental rights of ownership." These last two groups of cases tend to rely upon each other for support and

78. BROWER & BRUESCHKE, supra note 49, at 380-81.
79. Id. at 382.
82. BROWER & BRUESCHKE, supra note 49, at 378.
83. Id.
84. Id.
thus their tests need to be interpreted in light of each other. Finally, in a fourth line of cases, the Tribunal has examined whether the “effective” use of the property has been lost. Taken together, these formulations suggest that, for there to be a compensable taking, there must be a sufficient degree of interference with the most important rights of ownership for that interference to be equivalent to a transfer of the property. As noted above, the concept of a “compensable taking” used by the Tribunal arguably constitutes an outer bound for the definitions of “indirect expropriation” and “measures tantamount to expropriation” under chapter 11 of NAFTA.

The Tribunal found that compensation was owed in cases where Iran unilaterally took possession or ownership of an enterprise. On the theory that the right to participate in the management of an enterprise is the most fundamental right of its majority owner, the Tribunal also found that the non-temporary appointment by Iran of a manager to run the enterprise constituted a compensable taking. In the Amoco International Financial Corporation case, the Tribunal found that compensation was owed on account of the Iranian government’s unilateral annulment of its agreement with the complainant under which Amoco obtained the right to exploit Iranian oil resources and on the basis of which the company made substantial investments. In general, it appears that where the government took control of an enterprise or asset from its owner, the Tribunal found liability, regardless of whether that asset had been formally expropriated. This is in line with earlier international jurisprudence. The Tribunal made these findings even where it acknowledged the public purposes behind the measures.

85. Id.
86. Id. at 379.
87. BROWER & BRUESCHKE, supra note 49, at 384-85, and cases cited therein.
88. Id. at 395-410, and cases cited therein.
90. An early seminal case is Case Concerning Interests in Polish Upper Silesia (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 7 (May 25, 1926). In that case, the claim was based upon agreements between Germany and Poland for the protection of the German minority in Upper Silesia in which Poland had undertaken not to expropriate certain property of German nationals. The Polish government transferred from a German owner to itself the property rights to a piece of land with an industrial plant. A compensation claim was made by a company holding contractual rights to administer, use, and benefit from the industrial plant. The Court found in favor of the contract holder. Among its reasons, the Court stated that “the rights of Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland.” Id. at 44. In his influential article, supra note 55, Professor G.C. Christie reviewed a number of decisions by the International Claims Commission and its successor the Foreign Claims Settlement Commission, domestic U.S. tribunals established to rule on the validity of claims by U.S. Nationals based on war damage and nationalizations of property in the former Soviet Union and former Soviet bloc countries including Yugoslavia, Czechoslovakia, Romania, Hungary, Poland, and Bulgaria. The payment of the claims was often provided for under agreements between the United States and those countries, and the funds to be distributed were funds belonging to the governments of those countries and which had been frozen by the United States government, and under the terms of those agreements transferred into accounts for the purpose of claims payments. Among the decisions of the tribunals were rulings that:
On the other hand, it appears that in cases other than those where the government took possession of property or control of the management of an enterprise or unilaterally voided a concession contract, the Tribunal denied compensation, even where the measure in question undermined the value of the property, provided that the measure had a bona fide public purpose.

For example, the Tribunal found that a law rearranging the way in which payments were made to construction companies did not constitute a compensable taking. Similarly, a law establishing certain authentication requirements before a bank may honor a check, as a result of which the claimant's check was not honored, was found not to constitute "an unreasonable interference" with the claimant's property rights. These decisions are consistent with that in Sporrong and Lonnroth v. Sweden, the leading case under the European Convention on Human Rights. There, the European Court of Human Rights found that an order in place for twenty-three years giving the city of Stockholm the power to expropriate the claimants' property, taken together with another law prohibiting new buildings or significant changes to the existing houses on their land, did not amount to a deprivation of possessions. The Court noted that while the property was more difficult to sell because of these measures, selling it was not impossible and the plaintiffs still had use of it while the measures were in place.

More interestingly, in a series of decisions the Tribunal found that state measures preventing the conversion of bank accounts into foreign exchange and their removal from the country did not constitute compensable takings. In Sea-Land Service, Inc. v.

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* Measures by the Czechoslovak government requiring that landlords deposit rental payments with the government and giving the government the right to select tenants for rental dwellings, amounted to expropriation on the grounds that the owner was by virtue of these measures "precluded from the free and unrestricted use of such realty and its fruits, and even though he remains the record owner he is to all intents and purposes practically . . . managing and collecting . . . [rent] for the government." Id. at 315.


