

**CONCURRING OPINION OF ARTHUR W. ROVINE
ISSUES OF INDEPENDENT INVESTOR RIGHTS, DIPLOMATIC
PROTECTION AND COUNTERMEASURES**

I append this concurring opinion, focusing on the issues of independent investor rights, diplomatic protection and countermeasures, because I believe, with the greatest respect for my colleagues and their views in this case, that it is important to state clearly that countermeasures cannot, consistently with customary international law and the International Law Commission Articles on State Responsibility, eliminate, supersede, or suspend the rights of NAFTA investors to legal redress should the countermeasures constitute a breach of Chapter Eleven, whether such investor rights are characterized as direct and substantive, or derivative and procedural. In my view, NAFTA investor rights to legal redress for wrongs committed are substantive, but in the final analysis, it makes no difference how they are characterized. In my judgment, Chapter Eleven investor rights to remedies belong to the investor, not the state, and cannot, under the circumstances of this case, customary international law and NAFTA, be suspended or eliminated by countermeasures taken against the state of the investor.

In the instant case, the Tribunal has determined that Respondent's countermeasure defense fails because of the inducement and proportionality issues. Nevertheless, while the Award does not say so explicitly, the analysis of the independent rights issue by the Tribunal majority leaves the implication or suggestion that had the HFCS Tax been held to be a proper countermeasure directed against the U.S. Government, then the Tax would have suspended or eliminated Claimants' right to collect damages under Articles 1102

and 1106 despite the Tribunal’s conclusion that the Tax constituted a breach of those Articles by the Respondent. I believe it important to counter any suggestion of this kind.

The Tribunal majority on this issue states that “The Tribunal believes that the approach supported by the Respondent respects the traditional structure of international law and the object and purpose of Chapter Eleven. The Respondent is correct in its position that Section A of Chapter Eleven sets forth substantive obligations which remain inter-State, without accruing individual rights for the Claimants.”¹

Further, according to the Tribunal majority, “All investors have under Section B is a procedural right to trigger arbitration against the host State. What Section B does is to set up the investor’s exceptional right of action through arbitration that would not otherwise exist under international law, when another NAFTA Party has breached the obligations of Section A.”²

In addition, according to the Tribunal majority, “Chapter Eleven does not provide individual substantive rights for investors, but rather complements the promotion and protection standards of the rules regarding the protection of aliens under customary international law.”³ For the Tribunal majority, an investor is “a secondary right holder”...with “[t]he power to bring international arbitral proceedings under Section B,

¹ Award, p. 57, para. 168.

² Award, p. 58, para. 173.

³ Award, p. 57, para. 171.

mak[ing] the investor the holder of a procedural right, *irrespective of whether this right may be suspended by the NAFTA Parties.*”⁴

I agree that Chapter Eleven “complements the promotion and protection standards of the rules regarding the protection of aliens under customary international law.” But while agreeing with the Tribunal’s conclusions as to liability and damages in this case, I disagree with my colleagues’ formulations addressing NAFTA investors’ individual rights under Chapter Eleven, diplomatic protection, and the implication concerning the possible suspension or defeat of NAFTA investors’ rights through countermeasures. Thus this concurring opinion.

Customary International Law, the ILC Articles on State Responsibility, and Countermeasures.

1. As noted by the Tribunal, a central defense for Respondent in the instant case is that the HFCS tax, even if judged to be a breach of one or more of Articles 1102, 1106 and 1110 of Chapter Eleven, is a countermeasure authorized under customary international law and imposed as a response to alleged U.S. breaches of Chapter Twenty. Thus, Respondent maintains, no international responsibility can properly attach as a result of the Tax. The Tribunal majority has referred in this context to the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts.⁵

⁴ Award, p. 60, para. 177; italics added.

⁵ Award, at page 45, para. 125.

2. Whether and to what extent the ILC Articles, and the Commentaries thereto, constitute accurate restatements of customary international law, and to what extent they represent progressive development of international law, is hardly a matter on which there is general agreement. But for purposes of the instant case, and noting the general acceptance by the parties that the inducement and individual rights issues form part of the requirements for a countermeasures defense (though with disagreement between them on the breadth of the individual rights question), in my judgment an authoritative indication of customary international law on at least one matter, *i.e.*, countermeasures, may be found at Article 49 of the ILC's Articles, and the Commentary thereto, as well as other Articles and Commentaries relevant to countermeasures.⁶

3. Paragraphs 1 and 2 of Article 49 provide as follows:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.⁷

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

4. Significantly, although not noted in the Tribunal's Award, the ILC Commentary to Article 49, at para. 5, provides that countermeasures may "incidentally

⁶ For an important article calling for caution in the interpretation and application of the Articles, see Caron, David D., "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority," 96 *The American Journal of International Law* 857 – 873 (2002). Caron states that "the arbitrators and other decision makers to whom the articles are addressed (particularly the former) may give too much authority (and therefore influence) to the articles" (at p. 858), and that "they are not part of a treaty, and ...it is inappropriate to approach them as if they were" (at p. 868). He states further that "Recognizing that the ILC articles are not themselves a source of law is critical because, as I see it, arbitrators can otherwise defer too easily and uncritically to them," citing the practice of the Iran-U.S. Claims Tribunal (at p. 867).

⁷ Part Two is the Content of the International Responsibility of a State.

affect the position of third States or indeed other third parties” provided that these third parties “have no individual rights in the matter.” There is a similar Commentary to Article 22, which states that “indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside of the scope of Article 22.”⁸ The Articles do not distinguish between procedural rights that may be superseded by countermeasures, and substantive rights that may not. Nor do they distinguish between directly held rights and “derivative” rights. The Commentary to Article 49, paragraph 1 also includes a statement that “Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance.”⁹

5. Claimants rely upon the Commentary to Article 49 concerning third parties, maintaining, correctly in my view, that Claimants possess individual third party investor rights under NAFTA that cannot validly be overridden or suspended by countermeasures Respondent claims to have taken against the U.S. Government for alleged violations of Chapter Twenty. Respondent did not contend that Article 49 and the Commentary thereto were incorrect statements of customary international law or should not be looked to for guidance in the instant case.¹⁰ But Respondent places a far

⁸ Article 22 provides that “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.”

⁹ ILC Articles, at 284.

¹⁰ Respondent states that “The Claimants acknowledge that the Articles on Responsibility of States for International Wrongful Acts adopted by the International Law Commission are ‘an attempt to describe customary international law.’”¹⁰ The phrase “Claimants acknowledge” might thus indicate that the parties are at some level of agreement concerning the application in the instant case of Article 49, as one of the Articles, and the Commentary thereto. See Rejoinder, p. 51, para. 164, fn 159.

heavier emphasis than Claimants on the position that countermeasures under customary international law may properly and adversely affect third-party interests, and that in any event, Claimants, in Respondent's view, possessed no third-party NAFTA rights that could not be suspended or eliminated by the HFCS tax.

