

# Georgetown Environmental Law & Policy Institute

## Loewen, Mondev and Review of U.S. Judicial Rulings by International Arbitration Panels

On June 26, 2003, in Loewen Group, Inc v. United States, an arbitration panel convened under Chapter 11 of the North American Free Trade Agreement (NAFTA) rejected a widely publicized NAFTA claim based on a multi-hundred million dollar Mississippi jury award. See <http://www.state.gov/documents/organization/22094.pdf>. This recent decision provides an appropriate occasion to assess the state of “NAFTA law” on the reviewability of U.S. court rulings in NAFTA proceedings. The other important source of guidance on this issue is the October 11, 2002, panel decision in Mondev International Limited v. United States. See <http://www.state.gov/documents/organization/14442.pdf>. In Mondev the panel rejected a NAFTA challenge to a decision by the Massachusetts Supreme Judicial Court in suit by a Canadian real estate developer against the City of Boston and the Boston Redevelopment Agency.

The outcomes in these proceedings are potentially misleading. While the panels rejected claims based on judicial actions in both cases, they did so on relatively narrow grounds. In Loewen the panel rejected the claims based on a lack of jurisdiction, but expressly stated that, if it had to decide the issue, it would find that the Mississippi trial court’s actions violated Chapter 11. In Mondev the panel rejected the claim on the merits, but indicated that in other circumstances it might well conclude that a judicial action violates Chapter 11. Reading Loewen and Mondev together, the panels interpreted Chapter 11 as authorizing broad review of U.S. judicial actions to determine whether they violate the investor protection provisions of NAFTA. Thus, rather than laying to rest the concern that Chapter 11 panels might intrude on the U.S. judicial function, these decisions will likely encourage a growing volume of challenges to domestic judicial rulings under Chapter 11.

The decisions in Loewen and Mondev establish (implicitly or explicitly) the following basic principles for future NAFTA proceedings:

- Chapter 11 panels are empowered to review the actions of U.S. federal and state courts to determine whether they violate the legal standards in NAFTA Chapter 11. This review potentially covers every type of judicial judgment, ruling or other enforceable order issued by a U.S. court.
- At the same time, NAFTA grants foreign investors, after they have fully litigated legal claims in U.S. courts, the opportunity to litigate claims under Chapter 11 arising from the same transaction. Rules of claim and/or issue preclusion which might ordinarily bar (or at least limit the scope of) successive litigations do not apply. Thus, Chapter 11

proceedings may include claims based on the underlying actions that gave rise to U.S. litigation, or claims based on the conduct and results of the U.S. litigation itself, or both.

- In determining whether U.S. judicial actions violate Section 1105 of NAFTA (Minimum Standard of Treatment), the panels will apply a relatively open-ended, moderately deferential standard focusing, in language which appears in both Loewen and Mondev, on whether “a tribunal can conclude in light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to ‘unfair and inequitable treatment.’”
- In determining whether U.S. judicial actions violate Section 1102 of NAFTA (National Treatment), the determinative question will be whether the federal courts have granted “treatment no less favorable than that it accords, in like circumstances, to its own investors.” With respect to a state, the standard is more demanding, whether the state has accorded “treatment no less favorable than the most favorable treatment accorded, in like circumstances,” to the state’s own investors. While this standard will be difficult to apply in practice, it apparently means that it would constitute a violation of Chapter 11 for a state court not to grant a foreign investor judicial treatment which comports with the most favorable ruling that the state court, in a similar case, has issued to a domestic investor.
- Chapter 11 panels have authority to determine whether governmental immunities recognized by U.S. courts do or do not violate Chapter 11 of NAFTA. Mondev indicates that recognition of at least certain types of immunity by U.S. courts should be deemed to violate international law.
- On the positive side, Loewen establishes that Chapter 11 panels only have authority to review the actions of U.S. courts if the claimants have first exhausted all reasonably available opportunities for appellate view of the judicial actions. Thus, prior to challenging a state judicial action under Chapter 11, the foreign investor must pursue an appeal to the State Supreme Court, and if a federal question is involved, by filing a petition for certiorari in the U.S. Supreme Court.