93. Harza Engineering Co. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 499, 504 (1982). The Tribunal declined in this case to determine "how unreasonable the interference must be to constitute a taking of property."


95. Id. at 24-25.

96. See cases discussed in BROWER & BRUESCHKE, supra note 49, at 391-94, and in LILLICH & BARSTOW, supra note 77, at 241. These decisions would appear to be consistent with a line of case discussed in Christie, supra note 55, at 318:

"In several interesting proposed decisions formulated in the processing of Czechoslovakian claims, however, the Commission held that certain fairly sub-
Iran, the Tribunal denied compensation for the failure of the Iranian central bank to authorize a bank account transfer. A Tribunal majority held that a central bank is invested with a certain margin of discretion in granting permission for such transfers into foreign currency, and there was insufficient evidence to establish that the bank had intentionally obstructed the transfer application or unlawfully interfered with Sea-Land’s use of its account, or otherwise exercised this discretion in an unreasonable or discriminatory way. In two other cases, Tribunal majorities denied compensation for restrictions on international capital transfers authorized under the International Monetary Fund Agreement. The majorities did not address the question of whether such capital transfer restrictions could ever give rise to compensation obligations. In one case the dissenting Tribunal member would have ruled that compensation was owed on the view that the exchange control power had been exercised in a confiscatory manner and not in good faith.

These decisions can be contrasted with another line of cases in which the Tribunal found that preventing the export of productive equipment deprived the owner of effective use, benefit, and control of the equipment, thus constituting a compensable taking. It appears that the Tribunal recognized a legitimate regulatory purpose behind exchange controls, buttressed by the terms of the International Monetary Fund Agreement, whereas in the equipment removal cases no such purpose supported the government’s defense.

This interpretation is consistent with an earlier ruling of the Permanent Court of International Justice. In the Oscar Chinn case, the Court held that the Belgian government owed no compensation to a shipper who claimed that his business had been bankrupted by the actions of that government in subsidizing a state-controlled competitor. The parties to the case appear to have accepted that the Belgian government acted in order to provide low cost river transportation services to businesses in the Belgian Congo at the onset of a severe economic downturn. In reaching its decision the Court stated

98. Id. at 167. The majority went on to note that the funds remained available to Sea-Land for use within Iran. Id. However, as the dissent another case pointed out, for all practical purposes a U.S. National could not use Rials in Iran in the years immediately following the revolution. Hood Corporation v. Iran, 7 Iran-U.S. Cl. Trib. Rep. 36, 50 (dissenting opinion of Mosk J.) [hereinafter Hood Cooperation].
100. See Hood Corporation, supra note 98, at 49 (dissenting opinion of Mosk J.).
101. See cases discussed in BROWER & BRUESCHKE, supra note 49, at 387-88.
102. See LILLICH & BARSTOW, supra note 77, at 256 (“[A]ny conclusions that exchange controls have amounted to expropriation under customary international law would appear to presuppose that they go beyond what is permitted by the Articles of Agreement of the I.M.F.”).
104. This eventually became known as the Great Depression.
that it was agnostic about whether as a factual matter Chinn's bankruptcy was caused by the Belgian government's measures or by his alleged earlier financial troubles.\textsuperscript{105} It appears to have treated what happened to Chinn as part and parcel of a change in business circumstances resulting from general economic conditions.\textsuperscript{106} The narrow implication of this finding is that a government may act to stimulate economic activity in times of severe recession, even if this has the effect of bankrupting an enterprise, without being liable for compensation. Arguably, analogies to measures taken in response to other pressing public purposes could be drawn.

III. Conclusion.

The tests articulated by the Iran-United States Claims Tribunals to separate compensable and non-compensable measures tended, as did those of earlier Tribunals,\textsuperscript{107} to be broadly and vaguely worded. Taken on their face, some versions (such as the "unreasonable interference" theory of compensable takings) of the test offer investors an opportunity to argue that regulatory measures that have a substantial economic impact on the value of their property rights should be compensable. However, these tests need to be understood in relation to the fact situations that have thus far actually given rise to liability. The case law does not on the whole support using an economic effects test as the key determinant of compensation liability. The concept of formal expropriation appears to have been limited, in general, to actual transfers of title from a property owner to the government or another entity. Tribunals have on the whole not applied the broader category of compensable takings to bona fide regulations of property use, even where such regulation results in the loss to the owner of most, if not all, viable economic uses of the property. Compensable "taking" findings have generally been limited to cases in which the government actually took possession or control of an enterprise or other substantial property interest, formally voided a set of property rights that an investor had relied upon in making further investments, or without a bona fide regulatory purpose so restricted the use of the property as to deprive the owner of any benefit of it.