6. In its Rejoinder, Respondent defined its view of the limits on countermeasures, stating that:

International law gives Mexico certain rights in the event of a breach of a treaty by another Party. The rights apply across the whole of the treaty and, subject to the minimal legal requirements for the taking of a countermeasure (for example, proportionality, not violating fundamental human rights or *jus cogens*, etc.), these include the right to suspend the performance of any provision of the NAFTA. This is what Mexico has chosen to do.¹¹

7. There is thus a significant difference between the parties with respect to the kinds of third-party rights that are protected from countermeasures. The ILC Commentary to Article 49 refers to "individual rights in the matter," and the Commentary to Article 22 refers to consequential effects of countermeasures on third parties "which do not involve an independent breach of any obligation to those third parties...." These provisions reflect limits on the imposition of countermeasures that are far more strict than those contended for by Respondent.

8. Similarly, at the hearing, Respondent said, with respect to third-party rights, "we accept that if the Claimants have human rights under Chapter Eleven – that is, rights wholly independent of the United States, and so the legality of our treatment vis-à-vis them is wholly unaffected by anything to do with the sweeteners dispute, you can first

¹¹ Rejoinder, p. 52, para. 171, underscoring added.

of all determine that question, but for reasons already given, that is an untenable position, simply untenable.”¹²

9. However, Respondent has cited no authority, and I have seen none, supporting the proposition that under the customary international law of countermeasures, third party investor rights to file claims and collect damages under regional investor protection agreements, such as NAFTA, may be suspended or eliminated by countermeasures directed against the state of the investor. That is not what the Commentaries to Articles 49 and 22 say, nor do they say that there are no direct third party rights possessed by investors under regional or other investment treaties.

10. While Respondent did not contest Claimants’ right to file and argue its claims here, it argued strongly that Claimants had no right to collect damages, even with a Tribunal determination that Respondent breached one or more of Articles 1102, 1106 and 1110 of Chapter Eleven, precisely because of the Tax, ordered by the WTO to be repealed, but characterized as a countermeasure directed against the United States. In sum, according to Respondent, if the United States Government allegedly breached its Chapter Twenty obligations on trade and dispute settlement, Mexico could, for example, expropriate Claimants’ investments in Mexico without having to pay compensation, by means of a measure that would otherwise have been a violation of Chapter Eleven.

11. In addition to Articles 49 and 22, and the Commentaries thereto, Article 50 of the ILC Articles provides that countermeasures “shall not affect” certain basic obligations under international law, including the obligation to refrain from the threat or use of force as embodied in the UN Charter, “obligations for the protection of

¹² Transcript, p. 1320.

fundamental human rights,” obligations of a humanitarian character prohibiting reprisals, and other obligations under peremptory norms of general international law. The commentary to Article 50 (1) (b) on fundamental human rights refers to several human rights treaties.¹³ The Commentary to Article 40 also refers to certain human rights treaties as having a peremptory character or expressing peremptory norms.¹⁴ However, Article 50 and its Commentary and the Articles and Commentaries generally do not characterize “fundamental human rights” as the basic limit for countermeasures. There is no statement or indication that all other third-party rights may be defeated by countermeasures.

12. Further, Article 33, paragraph 2 provides that “this Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.” The Commentary to Article 33 states, *inter alia*, at paragraph (4):

In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. *It is also true in the case of rights under bilateral or regional investment protection agreements.*¹⁵

13. The key terms in Article 33 and the Commentary thereto refer to “any right” and “any person or entity other than a State,” which must mean individual rights

¹³ At page 289, fn 803.

¹⁴ At page, 246, para. 5.

¹⁵ Crawford, James, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2005, p. 210; italics added.

under “regional investment protection agreements,” which in turn would include NAFTA. The Commentary to Article 33 does make it clear, however, that these are possibilities, and “a matter for the particular primary rule”:

It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase ‘which may accrue directly to any person or entity other than a State.’¹⁶

14. In view of the foregoing formulations, as expressive of customary international law, my judgment is that the categories of third-party rights that may not be defeated by countermeasures do not exclude, as a matter of customary international law, investor rights to file claims and collect damages under a regional investment protection agreement like NAFTA, but may well include those rights for investors as provided by such agreements. I address at paragraphs 42 *et seq.*, *infra*, the question of inclusion of these rights for NAFTA investors.

15. As the Tribunal notes, while the written submissions of the parties varied in many respects on the questions involved in this context, at the hearings the Claimants maintained, and Respondent did not dispute that, to prevail on its countermeasure defense, Respondent was required to demonstrate, *inter alia*, that the Tax did not impair individual substantive rights of Claimants, although Respondent’s view of the individual substantive rights entitled to protection from countermeasures was narrower than the Claimants’ view.

16. As a general matter, and apart from the allegation of U.S. breaches, Respondent is correct that the Tribunal, applying customary international law, “has

¹⁶ *Id.*

jurisdiction to find that Mexico's use of countermeasures is a matter that precludes unlawfulness in its conduct, and hence, precludes international responsibility."¹⁷ The parties ultimately did not dispute the point. Obviously, however, the Tribunal also has jurisdiction to find the reverse, *i.e.*, that (apart from the allegations of U.S. breach) Mexico's use of countermeasures under customary international law was not appropriate, or did not constitute a true countermeasure, and therefore did not preclude unlawfulness and international responsibility.

The Question of Individual Rights and Diplomatic Protection under NAFTA

17. In its discussion of the countermeasures defense, Respondent maintains that the customary international law rules governing the institution of diplomatic protection¹⁸ are applicable to NAFTA, and that substantive obligations under NAFTA, including those set forth in Chapter Eleven, are obligations that each NAFTA Party has assumed *vis-à-vis* the other Parties, but *only* the other Parties. The Tribunal majority on this issue agrees. Investors, in contrast, according to Respondent, have been granted a

¹⁷ *Id.* Respondent suggested that, in its analysis of the countermeasure defense, the Tribunal could "appreciate," if not formally determine, that the United States had committed breaches of Chapter Twenty. However, the Tribunal did not, correctly in my opinion, deem it appropriate to render judgments or express views concerning allegations of breach of Chapter Twenty, even apart from the fact that the U.S. Government is not a participant in this case.

¹⁸ In the *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania), 1939 PCIJ (ser. A/B) No. 76, at 16 (Judgment of Feb. 28), the Permanent Court of International Justice stated that diplomatic protection involves an action in public international law in which "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."

right of action, and a right to collect damages, but such rights are “procedural,”¹⁹ do not entail or involve substantive rights, and therefore may be suspended or eliminated by countermeasures even if Respondent’s countermeasures violated the obligations of Articles 1102, 1106 and 1110. Respondent maintains that Claimants “so-called ‘rights’ were derivative of the United States’ rights and the obligations were owed by Mexico to the United States, not the Claimants.”²⁰ In that posture, according to Respondent, such “procedural” and “derivative” rights as provided to investors by NAFTA could be defeated by countermeasures even if the countermeasures were adjudged to be in violation of Chapter Eleven.

18. Respondent maintains that it is “necessary to distinguish between procedure and substance” and that Claimants “derive individual rights and obligations from the outcome of [Chapter Eleven] proceedings, rights to damages, obligations to pay costs and things like that.”²¹ But even in this posture, Respondent maintains, the procedural position of Claimants under Chapter Eleven “is not infeasible,” citing the Softwood Lumber Agreement between the United States and Canada, in which rights to bring proceedings under Chapter Eleven were suspended for investors.