### The Loewen Case

The Loewen case arose from a complex commercial dispute between operators of funeral homes in Mississippi, a Canadian firm (Loewen) and a Mississippi family and associated corporate entities (the O’Keefes). Loewen filed its Chapter 11 claim in an attempt to recover from the United States for the economic losses it suffered as a result of allegedly unfair treatment it received in the Mississippi court system. In the Mississippi litigation the O’Keefes sued Loewen for breach of contract, antitrust violations, and common law fraud. After a lengthy, contentious trial, the jury awarded the O’Keefes \$500 million, apparently a record judgment for Mississippi at the time. Shortly after the trial, the parties settled the case for \$175,000,000.

According to Loewen, it was unfairly coerced into the settlement by the Mississippi trial court's improper refusal to lower the bond Loewen was required to post to stay execution of the judgment and pursue its appeal. The Mississippi Supreme Court also refused to lower the bond, ruling that the trial court did not abuse its discretion in rejecting the O'Keefes' request.

Loewen filed a claim under Chapter 11, challenging the trial judge's management of the case, the large verdict, and the Mississippi courts' refusal to lower the bond, alleging violations of NAFTA section 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation). In an interlocutory decision issued on January 9, 2001, the panel rejected the argument of the United States that a judicial order in a case involving two private parties is not a "measure" within the meaning of NAFTA which would support a Chapter 11 claim. On January 25, 2002, following the hearing on the merits, the United States filed a motion to dismiss the case, arguing that Loewen, following its reorganization in bankruptcy, had become a U.S. corporation. The United States argued that the U.S. firm could not proceed with the claim because a claim under Chapter 11 can only be prosecuted by a firm of a nationality different from that of the defendant government.

The panel decided the case based on the jurisdictional argument. Loewen, prior to its reorganization, assigned its NAFTA claim to a newly created Canadian company, a subsidiary of Loewen's U.S. corporate incarnation. Piercing the corporate veil, the panel ruled that since the U.S. company was the ultimate beneficiary of the Chapter 11 claim, the proceeding could not continue. In the panel's words, "All of the assets of [old Loewen company] have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation."

Observing that its consideration of the merits had been "well advanced" when the U.S. filed its motion to dismiss, the panel stated that it had been prepared to dismiss the claim on the merits and offered its reasoning for that conclusion. The panel stated that a judicial action cannot support a claim under Chapter 11 unless the claimant has pursued all available avenues for appellate review before filing the claim. Because Loewen had not filed a petition for certiorari and a stay application with the U.S. Supreme Court, nor pursued the possibility of obtaining collateral review in federal District Court, the actions of the Mississippi courts were not final judicial actions subject to challenge under Chapter 11. In short, the panel indicated, even it had reached the merits of the claim, it would have dismissed the claim.

Last, but certainly not least, the panel also discussed at great length the question whether the actions of the Mississippi courts violated Chapter 11, specifically section 1105, which directs each party to NAFTA to "accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The panel concluded, apparently with little difficulty, that the conduct of the trial and the size of the jury verdict demonstrated a violation of 1105. Based on a detailed review of the trial court record, the panel concluded that "the trial judge failed to afford Loewen the process that was due," by "permitt[ing] the jury to be influenced by persistent appeals to local

favouritism as against a foreign litigant.” To summarize, “the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.” On the other hand, with little explanation, the panel rejected the argument that both the trial court’s and the Mississippi Supreme Court’s refusal to lower the bond violated section 1105.

Addressing briefly the claim under section 1102, the panel said that Loewen was entitled to recover if it could show a violation of the requirement of “treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the party of which it forms a part.” This claim failed in this case, the panel ruled, because Loewen did not produce evidence “of ‘the most favorable treatment accorded, in like circumstance,’ by a Mississippi court to investors and investments of the United States.” The panel rejected the claim under section 1110 as essentially redundant of the section 1105 claim on the facts of this case.