There is no apparent reason why the terms "indirect expropriation" and "measures tantamount to expropriation" in article 1110 should not be interpreted consistently with this understanding of the case law. Defining expropriation as a compulsory transfer of property and measures tantamount to expropriation as non-temporary deprivations of some or all of a limited class of legal rights, and holding that regulatory measures would not give rise to compensation obligations provided that they are bona fide is consistent with each of the implications of article 1110's language identified above.

However, some caveats are in order with respect to these conclusions. Nearly every scholar who has attempted to map the definition of "indirect expropriation" or "compensable takings" in international law has concluded that it is rife with ambiguity.\textsuperscript{108}

\textsuperscript{105} 1934 P.C.I.J. at 75.
\textsuperscript{106} Id. at 88.
\textsuperscript{107} See Dolzer, supra note 43; Sacerdoti, supra note 49.
Similarly, an internal memo prepared by the Canadian government in response to the Ethyl case notes that the line between takings and regulation is uncertain. This is perhaps not surprising given the sparseness of the case law and the political controversy surrounding its development. In any event, there appears to be an inevitable measure of uncertainty to be attached to any general conclusions in this area of law.

One key area of uncertainty lies in the issue of whether an investor who is deprived of the rights to use an investment to the extent that it is no longer economically viable may be denied compensation on the basis that this was the result of a bona fide regulatory measure. I have suggested above that such a result would be consistent with the state of the case law. However, the jurisprudence does not in general squarely face this issue.

This is an important ambiguity. Assessing the extent of deprivation of rights to use an investment according to its remaining economic viability inevitably opens the decision-maker to considering economic effects of impugned government measures. The extent to which economic effects are considered may be crucial to the outcome of cases, such as the S.D. Myers claim, in which the use value of an investment was allegedly destroyed by an apparently bona fide regulatory measure.

The United States has a dense jurisprudence addressing the question of when regulation amounts to a compensable taking under the United States Constitution. Subject to certain qualifications, that jurisprudence has specifically considered the economic effects of regulations in determining whether they give rise to compensation obligations. Some scholars have suggested that Tribunals established under chapter 11 may draw upon the domestic law of NAFTA member countries as a source of general principles of international law that may close gaps in the international jurisprudence and that U.S. jurisprudence may prove an important source in this regard.

109. MANN & VON MILTKE, supra note 26, at 42.
110. See generally Norton, supra note 70; SORNORAJAH, supra note 57.
111. In the Hood Corporation and Dallal cases, the Iran-U.S. Claims Tribunal appears to have assumed without providing reasons that compliance with IMF Agreement provisions sanctioning exchange controls would not give rise to compensation liability. In the Sea-Land case, the Tribunal relied in part upon its finding that the claimant's bank account remained available to the claimant in Rials, for use in Iran. The reasoning in the Chinn decision is cryptic at best.
112. See Wagner, supra note 8, at 502-10. The U.S. Supreme Court's use of economic effects in determining whether a regulatory measure gives rise to compensation liability is constrained by a number of doctrines. The Court has required that investors have reasonable investment-backed expectations, and has applied economic effects analysis to the relevant property rights "bundle... in its entirety" rather than subsets of property rights. However, as discussed above, the latter type of qualification is susceptible to instability. A court or tribunal that is relatively eager to protect property rights may see an entire bundle where others would see only a subset. There is some evidence that some current members of the United States Supreme Court are tending in this direction. See Weinberg, supra note 46. The doctrine of "reasonable investment-backed expectations[s]" incorporates detailed doctrines affirming the relative sanctity of real property as opposed to other commercial property and doctrines of public nuisance developed within the U.S. legal tradition.
I want to close by suggesting caution in drawing upon this source. Importing U.S. case law would run counter to a conscious political choice central to Canadian constitutional law. The constitutional protection of property found in the United States has no counterpart in Canada. This is the result of recent and deliberate political choices to maintain regulatory flexibility in economic matters. Under Canadian law a legislature may enact a statute that expropriates without compensation, provided that it does so by clear language. While most Canadian jurisdictions do in fact provide mechanisms through which compensation for expropriation can be sought, the fact remains that in difficult cases the legislature retains the ultimate right to decide the matter. Article 1110 represents something of a derogation from this principle for the benefit of foreign investors. How much of a derogation it represents will clearly depend upon the breadth of the definition of expropriation under that article. It should not be assumed lightly that the NAFTA parties intended to import U.S. takings jurisprudence, since within Canadian domestic politics a conscious decision was made not to do so.

114. HOGG, supra note 47, at 703-10.
116. HOGG, supra note 47.