19. The Tribunal majority and Respondents quoted from submissions made by the United States and Canada under Article 1128 in investor-state arbitrations and in court proceedings, as well as the U.S. Reply in *Loewen* and the *Loewen* Award, to

¹⁹ Rejoinder, p. 55, para. 184. Respondent denies that Claimants have “individual rights” under the Commentary to Article 49. *Id.*

²⁰ Rejoinder, p. 55, para. 184.

²¹ Transcript, pp. 191-192.

support the position that Respondent takes in the instant case that investors have no direct substantive rights against the three States Parties to NAFTA.

20. I note that none of the written submissions cited by the Tribunal majority or the Respondent address the matter of countermeasures. None of the cases were countermeasures cases. None addressed a key question in the instant case, *i.e.*, whether a countermeasure allegedly taken against the state of an investor (though in this case directed against the investor) can defeat that investor's right to legal redress (whether such right is characterized as substantive or procedural, direct or derivative) for violations of Articles 1102, 1106, or 1110 by the state imposing the countermeasure. Neither the United States nor Canada have indicated their view on that question, nor has it been addressed by the NAFTA cases decided to date. Unfortunately, neither Canada nor the United States filed submissions in the instant case, pursuant to Article 1128, notwithstanding invitations from the Tribunal to both governments to do so.

21. The question of individual rights for investors in the NAFTA framework has been bound up in the instant case with the questions of whether, and to what extent, the States Parties to NAFTA intended that the customary rules of diplomatic protection apply to NAFTA. From Respondent's point of view, this is crucial since, if the rules of diplomatic protection apply, then investors have no substantive rights of their own, according to Respondent, against the States Parties to NAFTA, but rather have the "procedural" right of enforcing the rights of their home State Party against the respondent State Party. Their rights belong to their state and not to them.

22. Yet, as is generally known, well before NAFTA, the international legal system had developed structures and processes establishing rights for investors permitting them to move directly against governments at their own initiative to protect their own

individual investment interests rather than those of their home state, and to do so independently of their home state.

23. The mechanism of diplomatic protection was not superseded by the system of individual investor rights, but rather was diminished by such system. Instruments such as treaties between states, both bilateral and multilateral, and agreements between and among States and private parties, provided an evolving legal framework for investor protection that differed in many respects from certain of the rules of diplomatic protection. This key development in the international law of investor protection was an approach favored by many governments, who entered into an ever-growing number of investor protection agreements, and was subsequently recognized by the International Court of Justice. The ICJ, in 1970, said the following concerning agreements concluded between private investors and states:

Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. *Sometimes companies are themselves vested with a direct right to*

*defend their interests against States through prescribed procedures.*²²

24. Judge Stephen Schwebel, writing in 1994 when he was a Judge at the International Court of Justice (subsequently becoming the Court's President), said the following with respect to the foregoing excerpt from *Barcelona Traction*:

It seems to me that one may read the foregoing excerpt as meaning that, when a company is 'vested with a direct right' to defend its interests against a State 'through prescribed procedures,' those procedures embrace the direct right of the company to invoke international law in defense of its interests. Certainly it is hard to maintain the contrary. How odd it would be if States were to conclude treaties such as the ICSID Convention or the Algiers Declaration providing for the Iran-United States Claims Tribunal, and were to conclude contracts with aliens providing for exclusive arbitration of disputes arising thereunder, and at the same time were to be deemed to have debarred the alien claimants and companies which are central to these processes from direct reliance upon international law to sustain their claims.²³

The Iran-U.S. Claims Tribunal

25. The Iran-U.S. Claims Tribunal, established by the 1980 Algiers Accords between the United States and Iran, constituted a major step in the development of investor protection against the state. The Tribunal is a leading example of an institution in which investors have direct rights to enforce State Party obligations, without themselves entering into an agreement, and in which the institution of diplomatic protection and claims espousal have no application. The Tribunal, functioning from 1981

²² *Barcelona Traction, Light & Power Co. Judgment*, ICJ Reports 1970, pp. 3, 47, italics added.

²³ Schwebel, Stephen M., *Justice in International Law* (Cambridge University Press, 1994), p. 211

to the present time, has jurisdiction over cases brought by investors against the two governments (the great majority of the claims at the Tribunal were filed by U.S. investors against the Government of Iran), as well as cases between the two governments, and cases involving the interpretation of the Algiers Accords. The Tribunal recognizes that investors have individual substantive rights against Iran or the United States, as the case may be, and that Iran and the United States, in a separate category of cases, have rights against each other. In both categories of cases, Iran and the United States have substantive obligations, the breach of which will result in an award of damages or other remedy.

26. The Tribunal, in its jurisprudence, has twice held that customary international law rules of diplomatic protection were not applicable at the Tribunal, and that American investors in Iran had individual rights to bring claims against Iran. The Tribunal's rules and practice also demonstrate that investors have the right to legal redress for breach of State Party obligations, without the intervention of the U.S. Government or the Government of Iran.²⁴ The investors, in short, were the beneficiaries of the treaty arrangements entered into by the United States and Iran.

27. There are several indicia within the Tribunal's establishment documents, structure and practice demonstrating that some of the central rules of the customary

²⁴ In the *Dual Nationality cases* (1984), Iran maintained that diplomatic protection applied to cases brought by investors at the Tribunal. The Full Tribunal stated that "most disputes [at the Tribunal] involved a private party on one side and a Government or Government-controlled entity on the other." The Tribunal held that "the object and purpose of the Algiers Declarations was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense." 5 *Iran-U.S. C.T.R.* 261 (1983). Similarly, in Case A/21 (1987), the Full Tribunal observed that "Tribunal awards uniformly recognize that no espousal of claims by the United States is involved in the cases before it." 14 *Iran-U.S. C.T.R.* 324, 330 (1987, Vol. I).

international law of diplomatic protection do not apply. As with NAFTA, the language of the Claims Settlement Declaration provides no indication that the governments were to file claims on behalf of their nationals or that investors were enforcing rights of their home states. Rather, Article II (1) of the Claims Settlement Declaration grants the Tribunal jurisdiction over the “claims of nationals of the United States and of Iran.” The claimants, without government intervention, decided whether or not to file and argue claims on their own behalf to enforce State Party obligations, and without any generally applicable requirement of exhaustion of local remedies. Claimants who were able to demonstrate to a panel of the Full Tribunal a valid claim arising out of contracts, debts, expropriation of assets or other measures affecting property rights,²⁵ were awarded damages or compensation directly, without having to repair to their governments for collection.

ICSID, ECT, BITs and investor rights

28. Other leading and well-known examples of institutions providing for rights of investors to enforce State Party obligations by filing claims on their own behalf are the International Centre for Settlement of Investment Disputes (ICSID) and the Energy Charter Treaty. Writing in 2004 in regard to ICSID and diplomatic protection, Lucy Reed, Jan Paulsson and Nigel Blackaby stated:

One of the chief impediments to foreign investment in developing countries has been the investors’ perception that, in the event of disputes with the host State, they would find themselves without an effective legal remedy. Investors may no longer realistically rely on their own governments to espouse their claims, at least promptly and

²⁵ Claims Settlement Declaration, Article II (1), 1 *Iran.-U.S. C.T.R* (1981-1982, p.9.

successfully, under traditional avenues of diplomatic protection. If investors proceed alone against the host State, they fear discrimination in the local courts.