Loewen might properly be viewed as something of a Trojan Horse. The result, to be sure, is that the NAFTA claims based on the rulings of the Mississippi courts were rejected. But the jurisdictional and the finality issues represent sui generis grounds for dismissal. In the future, it will be the extraordinary case in which a foreign claimant suing the United States transforms itself into a U.S. corporation, and it will be a relatively simple matter for future claimants seeking to challenge judicial actions to ensure they have exhausted all available avenues of appeal. Passing these relatively inconsequential hurdles, the panel has provided a straightforward roadmap for crafting credible challenges to judicial actions under Chapter 11. The panel’s January 9, 2001, opinion affirms that judicial rulings and orders are subject to review under Chapter 11. (Though the panel was addressing the rulings of a state court, the reasoning appears directly transferable to federal court judicial actions.) By explicitly stating that the trial conduct and the large verdict violated section 1105, the panel has provided a significant precedent supporting similar claims in future cases. In short, while Loewen is, on its surface, a win for government, in the long run Loewen is most likely to be regarded as a major win for investors.

In an ironic conclusion to its lengthy opinion, the panel explained that, in its view, “the interests of the international investment community” were served by the outcome in Loewen. The panel appears to mean that public confidence in and support for the investor-state dispute resolution process will be enhanced if the limitations on the jurisdiction of Chapter 11 panels are respected. But it might also be observed that by paving the way for future Chapter 11 claims based on judicial actions the opinion in Loewen serves the interests of the international investment community in a more immediate and direct way.

### The Mondev Case

The Mondev case arose from the efforts by a Canadian real estate developer to redevelop an area of downtown Boston in cooperation with the City and the Boston Redevelopment Agency (BRA). After the project collapsed, the developer sued the city and the BRA in the

Massachusetts courts. The Supreme Judicial Court ruled that the contract claim failed as a matter of law because Mondev failed to establish an actual breach of the contract. The Court ruled that the claim of tortious interference with contractual relations against the BRA had to be rejected because the agency was immune from suit under the Massachusetts Torts Claims Act. After the U.S. Supreme Court declined to review this decision, the Canadian developer filed a claim under Chapter 11.

Mondev challenged both the actions of the City and the BRA, as well as the rulings of the Massachusetts Supreme Judicial Court, under Sections 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation). In a decision issued on October 11, 2002, the panel rejected the claims. First, the panel ruled that none of the underlying actions by the City and BRA provided a basis for relief because they all preceded January 1, 1994, the date when NAFTA went into force. NAFTA was not intended to have retroactive effect, the panel ruled. Second, the court ruled that the only colorable legal basis for challenging the judicial rulings was section 1105. Thus, as the Tribunal explained, the case narrowed down to “that aspect of Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State’s courts or tribunals.” Based on a thorough analysis of the opinion of the Massachusetts Supreme Judicial Court, the panel ruled that the Court’s decision did not violate 1105.

The panel had relatively little difficulty with the argument that the Court had violated section 1105 by rejecting the breach of contract claim. Mondev argued that the Court had applied a legal standard that departed significantly from the Court’s prior precedents. The panel concluded that it was doubtful that the Court had departed from its earlier decisions and, in any event, stated that “its decision would have fallen well within the limits of common law adjudication.” Summarizing, the panel said, “There is nothing here to shock or surprise even a delicate judicial sensibility.”

The panel also rejected the argument that recognizing BRA’s immunity from suit for intentional torts violated section 1105, stating that it was “not persuaded that the extension to a statutory authority of limited immunity from suit for interference with contractual relations amounts in this case to a breach of 1105.” The panel stated that, “within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.” At the same time, the panel did not believe that grants of immunity could never be challenged under Chapter 11, stating that “circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA.” As an example, the panel suggested that the Massachusetts governmental immunity from suit based on assault and battery, if it were applied in a case involving an alleged violation of NAFTA’s guarantee of “full protection and security,” might well constitute a violation of 1105.

In this specific case the panel concluded that governmental immunity was justifiable;

“reasons can well be imagined,” the panel said, “why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference. Such an authority will necessarily have both detailed knowledge of the relevant contractual relations, and the power to interfere in those relations by granting or not granting permits. If sued, it will be able to plead that it was acting in good faith and in the exercise of a legitimate mandate – but such a claim may well not justify summary dismissal and will thus be a triable issue, with consequent distraction to the work of the Authority.”

Again, the claimants lost in the Mondev case. But, as the panel explained, “In the end, the City and BRA succeeded, but only on rather technical grounds.” The majority of the case failed because the operative events preceded the date NAFTA went into effect. The claims based on the rulings of the Massachusetts Supreme Judicial Court also failed, but because the challenge to the Court’s decision was insubstantial and because the panel accepted the reasonableness of the application of immunity doctrine “in this case.” Though not as pointed a challenge to domestic judicial institutions as the Loewen case, the Mondev decision will encourage future challenges to judicial actions under Chapter 11 as well.

### Analysis of Select Issues

The Loewen and Mondev decisions offer significant guidance on several important questions relating to Chapter 11 claims based on judicial actions.

Chapter 11 Applies to Judicial Actions. While the issue was debatable several years ago, there appears to be little dispute today that judicial judgments and other rulings constitute “measures” within the meaning of NAFTA and, therefore, are subject to challenge in Chapter 11 proceedings. In Loewen, the United States contested the applicability of Chapter 11 to judicial actions, at least in cases involving only private parties, but the argument failed. In Mondev, the United State does not appear to have even contested the applicability of Chapter 11 to judicial actions. While arbitration decisions are not, strictly speaking, binding precedent for future panels, these opinions are likely to be very influential. At this point, eliminating (or even modifying) review of judicial actions in Chapter 11 proceedings would probably require an amendment to NAFTA itself. To avoid the implication that future investment agreements also cover judicial actions, specific language to that effect would probably have to be inserted in the agreements.

The Need for Finality. The panel in Loewen has added an important limitation on Chapter 11 claims based on challenges to judicial actions – the requirement that claimants exhaust all available avenues for judicial review before filing a claim. Chapter 11 contains a general provision requiring claimants who file under Chapter 11 to waive their rights to seek monetary relief based on the same transaction in domestic courts. Loewen argued that this provision demonstrated that exhaustion of domestic appellate remedies should not be a precondition for filing under Chapter 11. The panel, however, distinguished this waiver

requirement from what it described as a general requirement of international law that, before a claimant can challenge a domestic judicial action as a substantive violation of international law, all available domestic appeals must be exhausted. Exhaustion of appellate remedies, the panel said, was necessary to determine whether the judicial action being challenged actually represents an action of the sovereign being sued.

This limitation obviously places some constraints on challenges to judicial actions under Chapter 11, and will at least delay the filing of certain claims. At the end of the day, however, exhausting appellate remedies, such as by filing a petition for certiorari in the U.S. Supreme Court, will not be a difficult hurdle to overcome.

Standard of Review. In Mondev and Loewen the panels have provided some (but only some) guidance on the applicable standard of review in determining whether a judicial action violates section 1105.

In Mondev, the panel invoked the decision of the International Court of Justice in Elettronica S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, at 76 (July 20), to define the test for evaluating whether a judicial action meets the international law standard: whether the judicial action reflects “a wilful disregard of due process of law... which shocks, or at least surprises, a sense of judicial propriety.” Explaining further, the panel said:

“The Tribunal would stress that the word ‘surprises’ does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all of the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subject to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.”

The panel stated, perhaps somewhat defensively, that this test was not intended to represent “an idiosyncratic standard.” In other words, panel members are not free to simply apply their own subjective sense of justice. Rather, the panel said, the standard “is to be found by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors.”