To help resolve this quandary, the World Bank conceived a special forum for arbitrating investment disputes.²⁶

29. The authors point to the proliferation of Bilateral Investment Treaties (BITs) throughout the world, speaking of investor rights and host state obligations:

Generally speaking, each State party to a BIT pledges to provide investors from the other State with certain minimum substantive protections, including the right to fair and equitable treatment and the right to be compensated for expropriation, and agrees that such investors may commence ICSID arbitration (or other agreed form of international arbitration) directly against it to obtain redress for violations of the substantive protections of the BIT.²⁷

30. Among the central purposes of NAFTA and the system of Bilateral Investment Treaties is precisely to have the States Parties disengage from key ongoing initiative decisions concerning investor protection, and to grant such decisions directly to investors, while establishing a system of obligations to be enforced by investors. The development of NAFTA and BITs were accomplished through the exercise by the governments concerned of their treaty powers. In the exercise of those treaty powers, governments granted investors key protections and remedies in case of breach by States Parties, even as third-party beneficiaries, because, as noted, the system of diplomatic protection did not work particularly well. As stated by Paulsson, the mechanism of diplomatic protection

proved itself unworkable as a way of protecting business interests in the context of contemporary international

²⁶ Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2004), p. ix.

²⁷ *Id.*, pp. x, xi.

economic life. Defendant States are irritated when another State requires them to defend the legitimacy of their acts. At the same time, foreign ministries have often been embarrassed and notoriously reluctant to shoulder the burden of presenting complaints raised by their nationals.²⁸

31. Other international law and investment treaty experts have agreed that the NAFTA and BIT structures grant substantive protections for the benefit of investors, thus generating investment in host countries, and helping to regularize systems of investor protection in a fashion that the mechanism of diplomatic protection could not equal. Charles N. Brower and Lee Steven have said that "...one should not lose sight of the reasons why the NAFTA Parties negotiated Chapter 11 in the first place. NAFTA Chapter 11 creates substantive investment protections that are enforceable in arbitration by the individuals directly impacted by any breach of such protections."²⁹ Brower and Steven continue as follows:

giving private individuals standing to sue a State before an international tribunal was not the only means of enforcement open to the NAFTA Parties. Consistent with existing international practice, the Parties could have relied on diplomatic protection, requiring the government of each NAFTA country to espouse the claims of its nationals. Alternatively, the Parties could have required that Chapter 11 claims be litigated in the domestic courts of the three NAFTA countries. Neither of these alternative options, however, would serve the aims of Chapter 11 as well as does investor-State arbitration.³⁰

32. The key here is that "the Parties could have relied on diplomatic protection, requiring the government of each NAFTA country to espouse the claims of its

²⁸ "Arbitration Without Privity," 10 *ICSID Rev.- F.I.L.J.* 232, 255-256 (1995).

²⁹ Brower, Charles N. and Lee, Steven, "Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11," *Chicago Journal of International Law*, Vol. 2, No. 1, p. 195, (2001).

³⁰ *Id.*, at p.196.

nationals.” But they did not so rely. Instead they relied on a different system, a better system, under Chapter Eleven, creating substantive obligations for States Parties, and granting rights of redress, whether characterized as substantive or procedural, to investors to enforce those State Party obligations, such rights to be invoked at the investors’ own initiative, not their governments’ initiative,³¹ and regardless of their governments’ preferences in the matter.

33. Professor Jack Coe writes in similar terms:

Compared to the traditional espousal model, Chapter 11 presents a striking departure. To a limited extent a private entity, not ordinarily endowed with international personality, may bring its own claim for breaches of international law – a prerogative not dependent on the investor’s state adopting the claim as its own. That states would prefer to disengage from the episodic practice of claim espousal, and would encourage other states to do likewise, reflects a variety of practical and policy-related concerns. Arguably, less inducement to invest abroad results from remedies that are wholly dependent on home state discretion and that produce only partial compensation.³²

34. Todd Weiler writes in the generally accepted way that:

³¹ Brower and Steven say the following about diplomatic protection:

“A system that originates in diplomatic protection – a product of expediency, it may be noted, from a time when the international legal order did not recognize the individual as able to invoke international law – places the burden and expense of prosecuting an investment dispute on the investor’s government, a process that can be highly inefficient, arbitrary, and politically explosive: inefficient because governments are pressured to prosecute, or at least investigate, a great number of frivolous claims that would not otherwise be pressed if the responsibility and cost of prosecution remained with the individual investor; arbitrary because the exigencies of time, money, political priorities, and the whims of individual bureaucrats may cause a government to downgrade, or even ignore, meritorious claims; and politically explosive because diplomatic protection has the distinct disadvantage of pitting two States against one another in an inherently confrontational setting where, once a case is commenced, government officials cannot be seen as acting indifferently to the interests of their nationals.” *Id.*, pp. 196-197.

³² Coe, Jack, “The Mandate of Chapter 11 Tribunals – Jurisdiction and Related Questions,” Chapter 10 in *NAFTA, Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, T. Weiler, ed., Transnational Publishers, Inc, (2004), p., 218.

Within the context of BITs and multilateral investment protection regimes such as Chapter 11 of the NAFTA and Article 26 of the Energy Chapter Treaty, individuals enjoy a catalogue of rights that protect their commercial interests, as well as a direct mechanism to vindicate them." ³³

35. Weiler has also written that:

NAFTA Chapter 11 has provided individual economic actors with a direct avenue of redress for a bundle of individualized international rights which grow stronger and more coherent by the day. In this activity, we may be seeing a paradigm-shift: away from an international legal order generated by states and prosecuted by states, and towards an order which recognizes the quasi-constitutional rights and freedoms of individual economic actors vis-à-vis the state.³⁴

36. Similarly, Article 24 of the U.S. Model BIT (2004) authorizes the claimant “on its own behalf” to submit to arbitration a claim that respondent has breached “an obligation under Articles 3 through 10” or an investment authorization, or an investment agreement. As with NAFTA, there is no indication that the claimant is enforcing the rights of the state. The language is significant in referring to a claimed breach of an “obligation” owed by the state Party to the investor. There is nothing regarding rights of states Parties, procedural rights, or derivative rights. There is no indication of diplomatic protection through claims espousal. There is no indication that States are protecting their nationals. Rather, nationals are protecting themselves by invoking their right to go to arbitration, pursuant to the treaties, to enforce State Party obligations owed to them.

³³ Weiler, Todd, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, Transnational Publishers, Inc., 2004, p. 22.

³⁴ *Id.*, p. 4.

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign
Arbitral Awards

37. Other highly significant international agreements provide individuals and companies with direct rights against States Parties even though the States Parties stand alone as parties to the agreements. The most central and significant instrument in the world of international commercial arbitration, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³⁵ is also a multilateral treaty that creates rights for individuals and companies, in this case for those who wish to enforce international agreements to arbitrate, and to enforce foreign arbitral awards. Only states are parties to the Convention, but individuals and companies have the right, pursuant to its provisions, to enforce the Convention obligations undertaken by any of the States Parties. For example, with respect to enforcement of agreements to arbitrate, Article II (1) of the Convention provides:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

38. The phrase “the parties” in Article II(1) of the Convention, as elsewhere in the Convention, includes private parties. These private parties may, if they choose, and subject to the Convention’s requirements, enforce the obligations of recognition and enforcement undertaken by the States Parties to the Convention. There is no indication in the Convention that these are merely “procedural” or “derivative” rights, or that the

³⁵ un.arbitration.recognition.and.enforcement.convention.new.york.1958.lm3

States Parties owe obligations of recognition and enforcement only to each other, or that the customary rules of diplomatic protection are applicable.

Human Rights Treaties

39. Mention should also be made of human rights treaties which, of course, differ in significant ways from Chapter Eleven and BITs, but nevertheless are further examples of direct grants of individual rights by treaty to be enforced against the States Parties to the treaty. Malcolm Shaw states:

Since then [the 1920's] a wide range of other treaties have provided for individuals to have rights directly and have enabled individuals to have direct access to international courts and tribunals. One may mention as examples the European Convention on Human Rights, 1950; the European Communities treaties, 1957; the Inter-American Convention on Human Rights, 1969; the Optional Protocol to the International Covenant on Civil and Political Rights, 1966; the International Convention for the Elimination of All Forms of Racial Discrimination, 1965 and the Convention on the Settlement of Investment Disputes, 1965.³⁶

40. It is notable that the last two conventions cited by Shaw in the foregoing paragraph, where such conventions provide “for individuals to have rights directly” are the International Convention for the Elimination of All Forms of Racial Discrimination, 1965, and the Convention on the Settlement of Investment Disputes, 1965.

41. There are some respects in which a human rights treaty may be analogous to Chapter Eleven or to a BIT. Claimants point out, as an example, that Article 1 of Protocol 1 of the European Convention on Human Rights protects both individuals and companies from an unlawful expropriation of property by a contracting government. A

³⁶ *International Law*, Third Ed., Cambridge, Grotius Publications Limited (1991), p. 180.

private party may bring a claim against a breaching government before the European Court of Human Rights, challenging the expropriation. Governments may also challenge the actions of another State Party to the European Convention.³⁷ So there exists within the European Convention a dual system of government and private party enforcement, somewhat similar to NAFTA.

Procedural or substantive rights; derivative or direct rights

42. Respondent maintains that the NAFTA provisions themselves do not justify treating Claimants' Chapter Eleven rights as anything more than procedural rights, *i.e.*, essentially the right to bring claims before a Chapter Eleven tribunal, but admittedly also the right to collect damages should the investor prevail. Respondent acknowledges that Section B of NAFTA includes remedies that make it clear "that if a claimant succeeds, it is entitled to have an award of monetary damages or an order for restitution in its favor."³⁸ Respondent acknowledges that "These are significant rights. But the substantive obligations are obligations that each NAFTA Party has assumed *vis-à-vis* the other Parties. They do not cease to be interstate obligations just because an investor has been granted a right of action."³⁹

³⁷ Transcript, p. 1028. The text of the first paragraph of Article 1 of Protocol 1 of the Convention reads as follows: "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 general principles of international law."

³⁸ Rejoinder, p. 56, para. 186.

³⁹ *Id.*, para. 187.

43. The question is what difference does it make whether an investor's right to redress for a wrong committed is substantive or procedural, direct or derivative. Again, the difference appears to be crucial from Respondent's point of view because it entails, so Respondent maintains, the legal right to suspend or eliminate, by means of a countermeasure, Claimants' "procedural" and "derivative" right to collect damages from the state imposing the countermeasure should the countermeasure violate Chapter Eleven. As Respondent apparently sees it, this legal power of a countermeasure depends upon the state-to-state relationship governing rights and obligations under NAFTA.

44. In my judgment, there is no compelling logic to the proposition that a NAFTA investor's "procedural" or "derivative" right to legal redress for a breach of Chapter Eleven may be suspended or eliminated by countermeasures against the home state of the investor, whereas a "substantive" or "direct" right may not. Nor is there any support for this proposition in the ILC's Articles or in customary international law generally. I do not believe that a NAFTA State Party may, for example, expropriate an investor's investment, without paying compensation, on the ground that the State Party had imposed a countermeasure against the investor's government with which the host state had a Chapter Twenty trade dispute.

45. Unless the provisions of Chapter Eleven create obligations owed to investors, to be enforced by investors, they have no meaning, even if the enforcement rights are "procedural" and "derivative." It is not correct to posit that the States Parties to NAFTA have national treatment obligations, for example, as Article 1102 provides, but investors in those countries have no corresponding individual rights of national treatment owed to them by the States Parties. As Claimants pointed out at the hearing "Nowhere in the case law of Chapter Eleven or of BITs will you find the suggestion that claimants are

enforcing the rights of the State. Nowhere do you find the suggestion that somehow investors are just deputized to enforce the rights of the state.”⁴⁰ And Respondent has acknowledged, as noted, that investors have “rights” to file claims and to collect damages for breach, and that these are “significant” rights.

46. It is clear that Chapter Eleven, as stated by Brower and Steven, “creates substantive investment protections that are enforceable in arbitration by the individuals directly impacted by any breach of such protections.”⁴¹ In my view, the substantive investment protections conferred by treaty upon NAFTA investors include the substantive right of legal redress for breaches of Section A of Chapter Eleven.

47. Why is the right to legal redress a substantive rather than a procedural right? In my view, the logic of the law, both internal and international, necessarily entails that a claimant with a right to file a claim and be awarded damages for breach of an obligation by defendant, should claimant prevail, has an individual right, owed to him directly, and underlying the right to file and collect damages, not to have that obligation breached by defendant. In internal law, if individual A has the right to file a claim against individual B for breach of a particular type of contract, and has the benefit of a damages award should the court conclude that individual B breached that contract, then A has an individual right not to have his contract breached and an individual right to a remedy should there be a breach. A right to a remedy is a substantive right. Legal redress for the wrong committed is a substantive right.

⁴⁰ Transcript, pp. 1013-1014.

⁴¹ See fn 214, *supra*.

48. Should the subject of property rights be addressed by two governments in a bilateral international agreement designed to protect foreign investment, the same thing is true. If a claim of expropriation may be brought pursuant to the terms of the agreement by a company of country A against the government of country B, and an award of compensation may be rendered in favor of the company of country A, then there is an underlying right in favor of the company not to have its property expropriated. To have the right to bring the claim, in addition to having the possibility or reality of satisfying that claim, demonstrates an enforceable right and remedy. Again, legal redress for the wrong committed is a substantive right.

49. What is the source of the investor's individual rights under NAFTA or a BIT? As noted, the source is the grant to the investor by the governments involved in the exercise of their treaty power. To confer upon investors these rights by treaty was clearly the intent of the States Parties to NAFTA. But even if one accepts the view of Respondent and the Tribunal majority on this issue, *i.e.*, the States Parties have direct obligations only to each other, rather than to investors, among these obligations is that of recognition and enforcement of awards in favor of claimants who have prevailed in claims under Chapter Eleven, meaning recognition and enforcement of the right of legal redress. It does not diminish the significance of an investor's right to legal redress to label that right "procedural" or "derivative." The right to a remedy is of the greatest importance to the structure and process of NAFTA, and as a third party right, insofar as concerns Chapter Twenty trade disputes between the States Parties, may not be suspended or eliminated by countermeasures under customary international law or under the ILC Articles on State Responsibility.