Rejecting the argument of Canada, the Mondev panel declined to adopt the position that the standard articulated in the Neer case should govern. See Neer Case (U.S. v. Mex), 4 R.I.A.A. 60 (Gen. Cl. Comm’n 1926). In that 1920’s decision, an international claims commission stated that, to find a violation of international law, “the treatment of an alien should amount to an

outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” The Mondev panel ruled that the “considerable development” in international law since the 1920's made the Neer standard inoperative. “To the modern eye, what is unfair or inequitable need not equate with the outrageous or egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”

Finally, the Mondev panel asserted, at numerous points in its opinion, the proposition that “it is not the function of NAFTA tribunals to act as courts of appeal.” As discussed below, this statement is evocative but, upon analysis, not terribly meaningful in the context of Chapter 11 claims based on U.S. judicial actions.

In Loewen, the panel used roughly comparable formulations to define the applicable standard of review. To establish a violation of 1105, the panel said, “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough.” Rejecting the position of the United States that bad faith is an essential element of the violation, the panel said that “neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.” Quoting with approval from the Mondev decision, the panel said, “[T]he question is whether, at an international level, and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to ‘unfair and inequitable treatment.’” Finally, the panel also quoted, again with apparent approval, the standard articulated in Elettronica, that “it is a wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety..”

The Loewen panel emphasized that a NAFTA panel is not directly concerned with whether a judicial action violates U.S. law, for that “is not for us to determine.” On the other hand, the panel suggested that the fact that a judicial action violates domestic law would support the conclusion that there has been a violation of international law. Thus, the panel said, “A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.” (Emphasis added.)

The Loewen panel, like the Mondev panel, emphasized that the function of a Chapter 11 panel in a proceeding challenging a judicial action is not to exercise the review powers of a traditional appellate court. As the Loewen panel said, “A NAFTA claim cannot be converted into an appeal against the decisions of the municipal courts.”

While the applicable standard of review can hardly be described with precision, it seems fair to conclude that these decisions authorize Chapter 11 panels to conduct a searching examination of domestic judicial actions. By rejecting the Neer standard and similar formulations, the panels in Loewen and Mondev have made clear that claims under 1105 based on judicial actions

are not reserved for rare cases involving bad faith or other egregious circumstances. In general terms, the standard can be compared to the standard for review of legislative or administrative action under the doctrine of substantive due process. The standard also can be compared to the arbitrary and capricious standard for judicial review of administrative action. While deferential, the test is hardly toothless.

Mondev and Loewen provide, in a sense, two data points to help identify the standard Chapter 11 panels will apply in reviewing U.S. judicial actions. In Mondev, the panel rejected the section 1105 claim on the merits. In Loewen, setting aside the procedural hurdles, the panel made clear that the claimant should easily prevail under 1105. The limit of acceptable domestic judicial action under Chapter 11 arguably lies somewhere between these two cases.

The statements in Mondev and Loewen that the panels are not exercising a traditional appellate function are not terribly meaningful in the context of Chapter 11 proceedings and provide no assurance that the panels will not conduct searching reviews of domestic judicial rulings. An appellate court examines whether a lower court properly applied relevant legal standards in a particular case. In the NAFTA context, the panels do not apply domestic law and, therefore, they have no authority to evaluate whether domestic courts properly applied domestic law. Thus, Chapter 11 panels do not exercise a traditional appellate function. Instead, applying the distinct legal standards articulated in Chapter 11, the panels determine whether domestic court rulings violate international legal standards, an issue which almost certainly will not have been raised in the first instance in the domestic courts. The fact that Chapter 11 panels will be applying a distinct body of international law in reviewing domestic judicial actions hardly demonstrates that the review will not be both searching and intrusive. Supervision of state court decisions under Chapter 11 might well become far more intensive than appellate review of state court decisions by the U.S. Supreme Court, for example.