The power of governments to amend or terminate the rights of investors

50. A portion of Respondent's position⁴² is that the governments that created NAFTA may amend or terminate the rights conferred upon investors, thus demonstrating that only the States Parties have substantive rights, while investor rights are derivative of the rights of the States Parties and may therefore be overridden by countermeasures. Respondent maintains that such rights as investors have "are not irrevocable. They give way to the exercise of sovereign prerogatives." Examples are given of settlements that interrupted cases. Further, "Mexico's customary international law right to take measures in defense of its interests is another instance of where an investor's rights in the ordinary course must give way to weightier sovereign rights and interests."⁴³

51. It is not clear what an investor's rights giving way to "weightier sovereign rights and interests" might mean to a law-based system such as NAFTA, particularly in the context of a Chapter Twenty trade dispute, though it certainly does not sound promising for investor protection. But in my judgment, whether in internal or international law, the legal capacity of governments to amend or repeal rights of non-state actors does not signify that the rights were never there, and do not remain as long as the rights are not amended or terminated. In internal law, it matters not that the government of individuals A and B might repeal rights to enforce a type of contract between them, for example, through legislation or other relevant government action. Governments could indeed amend or terminate such contract rights, although consistently with constitutional

⁴² Respondent maintains that investor "facilities...including important procedural rights, ...[are] nonetheless suspendible because in the end, when it comes down to it, NAFTA is an intrastate agreement..." Transcript, p. 1226-1227.

⁴³ Rejoinder, pp. 4-5, 15-16.

constraints. The legislature or other relevant agency could remove from the jurisdiction of the judiciary claims for breaches of a particular type of contract. But so long as they have not done so, the enforceable right not to have that contract breached remains. Repeal of the right to a remedy does not signify that there was no right to a remedy to begin with.

52. The same thing is true in international law. In international law, and apart from NAFTA and bilateral investment treaties, governments have entered into many treaties or conventions under which individuals or companies have rights that may be amended or terminated by those governments, but as long as they have not been amended or terminated, the rights continue in the stated form.

The United Nations Convention on Contracts for the International Sale of Goods

53. One example of the foregoing for international commercial transactions is the 1980 United Nations Convention on Contracts for the International Sale of Goods (“CISG”),⁴⁴ a multilateral treaty modeled largely on the United States Uniform Commercial Code, and applicable to transactions for the sale of goods in international commerce. Only states may be parties to the Convention. While only states are parties, the CISG creates rights and obligations concerning sellers and buyers of goods in international transactions. It contains several provisions for remedies for breach of contract by sellers or buyers that can only be enforced through litigation or arbitration. The CISG also contains, in Article 101, a provision stating that: “A Contracting State

⁴⁴ For U.S. citation purposes, the UN-certified English text is published in 52 Federal Register 6262, 6264-6280 (March 2, 1987); United States Code Annotated, Title 15, Appendix (Supp. 187).

may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.”

In sum, any, some, or all of the parties may remove rights granted to their nationals and nationals of other parties. This does not signify that those nationals never did possess individual substantive and enforceable contract rights. As long as the CISG remains in force for the ratifying parties, individual rights remain.

Investors have independent rights of legal redress

54. Respondent maintains that, while individuals have human rights against their own state, investors have no rights under Chapter Eleven except for the rights of the State. At the hearing, Counsel for Respondent argued that:

We all have human rights against our own State. The point of human rights is to have them against our State. We don't have them because of our State. We have them independently of our State. *They [investors] have no rights under Chapter Eleven of NAFTA except for the rights of the state.* That's what *Loewen* says, and it's good law.⁴⁵

55. I address *Loewen* at paragraphs 60 – 70, *infra*. At this point, it is sufficient to note that in the NAFTA setting, even if NAFTA is viewed as a treaty under which States Parties owe substantive obligations only to the other States Parties, it is clear that investors also have certain rights, even if “procedural” or “derivative,” precisely because the States Parties to NAFTA, through their treaty powers, intended to and did confer those rights upon investors. That is to say, investors have rights under NAFTA precisely because of their States, since the States Parties conferred upon them those rights in a

⁴⁵ Transcript, p. 1225; italics added.

treaty, and those rights have been carried out in practice. As noted, investors may be thought of as third-party beneficiaries of NAFTA, and the rights and obligations the NAFTA States Parties owe to each other include the recognition and enforcement of investor rights to legal redress for breach of Chapter Eleven.

56. Even accepting Respondent's position that the right to legal redress for a wrong committed is a procedural and derivative right, it is still a highly significant individual right, as acknowledged by Respondent.⁴⁶ What could be a more significant right to an investor than the right to collect damages in case of a Chapter Eleven breach by the host state? If third party individual rights may not be defeated by countermeasures, as the ILC Article says they may not, and if the right to file claims and collect damages are significant rights, as Respondent acknowledges they are, then a breach by Respondent of NAFTA Articles 1102 and 1006, as shown by Claimants in this case, may not defeat Claimants' right to legal redress by means of a characterization of the HFCS Tax as a countermeasure against the United States.

57. Respondent argues further that "even if the right of direct access to international arbitration transformed the substantive rights existing at the international level between the Parties to private parties' rights, these rights would still [be] subject to countermeasures because private claimants cannot be in a better position than the State from which they derive their rights."⁴⁷

58. The answer to Respondent's argument is that private claimants would not be in a better position than the State from which they derive their rights. Rather, they

⁴⁶ Rejoinder, p. 56, para. 187.

⁴⁷ *Id.*, para. 190.

would be in an altogether different and separate position, a position set apart from the States Parties, a third-party independent position, granted to them by the NAFTA States Parties by way of the treaty, and recognized as a third party position in customary international law and the ILC Articles and Commentaries. They are in a different position because as investors they possess separate rights to separate remedies, however characterized, pursuant to Chapter Eleven, such remedies being distinctly different from the Chapter Twenty remedies of the States Parties. And of course NAFTA investors are third parties to Chapter Twenty disputes between the States Parties.

59. States do not take countermeasures against investors. They take countermeasures against States. Respondent points out that private interests may be adversely affected by countermeasures. That is correct, of course, unless the holder of the private interests has independent third party rights. Commentary 5 to Article 49 of the ILC Articles on State Responsibility refers to both third States and other third parties. If a State or other third party has “individual rights in the matter,” such rights may not be defeated by countermeasures. The ILC’s precise wording in that Commentary is that if third parties “have no individual rights in the matter they cannot complain.” In the instant case, the third-party investors have both treaty-granted remedies against States Parties who have obligations under Chapter Eleven, and a complaint that they have filed here alleging breaches by Respondent of Chapter Eleven, Section A.

Loewen

60. In further support of its position that customary international law rules regarding diplomatic protection apply to investor-state arbitrations under NAFTA, and more particularly to individual rights and countermeasures, Respondent relies heavily, as

does the Tribunal majority, on the *Loewen* case,⁴⁸ along with specific submissions by Mexico and the United States in that case. Respondent characterizes the U.S. and Mexican submissions in *Loewen* as supporting the position that the rules of diplomatic protection apply to investor-state arbitrations under the NAFTA, and again meaning that NAFTA investors had no rights under Chapter Eleven except for the rights of the state.⁴⁹

61. One of the issues in *Loewen* was whether or not the continuous nationality rule was modified by Chapter Eleven. In that context, the United States submission stated that:

...the United States agrees with Mexico that there is no basis for Loewen's attempt to 'jettison' "the established rules and principles of diplomatic protection...on the rationale that they are 'old' and investor-State arbitration is 'new'." Mex. Submission, para. 25. Mexico is correct that "the right of direct access conferred by Section B of the NAFTA does not in any way alter the interpretation of the Treaty's substantive rights and obligation, which exist at the international plane between States inter se." Id, para. 28. The principles of international law applicable to claims between states based on those rights and obligations – including the rule of continuous nationality of claims – remain fully applicable to claims under Section B of Chapter Eleven. *See id.* Para. 31. In addition, the United States agrees with Mexico that the principles that are the foundation for the continuous nationality rule are, and remain, "settled rules of customary international law."⁵⁰

62. The United States also said that :

A customary international law rule, which supplies the rule of decision by virtue of NAFTA Article 1131 (1) unless overridden by an explicit contrary provision of the

⁴⁸ ICSID Case No. ARB(AF)/98/3.

⁴⁹ *See* Rejoinder, pp. 57-59, paras. 191-193.

⁵⁰ Cited by Respondent in its Rejoinder, pp. 58-59, para. 192.

Agreement, need not be further codified in the NAFTA in order to apply to a Chapter Eleven claim.⁵¹

63. These statements again raise the question for the instant case: (i) whether investor rights to file claims on their own behalf at NAFTA are to be viewed as “rights...held by the [States] Parties alone” (as contended for by Respondent)⁵² as part of the rules of diplomatic protection applicable to NAFTA, and as such are “derivatative” or “procedural” rights that may be defeated or superseded by countermeasures, or (ii) whether NAFTA has overridden the diplomatic protection rule of claims espousal for investors enforcing State Parties’ NAFTA obligations, so that investor enforcement rights of State Party obligations are independent rights, whether “substantive” or “procedural,” “direct” or “derivative,” that may not be suspended or superseded by countermeasures.

64. Respondent cites with approval the *Loewen* Award statement that “There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states...”⁵³

65. In my judgment, the foregoing assertion in the *Loewen* Award is wrong in three important respects:

66. First, the phrase “There is no warrant for transferring rules derived from private law...” into the NAFTA context is not and cannot be right. The warrant is the treaty power of the three states that created NAFTA. There is nothing in the law of treaties that precludes states from transferring rules derived from private law into

⁵¹ Cited by Respondent in its Rejoinder, p. 61, para. 199. Respondent’s Exhibit R-93.

⁵² See Rejoinder, p. 57, para. 191.

⁵³ *Loewen* Award, para. 233, cited by Respondent at Rejoinder, p. 59, para. 194.

NAFTA, or into bilateral investment treaties generally, or into any treaty that addresses investor/host state relationships. Should states intend to create, by treaty, rights for private investors in an investment setting, they may certainly do so. Treaty law does not recognize the limitation implied by the statement in the *Loewen* Award quoted above. As noted, an analogy from internal law may be the concept of the third-party beneficiary. Individuals A and B may enter into a contract that creates a right in individual C. The same thing is true in international treaty law.

67. Second, it is not a matter of permitting Claimants *for convenience* to enforce the obligations of the States Parties to NAFTA. Claimants are permitted and authorized *by law* to enforce such obligations - the law of the NAFTA. The law is the treaty. Claimants were directly granted, as beneficiaries of the NAFTA governments, rights of enforcement of the States Parties' obligations, by means of a treaty, the primary, though obviously not the sole mechanism of modern international law. NAFTA and bilateral investment treaties were entered into, as noted, precisely because the mechanism of discretionary diplomatic protection was perceived by many governments as a comparatively poor vehicle for guaranteeing investment protections, a stable rule-ordered investment system, and the encouragement of foreign investment.

68. NAFTA may have been entered into in the first place as a matter of convenience (most treaties are), in order, *inter alia*, to overcome the weaknesses of discretionary diplomatic protection among Canada, Mexico and the United States. But once NAFTA entered into force, the obligations it established for the States Parties and the rights it established for investors became legally binding. There is nothing in the history of NAFTA that suggests that investor rights of legal redress for violations of

Chapter Eleven State Party obligations are simply matters of convenience and not law – law in this case created by states through a treaty.

69. Third, *Loewen* uses the phrase “what are in origin the rights of Party states...” But what origin is spoken of here? The origin of rights under the institution of diplomatic protection, or the origin of rights under NAFTA? The former speaks of customary law. The latter has its origins in treaty law. The rights of investors under NAFTA to file claims and collect damages on their own initiative for violations of Chapter Eleven state obligations became part of a subsequent and different substance and process from customary law, with its traditional focus on Party rights. Investor protection treaties, in substantial measure, although certainly not entirely, displaced certain rules of the traditional system of diplomatic protection and to a certain extent diminished the rights of states under that system.

70. In any event, neither *Loewen* nor the U.S. and Mexican submissions in that case address the customary international law rules regarding countermeasures. *Loewen*, like the other cases cited by the Tribunal majority and Respondent, is not a countermeasures case. Nor were the U.S. and Canadian statements made in the context of countermeasures. They did not address the question whether countermeasures may legally suspend or eliminate an investor’s right to legal redress for a breach of Chapter Eleven by the State taking the countermeasures. The U.S. submission in *Loewen* was made in the context of the customary international law rule requiring continuous nationality of claims, and the applicability of that requirement under Section B of Chapter Eleven.

71. Continuous nationality of claims is a requirement under the customary international law of diplomatic protection, and may also be a requirement under a specific

provision of a treaty-based investor-state arbitration mechanism, such as the Iran-U.S. Claims Tribunal.⁵⁴ That Tribunal, as noted, has twice held that the institution of diplomatic protection *is not* applicable at the Tribunal – direct investor rights are applicable - while having as a provision in its constitutive document the rule of continuous nationality of claims. Direct investor rights under modern treaty law and the continuous national rule under customary international law can and do co-exist without difficulty.

72. At the Iran-U.S. Claims Tribunal the specific provision codifies the customary international law principle found in the rules of diplomatic protection, whereas at NAFTA there is no specific provision and thus the customary law rule applies. The point for the instant dispute is that the Iran-U.S. Claims Tribunal does not apply the general rules of diplomatic protection, but does apply the customary rule of continuous nationality of claims. The same appears to be true, or should be true, of NAFTA.

73. It is far too great a stretch to conclude that because the rule of continuous nationality of claims applies in NAFTA by way of customary international law, per *Loewen*, since it was not overridden by an explicit contrary provision in NAFTA, therefore the rules of diplomatic protection apply more generally at NAFTA - or at least to the extent that countermeasures may supersede individual “procedural” and “derivative” rights, and indeed, investors have no rights under NAFTA that may not be defeated by countermeasures carried out in a manner violative of Chapter Eleven. The one does not follow from the other.

⁵⁴ Article VII, para. 2 of the Claims Settlement Declaration provides: “‘Claims of nationals’ of Iran or of the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state...” 1 Iran-U.S.C.T.R 11, 1981-82.

The NAFTA assurance to investors of due process before an impartial tribunal

74. In my view, the States Parties to NAFTA intended to and did override the customary espousal rules of diplomatic protection for investors to enforce State obligations. The position that a customary international law rule must be expressly overridden by NAFTA or it continues to apply has been satisfied in NAFTA, particularly by Articles 1115 and 1116 of Section B. Article 1115, which is entitled “Purpose,” provides as follows:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal. (underscoring added.)