Governmental Immunities. Mondev raises the prospect that arbitration panels will routinely review domestic courts' applications of traditional government immunity doctrine to determine whether they violate Chapter 11. Notwithstanding the panel's ruling, "in this case," that Massachusetts' grant of immunity did not violate section 1105, the panel indicated that not all domestic court applications of immunity rules would be acceptable under Chapter 11. Implicit in this conclusion is the panel's assumption that it was authorized to make an independent determination about whether an established state immunity rule should or should not survive review under international law. In Mondev the panel concluded that immunity from suit for tortious interference with contract was justified based on an analysis of the competing policy considerations arguing for and against subjecting the government to monetary liability. In other cases, the panel might conclude that recognition of governmental immunity is not acceptable under international law standards. Thus, the panel, in effect, arrogated to itself the authority to revisit the legal policy judgments of State legislatures and State courts in defining the scope of governmental immunity.

Apart from affirming the authority to review domestic courts' application of immunity

rules, the Mondev panel asserted that state immunity rules would be completely irrelevant to the resolution of a NAFTA claim based on the underlying actions which produced the U.S. litigation. In Mondev, as discussed above, the panel did not reach the merits of the claims based on the actions of the city and the BRA, because those actions occurred before NAFTA went into effect. However, the Mondev panel made clear that, but for this timing problem, it could have reviewed both the underlying actions of the City and the BRA and the Massachusetts courts' resolution of the domestic litigation arising from those actions. In considering a claim under Chapter 11 based on the underlying actions, the panel said, Massachusetts rules of governmental immunity would be completely irrelevant. "Of course," the panel stated, governmental "immunity could not protect a NAFTA State party from a claim for conduct which was substantively in breach of NAFTA standards - but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply." In other words, immunity rules which might well bar claims by a U.S. investor suing the government in Massachusetts court would be completely irrelevant to the resolution of a Chapter 11 claim based on the same actions in an international arbitration proceeding.

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While the threat posed by Chapter 11 to the independence of the state (and federal) court systems is clear, the possible solutions to the problem appear difficult to define. The proponents of Chapter 11 do not generally contend that subjecting U.S. judicial actions to review by international arbitration panels is necessary to attract needed foreign investment into the United States. After all, U.S. law and judicial institutions are generally quite protective of foreign investment interests. Instead, the justification for Chapter 11 rests on the claim that the laws and courts of other countries do not fairly and adequately protect U.S. investors. Granting foreign investors broad new rights to sue the United States, based on the actions of our domestic courts, according to this argument, is a necessary quid pro quo for the United States to be able to demand that U.S. investors operating abroad can sue through a process that is independent of, and more protective than, other countries' judicial institutions.

A variety of questions and issues suggest themselves. Is subordinating U.S. courts to international arbitration panels a worthwhile tradeoff in order to protect certain U.S. business interests and to advance the larger economic welfare goals presumably served by the Chapter 11 process? Is such a tradeoff constitutionally permissible, given the importance of an independent judiciary within our system of separated powers? Is including judicial actions within the definition of measures subject to the jurisdiction of international arbitration panels truly necessary to achieving the economic integration goals of international trade and investment agreements? Looking at the issue from a global perspective, is the long-term development of a robust international legal system served by encouraging U.S. foreign investors to circumvent the judicial systems in other countries? Should U.S. foreign policy with respect to the judiciary emphasize, instead, the strengthening of domestic judicial institutions in other countries? Assuming that the United States wishes to ensure that U.S. investors operating abroad can

challenge the rulings of other countries' courts in arbitration proceedings, does this necessarily mean that U.S. court rulings have to be subject to challenge on the same basis? Is opening U.S. court rulings to challenge before arbitration panels an important item for the United States' trading partners around the world? Can the United States put something else on the table other than the independence of the U.S. judicial system (such as reduced agricultural subsidies) in order to induce other countries to allow U.S. investors to sue them in international arbitration proceedings?

It is fair to say that most of these questions (and others as well) have not yet been raised and debated, much less resolved.

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