75. Article 1116, entitled “Claim by an Investor of a Party on its Own Behalf,” provides, *inter alia*, that “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under (a) Section A....”

76. A system that “assures” an investor within the NAFTA framework of “due process before an impartial tribunal” and that entitles the investor to bring a claim “on its own behalf” expressly overrides for NAFTA the system of claims espousal by investors’ governments under the mechanism of diplomatic protection. Under the system of diplomatic protection there is no assurance that a government will espouse its nationals’ claims before an international tribunal or anywhere else. Nor is there a mechanism allowing an investor to file a claim on its own behalf in the absence of a treaty or other international agreement. NAFTA Articles 1115 and 1116 explicitly provide those

assurances to investors, who are thus beneficiaries of the treaty arrangement among the three States Parties.

77. These Articles obviously do not mean that all the rules of diplomatic protection and customary international law no longer apply at NAFTA. They do mean that the core of the diplomatic protection rule, state espousal of claims to enforce state obligations on behalf of the espousing state's nationals, is not part of NAFTA, and that instead NAFTA investors have their own individual rights to enforce such state obligations. That is the assurance that NAFTA investors received from the States Parties. That is the "Purpose" of NAFTA. Thus, even if it is accepted that the States Parties are parties only with each other, part of what the States Parties have agreed to with each other is the obligation to accept direct investor rights of legal redress for breaches of Chapter Eleven. There could not be a more significant individual right for NAFTA investors. There could not be a more significant third-party right for an investor in the circumstance of a dispute between the host state and the home state of the investor.

78. The assurance of due process before an impartial tribunal, the reverse of the espousal rule of diplomatic protection, which provides no assurance of any process before a tribunal of any kind, is not, in my judgment, consistent with an investor's "procedural" or "derivative" rights, as contended for by Respondent, that can be suspended or eliminated by countermeasures. To the contrary, according to Article 1115, that assurance of due process before an international tribunal is part of the "Purpose" of NAFTA. The availability of an international arbitral tribunal to commercial investors, traders, and those generally involved in international commerce, when the State is a party, is central to the meaning of NAFTA and fundamentally changes the relationship between private parties and the state. One scholar put it this way:

Thus, Chapter 11 alters the traditional, hierarchical relationship between foreign investors and host states in two ways. First, it prohibits certain exercises of sovereignty at the expense of foreign investors. Second, it creates a mechanism for resolving investment disputes that place foreign investors and their host states on more equal footing. Because investors do not have to rely on the mercy of their host states or their home states for protections, Chapter 11 redistributes bargaining power in a manner more reminiscent of relationships between commercial actors. As one U.S. negotiator of Chapter 11 explained, the point of this exercise is to remove investment disputes from 'the political realm and put them more into the realm of *commercial arbitration*.'⁵⁵

79. Removing investment disputes from the political realm and putting the disputing parties on a more equal footing, both of which appear to be the original intent of the States Parties to NAFTA, are underlying reasons for the rule creating independent third-party rights for investors. Investors may file claims as they choose, whether or not their home government approves of their choice. That is because investor claims belong to investors, and not to their states.

80. Whatever other rules of diplomatic protection may be held to apply to NAFTA, such as the continuous nationality rule, the espousal rules of diplomatic protection to enforce state obligations are not among them,⁵⁶ nor do NAFTA investors enforce the rights of their state. They enforce their own rights to legal redress and the

⁵⁵ Brower II, Charles H., "Investor-State Disputes Under NAFTA: The Empire Strikes Back," 41 *Columbia Journal of Transnational Law* 73 (2001).

⁵⁶ I am somewhat troubled by the possible ramifications beyond NAFTA of Respondent's argument concerning countermeasures. It may not be difficult for a host government acting in bad faith to create artificially a "dispute" with the state of a particular investor with whom the host state is having difficulties, then take measures (characterized as countermeasures) against that investor's state, such countermeasures diminishing or destroying the investor's interests, and with a perfect defense for the host state. Any state willing to act in bad faith in this fashion could weaken or scupper the system of investor protection and arbitration of disputes, at least in relation to that state. Needless to say, I am of the view that the investors and host State in the instant case have acted in the utmost good faith.

obligations of their host states. It will be recalled that, in light of Respondent's allegations of breach by the U.S. Government, Respondent maintained that it had the legal right to take countermeasures "which include the right to suspend the performance of any provision of the NAFTA. This is what Mexico has chosen to do."⁵⁷ In my judgment, that choice is not open to the NAFTA States Parties. Respondent's allegations of a Chapter Twenty breach against the U.S. Government cannot legally justify suspension of any NAFTA provision that creates third-party investor rights to a remedy for breaches of Chapter Eleven.

81. It should be emphasized that the customary international law mechanism of diplomatic protection and customary law generally will continue to play highly significant roles in the protection of foreign investment. There is much room for states to espouse the claims of their nationals in various ways, to negotiate settlements on their behalf, or to file claims in institutions such as the WTO or NAFTA in state-to-state proceedings, formally asserting their own interest in the claim on behalf of their nationals. Without doubt, discretionary diplomatic protection as a mechanism of customary international law has ceded ground to treaty-based investor-initiated protection, with investor rights of enforcement, but the traditional system is still at work in the investor and other contexts, and will continue to play a significant role so long as governments are willing to exercise their discretion to act on behalf of their nationals. Similarly, customary international law generally will necessarily continue to play a major role in the interpretation and application of NAFTA's Chapter Eleven.

⁵⁷ Rejoinder, p. 52, para. 171.

Conclusions

82. To sum up, the rules on countermeasures, as stated by the International Law Commission's Articles on State Responsibility, provide that countermeasures may "incidentally affect the position of third States or indeed other third parties" provided that these third parties "have no individual rights in the matter." The right to legal redress for a breach of Chapter Eleven State Party obligations is a significant right, as Respondent has acknowledged, and in my view, is a substantive right.

83. But even if NAFTA States Parties owe substantive obligations only to each other, and legal redress for wrongs committed may properly be described as a derivative right, or a procedural right, it is still a third-party right, conferred by treaty, with great significance for investors and for the NAFTA system as a whole. The States Parties to NAFTA, in Article 1115, "assure[d]" investors of "due process before an impartial tribunal." It follows that investor protection rights at NAFTA, however characterized, having been granted to investors as beneficiaries of the NAFTA, may not legally be set aside by countermeasures taken by a NAFTA State Party consistently with the ILC's Articles and Commentaries on State Responsibility as reflecting customary international law.

84. NAFTA was designed in large measure to create a law-based system pursuant to which an investor would be encouraged to invest in Canada, Mexico and the United States. For that, an investor needs predictability and stability, encouragement from the host state, legal standards that include basic minimum protections of investments, a right of legal redress in case of breach of any of those protections by the host state, and an atmosphere in which an investor need not fear that his investment will be diminished or taken because his host state has a trade dispute with his home state.

85. With regret, I cannot accept my learned colleagues' approach to NAFTA investor rights, diplomatic protection, and countermeasures because I believe their approach is not consistent with one of NAFTA's key reasons for being, or NAFTA's provisions, or customary international law.

[Signed]

Arthur W. Rovine
Arbitrator
Date: